Filed: 2012/11/29
EB-2012-0047
Horizon Utilities Corporation
Book of Authorities

ONTARIO ENERGY BOARD

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

AND IN THE MATTER OF an application under section 74 of the Act by Horizon Utilities Corporation for a licence amendment;

AND IN THE MATTER OF A MOTION by Hydro One Networks Inc.

HORIZON UTILITIES CORPORATION

BRIEF OF LAW AND AUTHORITIES

MOTION NOVEMBER 30, 2012

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TAB 1

Ontario Energy Board Act, 1998

S.O. 1998, CHAPTER 15
Schedule B

Consolidation Period: From December 31, 2011 to the e-Laws currency date.

Last amendment: See Table of Public Statute Provisions Repealed Under Section 10.1 of the *Legislation Act, 2006* – December 31, 2011.

Board objectives, electricity

1. (1) The Board, in carrying out its responsibilities under this or any other Act in relation to electricity, shall be guided by the following objectives:

1. To protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service.
2. To promote economic 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.
3. To promote electricity conservation and demand management in a manner consistent with the policies of the Government of Ontario, including having regard to the consumer's economic circumstances.
4. To facilitate the implementation of a smart grid in Ontario.
5. To promote the use and generation of electricity from renewable energy sources in a manner consistent with the policies of the Government of Ontario, including the timely expansion or reinforcement of transmission systems and distribution systems to accommodate the connection of renewable energy generation facilities. 2004, c. 23, Sched. B, s. 1; 2009, c. 12, Sched. D, s. 1.

21. (1) The Board may at any time on its own motion and without a hearing give directions or require the preparation of evidence incidental to the exercise of the powers conferred upon the Board by this or any other Act. 1998, c. 15, Sched. B, s. 21 (1).

Hearing upon notice

(2) Subject to any provision to the contrary in this or any other Act, the Board shall not make an order under this or any other Act until it has held a hearing after giving notice in such manner and to such persons as the Board may direct. 1998, c. 15, Sched. B, s. 21 (2).

(3) REPEALED: 2000, c. 26, Sched. D, s. 2 (2).

No hearing

(4) Despite section 4.1 of the *Statutory Powers Procedure Act*, the Board may, in addition to its power under that section, dispose of a proceeding without a hearing if,

(a) no person requests a hearing within a reasonable time set by the Board after the Board gives notice of the right to request a hearing; or

(b) the Board determines that no person, other than the applicant, appellant or licence holder will be adversely affected in a material way by the outcome of the proceeding and the applicant, appellant or licence holder has consented to disposing of a proceeding without a hearing.

(c) REPEALED: 2003, c. 3, s. 20 (1).

Requirement to hold licence

57. Neither the OPA nor the Smart Metering Entity shall exercise their powers or perform their duties under the *Electricity Act, 1998* unless licensed to do so under this Part and no other person shall, unless licensed to do so under this Part,

(a) own or operate a distribution system;

(b) own or operate a transmission system;

(c) generate electricity or provide ancillary services for sale through the IESO-administered markets or directly to another person;

(c.1) engage in unit sub-metering;

(d) retail electricity;

(e) purchase electricity or ancillary services in the IESO-administered markets or directly from a generator;

(f) sell electricity or ancillary services through the IESO-administered markets or directly to another person, other than a consumer;

(g) direct the operation of transmission systems in Ontario;

(h) operate the market established by the market rules; or

(i) engage in an activity prescribed by the regulations that relates to electricity. 1998, c. 15, Sched. B, s. 57; 2002, c. 1, Sched. B, s. 6; 2004, c. 23, Sched. B, s. 10; 2006, c. 3, Sched. C, s. 4; 2010, c. 8, s. 38 (8).

Licence conditions

70. (1) A licence under this Part may prescribe the conditions under which a person may engage in an activity set out in section 57 and a licence may also contain such other conditions as are appropriate having regard to the objectives of the Board and the purposes of the *Electricity Act, 1998*. 1998, c. 15, Sched. B, s. 70 (1).

....

Non-exclusive

(6) Unless it provides otherwise, a licence under this Part shall not hinder or restrict the grant of a licence to another person within the same area and the licensee shall not claim any right of exclusivity. 1998, c. 15, Sched. B, s. 70 (6).

....

Service area of distributor

6(11) The licence of a distributor shall specify the area in which the distributor is authorized to distribute electricity. 1998, c. 15, Sched. B, s. 70 (11).

Amendment of licence

74. (1) The Board may, on the application of any person, amend a licence if it considers the amendment to be,

(a) necessary to implement a directive issued under this Act; or

(b) in the public interest, having regard to the objectives of the Board and the purposes of the *Electricity Act, 1998*. 2004, c. 23, Sched. B, s. 13.

TAB 2

Statutory Powers Procedure Act

R.S.O. 1990, CHAPTER S.22

Consolidation Period: From June 1, 2011 to the e-Laws currency date.

Last amendment: 2009, c. 33, Sched. 6, s. 87.

Dismissal of proceeding without hearing

4.6 (1) Subject to subsections (5) and (6), a tribunal may dismiss a proceeding without a hearing if,

(a) the proceeding is frivolous, vexatious or is commenced in bad faith;

(b) the proceeding relates to matters that are outside the jurisdiction of the tribunal; or

(c) some aspect of the statutory requirements for bringing the proceeding has not been met.

Notice

(2) Before dismissing a proceeding under this section, a tribunal shall give notice of its intention to dismiss the proceeding to,

(a) all parties to the proceeding if the proceeding is being dismissed for reasons referred to in clause (1) (b); or

(b) the party who commences the proceeding if the proceeding is being dismissed for any other reason.

Same

(3) The notice of intention to dismiss a proceeding shall set out the reasons for the dismissal and inform the parties of their right to make written submissions to the tribunal with respect to the dismissal within the time specified in the notice.

Right to make submissions

(4) A party who receives a notice under subsection (2) may make written submissions to the tribunal with respect to the dismissal within the time specified in the notice.

Dismissal

(5) A tribunal shall not dismiss a proceeding under this section until it has given notice under subsection (2) and considered any submissions made under subsection (4).

Rules

(6) A tribunal shall not dismiss a proceeding under this section unless it has made rules under section 25.1 respecting the early dismissal of proceedings and those rules shall include,

(a) any of the grounds referred to in subsection (1) upon which a proceeding may be dismissed;

(b) the right of the parties who are entitled to receive notice under subsection (2) to make submissions with respect to the dismissal; and

(c) the time within which the submissions must be made.

Continuance of provisions in other statutes

(7) Despite section 32, nothing in this section shall prevent a tribunal from dismissing a proceeding on grounds other than those referred to in subsection (1) or without complying with subsections (2) to (6) if the tribunal dismisses the proceeding in accordance with the provisions of an Act that are in force on the day this section comes into force. 1999, c. 12, Sched. B, s. 16 (3).

Control of process

25.0.1 A tribunal has the power to determine its own procedures and practices and may for that purpose,

(a) make orders with respect to the procedures and practices that apply in any particular proceeding; and

(b) establish rules under section 25.1. 1999, c. 12, Sched. B, s. 16 (8).

(4) In an electronic hearing, all the parties and the members of the tribunal participating in the hearing must be able to hear one another and any witnesses throughout the hearing. 1994, c. 27, s. 56 (10).

Different kinds of hearings in one proceeding

5.2.1 A tribunal may, in a proceeding, hold any combination of written, electronic and oral hearings. 1997, c. 23, s. 13 (8).

Pre-hearing conferences

5.3 (1) If the tribunal's rules made under section 25.1 deal with pre-hearing conferences, the tribunal may direct the parties to participate in a pre-hearing conference to consider,

(a) the settlement of any or all of the issues;

(b) the simplification of the issues;

(c) facts or evidence that may be agreed upon;

(d) the dates by which any steps in the proceeding are to be taken or begun;

(e) the estimated duration of the hearing; and

(f) any other matter that may assist in the just and most expeditious disposition of the proceeding. 1994, c. 27, s. 56 (11); 1997, c. 23, s. 13 (9).

Other Acts and regulations

(1.1) The tribunal's power to direct the parties to participate in a pre-hearing conference is subject to any other Act or regulation that applies to the proceeding. 1997, c. 23, s. 13 (10).

Who presides

(2) The chair of the tribunal may designate a member of the tribunal or any other person to preside at the pre-hearing conference.

Orders

(3) A member who presides at a pre-hearing conference may make such orders as he or she considers necessary or advisable with respect to the conduct of the proceeding, including adding parties.

Disqualification

(4) A member who presides at a pre-hearing conference at which the parties attempt to settle issues shall not preside at the hearing of the proceeding unless the parties consent. 1994, c. 27, s. 56 (11).

Application of s. 5.2

(5) Section 5.2 applies to a pre-hearing conference, with necessary modifications. 1997, c. 23, s. 13 (10).

Disclosure

5.4 (1) If the tribunal's rules made under section 25.1 deal with disclosure, the tribunal may, at any stage of the proceeding before all hearings are complete, make orders for,

(a) the exchange of documents;

(b) the oral or written examination of a party;

(c) the exchange of witness statements and reports of expert witnesses;

(d) the provision of particulars;

(e) any other form of disclosure. 1994, c. 27, s. 56 (12); 1997, c. 23, s. 13 (11).

Other Acts and regulations

(1.1) The tribunal's power to make orders for disclosure is subject to any other Act or regulation that applies to the proceeding. 1997, c. 23, s. 13 (12).

Exception, privileged information

(2) Subsection (1) does not authorize the making of an order requiring disclosure of privileged information. 1994, c. 27, s. 56 (12).

Notice of hearing

TAB 3

ONTARIO ENERGY BOARD

Rules of Practice and Procedure
(Revised November 16, 2006, July 14, 2008, October 13, 2011 and January 9, 2012)

PART I - GENERAL

1. Application and Availability of Rules

1.01 These Rules apply to all proceedings of the Board. These Rules, other than the Rules set out in Part VII, also apply, with such modifications as the context may require, to all proceedings to be determined by an employee acting under delegated authority.

1.02 These Rules, in English and in French, are available for examination on the Board's website, or upon request from the Board Secretary.

1.03 The Board may dispense with, amend, vary or supplement, with or without a hearing, all or part of any Rule at any time, if it is satisfied that the circumstances of the proceeding so require, or it is in the public interest to do so.

2. Interpretation of Rules

2.01 These Rules shall be liberally construed in the public interest to secure the most just, expeditious, and efficient determination on the merits of every proceeding before the Board.

2.02 Where procedures are not provided for in these Rules, the Board may do whatever is necessary and permitted by law to enable it to effectively and completely adjudicate on the matter before it.

2.03 These Rules shall be interpreted in a manner that facilitates the introduction and use of electronic regulatory filing and, for greater certainty, the introduction and use of digital communication and storage media.

2.04 Unless the Board otherwise directs, any amendment to these Rules comes into force upon publication on the Board's website.

3. Definitions

3.01 In these Rules,

"affidavit" means written evidence under oath or affirmation;

"appeal" has the meaning given to it in **Rule 17.01**;

"serve" means to effectively deliver, in compliance with these Rules or as the Board may direct;

"statement" means any unsworn information provided to the Board;

"writing" includes electronic media, formed and secured as directed by the Board;

"written" includes electronic media, formed and secured as directed by the Board; and

"written hearing" means a hearing held by means of the exchange of documents.

4. Procedural Orders and Practice Directions

4.01 The Board may at any time in a proceeding make orders with respect to the procedure and practices that apply in the proceeding. Every party shall comply with all applicable procedural orders.

4.02 The Board may set time limits for doing anything provided in these Rules.

4.03 The Board may at any time amend any procedural order.

4.04 Where a provision of these Rules is inconsistent with a provision of a procedural order, the procedural order shall prevail to the extent of the inconsistency.

4.05 The Board may from time to time issue *Practice Directions* in relation to the preparation, filing and service of documents or in relation to participation in a proceeding. Every party shall comply with all applicable *Practice Directions*, whether or not specifically referred to in these Rules.

5. Failure to Comply

5.01 Where a party to a proceeding has not complied with a requirement of these Rules or a procedural order, the Board may:

(a) grant all necessary relief, including amending the procedural order, on such conditions as the Board considers appropriate;

(b) adjourn the proceeding until it is satisfied that there is compliance;

8. Motions

8.01 Unless the Board directs otherwise, any party requiring a decision or order of the Board on any matter arising during a proceeding shall do so by serving and filing a notice of motion.

8.02 The notice of motion and any supporting documents shall be filed and served within such a time period as the Board shall direct.

8.03 Unless the Board directs otherwise, a party who wishes to respond to the notice of motion shall file and serve, at least two calendar days prior to the motion's hearing date, a written response, an indication of any oral evidence the party seeks to present, and any evidence the party relies on, in appropriate affidavit form.

8.04 The Board, in hearing a motion, may permit oral or other evidence in addition to the supporting documents accompanying the notice, response or reply.

PART II - DOCUMENTS, FILING, SERVICE

9. Filing and Service of Documents

9.01 All documents filed with the Board shall be directed to the Board Secretary. Documents, including applications and notices of appeal, shall be filed in such quantity and in such manner as may be specified by the Board.

9.02 Any person wishing to access the public record of any proceeding may make arrangements to do so with the Board Secretary.

9A Filing of Documents that Contain Personal Information

9A.01 Any person filing a document that contains personal information, as that phrase is defined in the *Freedom of Information and Protection of Privacy Act*, of another person who is not a party to the proceeding shall file two versions of the document as follows:

(a) one version of the document must be a non-confidential, redacted version of the document from which the personal information has been deleted or stricken; and

(e) make any other order the Board finds to be in the public interest.

10.05 Where the Board makes an order under **Rule 10.04** to place on the public record any part of a document that was filed in confidence, the party who filed the document may, subject to **Rule 10.06** and in accordance with and within the time specified in the *Practice Directions*, request that it be withdrawn prior to its placement on the public record.

10.06 The ability to request the withdrawal of information under **Rule 10.05** does not apply to information that was required to be produced by an order of the Board.

10.07 Where a party wishes to have access to a document that, in accordance with the *Practice Directions*, will be held in confidence by the Board without the need for a request under **Rule 10.01**, the party shall make a request for access in accordance with the *Practice Directions*.

10.08 Requests for access to confidential information made at times other than during the proceeding in which the confidential information was filed shall be made in accordance with the *Practice Directions*.

10.09 The party who filed the information to which a request for access under **Rule 10.07** or **Rule 10.08** relates may object to the request for access by filing and serving an objection within the time specified by the Board.

10.10 The Board may, further to a request for access under **Rule 10.07** or **Rule 10.08**, make any order referred to in **Rule 10.04**.

11. Amendments to the Evidentiary Record and New Information

11.01 The Board may, on conditions the Board considers appropriate:

(a) permit an amendment to the evidentiary record; or

(b) order an amendment to the evidentiary record that may be necessary for the purpose of a complete record.

11.02 Where a party becomes aware of new information that constitutes a material change to evidence already before the Board before the decision

or order is issued, the party shall serve and file appropriate amendments to the evidentiary record, or serve and file the new information.

11.03 Where all or any part of a document that forms part of the evidentiary record is revised, each revised part shall clearly indicate:

(a) the date of revision; and

(b) the part revised.

11.04 A party shall comply with any direction from the Board to provide such further information, particulars or documents as the Board considers necessary to enable the Board to obtain a full and satisfactory understanding of an issue in the proceeding.

12. Affidavits

12.01 An affidavit shall be confined to the statement of facts within the personal knowledge of the person making the affidavit unless the facts are clearly stated to be based on the information and belief of the person making the affidavit.

12.02 Where a statement is made on information and belief, the source of the information and the grounds on which the belief is based shall be set out in the affidavit.

12.03 An exhibit that is referred to in an affidavit shall be marked as such by the person taking the affidavit, and the exhibit shall be attached to and filed with the affidavit.

12.04 The Board may require the whole or any part of a document filed to be verified by affidavit.

13. Written Evidence

13.01 Other than oral evidence given at the hearing, where a party intends to submit evidence, or is required to do so by the Board, the evidence shall be in writing and in a form approved by the Board.

13.02 The written evidence shall include a statement of the qualifications of the person who prepared the evidence or under whose direction or control the evidence was prepared.

13.03 Where a party is unable to submit written evidence as directed by the Board, the party shall:

(a) file such written evidence as is available at that time;

(b) identify the balance of the evidence to be filed; and

(c) state when the balance of the evidence will be filed.

13A. Expert Evidence

13A.01 A party may engage, and two or more parties may jointly engage, one or more experts to give evidence in a proceeding on issues that are relevant to the expert's area of expertise.

13A.02 An expert shall assist the Board impartially by giving evidence that is fair and objective.

13A.03 An expert's evidence shall, at a minimum, include the following:

(a) the expert's name, business name and address, and general area of expertise;

(b) the expert's qualifications, including the expert's relevant educational and professional experience in respect of each issue in the proceeding to which the expert's evidence relates;

(c) the instructions provided to the expert in relation to the proceeding and, where applicable, to each issue in the proceeding to which the expert's evidence relates;

(d) the specific information upon which the expert's evidence is based, including a description of any factual assumptions made and research conducted, and a list of the documents relied on by the expert in preparing the evidence; and

(e) in the case of evidence that is provided in response to another expert's evidence, a summary of the points of agreement and disagreement with the other expert's evidence.

13A.04 In a proceeding where two or more parties have engaged experts, the Board may require two or more of the experts to:

(a) in advance of the hearing, confer with each other for the purposes of, among others, narrowing issues, identifying the points on which their views differ and are in agreement, and preparing a joint written statement to be admissible as evidence at the hearing; and

(b) at the hearing, appear together as a concurrent expert panel for the purposes of, among others, answering questions from the Board and others as permitted by the Board, and providing comments on the views of another expert on the same panel.

13A.05 The activities referred to in **Rule 13A.04** shall be conducted in accordance with such directions as may be given by the Board, including as to:

(a) scope and timing;

(b) the involvement of any expert engaged by the Board;

(c) the costs associated with the conduct of the activities;

(d) the attendance or non-attendance of counsel for the parties, or of other persons, in respect of the activities referred to in paragraph (a) of **Rule 13A.04**; and

(e) any issues in relation to confidentiality.

13A.06 A party that engages an expert shall ensure that the expert is made aware of, and has agreed to accept, the responsibilities that are or may be imposed on the expert as set out in this **Rule 13A**.

14. Disclosure

14.01 A party who intends to rely on or refer to any document that has not already been filed in a proceeding shall file and serve the document in accordance with the Board's directions.

14.02 Any party who fails to comply with **Rule 14.01** shall not put the document in evidence or use it in the cross-examination of a witness, unless the Board otherwise directs.

(f) if an appeal of an order, finding or remedial action under section 36.3 of the *Electricity Act*, a statement confirming that the Independent Electricity System Operator has commenced all other reviews and appeals available to it and such reviews and appeals have been finally determined.

17.03 A notice of appeal shall be in such form as may be approved or specified by the Board and shall be accompanied by such fee as may be set for that purpose by the management committee under section 12.1(2) of the *OEB Act*.

17.04 At a hearing of an appeal, an appellant shall not seek to appeal a portion of the order, decision, market rules, or finding or remedial action referred to in **Rule 15.03** or rely on any ground, that is not stated in the appellant's notice of appeal, except with leave of the Board.

17.05 In addition to those persons on whom service is required by statute, the Board may direct an appellant to serve the notice of appeal on such persons as it considers appropriate.

17.06 The Board may require an appellant to file an affidavit of service indicating how and on whom service of the notice of appeal was made.

17.07 Subject to **Rule 17.08**, a request by a party to stay part or all of the order, Decision, market rules or finding or remedial action referred to in **Rule 15.03** being appealed pending the determination of the appeal shall be made by motion to the Board.

17.08 For greater certainty, a request to stay shall not be made where a stay is precluded by statute.

17.09 In respect of a motion brought under **Rule 17.07**, the Board may order that implementation of the order, decision or market rules be delayed, on conditions as it considers appropriate.

18. Dismissal Without a Hearing

18.01 The Board may propose to dismiss a proceeding without a hearing on the grounds that:

(a) the proceeding is frivolous, vexatious or is commenced in bad faith;

(b) the proceeding relates to matters that are outside the jurisdiction of the tribunal; or

(c) some aspect of the statutory requirements for bringing the proceeding has not been met.

18.02 Where the Board proposes to dismiss a proceeding under **Rule 18.01**, it shall give notice of the proposed dismissal in accordance with the *Statutory Powers Procedure Act*.

18.03 A party wishing to make written submissions on the proposed dismissal shall do so within 10 calendar days of receiving the Board's notice under **Rule 18.02**.

18.04 Where a party who commenced a proceeding has not taken any steps with respect to the proceeding for more than one year from the date of filing, the Board may notify the party that the proceeding shall be dismissed unless the person, within 10 calendar days of receiving the Board's notice, shows cause why it should not be dismissed or advises the Board that the application or appeal is withdrawn.

18.05 Where the Board dismisses a proceeding, or is advised that the application or appeal is withdrawn, any fee paid to commence the proceeding shall not be refunded.

19. Decision Not to Process

19.01 The Board or Board staff may decide not to process documents relating to the commencement of a proceeding if:

(a) the documents are incomplete;

(b) the documents were filed without the required fee for commencing the proceeding;

(c) the documents were filed after the prescribed time period for commencing the proceeding has elapsed; or

(d) there is some other technical defect in the commencement of the proceeding.

19.02 The Board or Board staff shall give the party who commenced the proceeding notice of a decision made under **Rule 19.01** that shall include:

(a) reasons for the decision; and

(b) requirements for resuming processing of the documents, if applicable.

19.03 Where requirements for resuming processing of the documents apply, processing shall be resumed where the party complies with the requirements set out in the notice given under **Rule 19.02** within:

(a) subject to **Rule 19.03(b)**, 30 calendar days from the date of the notice; or

(b) 10 calendar days from the date of the notice, where the proceeding commenced is an appeal.

19.04 After the expiry of the applicable time period under **Rule 19.03**, the Board may close its file for the proceeding without refunding any fee that may already have been paid.

19.05 Where the Board has closed its file for a proceeding under **Rule 19.04**, a person wishing to refile the related documents shall:

(a) in the case of an application, refile the documents as a fresh application, and pay any fee required to do so; or

(b) in the case of an appeal, refile the documents as a fresh notice of appeal, except where the time period for filing the appeal has elapsed, in which case the documents cannot be refiled.

20. Withdrawal

20.01 An applicant or appellant may withdraw an application or appeal:

(a) at any time prior to the hearing, by filing and serving a notice of withdrawal signed by the applicant or the appellant, or his or her representative; or

(b) at the hearing with the permission of the Board.

20.02 A party may by motion seek leave to discontinue participation in a proceeding at any time before a final decision.

TAB 4

Courts of Justice Act

R.R.O. 1990, REGULATION 194

RULES OF CIVIL PROCEDURE

Consolidation Period: From July 1, 2012 to the e-Laws currency date.

Last amendment: O. Reg. 55/12.

RULE 20SUMMARY JUDGMENT

WHERE AVAILABLE

To Plaintiff

20.01 (1) A plaintiff may, after the defendant has delivered a statement of defence or served a notice of motion, move with supporting affidavit material or other evidence for summary judgment on all or part of the claim in the statement of claim. R.R.O. 1990, Reg. 194, r. 20.01 (1).

(2) The plaintiff may move, without notice, for leave to serve a notice of motion for summary judgment together with the statement of claim, and leave may be given where special urgency is shown, subject to such directions as are just. R.R.O. 1990, Reg. 194, r. 20.01 (2).

To Defendant

(3) A defendant may, after delivering a statement of defence, move with supporting affidavit material or other evidence for summary judgment dismissing all or part of the claim in the statement of claim. R.R.O. 1990, Reg. 194, r. 20.01 (3).

EVIDENCE ON MOTION

20.02 (1) An affidavit for use on a motion for summary judgment may be made on information and belief as provided in subrule 39.01 (4), but, on the hearing of the motion, the court may, if appropriate, draw an adverse inference from the failure of a party to provide the evidence of any person having personal knowledge of contested facts. O. Reg. 438/08, s. 12.

(2) In response to affidavit material or other evidence supporting a motion for summary judgment, a responding party may not rest solely on the allegations or denials in the party's pleadings, but must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue requiring a trial. O. Reg. 438/08, s. 12.

FACTUMS REQUIRED

20.03 (1) On a motion for summary judgment, each party shall serve on every other party to the motion a factum consisting of a concise argument stating the facts and law relied on by the party. O. Reg. 14/04, s. 14.

(2) The moving party's factum shall be served and filed with proof of service in the court office where the motion is to be heard at least seven days before the hearing. O. Reg. 394/09, s. 4.

(3) The responding party's factum shall be served and filed with proof of service in the court office where the motion is to be heard at least four days before the hearing. O. Reg. 394/09, s. 4.

(4) Revoked: O. Reg. 394/09, s. 4.

DISPOSITION OF MOTION

General

20.04 (1) Revoked: O. Reg. 438/08, s. 13 (1).

(2) The court shall grant summary judgment if,

(a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; or

(b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment. O. Reg. 284/01, s. 6; O. Reg. 438/08, s. 13 (2).

Powers

(2.1) In determining under clause (2) (a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:

1. Weighing the evidence.

2. Evaluating the credibility of a deponent.

3. Drawing any reasonable inference from the evidence. O. Reg. 438/08, s. 13 (3).

Oral Evidence (Mini-Trial)

(2.2) A judge may, for the purposes of exercising any of the powers set out in subrule (2.1), order that oral evidence be presented by one or more parties, with or without time limits on its presentation. O. Reg. 438/08, s. 13 (3).

Only Genuine Issue Is Amount

(3) Where the court is satisfied that the only genuine issue is the amount to which the moving party is entitled, the court may order a trial of that issue or grant judgment with a reference to determine the amount. R.R.O. 1990, Reg. 194, r. 20.04 (3); O. Reg. 438/08, s. 13 (4).

Only Genuine Issue Is Question Of Law

(4) Where the court is satisfied that the only genuine issue is a question of law, the court may determine the question and grant judgment accordingly, but where the motion is made to a master, it shall be adjourned to be heard by a judge. R.R.O. 1990, Reg. 194, r. 20.04 (4); O. Reg. 438/08, s. 13 (4).

Only Claim Is For An Accounting

(5) Where the plaintiff is the moving party and claims an accounting and the defendant fails to satisfy the court that there is a preliminary issue to be tried, the court may grant judgment on the claim with a reference to take the accounts. R.R.O. 1990, Reg. 194, r. 20.04 (5).

VIEW BY JUDGE OR JURY

52.05 The judge or judge and jury by whom an action is being tried or the court before whom an appeal is being heard may, in the presence of the parties or their lawyers, inspect any property concerning which any question arises in the action, or the place where the cause of action arose. R.R.O. 1990, Reg. 194, r. 52.05; O. Reg. 575/07, s. 4.

TAB 5

PRACTICE AND PROCEDURE

BEFORE

Administrative Tribunals

VOLUME 2

by

ROBERT W. MACAULAY, Q.C.

and

JAMES L.H. SPRAGUE, B.A., LL.B.

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in Canada are called by their creators, "tribunals" in their mandating legislation and I believe for obvious reasons — they first and foremost are an agency of Parliament or the Legislatures, which courts (basically) are not.

Before proceeding further, however, it may be useful to identify what I believe is the major factor in administrative law which has given rise to the major role played by policy-making in agency decision-making and the resulting confusion respecting rule-making. This is the legal restraint upon agencies to use their decisions as precedents, or, in other words, the inapplicabilty of stare decisis in administrative decision-making.

6.2 THE ROLE OF PRECEDENT IN AGENCY DECISION-MAKING (STARE DECISIS)

Unlike administrative bodies, the traditional courts are generally bound to follow their own rulings. In so doing, parties in court proceedings rely heavily on the doctrine of precedent or stare decisis to substantiate their claims. Judicial decisions are usually categorized as either authoritative or persuasive. If authoritative, they must be strictly followed; if persuasive, they may follow them. The authoritative or persuasive status of decisons depends upon the level of the court which issued them. Within a jurisdiction (e.g. a province, and one may treat the federal court as a separate province simply for the purposes of this discussion), the decisions of a higher court are authoritative (or binding) upon all lower courts. Decisions of the same level of court are persuasive (although courts generally say that they should be reluctant to depart from their own earlier decisions). Decisions of courts of other jurisdictions (e.g. courts of provinces, other than the province of the court hearing the case) of whatever level are persuasive. Decisions of the Supreme Court are authoritative everywhere in Canada. Decisions of the Privy Council prior to 1949 are also authoritative across Canada. In determining which judicial decisions are authoritative for administrative agencies one can use as a general rule of thumb that decisions of the courts of the same jurisdiction as the agency will be authoritative if the judges of that court are appointed by the federal government (i.e. courts known as s. 96 courts — referring to the appointment power set out in s. 96 of the Constitution) while decisions of courts whose judges are appointed by the provincial government will be merely persuasive. Decisions of courts of other juridictions, of whatever level are merely persuasive to an agency. Decisions of the Supreme Court of Canada are authoriative for all Canadian agencies.

In performing their mandates agencies should strive for continuity, consistency and a degree of predictabilty. Justice demands that equality of treatment and impartiality prevail when the merits of a case are considered. On the other hand, in the face of legal uncertainties and novel situations, it is not desirable to accord precedent and stare decisis a pivotal role. Facts are often not comparable. Old precedents are expanded, twisted and contorted so many times that they often

no longer stand for the same principle they originally proclaimed. Furthermore, the public interst is not served by retelling antiquated stories which change with each retelling. Precedents can become worn out and sometimes serve no useful purpose.

Decisions of administrative agencies do not create precedents for anyone, including the agency. They are, at best, persuasive. While agencies should strive for consistency they are not bound by a mechanistic application of earlier administrative decisions. Rigid adherence to consistency can discredit an ageny's ability to improvise or adapt. I shall discuss the freedom of agencies from precedent in the next section.

6.3 THE POWER OF AN AGENCY TO DEPART FROM PREVIOUS DECISIONS

When I use the term "precedent" in this discussion I am referring to the situation when an agency is urged to interprete a law, or exercise its discretion, in a certain way because the agency had interpreted it or exercised its discretion in that way in the past.[7]

The question as to the role of precedent for agencies most commonly arises in one of two situations: i. where an agency is empowered to consider an issue involving the same party on a regular or periodic basis (e.g. rate setting); ii. where an agency is required to adjudicate an issue similar to that in other cases. In either case, the prevailing rule is easy to state: an agency is not bound by its prior decisions.[7.1] Stated otherwise, the notion of *stare decisis* is not applicable in the

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7 For the effect of a statutory direction that a decision of the Ontario Labour Relations Board was to be conclusive for all purposes see the Ontario Court of Appeal decision in *C.U.P.E. Local 1394 v. Extendicare Health Services Inc.* (1993), 14 O.R. (3d) 65, 104 D.L.R. (4th) 8, 64 O.A.C. 126, 93 C.L.L.C. 14,052 (C.A.). The Court held that that section did not make the Board's interpretation of a statutory provision conclusive and binding upon a subsequent decision-maker in a different matter.

7.1 See for example, *Communications, Energy and Paperworkers Union of Canada, Local 219 v. St. Anne-Nackawic Pulp Co.* (1999), 212 N.B.R. (2d) 120, 541 A.P.R. 120 (N.B. Q.B.), where the N.B. Court of Queen's Bench held that the New Brunswick Labour and Employment Board was not bound by precedent to follow an earlier decision of the Board as to what evidence was necessary to establish union membership (as per *United Brotherhood of Carpenters and Joiners of America, Local 1023 v. Laviolette* (1998), 199 N.B.R. (2d) 270 (C.A.)). See also *Ontario (Minister of Municipal Affairs & Housing) v. Transcanada Pipelines Ltd.* (2000), 186 D.L.R. (4th) 403 (Ont. C.A.) ("A tribunal is not bound to follow its own decisions on similar issues, although it may consider an earlier decision persuasive and find that it is of assistance in deciding the issue before it.")

To the same effect see *Québec (Commission des affaires socials) c. Tremblay* 1992 CarswellQue 108, [1992] 1 S.C.R. 952, 90 D.L.R. (4th) 609, 3 Admin. L.R. (2d) 173 (S.C.C.) (conflicting decisions may be given as agency develops its thinking of an issue); *United Steelworkers of America, Local 14097 v. Franks* (1990), 75 O.R. (2d) 382 (Div. Ct.) (agency not bound by stare decisis).

Nor does the fact that a court on judicial review may have found one panel's decision not

administrative sphere. Agencies are not only at liberty not to treat their earlier decisions as precedent, they are positively obliged not to do so.

This is clear in respect to matters where the agency has some discretionary authority which it has to decide how to exercise or a decision involves some policy element which the agency is to forumulate.

In *Hopedale Developments Ltd. v. Oakville (Town)*[8] the Ontario Court of Appeal held that the Ontario Municipal Board could not decide the case before it solely on the basis of principles enunciated in earlier decisions. As McGillivrey J.A. stated (at pp. 487-488 D.L.R.):

> In laying . . . down . . . principles and stipulating that the defendant must come within them the Board has sought, one must conclude, to reduce the scope of the

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to have been patently unreasonable binding other panels of the same agency to reach the same conclusion. A judicial finding that a decision is not patently unreasonable is not the same as a finding that it is correct – and other panels of the same agency may arrive at other decisions which are also not patently unreasonable. (See *Essex County Roman Catholic School Board (The Windsor-Essex Catholic School Board) v. Ontario English Catholic Teachers' Association* (2001), 56 O.R. (3d) 85 (C.A.).) See also *Domtar Inc. v. Quebec (Commission d'appel en Matière de Lésions professionnelles*, [1993] 2 S.C.R. 756 (fact that different agencies looking at same provision may have interpreted it differently does not in itself mean that the decisions are patently unreasonable).

See also *Myers v. Mannette*, 2003 CarswellNS 209 (N.S. C.A.) (Board not bound by its prior decisions); *Daley v. Economical Mutual Insurance Co.*, 2004 CarswellOnt 5696 (Ont. S.C.J.), reversed on other grounds (2005), 2005 CarswellOnt 7425, 206 O.A.C. 33 (Ont. C.A.) (Court not required to follow earlier decisions of Financial Services Commission of Ontario but states that reasoning in cases heard by the Commission may be of assistance in light of Commission's expertise).

Similarly, see the decision of the Alberta Court of Appeal in *Maitland Capital Ltd. v. Alberta (Securities Commission)*, 2009 CarswellAlta 710, 2009 ABCA 186 (Alta. C.A.):

> As for the second suggestion that, by imposing an administrative penalty higher than that proposed by Staff counsel, the panel had abandoned its adjudicative function, we find no authority that suggests the panel was bound by the *Securities Act* or other authority to obey the position of counsel as to sanction. On the contrary, it was ultimately the panel's duty to determine the public interest. Here the panel was certainly entitled to give weight to the issue of deterrence where, on the evidence, over 500 investors were prompted to invest in excess of $2,500,000: see e.g. *Cartaway Resources Corp., Re*, [2004] 1 S.C.R. 672, [2004] S.C.J. No. 22, 2004 SCC 26 (S.C.C.), at paras. 4, 45 - 70. The panel was, in service of the legislative objectives, entitled to move away from prior decisions made by earlier panels on the subject of sanction if it were satisfied that the public interest required it to do so. Earlier decisions are not carved in stone. For administrative tribunals, and where, as with sanction, the question involves mixed fact and law, and the "fact-intensive elements" are not "easily extracted" from "discretely framed questions of law", a decision is likely to be "not one that will determine future cases except insofar as it is a useful case for comparison": *Ryan v. Law Society (New Brunswick)*, [2003] 1 S.C.R. 247, [2003] S.C.J. No. 17, 2003 SCC 20 (S.C.C.), at para. 41. Accordingly, the presentation of earlier authorities by Staff counsel in its brief, which doubtless influenced the presentation of Staff counsel, could not crimp the panel's jurisdiction to require imposing those earlier more lenient levels of sanction. *A fortiori*, it could not be a denial of natural justice for the panel to exercise the jurisdiction given to it by the Legislature.

8 [1965] 1 O.R. 259, 47 D.L.R. (2d) 482 (C.A.).

> inquiry. To lay them down as principles by which the Board would be guided may therefore be both reasonable and wise but to say that the appellant *must* comply with them before the Board will allow the application in clearly wrong and the Board, if it so fettered its jurisdiction, would be in error.

On the facts of the case, however, the Court held that the Board had in fact *not* relied exclusively on principles derived from precedent to determine the outcome of the application before it. Rather, it had conducted a proper inquiry by giving full weight and consideration to all matters which it was called upon to determine. See also the English case of *Merchandise Transport Ltd. v. British Transport Commission*, where the Court of Appeal issued a similar warning to the Transport Tribunal not to permit 15 discretionary powers to become "hidebound by authority."[9]

The principle also extends to interpretations of law. Thus, it seems that while agencies are bound by the decisions of superior courts as to the meaning of law their own decisions have no such effect.

In *Portage la Prairie (City) v. Inter-City Gas Utilities*[10] the Manitoba Court of Appeal rejected the contention that the provincial Public Utilities Bopard was bound by its prior interpretations of the term "public interest" when approving utility rates. Counsel for Portage la Prairies argued that the Board erred in not applying the same definition of "public interest" in this case as it had employed in a decision some eight years earlier in 1961. The Court, however, could see no reason for the Board to rely on something which it "said or did in 1961, in completely different circumstances, having little, if any relevance to the situation of the present time".[11] Freedman J.A., speaking for the Court, held that the Board could define the "public interest" broadly or narrowly, as it sees fit, and as circumstances dictated. This was a question of policy for the Board alone to decide; it was not the place of the Court of Appeal to intervene. Later, in a case again involving the authority of an agency, this time the Alberta's Industrial Relations Board, to depart from an earlier legal interpretation Chief Justice Milvain of the Alberta Supreme Court said that "I am sure the Board is not bound to follow its own previous conclusions as to the law. It may repent and recant."[12]

In *Turnbull Real Estate Co. v. Sewell*[13] the New Brunswick Court of Appeal dealt with a situation involving the regular annual tax assessment of a property owner's holdings. In 1933 and 1934 the tax assessment officers had given the property owner the benefit of a favourable interpretation of one of the provisions found in the Assessment Act of the City of Saint John. This resulted in a significant tax savings. In 1935, the tax assessors altered their previous approach and the

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9 [1962] 2 Q.B. 173 (C.A.) at p. 186 per Sellers L.J.

10 (1970), 12 D.L.R. (3d) 388 (Man. C.A.).

11 (1970), 12 D.L.R. (3d) 388 (Man. C.A.) at p. 397.

12 *Lethbridge Northern Irrigation District v. Alberta (Industrial Relations Board)* [1973] 5 W.W.R. 71, 38 D.L.R. (3d) 121 (Alta. T.D.) at p. 125 D.L.R.

13 [1937] 2 D.L.R. 218, 12 M.P.R. 136 (N.B. C.A.).

property owner was hit with a much higher tax bill. Not surprisingly, he protested. The New Brunswick Court of Appeal held, however, that the tax assessors were not bound by their prior interpretations. The power of the assessment officers was to be exercised anew each year; a decision in one instance could not bind the exercise of their discretion thereafter.[14]

The power and duty to depart from previous positions and interpretations must be distinguished from fairness issues. Where fairness applies a party must have some notice and an opportunity to make submissions where an agency is considering departing from a previously established position or interpretation on which the party may be relying.[14a]

The prohibition against binding oneself to one's earlier decisions does not preclude an agency considering past decisions and the appropriateness of applying them to the case before one. And, in considering the appropriateness of that application, the agency can take into account as a factor the value of consistency in the matter.[14.1]

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14 See also *C.U.P.E. Local 1394 v. Extendicare Health Care Services Inc.* (1993), 14 O.R. (3d) 65, 93 C.L.L.C. 14052, 104 D.L.R. (4th) 8, 64 O.A.C. 126 (C.A.) and *Canada (Minister of Employment & Immigration) v. Jawhari* (1992), 59 F.T.R. 22 (T.D.). That last case involved a "credible basis" inquiry under the Immigration Act held to consider whether certain children had a credible basis for a refugee status claim. The Federal Court Trial Division held that it was not open to the Immigration and Refugee Board to find that credible basis solely on an earlier Board decision that the parents of the children had a credible basis. The matter had to be determined on its own merits.

14a See, in illustration, *Kelley v. New Brunswick (Workplace Health, Safety & Compensation Commission)*, 2009 CarswellNB 228, 2009 NBCA 30 (N.B. C.A.) where the Nova Scotia Court of Appeal held that an agency must give a party notice if it considers acting other than it has in the past and provide the party with an opportunity to make representations.

14.1 See, in illustration, *Alberta (Minister of Municipal Affairs) v. Alberta (Municipal Government Board)*, 2005 CarswellAlta 1737, 2005 ABQB 866, 45 Admin. L.R. (4th) 9 (Alta. Q.B.), affirmed 2007 CarswellAlta 839, 2007 ABCA 217, 62 Admin. L.R. (4th) 243 (Alta. C.A.). In that case, the Alberta Court of Appeal affirmed the decision of the province's Court of Queen's Bench in which the Queen's Bench judge stated, among other things:

> I cannot conclude that an administrative tribunal errs by following its own decisions. While such tribunals are precluded from fettering their discretion or avoiding their decision-making responsibilities, that does not mean that they cannot refer to past decisions and attempt to maintain a reasonable degree of consistency in appropriate cases.

See also *Ontario (Minister of Municipal Affairs & Housing) v. Transcanada Pipelines Ltd.* (2000), 186 D.L.R. (4th) 403, 2000 CarswellOnt 1072 (Ont. C.A.), leave to appeal refused (2000), 2000 CarswellOnt 4249, 2000 CarswellOnt 4248 (S.C.C.). ("A tribunal is not bound to follow its own decisions on similar issues although it may consider an earlier decision persuasive and find that it is of assistance in deciding the issue before it.")

The Alberta Court of Appeal in *Johnston v. Alberta (Director of Vital Statistics)*, 2008 CarswellAlta 644, 2008 ABCA 188 (Alta. C.A.) recognized that consistency was a desirable end in agency decision-making and noted that it could be achieved through the development of a body of decisions as well as through the creation of policies:

> Although consistency is a desired objective, the means of achieving that objective may vary, and are not restricted to the formulation of a policy. Indeed, one method of achieving consis-

The purpose of not encumbering agencies with the dead weight of precedent is to guarantee a flexibility and responsiveness in their decision-making which is not always forthcoming in the courts. Hence all the need to consider each case on its own merit. The danger is, however, that in releasing agencies from the moorings of stare decisis, they are being furnished, in effect, with a licence to be inconsistent. Inconsistency creates its own form of injustice, because it theoretically obviates the need to treat like cases alike. Furthermore, it means that a party may tailor its activites according to a give line of agency decisions, only to one day have the same agency "repent and recant", thereby throwing its affairs into disarray.

I believe that that it is this inability of agencies to resort to precedent which, in an effort to avoid purely ad hoc decision-making and to attain consistency in decision-making where appropriate which has led to the great role played by guidelines (and rule-making) in agency life.[14.2]

6.4 A GENERAL DESCRIPTION OF THE AUTHORITY OF ADMINISTRATIVE AGENCIES

Writers, the courts, lecturers and others have tried to categorize agencies by a descriptive word of what function the agency performs. Thus some still call certain agencies "legislative" agencies; others are called "regulatory agencies" while some are called "adjudicative" agencies. I assume that it is easier for a judge to use these classifications than it is for those of us who have had practical experience in the design, creation, supervision and operation of the agency system.

Every so often a court will decry the classification system by function as the Supreme Court of Canada did in the *Canada (Attorney General) v. Inuit Tapirisat of Canada*[15] case and having decried functionalism it went right ahead and used the functional classification to explain why it held that the Cabinet had no duty to be fair in that case because it was performing a legislative function.

I see no need in this Chapter to get into the differences of function in administrative agencies. Suffice it to say, there are about 2,500 administrative agencies in Canada and some do this and some do that. It is only when one looks clearly and in substantial detail at their mandate and how they carry it out that one can visualize whether an agency could, even if it wanted, to rule-make, while it is quite clear that most administrative agencies may well need to policy-make from time to time.

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tency is by way of a body of decisions, as is implemented by courts in their dissemination of jurisprudence.

14.2 At the same time, neither past decisions or guidelines issued by an agency are "nothings" which can simply be ignored. See the discussion later in this text under heading 6.20 "Practice Hints in Dealing With Agency Guidelines for Agencies and Practitioners" under the heading "Cannot Simply Ignore Guidelines".

15 [1980] 2 S.C.R. 735, 115 D.L.R. (3d) 1.

TAB 6

ESSENTIALS OF
CANADIAN LAW

THE LAW OF EVIDENCE

SIXTH EDITION

DAVID M. PACIOCCO

Justice of the Ontario Court of Justice

LEE STUESSER

Professor of Law, Bond University

IRWIN LAW

7.2) Views

Should it be impractical to bring the evidence to the court, the court may go to the evidence by way of a view. The trial judge has the discretion whether or not to undertake a view.[187] The value in conducting a view must be weighed against the inconvenience and disruption necessitated in essentially moving the court participants to the site.

Preserving a record as to what occurs and what is said during the course of a view is a concern. Sometimes attempts are made to conduct views without commentary. This is impractical in most instances. Some explanation will almost inevitably be required. Therefore, a recommended practice is to have a court reporter present to record any commentary and which also allows for the parties and the judge to put on the record what is occurring. The view record could also be preserved through videotaping.[188]

One issue that arises is the purpose of a view. The Ontario Court of Appeal in *Chambers v. Murphy* said that it was "well settled and beyond all controversy that the purpose of a view by a Judge or jury of any place is 'in order to understand better the evidence.'"[189] *Murphy* involved an automobile accident that occurred at the intersection of two highways. The defendant had testified that his vision was obstructed. There was no evidence to the contrary. The judge and counsel viewed the scene and, based on his own observations, the judge rejected the defendant's claim that his vision was blocked. The Court of Appeal said the rejection was "unwarranted" in that the judge was effectively relying on his own evidence. The Manitoba Court of Appeal in *Meyers v. Manitoba* rejected this limitation.[190] The court concluded that the observations of the trier of fact made during a view were evidence. The court quoted from Lord Denning in *Buckingham v. Daily News Ltd.*, where he said:

> Everyday practice in these courts shows that, where the matter for decision is one of ordinary common sense, the judge of fact is en-

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187 See, for example, *Criminal Code*, above note 2, s. 652; Ontario, *Rules of Civil Procedure*, above note 54, r. 52.05.

188 In one case a judge tried to avoid having any untoward commentary during a view by having a script prepared in advance. Not only is this most unworkable, but it puts counsel to considerable time and work to prepare. The judge also then gave the option of having a court reporter present and having the view audio- and videotaped. The latter option is the far more sensible approach. See *Edmonton v. Lovat Tunnel Equipment Inc.* (2000), 258 A.R. 92 (Q.B.).

189 [1953] 2 D.L.R. 705 at 706 (Ont. C.A.). See also *Triple A Investments Ltd. v. Adams Brothers Ltd.* (1985), 56 Nfld. & P.E.I.R. 272 (Nfld. C.A.); *R. v. Welsh* (1997), 120 C.C.C. (3d) 68 (B.C.C.A.).

190 (1960), 26 D.L.R. (2d) 550 (Man. C.A.).

> titled to form his own judgment on the real evidence of a view, just as much as on the oral evidence of witnesses.[191]

Mr. Justice Schultz in the Manitoba Court of Appeal then went on to state a far broader proposition, which would apply to all real or demonstrative evidence:

> I think it is a matter of everyday practice in our Courts that scale models, or similar objects, are tendered and accepted as real evidence. Such evidence may offer stronger and more convincing proof of the fact claimed than the oral evidence of witnesses. The Judge who views them in the court room is in no different position there than when, with all the necessary safeguards and conditions met, he views them outside the court room.[192]

This statement of the law as it applies to views or other real evidence is sound. It is illogical to ask judges or jurors to ignore what they have observed.[193]

7.3) Photographs and Videotapes

The admissibility of photographs or videotapes depends upon (1) their accuracy in truly representing the facts; (2) their fairness and absence of any intention to mislead; and (3) their verification on oath by a person capable of doing so.[194] The person verifying the authenticity of the photographs or videotapes need not be the photographer. An eyewitness of the scene or events may confirm that the photograph or videotape is a fair and accurate reproduction. This is true even if the photograph of the scene is taken well after the events, as long as a witness testifies that it is a fair and accurate reproduction of the scene *as it looked at the time of the incident.*

A good case to illustrate the concerns about accuracy and fairness is *R. v. Maloney (No. 2).*[195] In a National Hockey League game, Maloney, who played for the Detroit Red Wings, got involved in a fight with a Toronto Maple Leaf player. During the course of the fight, Maloney repeatedly smashed the Toronto player's head into the ice. Maloney was charged with assault causing bodily harm. The Crown sought to intro-

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191 [1956] 2 All E.R. 904 at 914 (C.A.).

192 *Meyers v. Manitoba*, above note 190 at 558.

193 For a thorough discussion on this issue, see G.S. Lester, "Tendering a View and a Demonstration on a View in Evidence" (1997) 19 Advocates' Q. 345.

194 *R. v. Creemer* (1967), 1 C.R.N.S. 146 at 154 (N.S.C.A.).

195 (1976), 29 C.C.C. (2d) 431 (Ont. G.S.P.).

TAB 7

Rosemarie T. Leclair
Chair and CEO
Ontario Energy Board

Efficient, Effective, Consumer Focused – Inside and Out

OEA Annual Conference
Niagara Falls, ON
October 18, 2012

CHECK AGAINST DELIVERY

Good afternoon. Let me first congratulate the Ontario Energy Association (OEA), particularly Elise Herzig and the organizing committee, on the success of this year's conference.

It is a pleasure for me to be speaking to an OEA gathering so soon after addressing another OEA breakfast event in Toronto just last month where I focused my remarks on the Board's recently released Renewed Regulatory Framework for Electricity (RRFE).

It occurred to me in preparing for today's session, that I have had many opportunities over the last year to speak at the OEA and elsewhere about my perspectives on the industry and the regulator's, how we want to work with stakeholders some of the initiatives that are underway at the Ontario Energy Board (OEB), and what we hope to accomplish.

And while all of these topics start to paint a picture I think it's important to put all of the Board's initiatives into a broader context.

So today, I would like to talk to you about our vision for regulation and how all of the initiatives that we have underway contribute to the achievement of that vision.

For those of you who have visited the "What's New" section of the OEB website recently you may have noticed that we posted our 2012-15 Business Plan earlier this summer. Like most business plans, it sets out the specific projects the Board plans to undertake over this period but for the first time it also sets out the outcomes that we hope to achieve. These outcomes are set out in four statements that appear prominently in the plan. Together they suggest what things will look like a few years down the road both at the OEB and within the sector that we regulate.

First, we will regulate the gas and electricity sectors in a manner that focuses on outcomes that are valued by consumers. Second, regulated utilities will invest and operate in a manner that increases efficiency and productivity, and provides consumers with a reliable energy supply at a reasonable cost. Third, the Board's own processes will be efficient, cost effective, understood and accessible to both industry and consumers. And last, but not least, energy consumers will have the information they need to understand the value they receive for their energy dollar and make choices regarding their energy use.

Four statements that reflect the Board's focus - looking out at the industry that we regulate and looking in at the way in which we go about doing that. Our focus is on achieving greater efficiency, effectiveness and responsiveness so that consumers can be assured that they are getting good value for their energy dollar. And if you were listening closely, you will have noticed that "consumers" figure prominently in each of these four statements. That is not accidental. The service that regulated utilities provide and the oversight that the Board provides are very much for the benefit of consumers. The Board's mandate includes both protecting the interests of consumers and ensuring

that we have a financially viable industry to provide service to those consumers. The two objectives, in my view, are closely linked.

So it makes sense that consumers are central to the Board's approach to regulation. That does not mean that the Board will be any less focused on ensuring the viability of the industry. The Board has an important role in facilitating the alignment of both consumer and utility interests in delivering on our mandate.

While there are many initiatives included in this year's Business Plan, there are three in particular which I believe will be instrumental in moving us closer to the achievement of these objectives, all of which are currently underway.

- Our new Performance Based Approach to regulation, as laid out in the Board's just released Report on the Renewed Regulatory Framework for Electricity;

- Our Applications and Hearing Process Review; and

- Our Consumer Touchpoints Review

I have spoken about each of these initiatives before, some at great length, and others very briefly. But let me take a moment to touch on each.

As I alluded to a moment ago, the Renewed Regulatory Framework is the Board's performance-based approach to regulating electricity, distributors. It is about the achievement of clearly identified outcomes supported by specific measures and targets and annual reporting. Utility performance will be compared year over year and to the best of the best with the use of a new scorecard approach.

Consistent with the broader ambitions of the Board I mentioned the Board has similarly identified four key areas of focus that will be reflected in ongoing performance monitoring of regulated utilities:

- Customer service: services are provided in a manner that responds to identified customer preferences;
- Operational effectiveness: continuous improvement in productivity and cost performance is achieved; and utilities deliver on system reliability and quality objectives;
- Public policy: utilities deliver on obligations mandated by government (e.g., in legislation and in regulatory requirements imposed further to Ministerial directives to the Board); and
- Financial performance: financial viability is maintained; and savings from operational effectiveness are sustainable.

In order to accomplish these desired outcomes we are enhancing our approach to rate setting so that it better recognizes distributor diversity it is anchored in a coordinated and comprehensive approach to planning while maintaining a commitment to continuous improvement.

Each distributor will ultimately be expected to select from the three alternative rate-setting methods choose the one that best meet its needs and circumstances and apply to the Board to have its rates set on that basis.

The Board believes that this more flexible approach to rate-setting will enhance predictability necessary to facilitate planning and decision-making by consumers and electricity distributors better align rate-setting with distributor planning horizons facilitate the cost-effective and efficient implementation of distributor investments help to manage the pace of rate increases for consumers and encourage consumer alignment through better engagement performance monitoring and utility benchmarking

We are now in the process of assembling industry working groups to help us implement the direction laid out in the Board's report. With their help and a lot of hard work our expectation is to have the regulatory tools in place by next spring so that distributors can begin selecting a path under our new ratemaking structure for their 2014 rates.

We are also moving quickly on two more internally focused reviews aimed at bolstering our own performance in the pursuit of better outcomes and consumer-centric regulation. The first initiative I would like to highlight is the Board's Rates Application Process Review. This review aims to align our internal process with the outcome-based approach we are reinforcing through performance-based regulation. We looked very broadly at our approach to applications and hearings with a view to streamlining these processes improving their efficiency and effectiveness and ultimately reducing costs to customers.

With the assistance of external consultants, we have looked at the entire application process from end to end from filing requirements to pre-hearing processes through the duration of the hearing. We examined best practices from other jurisdictions in addition to learning from our own experience. We sought input from a number of stakeholders involved across the process from OEB Board members and staff to applicants, legal counsel and others who participate regularly. Ultimately, we spoke to more than 130 different people.

A number of opportunities across multiple parts of the end-to-end process have been identified opportunities centred around process, metrics, communication, accountabilities and consistency. Some improvements will be implemented quickly, and others may take a little longer.

Here are some examples that we are looking at. We are looking at things such as streamlining and simplifying the Notice of Application to make them more accessible and understandable for customers and reduce the associated costs. We will be working toward a greater focus on materiality to optimize the allocation of time spent on applications while maintaining quality results. And we will be looking to improve communications with applicants and other participants before and after applications are processed so that we can improve the quality of applications and the efficiency of the process as a whole.

Ultimately what we hope to see is a more effective and efficient process supported by high quality comprehensive applications that is less costly in time and resources and that supports the best decisions possible.

All of this spells better results for customers. Better engagement with consumers is a central theme of the Board's vision and our supporting initiatives be it the RRFE that contemplates better distributor engagement on their investment plans or the Applications Review that contemplates greater accessibility and understanding by customers on individual applications.

But there is one more Board initiative that is focused much more directly on customer communication – our Consumer Touchpoints review.

As I have said many times I strongly believe that we need to communicate with consumers through their lens not ours.

Indeed, we've been talking about this more and more with our agency partners, distributors, and organizations like the OEA, and through our own industry and consumer executive roundtables.

Everyone agrees that we need to do everything possible to better engage with the consumer to provide an appropriate level of understanding of the value that they receive for their energy dollar. And engagement and communication needs to be a two way street. It means talking *to* but it also means hearing *from*.

Our Consumer Touchpoints review is still underway but let me tell you a bit about what we've done so far. Like all of our initiatives we have sought the viewpoints of those affected by our work so that the decisions stemming from this review consider as many perspectives as possible.

We have examined recent public opinion research and focus groups to get a better handle on how much consumers know about the Board the work that we do and how it benefits them; how much they understand the workings of the energy sector and how it relates to their own energy use; and, what they need to know or want to know to help them be informed customers/ consumers.

We have also conducted dozens of interviews with a broad range of stakeholders reaching out to utilities and other agencies - consumer advocates representing a range of groups from business to seniors, because, as I said at the outset, we need to a better understand from their perspective as to where there are opportunities to do better.

Work on our Consumer Touchpoints review is in its early stages, and we look forward to the results that will identify opportunities to improve on our current work

Looking at what we do how we do it and how we work with and engage with both consumers and industry are all part of achieving our vision for the Board as a regulator.

Put very simply, we are aiming to be consumer centric in our approach knowledgeable of the business operations of those we regulate outcome and performance based in our approach focused on enhancing efficiency and effectiveness for the benefit of customers and engaged in a meaningful way with all of our stakeholders.

Getting there will take time and commitment from the Board and from those that we regulate and those who participate in our proceedings. But I believe we have made some great strides in the right direction recently.

I am confident that working with you and keeping a steady focus on those broader ambitions articulated in our 2012-15 business plan will lead us to energy consumers who value the service they get from an increasingly efficient and productive sector and who are empowered with the information they need in order to value and manage their energy use.

Thank you.

TAB 8

CITATION: Combined Air Mechanical Services Inc. v. Flesch, 2011 ONCA 764
DATE: 20111205
DOCKET: C51986, C52912, C52913, C53035, C53395

COURT OF APPEAL FOR ONTARIO

Winkler C.J.O., Laskin, Sharpe, Armstrong and Rouleau JJ.A.

C51986

BETWEEN

Combined Air Mechanical Services Inc., Dravo Manufacturing Inc. and Combined Air Mechanical Services

Plaintiffs (Appellants)

and

William Flesch, WJF Investments Inc., Service Sheet Metal Inc. and James Searle

Defendants (Respondents)

C52912

AND BETWEEN

Fred Mauldin, Dan Myers, Robert Blomberg, Theodore Landkammer, Lloyd Chelli, Stephen Yee, Marvin Cleair, Carolyn Cleair, Richard Hanna, Douglas Laird, Charles Ivans, Lyn White and Athena Smith

Plaintiffs (Respondents)

and

Cassels Brock & Blackwell LLP, Gregory Jack Peebles and Robert Hryniak

Defendants (Appellant)

C52913

AND BETWEEN

Bruno Appliance and Furniture, Inc.

Plaintiff (Respondent)

and

Cassels Brock & Blackwell LLP, Gregory Jack Peebles and Robert Hryniak

Defendants (Appellant)

C53035

AND BETWEEN

394 Lakeshore Oakville Holdings Inc.

Plaintiffs (Respondent)

and

Carol Anne Misek and Janet Purvis

Defendants (Appellant)

C53395

AND BETWEEN

Marie Parker, Katherine Stiles and Siamak Khalajabadi

Plaintiffs (Appellants)

and

Eric Casalese, Gerarda Dina Bianco Casalese, Pino Scarfo, Antonietta Di Lauro and Mauro Di Lauro

Defendants (Respondents)

J. Gardner Hodder and Guillermo Schible, for the appellants in *Combined Air v. Flesch*

Daniel F. Chitiz and Tamara Ramsey, for the respondents in *Combined Air v. Flesch*

Sarit E. Batner and Moya J. Graham, for the appellant Robert Hryniak in *Mauldin v. Hryniak* and *Bruno Appliance and Furniture v. Hryniak*

Javad Heydary, David K. Alderson and Ruzbeh Hosseini, for the respondents in *Mauldin v. Hryniak* and *Bruno Appliance and Furniture v. Hryniak*

David A. Taub and Dominique Michaud, for the appellant Misek in *394 Lakeshore v. Misek*

William A. Chalmers, for the respondent in *394 Lakeshore v. Misek*

Gregory M. Sidlofsky and Faren H. Bogach, for the appellants in *Parker v. Casalese*

Mark A. Klaiman, for the respondent Scarfo in *Parker v. Casalese*

Charles Wagman, for the respondents Casalese and Di Lauro in *Parker v. Casalese*

Malliha Wilson and Kevin Hille, for the *amicus curiae* the Attorney General of Ontario

David W. Scott, Q.C. and Patricia D.S. Jackson, for the *amicus curiae* The Advocates' Society

Paul R. Sweeny, Robert J. Van Kessel and David L. Sterns, for the *amicus curiae* Ontario Bar Association

Allan Rouben and Ronald P. Bohm, for the *amicus curiae* Ontario Trial Lawyers Association

Robert G. Zochodne, for the *amicus curiae* The County and District Law Presidents' Association

Heard: June 21, 22 and 23, 2011

On appeal from the order of Justice Edward P. Belobaba of the Superior Court of Justice, dated April 8, 2010, with reasons reported at 2010 ONSC 1729 (C51986); and on appeal from the order of Justice A. Duncan Grace of the Superior Court of Justice, dated October 22, 2010, with reasons reported at 2010 ONSC 5490 (C52912/C52913); and on appeal from the order of Justice Paul M. Perell of the Superior Court of Justice, dated November 2, 2010, with reasons reported at 2010 ONSC 6007 (C53035); and on appeal from the order of the Divisional Court (Justices Emile R. Kruzick, Katherine E. Swinton and Alison Harvison Young J.J.), dated October 21, 2010, with reasons reported at 2010 ONSC 5636 (C53395).

Table of Contents

By the Court:

I. Introduction

[1] On January 1, 2010, a significant package of amendments to the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, came into effect. Motivating the amendments was the overriding objective of making the litigation system more accessible and affordable for Ontarians. Reflecting this objective, the touchstone of proportionality was introduced as a guiding interpretative principle under the *Rules*. To this end, rule 1.04(1.1) requires courts to "make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding."

[2] Of the changes introduced, the amendments to Rule 20, which governs motions for summary judgment, were arguably the most important. Simply put, the vehicle of a motion for summary judgment is intended to provide a means for resolving litigation expeditiously and with comparatively less cost than is associated with a conventional trial. Although such motions have long been available in this province, their utility had

been limited in part by a line of jurisprudence from this court that precluded a judge on a summary judgment motion from weighing the evidence, assessing credibility, or drawing inferences of fact. These powers were held to be reserved for the trial judge.

[3] The 2010 amendments to Rule 20 effectively overruled this line of authority by specifically authorizing judges to use these powers on a motion for summary judgment unless the judge is of the view that it is in the interest of justice for such powers to be exercised only at a trial. One of the objectives behind enhancing the powers available to judges on a summary judgment motion was to make this form of summary disposition of an action more accessible to litigants with a view to achieving cost savings and a more efficient resolution of disputes. Indeed, the principle of proportionality is advanced by the expansion of the availability of summary judgment.

[4] However, it is equally clear that the amendments to Rule 20 were never intended to eliminate trials. In fact, the inappropriate use of Rule 20 has the perverse effect of creating delays and wasted costs associated with preparing for, arguing and deciding a motion for summary judgment, only to see the matter sent on for trial.

[5] In the months following the amendments to Rule 20, it has become a matter of some controversy and uncertainty as to whether it is appropriate for a motion judge to use the new powers conferred by the amended Rule 20 to decide an action on the basis of the evidence presented on a motion for summary judgment. Judges of the Superior Court of Justice have expressed differing views on this and other interpretative issues raised by the

amendments. Both the bench and the bar have turned to this court for clarification on what the amended rule does, and does not, accomplish.

[6] To provide some guidance to the profession, this court convened a five-judge panel to hear five appeals from decisions under the amended rule. In some of these cases, summary judgment was granted, while in others the motion was dismissed in whole or in part. With their varying outcomes, these cases raise a number of issues concerning the interpretation of the new Rule 20, including the nature of the test for determining whether or not summary judgment should be granted, the scope and purpose of the new powers that have been given to judges hearing motions for summary judgment, and the types of cases that are amenable to summary judgment.

[7] In addition to hearing from counsel representing the parties on the appeals, the court appointed the following five *amicus curiae* to provide submissions on how the amended rule should be interpreted and applied: the Attorney General of Ontario, The Advocates' Society, the Ontario Bar Association, the Ontario Trial Lawyers Association, and The County and District Law Presidents' Association. The *amicus* were asked to address the meaning and scope of the amended Rule 20, but advised to take no position on the facts or merits of any of the decisions under appeal.

[8] These reasons will proceed as follows. First, there will be a historical review of Rule 20 before the 2010 amendments, including a review of some of the leading cases interpreting the former rule. Next, there will be an examination of the findings and

recommendations of the former Associate Chief Justice of Ontario, the Honourable Coulter A. Osborne, Q.C., in his report entitled *Civil Justice Reform Project: Summary of Findings and Recommendations* (Toronto: Ontario Ministry of the Attorney General, 2007) ("the Osborne Report"). This will be followed by an analysis of the 2010 amendments to determine the extent to which Mr. Osborne's recommendations concerning summary judgment were implemented. We will then explain the general principles to be followed in applying the amended Rule 20. Finally, we will apply these principles to the five appeals before the court.

II. The Former Rule 20

[9] Rule 20 came into force in Ontario on January 1, 1985. Prior to this, there had been a summary judgment mechanism for resolving an action in the *Rules of Civil Procedure*, but it operated on a very limited basis – only a plaintiff was entitled to move for summary judgment and only on enumerated claims for a debt or liquidated demand. With the introduction of Rule 20, the remedy of summary judgment appeared to be more widely available. For example, summary judgment could be requested by either plaintiffs or defendants in the context of any action.

[10] The pertinent provisions of the former Rule 20 state:

> 20.01 (1) A plaintiff may, after the defendant has delivered a statement of defence or served a notice of motion, move with supporting affidavit material or other evidence for summary judgment on all or part of the claim in the statement of claim.

...

(3) A defendant may, after delivering a statement of defence, move with supporting affidavit material or other evidence for summary judgment dismissing all or part of the claim in the statement of claim.

...

20.04 (1) In response to affidavit material or other evidence supporting a motion for summary judgment, a responding party may not rest on the mere allegations or denials of the party's pleadings, but must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue for trial.

(2) The court shall grant summary judgment if,

(a) the court is satisfied that there is no genuine issue for trial with respect to a claim or defence; or

(b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment.

...

(4) Where the court is satisfied that the only genuine issue is a question of law, the court may determine the question and grant judgment accordingly, but where the motion is made to a master, it shall be adjourned to be heard by a judge.

20.05 (1) Where summary judgment is refused or is granted only in part, the court may make an order specifying what material facts are not in dispute and defining the issues to be tried and may order that the action proceed to trial by being,

(a) placed forthwith, or within a specified time, on a list of cases requiring speedy trial; or

> (b) set down in the normal course, or within a specified time, for trial.

[11] Under the former Rule 20, a motion for summary judgment was heard entirely on the basis of a paper record that typically consisted of affidavits sworn by the witnesses, transcripts of examinations of the witnesses on their affidavits, and, if available, any transcripts of examinations for discovery.

[12] Based on this written record, the court was required to determine whether there was any genuine issue for trial with respect to a claim or defence. If the court was satisfied that there was no such genuine issue, the court was required to grant summary judgment and the action would either be allowed or dismissed without the need for a full trial.[1] If the court was satisfied the only genuine issue was a question of law, then the judge had the discretion to determine the issue on the motion. If the court determined that a trial was necessary to resolve a genuine issue of fact or law, then the motion would be dismissed and the matter would proceed to trial. It was also open to the motion court to grant a motion in part, as well as to specify what material facts were not in dispute, to define the issues to be tried, and to order that the trial be heard on an expedited basis.

---

[1] Typically the power to grant summary judgment would be exercised in favour of the party bringing the motion. However, as the Supreme Court of Canada held in *Manulife Bank of Canada v. Conlin*, [1996] 3 S.C.R. 415, at p. 448, *per* Iacobucci J. dissenting, it is open to the court under rules 20.04(2) and (4) to grant summary judgment in favour of the responding party, even if that party did not bring a motion requesting such relief. The majority agreed with Iacobucci J. on this issue, at p. 421.

[13] The leading case on the meaning of "genuine issue for trial" under the former Rule 20 is the decision of Morden A.C.J.O. in *Irving Ungerman Ltd. v. Galanis* (1991), 4 O.R. (3d) 545 (C.A.), at p. 551:

> It is safe to say that "genuine" means not spurious and, more specifically, that the words "for trial" assist in showing the meaning of the term. If the evidence on a motion for summary judgment satisfies the court that there is no issue of fact which requires a trial for its resolution, the requirements of the rule have been met. It must be clear that a trial is unnecessary. The burden is on the moving party to *satisfy* the court that the requirements of the rule have been met. Further, it is important to keep in mind that the court's function is not to resolve an issue of fact but to determine whether a genuine issue of fact exists. [Emphasis in original.]

[14] Morden A.C.J.O. also described the function served by the mechanism of summary judgment as follows, at pp. 550-51:

> A litigant's "day in court", in the sense of a trial, may have traditionally been regarded as the essence of procedural justice and its deprivation the mark of procedural injustice. There can, however, be proceedings in which, because they do not involve any genuine issue which requires a trial, the holding of a trial is unnecessary and, accordingly, represents a failure of procedural justice. In such proceedings the successful party has been both unnecessarily delayed in the obtaining of substantive justice and been obliged to incur added expense. Rule 20 exists as a mechanism for avoiding these failures of procedural justice.

[15] Another often-cited decision under the former Rule 20 is that of Henry J. in *Pizza Pizza Ltd. v. Gillespie* (1990), 75 O.R. (2d) 225 (Gen. Div.). Henry J. explained at p. 237 that a summary judgment court is to take "a hard look at the merits" and "decide whether

the case merits reference to a judge at trial." If there are "real issues of credibility, the resolution of which is essential to determination of the facts", the case will "no doubt, have to go to trial". However, parties to the motion are required to "put their best foot forward" through filing sworn affidavits and other material. In Henry J.'s words at p. 238: "It is not sufficient for the responding party to say that more and better evidence will (or may) be available at trial. The occasion is now."

[16] Henry J. also held at p. 238 that the motion judge is "expected to be able to assess the nature and quality of the evidence" and to determine if "the case is so doubtful that it does not deserve consideration" through a "long and expensive trial". The court can draw inferences from the evidence on a common sense basis and "look at the overall credibility" of a party's position. The court is to ask: does the party's case have "the ring of truth about it such that it would justify consideration" at a regular trial?

[17] Henry J.'s view that it was open to a judge to assess the cogency of the evidence on a summary judgment motion was superseded by a subsequent decision of this court in *Aguonie v. Galion Solid Waste Material Inc.* (1998), 38 O.R. (3d) 161. Borins J. (sitting *ad hoc*) held, at p. 173:

> In ruling on a motion for summary judgment, the court will never assess credibility, weigh the evidence, or find the facts. Instead, the court's role is narrowly limited to assessing the threshold issue of whether a genuine issue exists as to material facts requiring a trial. Evaluating credibility, weighing evidence, and drawing factual inferences are all functions reserved for the trier of fact.

[18] To similar effect is Borins J.A.'s decision in *Dawson v. Rexcraft Storage and Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (Ont. C.A.), at paras. 20 and 28:

> However, in my respectful view, in determining this issue [of the necessity of a trial] it is necessary that motions judges not lose sight of their narrow role, not assume the role of a trial judge and, before granting summary judgment, be satisfied that it is clear that a trial is unnecessary.
>
> ...
>
> [A]t the end of the day, it is clear that the courts accord significant deference to the trial process as the final arbiter of the dispute which has brought the parties to litigation. If there is a genuine issue with respect to material facts then, no matter how weak, or how strong, may appear the claim, or the defence, which has been attacked by the moving party, the case must be sent to trial. It is not for the motions judge to resolve the issue.

[19] In *Aronowicz v. Emtwo Properties Inc.*, 2010 ONCA 96, 98 O.R. (3d) 641, at para. 15, Blair J.A. recently commented on the effect of the *Aguonie* and *Rexcraft Storage* decisions in restricting the analytical approach of judges on a summary judgment motion:

> The proper test for summary judgment – as articulated by Morden A.C.J.O. in *Irving Ungerman Ltd. v. Galanis* (1991), 4 O.R. (3d) 545, at pp. 550-51 – is whether there is a genuine issue of material fact that requires a trial for its resolution. Neither *Aguonie v. Galion Solid Waste Material Inc.* (1998), 38 O.R. (3d) 161 (C.A.), nor *Dawson v. Rexcraft Storage and Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (Ont. C.A.) – the two summary judgment authorities most referred to in this province – alter this test. Indeed, they affirm it. What *Aguonie* and *Dawson* and their jurisprudential progeny have done is develop a more restricted view of the analytical approach to be adopted by the summary judgment motion

> judge and of the judge's role in determining the "genuine issue for trial" question.

[20] As noted in the Osborne Report, the strict limits that the jurisprudence of this court placed on a judge's power to assess the quality and cogency of the evidence in determining the "genuine issue for trial" question were viewed as undermining the efficacy of Rule 20 and as deterring litigants from using this mechanism for summarily resolving disputes.

III. The Osborne Report

[21] In June 2006, the Government of Ontario commissioned the former Associate Chief Justice of Ontario, the Honourable Coulter Osborne, to provide recommendations for making the civil justice system in Ontario more accessible and affordable. Following extensive consultations with members of the bench, the bar and the public, in November 2007, Mr. Osborne released his report containing detailed recommendations relating to 81 substantive areas of law, including numerous proposed changes to the *Rules of Civil Procedure*.

[22] In the section of his report, "Summary Disposition of Cases", Mr. Osborne observed at p. 33 that there was general agreement that Rule 20 was not working as intended: "Both lawyers and Superior Court judges said that the Court of Appeal's view of the scope of motion judges' authority is too narrow." Mr. Osborne considered the proposal of replacing the "no genuine issue for trial" test in Rule 20 with the "no real

prospect of success at trial" test, as appears in the *Civil Procedure Rules* in England and Wales. However, Mr. Osborne expressed doubt that such a wording change would accomplish the objective of expanding the scope of summary judgment, noting that English case law interpreting the "no real prospect of success" test is as, or even more restrictive than, this court's interpretation of the "no genuine issue for trial" test.

[23] Mr. Osborne recommended the following three changes to Rule 20. First, he proposed eliminating the jurisprudential restrictions that had been placed on the powers of a motion judge or master. In the words of the Report, at p. 35:

> [F]rom my reading of the Court of Appeal's decisions on summary judgment, it is how the court has confined the scope of the powers of a motion judge or master under rule 20, not the "no genuine issue for trial" test itself, that has limited the effectiveness of the rule.
>
> If the objective is to provide an effective mechanism for the court to dispose of cases early where in the opinion of the court a trial is unnecessary after reviewing the best available evidence from the parties, then it seems to me to be preferable to provide the court with the express authority to do what some decisions of the Court of Appeal have said a motion judge or master cannot do. That is, permit the court on a summary judgment motion to weigh the evidence, draw inferences and evaluate credibility in appropriate cases. Therefore, any new rule 20 should provide a basis for the motion judge to determine whether such an assessment can safely be made on the motion, or whether the interests of justice require that the issue be determined by the trier of fact at trial.

[24] Second, Mr. Osborne proposed, at p. 36, that Rule 20 be amended to address the situation where a court is unable to determine the motion without hearing *viva voce* evidence on discrete issues:

> In my view, amendments to rule 20 ought to be made to permit the court, as an alternative to dismissing a summary judgment motion, to direct a "mini-trial" on one or more discrete issues forthwith where the interests of justice require *viva voce* testimony to allow the court to dispose of the summary judgment motion. The same judge hearing the motion would preside over the mini-trial.

[25] Mr. Osborne's third suggested amendment to Rule 20 was to eliminate the presumption in rule 20.06 that substantial indemnity costs be awarded against an unsuccessful moving party. As noted in the Osborne Report, at p. 36, there was concern that Rule 20 was not being used in appropriate cases because of the potentially significant adverse cost consequences of an unsuccessful motion. Mr. Osborne suggested replacing the presumption of substantial indemnity costs with a rule conferring permissive authority on the court to impose such costs on any party where the court is of the opinion that a party has acted unreasonably in bringing or responding to a summary judgment motion, or where a party has acted in bad faith or for the purpose of delay (at p. 37).

[26] In addition to these three suggested amendments to Rule 20, Mr. Osborne also recommended that a new summary trial mechanism be adopted, similar to Rule 18A in British Columbia's *Supreme Court Civil Rules*, B.C. Reg. 221/90 [now Rule 9-7]. Mr.

Osborne noted, at p. 37, that such an option "may provide an effective tool for the final disposition of certain cases on affidavit and documentary evidence alone."

[27] These recommendations are encapsulated as follows in the List of Recommendations from the Osborne Report:

> 13. Do not amend the test of "no genuine issue for trial" in rule 20.
>
> 14. Amend rule 20 to expressly confer on a motion judge or master the authority to weigh evidence, evaluate credibility and draw any reasonable inference from the evidence and documents filed, including adverse inferences where a party fails to provide evidence of persons having personal knowledge of contested facts. This power, however, ought not to be exercised where the interests of justice require that the issue be determined at trial.
>
> 15. Amend rule 20 to permit the court to direct a "mini-trial" on one or more issues, with or without *viva voce* evidence, where the interests of justice require a brief trial to dispose of the summary judgment motion. The same judicial official hearing the summary judgment motion would preside at the "mini-trial."
>
> 16. Eliminate the presumption of substantial indemnity costs against an unsuccessful moving party in a summary judgment motion in rule 20.06. Replace it with a rule conferring permissive authority on the court to impose substantial indemnity costs where it is of the opinion that any party has acted unreasonably in bringing or responding to a summary judgment motion, or where a party has acted in bad faith or for the purpose of delay.
>
> 17. Adopt a new summary trial mechanism, similar to rule 18A in British Columbia.

IV. The Amendments to Rule 20

[28] The Civil Rules Committee studied Mr. Osborne's recommendations and proposed a series of amendments to the *Rules* that adopted various of his recommendations. The amendments were implemented by regulation effective January 1, 2010.

[29] For the purposes of the central issues before us, the material parts of the amended Rule 20 state:[2]

> 20.04 (2) The court shall grant summary judgment if,
>
> (a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; or
>
> (b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment.
>
> (2.1) In determining under clause (2) (a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:
>
> 1. Weighing the evidence.
>
> 2. Evaluating the credibility of a deponent.
>
> 3. Drawing any reasonable inference from the evidence.
>
> (2.2) A judge may, for the purposes of exercising any of the powers set out in subrule (2.1), order that oral evidence be

[2] The entirety of the amended Rule 20 is included as an appendix to these reasons.

> presented by one or more parties, with or without time limits on its presentation.

[30] The amendments to Rule 20 generally reflect Mr. Osborne's recommendations, albeit with some modifications. To start with, the wording of the test "no genuine issue for trial", although not changed to "no real prospect of success at trial", was re-worded to "no genuine issue requiring a trial".[3]

[31] As recommended by Mr. Osborne, a motion court judge was granted the power to weigh the evidence, evaluate credibility, and draw reasonable inferences from the evidence. The wording of rule 20.04(2.1), which confers these powers, indicates that they may be used for the purpose of determining whether there is a genuine issue requiring a trial. However, contrary to Recommendation 14 in the Osborne Report, only judges are given these powers and not masters.

[32] With respect to Recommendation 15, an "oral evidence" option was added in rule 20.04(2.2), but the text of this rule differs from the wording of the recommendation in several important respects. This rule does not refer to a mini-trial on "one or more issues, with or without *viva voce* evidence, where the interests of justice require a brief trial to dispose of the summary judgment motion." Rather, the provision allows a judge (not a master) to order the presentation of oral evidence, with or without time limits, for the purpose of exercising any of the powers in rule 20.04(2.1).

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[3] The new wording of the test for summary judgment reflects the language from *Ungerman v. Galanis* set out above at para. 14.

[33] Recommendation 16 in the Osborne Report was adopted in rule 20.06. The result is that costs on a failed motion are to be determined presumptively on a partial indemnity basis rather than on a substantial indemnity basis as was previously the case. The rule still provides for substantial indemnity costs but only where the factors of unreasonableness or bad faith are present:

> 20.06 The court may fix and order payment of the costs of a motion for summary judgment by a party on a substantial indemnity basis if,
>
> (a) the party acted unreasonably by making or responding to the motion; or
>
> (b) the party acted in bad faith for the purpose of delay.

[34] Finally, contrary to Recommendation 17, the amended *Rules* did not add a rule for the purpose of implementing a summary trial mechanism.

V. Analysis of the Amended Rule 20

1. Overview

[35] By the time these appeals were argued, a well-developed body of jurisprudence from the Superior Court of Justice under the new Rule 20 was already in place: see e.g., *Healey v. Lakeridge Health Corp.*, 2010 ONSC 725, 72 C.C.L.T. (3d) 261; *Cuthbert v. TD Canada Trust,* 2010 ONSC 830, 88 C.P.C. (6th) 359; *New Solutions Extrusion Corp. v. Gauthier*, 2010 ONSC 1037; *Hino Motors Canada Ltd. v. Kell*, 2010 ONSC 1329;

Lawless v. Anderson, 2010 ONSC 2723; *Canadian Premier Life Insurance Co. v. Sears Canada Inc.*, 2010 ONSC 3834; *Enbridge Gas Distribution Inc. v. Marinaccio*, 2011 ONSC 2313; and *Optech Inc. v. Sharma*, 2011 ONSC 680, with supplementary reasons at 2011 ONSC 1081. We have carefully reviewed and considered the conflicting jurisprudence from the Superior Court. However, we have chosen not to comment on the relative merits of the various interpretative approaches found in this body of case law because our decision marks a new departure and a fresh approach to the interpretation and application of the amended Rule 20.

[36] The amendments to Rule 20 are meant to introduce significant changes in the manner in which summary judgment motions are to be decided. A plain reading of the amended rule makes it clear that the *Aguonie* and *Dawson* restrictions on the analytical tools available to the motion judge are no longer applicable. The motion judge may now weigh the evidence, evaluate the credibility of a deponent, and draw any reasonable inference from the evidence in determining whether there is a genuine issue requiring a trial with respect to a claim or defence: see rule 20.04(2.1). Moreover, the new rule also enables the motion judge to direct the introduction of oral evidence to further assist the judge in exercising these powers: see rule 20.04(2.2).

[37] As we shall go on to explain, the amended rule permits the motion judge to decide the action[4] where he or she is satisfied that by exercising the powers that are now available on a motion for summary judgment, there is no factual or legal issue raised by the parties that requires a trial for its fair and just resolution.

[38] However, we emphasize that the purpose of the new rule is to eliminate *unnecessary* trials, not to eliminate all trials. The guiding consideration is whether the summary judgment process, in the circumstances of a given case, will provide an appropriate means for effecting a fair and just resolution of the dispute before the court.

[39] Although both the summary judgment motion and a full trial are processes by which actions may be adjudicated in the "interest of justice", the procedural fairness of each of these two processes depends on the nature of the issues posed and the evidence led by the parties. In some cases, it is safe to determine the matter on a motion for summary judgment because the motion record is sufficient to ensure that a just result can be achieved without the need for a full trial. In other cases, the record will not be adequate for this purpose, nor can it be made so regardless of the specific tools that are now available to the motion judge. In such cases, a just result can only be achieved through the trial process. This pivotal determination must be made on a case-by-case basis.

[4] Rules 20.01(1) and (3) also permit motions for partial summary judgment. The following analysis is focused on motions that would dispose of the totality of the action. The same interpretative principles apply to motions for partial summary judgment.

2. The Types of Cases that are Amenable to Summary Judgment

[40] Speaking generally, and without attempting to be exhaustive, there are three types of cases that are amenable to summary judgment. The first two types of cases also existed under the former Rule 20, while the third class of case was added by the amended rule.

[41] The first type of case is where the parties agree that it is appropriate to determine an action by way of a motion for summary judgment. Rule 20.04(2)(b) permits the parties to jointly move for summary judgment where they agree "to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment." We note, however, that the latter wording – "the court is satisfied" – affirms that the court maintains its discretion to refuse summary judgment where the test for summary judgment is not met, notwithstanding the agreement of the parties.

[42] The second type of case encompasses those claims or defences that are shown to be without merit. The elimination of these cases from the civil justice system is a long-standing purpose well served by the summary judgment rule. As stated by the Supreme Court of Canada in *Canada (A.G.) v. Lameman*, 2008 SCC 14, [2008] 1 S.C.R. 372, at para. 10:

> The summary judgment rule serves an important purpose in the civil litigation system. It prevents claims or defences that have no chance of success from proceeding to trial. Trying unmeritorious claims imposes a heavy price in terms of time

> and cost on the parties to the litigation and on the justice system. It is essential to the proper operation of the justice system and beneficial to the parties that claims that have no chance of success be weeded out at an early stage. Conversely, it is essential to justice that claims disclosing real issues that may be successful proceed to trial.

[43] As we shall discuss further below,[5] the amended Rule 20 has given the motion judge additional tools to assess whether a claim or defence has no chance of success at trial.

[44] Moreover, the amended Rule 20 now permits a third type of case to be decided summarily. The rule provides for the summary disposition of cases other than by way of agreement or where there is "no chance of success". The prior wording of Rule 20, whether there was a "genuine issue for trial", was replaced by "genuine issue requiring a trial". This change in language is more than mere semantics. The prior wording served mainly to winnow out plainly unmeritorious litigation. The amended wording, coupled with the enhanced powers under rules 20.04(2.1) and (2.2), now permit the motion judge to dispose of cases on the merits where the trial process is not required in the "interest of justice".

[45] The threshold issue in understanding the application of the powers granted to the motion judge by rule 20.04(2.1) is the meaning to be attributed to the phrase "interest of

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[5] See paras. 50, 73 and 101-111.

justice". This phrase operates as the limiting language that guides the determination whether a motion judge should exercise the powers to weigh evidence, evaluate credibility, and draw reasonable inferences from the evidence on a motion for summary judgment, or if these powers should be exercised only at a trial. The phrase reflects that the aim of the civil justice system is to provide a just result in disputed matters through a fair process. The amended rule recognizes that while there is a role for an expanded summary judgment procedure, a trial is essential in certain circumstances if the "interest of justice" is to be served.

[46] What is it about the trial process that certain types of cases require a trial for their fair and just resolution? In *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, the majority decision of Iacobucci and Major JJ., at para. 14, quotes a passage from R.D. Gibbens in "Appellate Review of Findings of Fact" (1991-92), 13 *Advocates' Q.* 445, at p. 446, which refers to the trial judge's "expertise in assessing and weighing the facts developed at trial". The quoted passage states: "The trial judge has sat through the entire case and his ultimate judgment reflects this total familiarity with the evidence." The passage further notes that the trial judge gains insight by living with the case for days, weeks or even months. At para. 18, Iacobucci and Major JJ. go on to observe that it is the trial judge's "extensive exposure to the evidence, the advantage of hearing testimony *viva voce*, and the judge's familiarity with the case as a whole" that enables him or her to gain the level of appreciation of the issues and the evidence that is required to make dispositive findings.

[47] As these passages reflect, the trial judge is a trier of fact who participates in the dynamic of a trial, sees witnesses testify, follows the trial narrative, asks questions when in doubt as to the substance of the evidence, monitors the cut and thrust of the adversaries, and hears the evidence in the words of the witnesses. As expressed by the majority in *Housen*, at para. 25, the trial judge is in a "privileged position". The trial judge's role as a participant in the unfolding of the evidence at trial provides a greater assurance of fairness in the process for resolving the dispute. The nature of the process is such that it is unlikely that the judge will overlook evidence as it is adduced into the record in his or her presence.

[48] The trial dynamic also affords the parties the opportunity to present their case in the manner of their choice. Advocates acknowledge that the order in which witnesses are called, the manner in which they are examined and cross-examined, and how the introduction of documents is interspersed with and explained by the oral evidence, is of significance. This "trial narrative" may have an impact on the outcome. Indeed, entire books have been written on this topic, including the classic by Frederic John Wrottesley, *The Examination of Witnesses in Court* (London: Sweet and Maxwell, 1915). As the author instructs counsel, at p. 63:

> It is, perhaps, almost an impertinence to tell you that you are by no means bound to call the witnesses in the order in which they are placed in the brief.
>
> It will be your task, when reading and noting up your case, to marshall your witnesses in the order in which they will best

> support your case, as you have determined to submit it to the [trier of fact].

[49] In contrast, a summary judgment motion is decided primarily on a written record. The deponents swear to affidavits typically drafted by counsel and do not speak in their own words. Although they are cross-examined and transcripts of these examinations are before the court, the motion judge is not present to observe the witnesses during their testimony. Rather, the motion judge is working from transcripts. The record does not take the form of a trial narrative. The parties do not review the entire record with the motion judge. Any fulsome review of the record by the motion judge takes place in chambers.

[50] We find that the passages set out above from *Housen*, at paras. 14 and 18, such as "total familiarity with the evidence", "extensive exposure to the evidence", and "familiarity with the case as a whole", provide guidance as to when it is appropriate for the motion judge to exercise the powers in rule 20.04(2.1). In deciding if these powers should be used to weed out a claim as having no chance of success or be used to resolve all or part of an action, the motion judge must ask the following question: can the full appreciation of the evidence and issues that is required to make dispositive findings be achieved by way of summary judgment, or can this full appreciation only be achieved by way of a trial?

[51] We think this "full appreciation test" provides a useful benchmark for deciding whether or not a trial is required in the interest of justice. In cases that call for multiple findings of fact on the basis of conflicting evidence emanating from a number of

witnesses and found in a voluminous record, a summary judgment motion cannot serve as an adequate substitute for the trial process. Generally speaking, in those cases, the motion judge simply cannot achieve the full appreciation of the evidence and issues that is required to make dispositive findings. Accordingly, the full appreciation test is not met and the "interest of justice" requires a trial.

[52] In contrast, in document-driven cases with limited testimonial evidence, a motion judge would be able to achieve the full appreciation of the evidence and issues that is required to make dispositive findings. Similarly, the full appreciation test may be met in cases with limited contentious factual issues. The full appreciation test may also be met in cases where the record can be supplemented to the requisite degree at the motion judge's direction by hearing oral evidence on discrete issues.

[53] We wish to emphasize the very important distinction between "full appreciation" in the sense we intend here, and achieving familiarity with the total body of evidence in the motion record. Simply being knowledgeable about the entire content of the motion record is not the same as *fully appreciating* the evidence and issues in a way that permits a fair and just adjudication of the dispute. The full appreciation test requires motion judges to do more than simply assess if they are capable of reading and interpreting all of the evidence that has been put before them.

[54] The point we are making is that a motion judge is required to assess whether the attributes of the trial process are necessary to enable him or her to fully appreciate the

evidence and the issues posed by the case. In making this determination, the motion judge is to consider, for example, whether he or she can accurately weigh and draw inferences from the evidence without the benefit of the trial narrative, without the ability to hear the witnesses speak in their own words, and without the assistance of counsel as the judge examines the record in chambers.

[55] Thus, in deciding whether to use the powers in rule 20.04(2.1), the motion judge must consider if this is a case where meeting the full appreciation test requires an opportunity to hear and observe witnesses, to have the evidence presented by way of a trial narrative, and to experience the fact-finding process first-hand. Unless full appreciation of the evidence and issues that is required to make dispositive findings is attainable on the motion record – as may be supplemented by the presentation of oral evidence under rule 20.04(2.2) – the judge cannot be "satisfied" that the issues are appropriately resolved on a motion for summary judgment.

[56] By adopting the full appreciation test, we continue to recognize the established principles regarding the evidentiary obligations on a summary judgment motion. The Supreme Court of Canada addressed this point in *Lameman*, at para. 11, where the court cited Sharpe J.'s reasons in *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1996), 28 O.R. (3d) 423 (Gen. Div.), at p. 434, in support of the proposition that "[e]ach side must 'put its best foot forward' with respect to the existence or non-existence of material issues to be tried." This obligation continues to apply under

the amended Rule 20. On a motion for summary judgment, a party is not "entitled to sit back and rely on the possibility that more favourable facts may develop at trial": *Transamerica*, at p. 434.

[57] However, we add an important *caveat* to the "best foot forward" principle in cases where a motion for summary judgment is brought early in the litigation process. It will not be in the interest of justice to exercise rule 20.04(2.1) powers in cases where the nature and complexity of the issues demand that the normal process of production of documents and oral discovery be completed before a party is required to respond to a summary judgment motion. In such a case, forcing a responding party to build a record through affidavits and cross-examinations will only anticipate and replicate what should happen in a more orderly and efficient way through the usual discovery process.

[58] Moreover, the record built through affidavits and cross-examinations at an early stage may offer a less complete picture of the case than the responding party could present at trial. As we point out below, at para. 68, counsel have an obligation to ensure that they are adopting an appropriate litigation strategy. A party faced with a premature or inappropriate summary judgment motion should have the option of moving to stay or dismiss the motion where the most efficient means of developing a record capable of satisfying the full appreciation test is to proceed through the normal route of discovery. This option is available by way of a motion for directions pursuant to rules 1.04(1), (1.1), (2) and 1.05.

3. The Use of the Power to Order Oral Evidence

[59] It is necessary at this point to discuss the limits on the discretion of the motion judge to order oral evidence under rule 20.04(2.2) of the amended Rule 20. First, while the terminology of the "mini-trial" provides a convenient short form, this term should not be taken as implying that the summary judgment motion is a form of summary or hybrid trial. A summary judgment motion under the new rule does not constitute a trial. Mr. Osborne's recommendation of adopting a summary trial mechanism was not adopted, and his recommendation relating to mini-trials was not accepted in full. Indeed, the term "mini-trial" did not find its way into the body of the rule.

[60] The discretion to order oral evidence pursuant to rule 20.04(2.2) is circumscribed and cannot be used to convert a summary judgment motion into a trial. Significantly, it is the motion judge, not counsel, who maintains control over the extent of the evidence to be led and the issues to which the evidence is to be directed. The distinction between the oral hearing under rule 20.04(2.2) and the narrative of an actual trial is apparent. The discretion to direct the calling of oral evidence on the motion amounts to no more than another tool to better enable the motion judge to determine whether it is safe to proceed with a summary disposition rather than requiring a trial.

[61] In appropriate cases, the motion judge is empowered to receive oral evidence on discrete issues for purposes of exercising the powers in rule 20.04(2.1). In other words, the motion judge may receive oral evidence to assist in making the determination whether

any of the issues raised in the action require a trial for their fair and just resolution. We discuss below, at paragraphs 101-103, the circumstances in which it will be appropriate to order the presentation of oral evidence. However, at this stage, we stress that the power to direct the calling of oral evidence under rule 20.04(2.2) is not intended to permit the parties to supplement the motion record. Nor can the parties anticipate the motion judge directing the calling of oral evidence on the motion.

[62] The latter point requires that we address a practice issue in the Toronto Region. As a case management matter, parties to a summary judgment motion in Toronto are required to complete a summary judgment form, which includes questions about whether the parties intend to call *viva voce* evidence on an issue in dispute, and estimating the time required for such evidence. Although no doubt well-intentioned, these questions are misplaced in that they create the misconception that a summary judgment motion is in fact a summary trial.

[63] A party who moves for summary judgment must be in a position to present a case capable of being decided on the paper record before the court. To suggest that further evidence is required amounts to an admission that the case is not appropriate, at first impression, for summary judgment. It is for the motion judge to determine whether he or she requires *viva voce* evidence under rule 20.04(2.2) "for the purpose of exercising any of the powers" conferred by the rule. This is not an enabling provision entitling a party to enhance the record it has placed before the court. It may be that, for scheduling reasons,

the oral evidentiary hearing will need to be held after the hearing of the main motion. Nonetheless, it is the purview of the motion judge, and the motion judge alone, to schedule this hearing, which is a continuation of the original motion and not a separate motion.

4. Trial Management Under Rule 20.05

[64] Rule 20.05 facilitates a greater managerial role for judges and masters in circumstances where a summary judgment motion is dismissed in whole or in part and where the court orders that the action proceed to trial expeditiously. The summary judgment court, having carefully reviewed the evidentiary record and heard the argument, is typically well-positioned to specify what issues of material fact are not in dispute and to define the issues to be tried. Rule 20.05(2) sets out a lengthy list of directions that a court may make with a view to streamlining the proceedings and empowers the court to make a variety of orders, including requiring the filing of a statement setting out what material facts are not in dispute, specifying the timing and scope of discovery, and imposing time limits on any oral examination of a witness at trial.[6]

[65] While the court may make use of the provisions in rule 20.05 to salvage the resources that went into the summary judgment motion, the court should keep in mind that the rule should not be applied so as to effectively order a trial that resembles the

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[6] The full text of rule 20.05(2) is found in the appendix.

motion that was previously dismissed. For example, while rule 20.05(2)(f) provides that "the affidavits or any other evidence filed on the motion and any cross-examinations on them may be used at trial in the same manner as an examination for discovery", these materials should not be treated as a substitute for the *viva voce* testimony of the witnesses in the trial judge's presence. Any trial management order flowing from a failed summary judgment motion must facilitate the conduct of a genuine trial that will permit the full appreciation of the evidence and issues required to make dispositive findings. In other words, the trial ought not to be simply a reconfiguration of the dismissed motion.

[66] Further, litigants must not look to rule 20.05 as a reason for bringing a motion for summary judgment or as a substitute for effective case management of the trial of an action. The newly-introduced Rule 50 permits parties to obtain orders and directions that will assist in ensuring that a trial proceeds efficiently.

5. Costs in Rule 20.06

[67] As a result of the amendments to rule 20.06, the onus is now on the party seeking substantial indemnity costs to convince the court that the other side acted unreasonably or in bad faith for the purpose of delay in bringing or responding to a motion for summary judgment. This amendment removes a disincentive to litigants from using Rule 20 by eliminating the presumption that they will face substantial indemnity costs for bringing an unsuccessful motion for summary judgment. However, as the jurisprudence becomes more settled on when it is appropriate to move for summary judgment, the reasonableness

of the decision to move for summary judgment or to resist such a motion will be more closely scrutinized by the court in imposing cost orders under rule 20.06.

6. The Obligation on Members of the Bar

[68] It is important to underscore the obligation that rests on members of the bar in formulating an appropriate litigation strategy. The expenditure of resources, regardless of quantum, in the compilation of a motion record and argument of the motion is not a valid consideration in determining whether summary judgment should be granted. It is not in the interest of justice to deprive litigants of a trial simply because of the costs incurred by the parties in preparing and responding to an ill-conceived motion for summary judgment.

7. Standard of Review

[69] A final matter to address before assessing the merits of the appeals is the standard of review that applies to a decision to grant or deny a motion for summary judgment. Under the former Rule 20, courts reviewed the question whether the motion judge applied the appropriate test of a "genuine issue for trial" on a standard of correctness: see, e.g., *Whalen v. Hillier* (2001), 53 O.R. (3d) 550 (C.A.), at para. 14; *Canadian Imperial Bank of Commerce v. F-1 Holdings & Investments Inc.*, 2007 CarswellOnt 8012 (Div. Ct.), at para. 6; see also Donald J.M. Brown, Q.C., *Civil Appeals* (Toronto: Canvasback Publishing, 2011), at pp. 15-52 to 15-53 and the case law cited at footnote 348.

[70] There is no reason to depart from this standard under the new rule. The determination of whether there is a "genuine issue requiring a trial" is a legal determination. In the leading authority on the standard of review, the majority of the Supreme Court in *Housen* explained, at para. 8, that the standard of review on a question of law is correctness. Similarly, the standard of review on a question of mixed fact and law that "can be attributed to the application of an incorrect standard, a failure to consider a required element of a legal test, or similar error in principle" is also correctness: *Housen*, at para. 36. As Blair J.A. said in *Bell Canada v. The Plan Group*, 2009 ONCA 548, 96 O.R. (3d) 81, at para. 27:

> Where the matter referred to is more a matter of legal principle and sits towards the error of law end of the spectrum, the standard is correctness. Where the matter is one in which the legal principle and the facts are inextricably intertwined – where the facts dominate, as it were – it falls more towards the factual end of the spectrum, and significant deference must be accorded.

[71] Where the appellate court determines that the motion judge correctly applied the legal test for determining whether to grant summary judgment, any factual determinations by the motion judge in deciding the motion will attract review on the deferential standard of palpable and overriding error.

8. Summary

[72] We have described three types of cases where summary judgment may be granted. The first is where the parties agree to submit their dispute to resolution by way of summary judgment.

[73] The second class of case is where the claim or defence has no chance of success. As will be illustrated below, at paras. 101-111, a judge may use the powers provided by rules 20.04(2.1) and (2.2) to be satisfied that a claim or defence has no chance of success. The availability of these enhanced powers to determine if a claim or defence has no chance of success will permit more actions to be weeded out through the mechanism of summary judgment. However, before the motion judge decides to weigh evidence, evaluate credibility, or draw reasonable inferences from the evidence, the motion judge must apply the full appreciation test.

[74] The amended rule also now permits the summary disposition of a third type of case, namely, those where the motion judge is satisfied that the issues can be fairly and justly resolved by exercising the powers in rule 20.04(2.1). In deciding whether to exercise these powers, the judge is to assess whether he or she can achieve the full appreciation of the evidence and issues that is required to make dispositive findings on the basis of the motion record – as may be supplemented by oral evidence under rule 20.04(2.2) – or if the attributes and advantages of the trial process require that these powers only be exercised at a trial.

[75] Finally, we observe that it is not necessary for a motion judge to try to categorize the type of case in question. In particular, the latter two classes of cases we described are not to be viewed as discrete compartments. For example, a statement of claim may include a cause of action that the motion judge finds has no chance of success with or without using the powers in rule 20.04(2.1). And the same claim may assert another cause of action that the motion judge is satisfied raises issues that can safely be decided using the rule 20.04(2.1) powers because the full appreciation test is met. The important element of the analysis under the amended Rule 20 is that, before using the powers in rule 20.04(2.1) to weigh evidence, evaluate credibility, and draw reasonable inferences, the motion judge must apply the full appreciation test in order to be satisfied that the interest of justice does not require that these powers be exercised only at a trial.

[76] We now turn to apply these principles to the appeals before us.

VI. Application to the Five Appeals

Combined Air Mechanical v. Flesch (C51986)

On appeal from the order of Justice Edward P. Belobaba of the Superior Court of Justice, dated April 8, 2010, with reasons reported at 2010 ONSC 1729.

1. Introduction

[77] The appellants, Combined Air Mechanical Services Inc. and related companies (collectively, "Combined Air"), appeal a summary judgment dismissing Combined Air's

TAB 9

CITATION: Cuthbert v. TD Canada Trust, 2010 ONSC 830
COURT FILE NO.: CV-09-7981-0000
DATE: 20100204

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Frank Cuthbert, Plaintiff

AND:

TD Canada Trust and the Toronto-Dominion Bank, Defendants

AND:

Royal Bank of Canada, Third Party

BEFORE: Karakatsanis J.

COUNSEL: *Aliamisse Mundulai*, Counsel for the Plaintiff

Martin Greenglass, Counsel, for the Defendants and Third Party

HEARD: January 25, 2010

ENDORSEMENT

[1] Both the plaintiff and the defendants and third party have each brought a motion for summary judgement. These motions rest primarily upon an assessment of the evidence under the new Rule governing motions for summary judgement.

[2] This action pertains to monies obtained from the Royal Bank by fraud, and deposited to Cuthbert's account with the defendants (the TD Bank). The funds were subsequently debited from that account by the TD Bank and returned to the Royal Bank. While Cuthbert concedes that the monies were obtained from the Royal Bank by fraud, he deposes that he is an innocent third party who received the funds in repayment of loans made by him. Cuthbert seeks return of those funds. The Banks seek dismissal of the action.

[3] Many of the facts are not disputed. In early 2003, Cuthbert received five payments totalling $454,115.64 that were paid by the Royal Bank pursuant to directions from the solicitor for the mortgagees in fraudulent mortgages on four different properties. The final payment was a Royal Bank draft dated May 8, 2003 for $112,327.33 deposited in Cuthbert's TD Bank account on May 12, 2003. These funds were paid from the proceeds of the fraudulent mortgage on 22 Louis Street, Port Colborne. Only this last payment remained intact in Cuthbert's account when the Royal Bank traced the funds. In July 14

2003, the TD Bank debited Cuthbert's account and returned the $112,327.33 to the Royal Bank (subject to an indemnification agreement).

[4] The Royal Bank subsequently commenced a mortgage fraud action against various parties, including Cuthbert as recipient of the funds and obtained a Mareva injunction in December 2003. Cuthbert only became aware that the funds had been debited in April 2004. The Royal Bank ultimately obtained judgment in the mortgage fraud action (including the mortgage placed on 22 Louis Street Port Colborne) but the action against Cuthbert was dismissed, on consent, without costs, in August 2008. The Royal Bank evidence is that it did not expect any further recovery because Cuthbert was elderly and had no exigible assets. After the dismissal of the action, Cuthbert asked for return of the monies debited from his account and commenced this action. He states in his affidavit that the branch Manager had assured him that his account was frozen and that he would have his money back once everything was resolved.

[5] Cuthbert seeks summary judgment in this action for the return of those funds. The plaintiff submits that the Royal Bank can point to no judgment or court order identifying the funds as belonging to it and that the bank was not entitled to trace the funds. Further the plaintiff submits that the evidence is uncontroverted that the money was in Cuthbert's account and belonged to him as repayment for loans made by him.

[6] The TD Bank and Royal Bank seek summary judgment dismissing this action on the basis that the funds belong to the Royal Bank and Cuthbert has no claim to the funds. The Banks also submitted that the action was commenced outside the limitation period; and that Cuthbert is estopped from seeking the funds based upon the settlement of the action.

[7] I have before me documents and affidavits from the mortgage fraud action, cross-examinations on those affidavits, as well as affidavits and a cross examination in this motion. While the plaintiff did not have an opportunity to cross examine the Banks' affiant, Moran, due to the tight schedule and the intervening holidays, I do not strike that affidavit or draw an adverse inference. The Banks rely only upon the exhibits to that affidavit; those exhibits are excerpts of the exhibits already before the court on a previous motion in the fraud action.

[8] For the reasons that follow, summary judgment shall issue dismissing the action. I am satisfied that the Royal Bank paid the funds pursuant to a fraudulent mortgage and is *prima facie* entitled to them. I am satisfied that Cuthbert has no claim to the funds that can defeat the claim of the Royal Bank. I am satisfied that there is no genuine issue requiring a trial and that the interests of justice do not require that the evidence be presented and assessed at trial. As a result, I need not deal with the other issues raised by the Banks.

The New Rule for Summary Judgment Motions

[9] Rule 20.04 provides:

(2) The court shall grant summary judgment if,

(a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence;...

(2.1) In determining under clause 2 (a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interests of justice for such powers to be exercised only at a trial:

1. Weighing the evidence.
2. Evaluating the credibility of a deponent.
3. Drawing any reasonable inference from the evidence.

(2.2) A judge may, for the purposes of exercising any of the powers set out in subrule 2.1 order that oral evidence be presented by one or more parties, with or without time limits on its presentation.

[10] The change in the Rules from "no genuine issue for trial" to "no genuine issue requiring a trial," together with the explicit powers of the motions judge to make evidentiary determinations permits a more meaningful review of the paper record and expressly overrules jurisprudence that prevented motions judge from making evidentiary determinations. As a result, consistent as well with the new principle of proportionality in Rule 1.04 (1.1), cases or issues need not proceed to trial unless it is genuinely required.

[11] The decision itself or the test for summary judgment –whether there is a genuine issue of material fact that requires a trial for its resolution as first articulated in *Irving Ungerman Ltd. v Galanis* 1991, 4 O.R. (3d) 545 (C.A.)– has not changed. However, the cases that have since restricted a motions judge in assessing credibility, weighing evidence or drawing factual inferences have been superseded by the powers set out in the new Rule. Both the analytical review and the availability of oral evidence have considerably broadened the motions judge's tools in a summary judgment motion. Nonetheless, although a motions judge may weigh the evidence, evaluate the credibility and draw reasonable inferences from the evidence, it is not the role of the motions judge to make findings of fact for the purpose of deciding the action on the basis of the evidence presented on a motion for summary judgment. This change in the Rule does substitute a summary trial for a summary judgment motion. Although a summary judgment motion may, if the motions judge so directs, resemble a summary trial, the test and the decision are different (See *Dawson v Rexcraft Storage and Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (Ont. C.A.)) The motions judge must take "a hard look" at the evidence to determine whether it raises a genuine issue requiring a trial. (See *Rozin v Ilitchev* (2003), 66 O. R. (3d) 410 at para 8 (C.A.)) New Rule 20.04 provides the judge with more tools to do so.

[12] The new Rule does not change the burden of a party in a summary judgment motion. Rule 20.01 provides that a party who seeks summary judgment must move with supporting affidavit material or other evidence to support its motion. Pursuant to Rule

20.02(2), a responding party "may not rest solely on the allegations or denial in the party's pleadings but must set out in affidavit material or other evidence, specific facts showing there is a genuine issue requiring a trial." In other words, consistent with existing jurisprudence, each side must "put its best foot forward." The court is entitled to assume that the record contains all the evidence which the parties will present if there is a trial, although in some circumstances the interests of justice may require that a material issue should be determined at trial, upon a full evidentiary record.

[13] In this case there are two summary judgment motions. It is only after the moving party has discharged its evidentiary burden of proving that there is no genuine issue which requires a trial for its resolution, that the burden shifts to the responding party to prove that its claim or defence has a real chance of success. *Augonie v Galion Solid Waste Material Inc.*, 39 O.R. (3rd) 161 (C.A.).

[14] The parties have met their initial evidentiary burden in both motions. With respect to the plaintiff's motion, the plaintiff has led evidence that the funds had been taken from its account and the plaintiff had received the money as repayment of a loan. With respect to the Banks' motion, the Banks have led evidence that the Royal Bank had traced the funds that it paid as a result of fraud to the plaintiff's account and that it was entitled to restitution of those same funds. The Banks' evidence regarding the Royal Bank's right to retain those funds and challenging the plaintiff's evidence that he had received consideration for the funds, was relevant both in response to the plaintiff's motion and on its own motion summary judgment. Similarly, the plaintiff's evidence that it had received the funds as repayment of loans was relevant both to prove his claim and to provide a defence to the Royal Bank's claim. In effect, each asserted competing claims to the funds. In the circumstances of this case, the same analysis is relevant to both motions.

[15] For the reasons that follow, I have taken a good hard look at the evidence, evaluated it, drawn inferences and made a finding of credibility in order to determine whether there was a genuine issue of a material fact for trial. I have concluded that the evidence of the Royal Bank's claim for restitution is compelling; I have concluded, on the other hand, the evidence of the plaintiff's claim that it received the funds in repayment of the loan is not credible and that it is not in the interests of justice that credibility be determined at trial. To this extent I have weighed and evaluated the evidence and determined that there is no genuine issue of a material fact requiring a trial.

The Royal Bank's Claim

Tracing

[16] I am satisfied that the Royal Bank properly traced the funds it paid out pursuant to a fraudulent mortgage. The Royal Bank draft deposited in Cuthbert's account was made in response to a direction to pay to Cuthbert $112,327.33 of the mortgage proceeds on 22 Louis Street; the bank draft itself references the name of the mortgagee; and the direction was signed by the solicitor who was ultimately convicted of fraud in relation to this mortgage. This payment was part of a total of $454,115.64 traced to Cuthbert's account

from the proceeds of fraudulent mortgages placed on four properties. The other payments were no longer in the account at the time of the tracing. However, the $112,327.33 remained whole and was traced by the Royal Bank as the very monies that had been stolen from it by way of a mortgage advance in a fraudulent mortgage transaction.

[17] As the Supreme Court of Canada held in *B.M.P. Global Distribution. Inc. v Bank of Nova Scotia*, 2009 SCC 15 at paras. 75, 79, and 85, tracing is an identification process. The common law rule is that the claimant must demonstrate that the assets being sought in the hands of the recipient are either the very assets in which the claimant asserts a proprietary right or a substitute for them. It is possible at common law to trace funds into bank accounts if it is possible to identify the funds and mixing by the recipient is not a bar to recovery. Tracing at law is permitted where a person has received money rightfully claimed by the claimant and liability is based on mere receipt (subject to any defences).

[18] Although there is no Court order directing the return of these specific funds to the Royal Bank, the mortgage fraud action specifically references the mortgage frauds on all these properties, including 22 St Louis St. Similarly, the criminal judgment made specific findings of the mortgage funds obtained by fraud in relation to 22 St Louis St. In addition to the Court findings, there is clear evidence establishing the Royal Bank's claim to the funds. Cuthbert does not dispute that the funds were obtained from the Royal Bank as a result of fraud.

[19] As a result, the Bank was entitled to trace the funds. I am satisfied that the funds debited from Cuthbert's account at the TD Bank were traced and identified as the funds paid by the Royal Bank pursuant to the fraudulent mortgage. There is no issue that the funds came from the Royal Bank and there is no issue of the identification of the funds in Cuthbert's account; they had not lost their identity.

Mistake of Fact

[20] Where monies are paid to another under a mistake of fact which causes the payer to make the payment, the payer is *prima facie* entitled to recover the monies. The claim may fail, however, if (1) the payer intends that the payee shall have the money at all events or is deemed in law so to intend; (2) the payment was made for good consideration, in particular if the money is paid to discharge a debt owed to the payee by the payer or by a third party who has authorized the payer to discharge the debt; or (3) the payee has changed his position in good faith or is deemed in law to have done so. *B.M.P. Global Distribution. Inc. v Bank of Nova Scotia*, 2009 SCC 15 at para. 22.

[21] In *B.M.P.*, BMP deposited a cheque drawn on the Royal Bank into its account with the Bank of Nova Scotia. The Royal Bank subsequently discovered that the signature on the cheque was forged. The Bank of Nova Scotia returned the funds in BMP's account and in related company accounts. BMP sued the Bank of Nova Scotia for the return of the monies. The Supreme Court of Canada held that the Royal Bank had a right to recover the money paid to BMP on the basis of a forged cheque and the defences were not available to BMP in the circumstances of that case.

[22] The Court noted that the Royal Bank, as drawee, provided the funds under the mistaken assumption that the drawer's signature was genuine. The Royal Bank had no right to pay the funds, would have to reimburse its customer and therefore would incur the loss; in such a situation the payer cannot be said to have intended the payee to keep the money in any event. The rightful owner had a legitimate claim against the recipient and the Bank of Nova Scotia had no duty to give preference to BMP who had given no consideration and did not lose anything because the funds had to be returned to the Royal Bank. The Bank of Nova Scotia had the right to claim the amount in BMP's account and to trace funds in the related accounts. There was no issue of identification of the money in BMP's account.

[23] The plaintiff's position is that in this case the Royal Bank did not pay the funds under a mistake of fact. It seeks to distinguish this case from BMP on the basis that the mistake of fact in that case was based upon a fraudulent cheque, while in this case the plaintiff received the funds that had already been negotiated by the solicitor acting in the real estate transaction.

[24] However, mistake of fact is not restricted to fraudulent cheques. In this case, the Royal Bank provided the funds by way of bank draft pursuant to the direction of the solicitor for the mortgagee under the mistaken belief it was pursuant to a valid mortgage. This is clear not only from the evidence but also from the findings and judgments in both the mortgage fraud action and the criminal trial. Unjust enrichment does not arise. This issue does not require a trial.

The Plaintiff's Claim - Consideration

[25] The success of the Royal Bank's entitlement to the funds does not depend upon a finding that the plaintiff was involved in the fraud. However the common law affords defences to a party who receives the funds paid under mistake of fact. Two of the defences do not arise on the evidence before me. Given that the Royal Bank intended to provide the funds based upon valid security, it cannot be said in such circumstances that it intended that the recipients of the mortgage proceeds would keep the money in any event. Furthermore, there is no evidence that Cuthbert changed his position as a result of the receipt of the funds; there is no suggestion, for example, that he gave any releases with respect to any loans.

[26] The key disputed factual issue is Cuthbert's claim that he received the funds in repayment of loans and whether it raises an issue requiring a trial. The plaintiff's position is that he received the funds for valuable consideration for lending services rendered. Counsel for the plaintiff submits that whether Cuthbert failed to keep records or engaged in questionable business practices is irrelevant given his uncontraverted evidence that the monies were paid to him in repayment of a loan. As the money was in his account and he deposed that the money belonged to him as repayment of a loan, counsel submits the plaintiff is entitled to summary judgement for the return of the monies. The banks submit

that the evidence does not support a claim that Cuthbert received the funds for consideration and does not raise an issue requiring a trial.

[27] In his various affidavits and examinations, Frank Cuthbert has sworn he was not involved in the mortgage fraud. He has set out the nature of his interest in the funds in two different affidavits in the 2003 mortgage fraud action and two affidavits in this action, as well as in his examinations.

[28] In his affidavit sworn November 26, 2003, Frank Cuthbert swore that Terry Walker provided the cheques, identified by the Royal Bank as proceeds from the fraudulent mortgages, as repayment for loans which Cuthbert had advanced to Walker. In his examination, he confirmed that the $112,327.33 was part of that repayment by Walker. Cuthbert said that after the sale of his business in the late 1980s, he had available cash so he started advancing small short-term loans to individuals whom he knew who would repay the loans with interest. Cuthbert stated that his friend Ken Shah had introduced him to Terry Walker, who was in the brokerage business and put deals together; he would advance funds to Mr. Walker making the cheques payable to individuals as he directed. Mr. Walker would repay the loans advanced to these individual with interest.

[29] In his affidavits sworn November 24, 2009 and January 19, 2010, Frank Cuthbert again repeated that he was not involved with mortgage fraud and that: "I[n] 2003 I was involved in the supply of small loans, bridge financing and small mortgage financing to individuals for a short or medium term period."

[30] Cuthbert was cross-examined on the 2003 affidavits and on his 2009 affidavit. He was required to produce all relevant documentation. He produced 12 bank drafts payable to various individuals between December 13, 2002 and May 6, 2003 that he swore represented loans to Walker, payable to the various payees at Walker's direction. He testified that the funds he received (from the fraudulent mortgages) were funds that Walker directed others to pay him in repayment of those loans.

[31] Cuthbert testified that he had no receipts whatsoever from Mr. Walker. He was unable to provide any other details of the loans including dates or interest earned; and he was unable to produce any documentation for the loans; and he was unable to provide any covering letters or receipts or contact information for Walker at the time.

[32] In response to an undertaking Cuthbert also provided a hand-written sheet of paper explaining the loans. It indicated that Walker owed him a total of $452,289, and Walker paid $455,626.63 in repayment of loans. The indebtedness was made up of the loan payments made at Terry Walker's direction of $177,289.49 (matching the 12 bank drafts disclosed); cash loans to Walker of $80,000 and the assumption of loans to Ken Shah in the amount of $195,000. Cuthbert testified that he made the loans to Ken Shah ($195,000) mainly from the cash from his business before 1995 and the loans to Mr Walker ($257,289.49) were made after 1995.

[33] When pressed in cross examination where he obtained the capital to make those loans, Cuthbert deposed that it came from cash sums from his business and the sale of his business in the late 1980s, although he had not deposited the cash or invested it in any financial institution. In his affidavit he indicated his main source of income was from the business and that since selling the business he had available cash to pursue his small business. Cuthbert's evidence is that he was a real estate agent and mortgage agent in the years following his business closing in the late 1980s. He testified that since the closing of the club he did a little bit of lending to people he knew. His income tax returns did not disclose any appreciable income.

[34] During the course of this proceeding, counsel for the banks discovered that Cuthbert filed for bankruptcy in 1993 and was discharged in 1994. He declared assets of $1050 and liabilities of $125,000, although he admitted in cross examination that Ken Shah still owed him the money ($195,000) and he had not advised the Trustee in bankruptcy of the receivable. When confronted with the bankruptcy information for the first time during his cross examination for this motion, Cuthbert testified that he was able to build his business between his bankruptcy and the time he loaned the $257,000 to Walker by starting small, for example with $5000 loans. When pressed he said he borrowed the sums from friends. He had no records. This is not consistent with his earlier evidence in the affidavits and previous examination that he used the cash from his business and the sale of his business in the late 1980s as capital for the loans in his loan business.

[35] Finally, in this proceeding, Cuthbert filed two documents that he had not produced in the 2003 mortgage fraud action. He did not recall when he received them. In his affidavit dated November 24, 2009, he states at para 6: "Part of the money in the account I had received as repayment of personal loans I had provided to Mr Terry Walker. Attached ...is a copy of a letter and a promissory note provided by Mr. Walker to confirm the personal loans." In the undated letter, Terry Walker expresses his regret that they can no longer work together on projects, indicates he is moving away and acknowledges "indebtedness to ...[Cuthbert] the sum of $37,852.60 plus interest which was made payable to TD Canada Trust on my behalf, on April 25, 2003."

[36] The undated promissory note reflects the payees and amounts of the 12 bank drafts and the amount shown in the written explanation of loans to Walker produced in the mortgage fraud action. It lists funds advanced to others on Walker's behalf which he agrees to repay, totalling $177,289.49 plus 12% interest of $21,274.74. (During his examination Mr Cuthbert testified that the interest rate was not per annum but per loan.) On the face of the promissory note, interest of $21,274.74 was payable on these loans even though, according to the date of the bank drafts, only $54,214 had been loaned between December 13, 2002 and March 2003, and even though all loan advances were repaid within two days, the last advance of $85,195.89 on May 6, 2003.

[37] Furthermore, the promissory note is inconsistent with the dates of the loan payments and the loan repayments as established in the 2003 documentation provided by Cuthbert. Given the dates of the various bank drafts referenced in the note, it is clear that the promissory note was written after the final advances dated May 6, 2003. However as of

May 6, 2003 all the repayments except the final repayment had been made. Thus the principal amount noted as outstanding was obviously inaccurate as of that date. Indeed, the final payment of $112,327.33 was made 2 days after the last advances of $85,000 were made on May 6, 2003. Mr Cuthbert testified however that loans were never repaid within 2 days. When this was put to him in cross-examination, Cuthbert testified that the payment of $112,327.33 could have been for some of the earlier loans. This, however, is not consistent with his written loan description produced in 2004. It is clear from all his evidence that this was the final repayment of all the loans to Walker.

[38] (In addition, of the 12 loan advances identified in the promissory note, the corresponding bank drafts show that 4 of the loan advances totalling $123,048.49 were made after April 25, 2003. By April 23, 2003 however, Cuthbert had received all the repayments except for the $112,327.33 bank draft dated May 8, 2003. In other words, as of April 23, 2003 repayments exceeded the amounts loaned.)

[39] Therefore, although the note purports to set out existing liabilities, it does not accurately reflect the liabilities as they would have existed at the time of its preparation. It is inconsistent with the documentary evidence provided by Cuthbert in 2004. The only explanation is that this promissory note was produced after the events. Cuthbert could not recall when he received the documents (although he thought it must have been after the earlier lawsuit since he had not disclosed it); whether he had the originals; and when he last saw Mr. Walker (he thought 4 or 5 years ago although he said it was before his cross examination in 2004). In his 2004 examination Cuthbert testified that Walker did not sign a promissory note or an IOU or any receipts.

Findings

[40] The Royal Banks was clearly defrauded of these funds and is entitled to them subject to any valid claim of the plaintiff as a third party recipient that he provided consideration for the funds.

[41] Counsel for the plaintiff argued that Cuthbert's statements that the funds were repayment of loans made as part of his small business were uncontroverted and established his entitlement to return of the money. He submitted that the activity in his bank account was consistent with a small business. (Cuthbert however states in his affidavits that the money that was seized was from a personal bank account and was money that he was using for current expenses for himself and for his family.) Finally, he points to the criminal judgment convicting the solicitor who directed that the Royal Bank send mortgage funds to Cuthbert, which sets out his evidence that his dealings included legitimate transactions. However, it is clear from the judgment that the proceeds from the mortgage on 22 Louis St, including the funds in issue, were proceeds of a fraudulent transaction.

[42] I am satisfied that Cuthbert's evidence is not credible and does not raise an issue requiring a trial. Although I have not had the benefit of observing his demeanour during

his testimony, courts have long recognized that demeanour can be misleading and is but one factor in assessing credibility. Credibility is best tested against common sense, inherent consistency and consistency with contemporaneous and undisputed documents. I have numerous sworn statements – three affidavits and two cross-examinations – relating to this issue and numerous undisputed documents with which to test his evidence.

[43] Cuthbert's testimony about the loans lacks internal consistency and credibility. He has no records to support his testimony, except bank drafts that bear no relationship to the amounts of the repayment. The loan advances were not made to the person he says borrowed the money; nor were the repayments made by the person he says borrowed the money. He was unable to provide any contact information for the borrower. He has no records and no receipts. He could not provide a credible or consistent account of where he obtained the money to make the loans. His explanation was either misleading or he misled the Trustee in Bankruptcy. He told the Trustee in Bankruptcy that he had no assets and testified he did not tell him about prior receivables of $195,000 he claims were ultimately repaid by the funds obtained through the mortgage fraud. The undisputed documentary evidence regarding the payments to Cuthbert's account is compelling and is inconsistent with Cuthbert's evidence. Finally, the undated letter and promissory note produced in this litigation for the first time, despite his obligation to produce all relevant documents in the mortgage fraud action, are self-serving and inconsistent with his evidence about the loans, his 2003 documentation and the undisputed bank drafts. The documents were obviously created after the fact.

[44] In these circumstances, I am satisfied there is a strong evidentiary basis upon which to make findings of credibility, to draw inferences and to weigh the evidence. I am satisfied that the interests of justice do not require that this issue should be resolved at trial. The Royal Bank's claim to the money is undisputed based upon undisputed documentary evidence. Cuthbert has had a number of opportunities to provide evidence by way of affidavit and in cross-examination. I have no hesitation in finding Cuthbert's evidence lacks any credibility based upon the evidence before me. As a result, I am satisfied there is no genuine issue requiring a trial.

[45] The plaintiff's motion for summary judgment is dismissed. I grant summary judgment to the defendants and third party and dismiss this action.

[46] The Banks have filed a costs outline in the amount of $14,693.14 all inclusive. Given the plaintiff's request for costs of $44,880 all inclusive, the amount claimed by the Banks is within the reasonable expectation of the plaintiff (even if previous cost awards and disbursements are deducted, the amount claimed still exceeds $30,000). The amount claimed is reasonable and proportionate to the nature and complexity of the issues raised in accordance with Rule 57.01 of the Rules.

Karakatsanis J.

Date:

TAB 10

Ontario Energy Board

Commission de l'énergie de l'Ontario

EB-2011-0144

IN THE MATTER OF the *Ontario Energy Board Act, 1998,* S.O. 1998, c. 15, (Schedule B);

AND IN THE MATTER OF an application by Toronto Hydro-Electric System Limited for an order approving just and reasonable rates and other charges for electricity distribution to be effective May 1, 2012, May 1, 2013 and May 1, 2014.

BEFORE: Cynthia Chaplin
Vice-Chair and Presiding Member

Paula Conboy
Member

Marika Hare
Member

DECISION WITH REASONS AND ORDER ON THE PRELIMINARY ISSUE

January 5, 2012

Background

Toronto Hydro-Electric System Limited ("THESL") filed an application with the Ontario Energy Board (the "Board") on August 26, 2011 under section 78 of the *Ontario Energy Board Act*, *1998*, (the "Act") seeking approval for changes to the rates that THESL charges for electricity distribution, to be effective May 1, 2012, May 1, 2013 and May 1, 2014. The Board assigned the application file number EB-2011-0144.

The filing was a prospective three year cost of service application. If the application is fully approved, the distribution portion of the monthly bill for a residential customer (who consumes 800 kWh per month) will increase by 18.7% in 2012, followed by a further increase of 12% in 2013 and a further increase of 12% in 2014. The distribution portion of the monthly bill for a General Service customer consuming 2,000 kWh per month and having a monthly demand of less than 50 kW would increase by 16.9% in 2012, followed by a further increase of 11.9% in 2013 and a further increase of 11.3% in 2014.

At issue at this stage is the Preliminary Issue as to whether the application should be accepted or dismissed, based on a consideration of the early rebasing criteria that have been established by the Board.

Active participants in this Preliminary Issue proceeding included the Association of Major Power Consumers in Ontario ("AMPCO"), Building Owners and Managers Association of the Greater Toronto Area ("BOMA"), City of Toronto ("the City"), Consumers Council of Canada ("CCC"), Energy Probe Research Foundation ("Energy Probe"), School Energy Coalition ("SEC") and Vulnerable Energy Consumers Coalition ("VECC").

Policy Framework

The Board's 3rd Generation Incentive Regulation Plan ("3GIRM") for Ontario's electricity distributors is outlined in the *Report of the Board on 3rd Generation Incentive Regulation for Ontario's Electricity Distributors* which was issued July 14, 2008. The policy was further refined in the Board's subsequent report *Supplemental Report of the Board on 3rd Generation Incentive Regulation for Ontario's Electricity Distributors* which was issued on September 17, 2008.[1] The 3GIRM framework is composed of a first year of rates set on the basis of a cost of service application (the rebasing year), followed by three years of rates set using a formula with an inflation factor and productivity factors (the IRM period).

The 3GIRM framework itself includes important elements designed to address potential needs of distributors during the IRM period, including the following:

- An Incremental Capital Module ("ICM"): The first report established the ICM mechanism to address the treatment of incremental capital investment needs

[1] These reports are available on the Board's website: www.ontarioenergyboard.ca

that arise during the IRM period. The appendix to that document outlined the eligibility criteria for ICM applications. The supplemental report established the materiality threshold.

- "Z factor" adjustments: These are for events that are not within management's control. A distributor facing such circumstances is expected to supply the details of management's plans for addressing these events and how the specified eligibility criteria have been met in support of the request for special cost recovery.
- The "off ramp": If the achieved annual return on equity ("ROE") deviates from the allowed ROE by more than plus or minus 300 basis points, a regulatory review may be initiated. A distributor facing such circumstances is required to make a report to the Board no later than 60 days after the company's receipt of its annual audited financial statements.

The Board's 3GIRM policy has multiple objectives, among which are the following:

- Productivity incentives for the benefit of distributors and ratepayers;
- Predictability about the regulatory regime;
- Reduced regulatory burden on applicants through streamlined IRM applications; and
- Reduced resource requirements for the Board through staggered cost of service applications.

If a distributor applies using cost of service during the IRM period, it is considered an early rebasing, and hence a departure from the policy. The Board's decision-making related to THESL's application for early rebasing has been guided by the Board's established regulatory policy, particularly as outlined for 3GIRM including the underlying objectives, and by the specific circumstances of the application.

The *Report of the Board on the Cost of Capital for Ontario's Regulated Utilities* outlined the role that specific circumstances can play in the Board's decision-making processes:

> Board panels considering individual rate applications, however, are not bound by the Board's policy, and when justified by specific circumstances may choose not to apply the policy (or a part of the policy).[2]

[2] *Report of the Board on the Cost of Capital for Ontario's Regulated Utilities*, EB-2009-0084, December 11, 2009, p. 13.

Where requests for early rebasing by electricity distributors are concerned, the test to depart from the Board's 3GIRM policy is articulated in the Board's letter of April 20, 2010 regarding *Early Rebasing Applications*, which stated:

> A distributor, including the four distributors referred to above, that seeks to have its rates rebased in advance of its next regularly scheduled cost of service proceeding must justify, in its cost of service application, why an early rebasing is required notwithstanding that the "off ramp" conditions have not been met. Specifically, the distributor must clearly demonstrate why and how it cannot adequately manage its resources and financial needs during the remainder of its IRM plan period. Distributors are advised that the panel of the Board hearing the application may consider it appropriate to determine, as a preliminary issue, whether the application for rebasing is justified or whether the application as framed should be dismissed.
>
> Distributors are also advised that the Board may, where an application for early rebasing does not appear to have been justified, disallow some or all of the regulatory costs associated with the preparation and hearing of that application, including the Board's costs and intervenor costs. In other words, the Board may order that some or all of those costs be borne by the shareholder.

THESL's Rate Application History

THESL has had its rates set on the basis of cost of service applications for every year since 2006, with the exception of 2007, for which THESL filed an IRM application.

On August 23, 2010, THESL filed a cost of service application for 2011 rates which was assigned file number EB-2010-0142. On July 7, 2011, the Board issued a Partial Decision and Order (the "Partial Decision").

On March 1, 2011, the Board issued a letter entitled *Electricity Distributors Scheduled to Apply for Rebasing for 2012 Rates* with an attached Appendix A listing distributors scheduled to apply for 2012 rates. THESL was not included on this list. This letter advised distributors proposing to file a cost of service application for 2012 rates and who were not on the Appendix A list to so notify the Board in writing, as soon as possible, and in any event no later than April 29, 2011. On March 25, 2011, THESL sent a letter to the Board advising the Board and other stakeholders of its intention to file a non-IRM cost of service application for 2012 rates and providing the reasons supporting the need for this approach.

The Board's EB-2010-0142 Partial Decision, which was issued after the March 25 letter from THESL, rejected THESL's argument that there are two ratemaking frameworks, namely a cost of service framework and an IRM framework. The Board stated:

> The Board's rate setting policies are not composed of the two separate frameworks that THESL describes. As stated above, the Board has clearly articulated the mechanics of the multi-year rate setting plan and its expectations of distributors. The Board believes that THESL's submissions mischaracterize the Board's rate setting policies and the Board does not accept the construct as described by THESL as a Board sanctioned framework.

The Board's Decision further concluded that:

> The Board makes no determination as to what THESL is required to file in its subsequent rate application. It is for THESL to determine the manner in which it chooses to apply for any adjustment to its rates for 2012. The acceptability of the application will be determined by the Board at that time.
>
> The Board notes that THESL is not included in the list of expected cost of service applicants for 2012, as per the letter issued by the Board on March 1, 2011.
>
> Should THESL file a cost of service application for 2012 rates, the expectations of the Board are clear. As set out in the April 20, 2010 and March 1, 2011 letters, a distributor that seeks to have its rates rebased earlier than scheduled must justify, in its cost of service application, why early rebasing is required and why and how the distributor cannot adequately manage its resources and financial needs during the remainder of the 3rd generation IRM plan term.

Regardless of THESL's expectations in the past regarding the acceptability of serial cost of service applications, based on the EB-2010-0142 Partial Decision, as quoted above, the company could have been in no doubt as to the Board's expectations going forward. And indeed the company does not rely on past expectations in its arguments.

The Board, in its EB-2010-0142 Partial Decision did not direct THESL to file an IRM application. As some parties have noted, to have directed a particular form of

application would have been inappropriate. It is for the applicant to determine the form of application, in full knowledge of the Board's policy and in full knowledge of the test which must be met in the event the application departs from that policy.

On August 26, 2011, THESL filed the current application, which is a cost of service application, for 2012, 2013 and 2014 rates. As indicated above, THESL's application would result in significant increases to the distribution portion of a typical residential customer's monthly bill: 18.7% in 2012; a further 12% in 2013; and a further 12% in 2014. Similar increases would result for General Service customers less than 50 kW: 16.9% in 2012; a further 11.9% in 2013; and a further 11.3% in 2014.

The Preliminary Issue

On October 4, 2011, the Board issued Procedural Order No. 1 which determined that in advance of further procedural steps the Board would consider the question of whether the application filed by THESL is acceptable or whether it should be dismissed (the "Preliminary Issue"). The Board stated that it would allow an initial round of interrogatories to seek additional information specifically related to the Preliminary Issue and THESL's evidence on the Preliminary Issue and that oral submissions would follow.

On October 21, 2011, THESL filed a Notice of Motion (the "Motion") with the Board requesting that the Board vary Procedural Order No. 1 to allow THESL to present a witness panel to provide *viva voce* evidence relevant to the Preliminary Issue. On October 21, 2011, the Board issued Procedural Order No. 2 in which it determined that it would hear the Motion in writing.

On October 28, 2011, the Board issued its Decision and Procedural Order No. 3 in which it determined that it would grant the Motion and allow THESL to present a witness panel on the Preliminary Issue. The Board also noted that the submissions by parties raised issues related to the interrogatory responses provided by THESL on the Preliminary Issue, in particular that a number of the interrogatories were not answered. The Board stated that it would expect all parties and THESL to come prepared to speak to the issue of unanswered interrogatories on November 1, 2011, the date originally scheduled to hear submissions on the Preliminary Issue.

On November 1, 2011, at the commencement of the oral hearing, THESL provided to the Board a proposal which had been agreed to by intervenors whereby THESL would provide answers for all of the interrogatories which it had not previously answered, as

well as those interrogatories that had been clarified, or modified by parties in their correspondence of October 31, 2011. The Board accepted THESL's proposal and stated that further procedural direction beyond the phase of the interrogatory responses would follow.

On November 4, 2011, the Board issued Procedural Order No. 4 in which it determined that the hearing would resume on Friday November 11, 2011 with the presentation and cross-examination of THESL's witness panel, followed by oral argument-in-chief on the Preliminary Issue on Monday November 14, 2011, oral submissions from Board staff and intervenors on Thursday November 17, 2011, and oral reply submissions by THESL on Thursday November 24, 2011.

The Test

THESL agreed that the test as to whether or not an early rebasing application is justified is as outlined in the Board's letter of April 20, 2010. This test was also restated in the Board's EB-2010-0142 Partial Decision which was referenced in Procedural Order No. 1 of this proceeding:

> Should THESL file a cost of service application for 2012 rates, the expectations of the Board are clear. As set out in the April 20, 2010 and March 1, 2011 letters, a distributor that seeks to have its rates rebased earlier than scheduled must justify, in its cost of service application, why early rebasing is required and why and how the distributor cannot adequately manage its resources and financial needs during the remainder of the 3rd generation IRM plan term.

The Standard

The Board is in agreement with staff's submission as to the nature of the standard that THESL must meet regarding this test. Staff submitted as follows:

> …the Board needs to be persuaded, through clear, cogent, and credible evidence, that it is more likely than not that THESL will not be able to adequately manage its resources and financial needs if it is subject to IRM for rate-setting purposes.[3]

[3] Tr4, pp. 59-60.

The Board notes that this test was substantially agreed to by all parties, including THESL, which maintained in its reply argument that it had met this test:

> So, Madam Chair, to start, the Board has established a process here to consider and determine the preliminary issue. Toronto Hydro has followed that process and, in our submission, we have met and discharged the Board's test and standard.
>
> The Board should decide that Toronto Hydro is entitled to proceed to have its application heard in a cost of service hearing, and Toronto Hydro submits that we have demonstrated in a clear and cogent way why it cannot adequately manage under IRM.[4]

Jurisdiction

BOMA submitted that the Board does not have the jurisdiction to dismiss THESL's application given the provisions of section 4.6(1) of the *Statutory Powers Procedure Act*, *R.S.O. 1990, Chapter S.22* ("SPPA") which states as follows:

> Subject to subsections (5) and (6), a tribunal may dismiss a proceeding without a hearing if,
>
> a) the proceeding is frivolous, vexatious or is commenced in bad faith;
>
> b) the proceeding relates to matters that are outside the jurisdiction of the tribunal; or
>
> c) some aspect of the statutory requirements for bringing the proceeding has not been met.

As was noted by BOMA, this section of the SPPA is repeated in section 18.01 of the Board's *Rules of Practice and Procedure* ("the Rules").

The Board finds BOMA's argument is without merit. If the Board were to dismiss THESL's application based on its consideration of the Preliminary Issue it would not be doing so in contravention of either its own Rules or the SPPA. The provisions of the SPPA and the Rules refer to the dismissal of an application *without* a hearing. That circumstance does not apply in the current case. The Board has quite specifically held a hearing to determine the Preliminary Issue. The hearing has included pre-filed evidence, interrogatories, *viva voce* evidence and submissions.

[4] Tr5, pp 3-4.

Summary of THESL's Position

THESL has argued that 3GIRM does not work for the company because of the level of its capital expenditure requirements and workforce renewal needs. THESL has stated that if it was to go on IRM rates and maintained its planned expenditure levels, there would be severe impacts on its key financial ratios with consequential impacts on its debt ratings and its ability to raise capital. The table below presents the deterioration in the ROE which THESL projects would occur by 2014.[5]

ROE Consequences under IRM Rates

	2011 Approved	2012	2013	2014
Equity Returns under IRM	$88,068,069	$52,435,771	$5,437,489	$(47,783,358)
Proposed ROE	9.58%	9.58%	9.58%	9.58%
ROE under IRM	9.58%	4.97%	0.45%	(3.41%)

THESL's comment on this scenario was that:

> This analysis clearly shows that an unsustainable reduction in ROE would occur in the first test year and worsen substantially in the subsequent test years. However, by presenting the results of this analysis, THESL specifically does not imply that it would ever be possible in practice for THESL to undertake the proposed expenditures and investments without the corresponding revenue requirements.[6]

THESL, during its argument-in-chief, commented that by 2014 the shareholder would no longer be earning any return on the company's capital investment and the return would have fallen 1,299 basis points below the Board's allowed ROE. THESL argued that such a circumstance would be a clear violation of the fair return standard. But as indicated in the quote above, this scenario is hypothetical and not how the company would respond to rates set through IRM.

[5] Reproduced from Mr. Couillard's evidence (p.5) and as amended by THESL (Exh A1/Tab 1/Sch 2/p.28)
[6] Exh A1/T1/Sch 2, p. 28.

Mr. Couillard testified that if THESL was placed under IRM then a credit downgrade would be very likely, unless THESL reduced expenditures and activities. This downgrade would occur because leverage ratios would increase to unacceptably high levels since incremental capital would not be in the rate base. THESL maintained that IRM would also put THESL in the position of borrowing long-term capital without explicit regulatory approvals, resulting in regulatory risk due to the prudence of capital spending only being established by the Board in the future. Mr. Couillard testified that a credit downgrade would also increase interest costs on short-term working capital and increase significantly THESL's prudential requirements with the IESO.

THESL also provided an alternative scenario setting out the impacts if the Board did not approve the requested revenue requirements but rather set rates based on IRM. Under this scenario, THESL claimed that it would be necessary to make the referenced expenditure and investments reductions.

THESL maintained that under such circumstances it would only be able to fund capital expenditures to the extent of available depreciation, and ROE would be maintained at 8.10%. This level is below the current allowed return, but above the 300 basis point off ramp established in the 3GIRM framework. THESL maintained that the 8.10% level in 2012 is what results from the implementation of the half-year rule[7] on the capital expenditures approved in 2011.

Mr. Haines described the consequences if the company reduced its spending, stating that in addition to the restrictions on THESL's capital expenditures outlined above, THESL "would be faced with the very real matter of essentially going into "survival mode"."[8] Mr. Haines explained what this would mean:

> THESL would be in the position of having an insufficient workforce and few-to-no contractors to do the capital work required, as well as no ability to efficiently raise capital. In short, the company would be severely financially challenged for an extended period of time, and the distribution system would be being maintained at unacceptable service levels.[9]

[7] The Board recognizes that individual capital projects will be completed throughout the year. However, for purposes of setting rates, all projects are assumed to be completed in the middle of the year. This is the "half-year" rule.
[8] Witness Statement of Anthony Haines, p. 11.
[9] Ibid, p. 12.

Mr. Haines further explained that at the end of the IRM period in 2015 THESL would expect to need to spend approximately $1.6 billion to “catch up” on its capital renewal program as well as the approximately $660 million that would be required in 2015, resulting in a total 2015 capital program requirement of approximately $2.2 billion. This was referred to as the "snowplough effect". The result would be an approximately 43% rate increase from the capital budget alone, before increases to the operating budget were taken into account.

THESL also argued that the ICM mechanism would not accommodate the company’s needs. The company pointed to Mr. McLorg's testimony in which he expressed the view that ICM is designed for extraordinary and unanticipated capital spending requirements and therefore does not apply to THESL’s operational spending requirements, nor does it apply to capital spending requirements that exceed depreciation, which THESL’s do. Mr. McLorg concluded that ICM is meant for discrete one-off projects and not for broad-based infrastructure renewal programs of the type proposed by THESL.

Positions of the Intervenors

The City of Toronto, BOMA and AMPCO supported the company’s position to have its three-year cost of service application heard by the Board. VECC, Energy Probe and SEC disagreed, and argued that THESL could have rates set based on the IRM mechanism, but accompanied with – or immediately followed by – a capital expenditure review. This review could take place as an ICM proceeding, perhaps with more lenient criteria, or possibly as a modified Z-factor proceeding. CCC submitted that the application should be dismissed completely at this stage and that THESL should be on IRM. The positions of parties are set out in more detail below.

The City of Toronto expressed concerns about the level of streetlighting rates charged by THESL that are developed using the Board’s cost allocation model. The City submitted that THESL’s application should be heard because an enquiry into streetlighting rates and the associated cost allocation would not be possible under an IRM application.

BOMA suggested that THESL’s evidence indicates that IRM is not appropriate for the company. BOMA stated that it would be more prudent and better regulatory practice to

hear the case in its entirety. The Board could then decide, after hearing all the evidence, whether to approve the revenue requirement request in whole or in part for one year, two years, three years, or not at all.

AMPCO's view was that rates should be set based on a consideration of the specific circumstances of the applicant and as such agreed with THESL that the company should be free to choose the best regulatory construct for those circumstances. AMPCO submitted that based on the evidence presented to date, it could not accept THESL's level of proposed expenditures or the consequences that the company would suffer if placed under IRM. AMPCO further submitted that the Board is unable on the current record to make a determination of whether THESL has met the test for early rebasing, and AMPCO maintained that the test was largely arbitrary in any event. AMPCO concluded that THESL should not be denied the opportunity to present its cost of service application and in that way the Board could make a determination on the appropriate level and pace of capital expenditures as well as productivity improvements. However, AMPCO submitted that capital and workforce renewal plans should be excluded from any settlement process and would be best tested by a full hearing.

Board staff submitted that the Board has two options in determining this preliminary matter. The first is to apply the test articulated in the April 20th letter. Staff submitted that, based on the evidence, THESL has failed to meet the test and therefore should have rates set based on the IRM formula. The second option is that the Board could decline to determine the issue as a preliminary matter, and could hear the capital budget portion of the case and any other portions the Board may deem necessary. After that, the Board could determine whether the evidence supports THESL's capital expenditure claims and therefore whether rates should be set through a cost of service review rather than through IRM.

Board staff also suggested that under this second option the Board could set out its expectations for the scope of the remaining ICM adjustments that THESL might wish to include in years 2 and 3 of the IRM period should the Board find that THESL has not made its case for setting rates on a cost of service basis. This could result in a more efficient approach than re-hearing the evidence on the capital budget as part of an ICM application under IRM.

Board staff proposed that under this option the Board should consider whether most, if not all, issues should be excluded from settlement in order to ensure a full testing of the evidence and a clear and transparent analysis of that evidence.

Energy Probe submitted that THESL is not entitled to a cost of service application because it will not meet the 300 basis points off ramp until the end of 2012 which means the earliest entitled rebasing would be 2013. Energy Probe also submitted that THESL had not demonstrated its inability to manage its resources and financial needs mainly because the evidence could not be taken at "face value" and had not been scrutinized to determine its legitimacy. Energy Probe recommended that the Board conduct a comprehensive review of the capital expenditures before making its decision on the preliminary issue.

VECC submitted that the evidence presented by THESL demonstrates that the company would be operating within the acceptable bounds of financial management that are implicit when rates are set through IRM, at least through 2012. In VECC's view, the 3GIRM policy should be applied equally to all distributors unless they qualify for an exception. However, VECC submitted that the potential consequences for the system, the company, and ratepayers under 3 years of repeated IRM are uncertain and that the magnitude of the capital expenditures warrants a thorough testing of the evidence. VECC therefore recommended imposing IRM on THESL for 2012, but allowing for a separate proceeding to address the 10 year capital plan which has changed significantly year over year and under which there is now no foreseeable decline in capital needs over a ten year period.

Similarly to VECC, SEC expressed concern over THESL's "cycle of ever-increasing costs" coupled with no evidence of demonstrated productivity improvements. SEC rejected THESL's argument that it could not be compared to any other distributor in Ontario and argued that THESL is the most costly utility in Ontario by almost every metric, including, for example, distribution revenue per customer, OM&A per customer, capital additions per customer, or distribution cost per delivered kWh. SEC agreed with VECC that THESL should be placed on IRM at least for 2012. SEC further argued that THESL must provide empirical evidence to demonstrate why it cannot operate under 3GIRM. SEC also argued that the Board should conduct a thorough review of THESL's operations either through a cost of service or other proceeding.

CCC concluded that THESL has not met the test established by the Board and that the application should be dismissed completely at this threshold stage. CCC argued that THESL did not demonstrate that it could not manage under an IRM regime because the company's case is based on a single assertion of a unique need for capital spending and what would hypothetically happen if it were subject to IRM. CCC strongly cautioned

the Board against adopting a "hybridized regulatory model" but instead urged the Board to maintain the integrity of the regulatory regime. CCC argued that this regime is working well for most utilities and the Board and has important benefits for ratepayers, including:

1. incentives for distributors to reduce costs;
2. stable prices and the benefits of savings and efficiencies gained at the end of an IRM period; and
3. reduced regulatory burden to the Board, distributors and ratepayers who ultimately pay for rates proceedings.

Board Findings

In considering the Preliminary Issue, the Board must consider the interests of ratepayers and the interests of THESL. The Board must also consider these interests within the context of the Board's 3GIRM policy and its objectives, as well as the Board's statutory objectives. The Board's 3GIRM policy is well established and is being implemented by almost all distributors. The Board finds that THESL has not met the test for a departure from the 3GIRM policy. The reasons are detailed below, but in summary:

- THESL is under no current financial stress; nor do the reliability measures show evidence of system deterioration.
- The company did not provide cogent and compelling evidence showing significant prospective financial or operational distress under IRM rates. Such evidence would necessarily include a robust analysis of the planning, project prioritization and/or productivity measures undertaken in response to the incentives and parameters of 3GIRM. THESL has only put forth two scenarios which the Board has found are not credible.
- The company has not attempted to use the ICM as a means of funding additional non-discretionary capital expenditures beyond the level already incorporated in rates.

THESL argued that if the Board concludes that the company has not met the test for the Preliminary Issue, the findings must not be based on considerations beyond the limits of the Preliminary Issue hearing. Mr Rodger explained in reply argument:

> So if the Board were to decide that Toronto Hydro has not satisfied your test because, for example, witnesses did not go into the sufficient level of detail for workforce renewal, let's say, but the entire preliminary issue itself, it's been heard in a context that is much narrower than a full cost of service hearing, where all the five volumes of evidence is read, presented, and tested, then that outcome, in our view, would be inappropriate and would raise procedural fairness concerns.
>
> But you can avoid this issue by acknowledging in your decision the limits associated with this preliminary issue process when you consider the issue, and then when you decide whether it is more likely than not that Toronto Hydro will be unable to adequately manage its resources given its situation and given how IRM works.[10]

As set out in the findings below, the Board has based its conclusions solely on matters before the Board during the Preliminary Issue hearing. As THESL acknowledged, the scope of the proceeding did not include a full examination of the company's cost of service application but the onus was on the company to show that it cannot adequately manage its resources and financial needs under IRM. THESL presented two scenarios of the potential consequences of being placed on IRM rates, and neither was sufficiently credible to meet the Preliminary Issue test; nor were the other arguments put forward sufficiently persuasive to meet the test.

The Board therefore will dismiss the application. It remains open to THESL to file an IRM application for 2012, including an ICM application. The Board encourages THESL to do so.

The examination of the Preliminary Issue focussed on a number of areas of THESL's application which provide a useful framework for the Board's findings:

- Workforce Renewal
- Streetlighting Rates
- Productivity
- Capital Expenditures
- The Incremental Capital Module (ICM)

[10] Tr. 5, p. 11.

Each of these is discussed below.

Workforce Renewal

THESL has maintained that workforce renewal is one of the key drivers for its need to have rates set on the basis of cost of service, rather than IRM. Workforce renewal relates to the recruitment, training and retention of new personnel to address the aging demographics of the company's workforce. The Board finds that this reason is insufficient to warrant a departure from the Board's 3GIRM policy. THESL presented no evidence to suggest that its requirements in this area are in any way unusual in comparison with other Ontario distributors and did not claim to be unique. The Board notes that workforce management, and an aging workforce, is an issue which is being addressed by all distributors – almost all of whom are currently under the 3GIRM framework.

Streetlighting Rates

The City of Toronto expressed concerns about the level of streetlighting rates and the cost allocation underpinning those rates. The City submitted that THESL's application should be heard because an enquiry into streetlighting rates and the associated cost allocation would not be possible under an IRM application. This is not a compelling reason to conduct a cost of service application. THESL's rates for streetlighting are set in accordance with the Board's cost allocation policies, and while the level of rates are of significance to the City, the magnitude of the issue is not such that the time and resources required for a cost of service hearing would be warranted to hear this issue alone.

Productivity

The 3GIRM framework imposes a discipline on a distributor which serves to benefit ratepayers and shareholders by providing incentives for the company to find efficiencies and manage costs during the period rates are set using IRM. The situation may arise where despite significant productivity improvements a distributor finds itself in a position where it cannot manage its arrangements under IRM rates. Alternatively, a distributor

might face unique and unusual cost pressures which result in it being unable to make the productivity improvements that other distributors are expected to achieve under IRM rates. THESL did not make either of these claims as part of its analysis of the impact of operating under IRM rates.

On the contrary, the evidence suggests that THESL has not made significant productivity improvements in comparison to other Ontario distributors. Customer bills for each of THESL's main rate classes are higher than for any other urban distributor in Ontario with more than 30,000 customers. In addition, THESL's ranking in terms of OM&A per customer, capital additions per customer, and property, plant and equipment per customer is amongst the poorest in Ontario based on analysis derived from data in the Board's statistical yearbooks.

THESL maintained that it is highly problematic to compare its performance with that of other Ontario distributors – to the point of being of questionable value. THESL would prefer that the Board compare the company's own performance over time. The Board agrees that there are limitations in cross-sectional comparisons. However, there are also limits on the value of comparisons over time of one company. In both cases there may be differences in circumstances, physical characteristics, market factors, etc. Both types of analyses have value; both have limitations.

The Board remains of the view that comparisons with other Ontario distributors are relevant. Although there may not be another utility in Ontario with the exact same characteristics as THESL, urban distributors share many similarities in terms of cost drivers. In fact, although THESL maintained that it could not be usefully compared to other Ontario distributors, it did not take the position that it was unique or that the conditions it was facing (in terms of workforce, assets, customer growth) were particularly unusual among Ontario distributors. In addition, it is always open to applicants to bring forth alternative benchmarking evidence which incorporates comparators from other jurisdictions if the distributor believes those comparisons are more relevant. THESL brought forth no such independent analysis.

THESL maintained that it could not conduct its business under IRM rates as that business has been planned for under an annual cost of service approach. But IRM is not intended to result in a status quo approach. The expectation is for changes in the way a distributor conducts business – not to do less – but to find efficiencies and drive productivity improvements.

The company's evidence as to its productivity improvements was not compelling. THESL pointed to the fact that capital spending has increased from $132 million to $260 million (an almost 100% increase), while employee numbers have grown from 1,650 to 1,750 (a 6% increase). The Board accepts that this *might* be evidence of productivity growth, but there might be alternative explanations that do not involve productivity improvements. Spending more capital dollars per employee is not necessarily a sign of increased productivity. The company also explained that the staff levels and the number of job descriptions have been reduced since amalgamation. However, there was no quantification of the impact of these initiatives. In addition, no independent studies of productivity have been performed.

The Board concludes that THESL has not brought forth evidence regarding its productivity performance which would substantiate the company's claim that it cannot manage its resources and financial needs under IRM.

Capital Expenditures

THESL's current application indicates that it plans to spend in the order of $600 million per year on capital projects for the next ten years. This far exceeds historical levels, and significantly exceeds current levels which were agreed through settlements in prior proceedings: $350 million for 2010 and $378.8 million for 2011.

THESL maintained that the planned level of expenditures cannot be accommodated under the 3GIRM framework. THESL asserted that the operation of 3GIRM, and in particular the half-year rule for ratebase additions[11], results in inadequate return for any capital expenditures in excess of depreciation during IRM years. The company went so far as to suggest that imposition of the IRM model could lead to a breach of the fair return standard.

The Board does not agree that IRM creates a structural deficit for distributors dealing with replacing aging infrastructure; nor does it accept that IRM would lead to a breach of the fair return standard. As the Board stated in its Hydro Ottawa decision:

> Asset management and workforce planning are ongoing issues for distributors and the company should be able to accommodate those

[11] The Board recognizes that individual capital projects will be completed throughout the year. However, for purposes of setting rates, all projects are assumed to be completed in the middle of the year. This is the "half-year" rule.

> requirements – indeed is expected to do so – within the IRM framework; there is no evidence that it cannot do so.[12]

The level of capital expenditures within the 3GIRM framework was closely considered while the policy was under development. The 3GIRM framework recognizes that funding for capital expenditures is available beyond the level of depreciation during the IRM phase of the rate making scheme, and clearly many distributors have spent in excess of depreciation under 3GIRM. THESL asserted that adverse credit impacts would result from capital spending for projects that do not go into rate base until after the IRM period. However, THESL provided no evidence of adverse credit impacts for any other distributor which has made capital expenditures beyond the level of depreciation during the IRM period. The 3GIRM policy also incorporates the ICM to address specific requirements during the years rates are set using IRM. (The ICM is discussed further below.) There is also the off-ramp and the z-factor adjustment. All three of these mechanisms are designed to provide flexibility within the policy framework to address distributor-specific situations.

The theoretical arguments which THESL has presented were previously considered by the Board during the 3GIRM policy consultation process. THESL has not put forth any new evidence for the Board's consideration regarding the structure and operation of the framework. These arguments therefore provide no basis for the Board to depart from its established policy. The Board has already considered the issue of capital spending in the development of its 3GIRM policy and has ensured that the policy is flexible through the inclusion of the ICM, the z-factor, and the off-ramp. It is this suite of mechanisms which ensure appropriate treatment for distributors while ensuring cost discipline benefits for customers. THESL has not presented evidence that its operating circumstances (in terms of aging infrastructure, limited customer growth and aging workforce) are markedly different from those of other distributors, almost all of whom are under 3GIRM. The Board finds therefore that no case has been made that the 3GIRM framework as it would be applied to THESL is flawed.

THESL has provided evidence as to how the 3GIRM framework would operate in its specific circumstances, and it is those circumstances which are more germane to the Board's consideration of THESL's early rebasing request than the theoretical arguments.

[12] Hydro Ottawa Limited, *Decision*, EB-2010-0133, October 27, 2010, p. 11.

THESL has identified two scenarios describing the implications for the company if it were placed under IRM rates. The company argued that both scenarios demonstrate that the company meets the test for the Preliminary Issue.

In the first scenario, THESL continues to spend as proposed, and the result is a precipitous drop in its financial performance, resulting in the off ramp being triggered by the end of 2012 and a negative ROE by 2014. Given the magnitude of the growth in expenditures this is not surprising. Distributors are expected to operate differently under 3GIRM than under annual cost of service rates: they are expected to manage their resources in light of customer growth and system priorities and to seek out efficiencies and productivity improvements aggressively, and where warranted make applications using the additional 3GIRM tools of the ICM, or z-factor, or off-ramp. The Board therefore finds that this scenario is not credible because it does not incorporate the sort of prioritization and productivity innovation which would be expected to take place under IRM rates. Nor does this scenario substantiate the company's claim that 3GIRM could lead to a breach of the fair return standard. If THESL were to operate according to this scenario, which it has stated clearly it would not, the off-ramp would be triggered at the end of 2012, and therefore even if the company did not come forward the Board itself would initiate a review. The Board finds that this scenario does not demonstrate that the company meets the test for the Preliminary Issue.

In the second scenario, THESL responds to the 3GIRM framework by reducing spending substantially, down to a level characterized by the company as an "unsustainable mode of bare survival,"[13] while maintaining an ROE of 8.1%. In this scenario capital expenditures are deferred, creating what the company referred to as a "snowplough effect" which leads to large future rate impacts. In addition, the workforce would be cut by between 300 and 400 employees. The Board finds that this scenario is not credible. The 3GIRM framework is designed to instil cost management discipline through shareholder incentives for the benefit of ratepayers. THESL's scenario assumes that the company can only respond by spending less with no prospect of productivity improvements to do the same (or more) with less. It also implies that THESL would refuse to expend capital beyond the level of depreciation even though the company claims this could lead to a deterioration of its system. Good utility practice would necessitate a consideration of priorities and planning to accommodate the needs of the system.

[13] Ex R1, Tab 1, Schedule 1, p. 3.

The 3GIRM framework accommodates spending beyond the level of depreciation, including through the operation of the ICM. If additional spending for genuine system needs is required, beyond that available through the 3GIRM framework, including the ICM, then it is possible that the spending could result in a decline in earnings sufficient to trigger the off-ramp. But this happens after genuine effort is expended to operate within the parameters of the framework. The Board concludes that this scenario is not sufficiently credible to demonstrate that the company meets the test for the Preliminary Issue.

The Incremental Capital Module (ICM)

Under neither scenario does the company consider the option of pursuing an ICM application. In fact, the company largely dismisses the ICM as a potential tool. This is particularly remarkable given the company's assertion that without pre-approval for capital expenditures it risks adverse credit consequences.

The ICM was developed to address the circumstances of increased capital needs within 3GIRM. In its Report on 3GIRM, the Board set out the framework for the ICM and identified the eligibility criteria: materiality, need and prudence.[14] In the Supplemental Report, the Board established the ICM materiality threshold and set out the associated filing guidelines and reporting requirements. In considering a distributor's eligibility for the ICM, the Board stated:

> The intent is not to have an IR regime under which distributors would habitually have their CAPEX reviewed to determine whether their rates are adequate to support the required funding. Rather, the capital module is intended to be reserved for unusual circumstances that are not captured as a Z-factor and where the distributor has no other options for meeting its capital requirements within the context of its financial capacities underpinned by existing rates.[15]

Hydro One Networks Inc. made the first application under the ICM, and in its decision the Board stated:

> In fact, what the Board requires in considering an application under the incremental capital module is a demonstration that the distributor is facing

[14] *Report of the Board on 3rd Generation Incentive Regulation for Ontario's Electricity Distributors*, July 14, 2008.
[15] *Supplemental Report of the Board on 3rd Generation Incentive Regulation for Ontario's Electricity Distributors*, September 17, 2008, p. 31.

> extraordinary and unanticipated capital spending requirements; i.e. something other than the normal course of business.[16]

While the Board did not accept the application for relief under the ICM for Hydro One Networks Inc., it did provide substantial relief by increasing the revenue requirement by more than half of what was originally requested ($20.3 million was requested; $12.1 million was granted).

In a decision regarding an Oshawa PUC Networks Inc. ICM request, the Board determined that some of the projects were discretionary (including a feeder replacement project) and therefore not eligible for relief, but that the concrete pole replacement project was non-discretionary and therefore eligible for relief.[17] The relief was granted through a deferral account.

In the Board's 2011 IRM decisions for Guelph Hydro[18] and Oakville Hydro[19] the Board allowed for municipal transformer stations to be funded through the ICM.

The Board's thinking in this area has evolved, and in the recent ICM decisions the Board has granted rate relief for discrete, material and non-discretionary projects which cannot be funded through the normal operation of the 3GIRM mechanism.

While the Board cannot determine at this time the level of spending under THESL's capital plan that would be eligible for the ICM, it appears that two projects, the Bremner station and contributions to Hydro One Networks Inc. for the Leaside-Birch transmission reinforcement (which together total $86.6 million in 2012), are directly analogous to projects that the Board has previously approved under ICM for other distributors. These projects represent approximately 15% of the total proposed budget for 2012. (There is a further $49.4 million for these two projects in the 2013 budget.) Further amounts might also qualify.

THESL's witness Mr. McLorg asserted "it's certainly our view that a case cannot be made to characterize the bulk of Toronto Hydro's spending as being in any sense extraordinary."[20] However, the fact is that planned spending is increasing significantly. Whereas over 2010 and 2011 capital expenditures averaged $364 million, the average

[16] Hydro One Networks Inc., *Decision*, EB-2008-0187, May 13, 2009, pp. 8-9
[17] Oshawa PUC Networks Inc., *Decision – Part II*, EB-2008-0205, June 10, 2009.
[18] Guelph Hydro Electric Systems Inc., *Decision and Order*, EB-2010-0130, March 17, 2011 (corrected)
[19] Oakville Hydro Electricity Distribution Inc., *Decision and Order*, EB-2010-0104, June 10, 2009.
[20] Tr. 2, p. 36.

planned level of expenditures over the period 2012-2014 is $615 million, which VECC characterized as a "remarkably large capital plan."[21]

It may also be that the full planned spending is not imperative to ensure appropriate system reliability. Although THESL asserted that the high level of expenditures are driven by pressing system needs, the Board notes that on the existing capital spending level the company's reliability statistics show no marked deterioration, and the number of "worst performing feeders"[22] (a more important criteria than the reliability statistics, according to Mr. Haines) has been reduced by half – from 80 to 40.
If there really is nothing unusual about THESL's capital expenditures in terms of the nature of the activities, then the spending should be managed within the parameters of the 3GIRM framework, just as spending is managed by almost every other distributor. If the company is facing unusual non-discretionary requirements, then the appropriate course is an ICM application.

THESL has explained that it did not conduct its planning in contemplation of a year or years with rates set using IRM. It may be that a re-analysis of its capital plan will result in other expenditures which are potentially eligible for ICM treatment. The Board notes that were THESL to apply for an ICM adjustment for 2012, the half-year rule would likely not apply as the expectation would be that 2013 rates would also be set using IRM. This adjustment would have the effect of including the expenditures in rate base from the beginning of the year.

Next Steps

Some intervenors would have the Board set rates for 2012 using IRM in the expectation that the company would return with an ICM application, or that the Board would conduct a capital program review of some sort in the same timeframe. The objectives of these approaches are to instil greater cost discipline on THESL, reinforce the integrity of the policy, and still provide the opportunity for a review of the capital spending. On the other hand, CCC argued against a "hybridized" approach of combining IRM for a year and some sort of capital expenditure review.

CCC summarized the benefits of the IRM framework for ratepayers and highlighted that the Board needs to consider the interests of ratepayers and the impact of its decision on

[21] Tr. 4, p. 102.
[22] Mr. Haines described "worst performing feeders" as those feeders that have more than 7 outages per year.

them. CCC concluded that the Board should dismiss THESL's application so as to apply some cost discipline on the company. SEC made similar arguments.

As THESL has noted, the Board has initiated a comprehensive review of its ratemaking framework: the Renewed Regulatory Framework for Electricity. When the consultation is completed there may well be changes to the ratemaking framework involving planning, capital expenditures, and performance metrics (as well as other parameters). The Board therefore agrees with THESL that it would not be appropriate or efficient to develop a customized approach for THESL at this time.

The Board will not direct THESL to file a 2012 IRM application; however, the Board invites THESL to do so, and to consider whether it would be appropriate to file an ICM module as part of the application. With respect to 2013 rates, if THESL chooses to file a cost of service application, the Board will likely again consider the early rebasing request as a Preliminary Issue. For the company's next cost of service application, the Board will expect to see external evidence related to productivity and capital planning. The productivity evidence could be in the form of a benchmark study which includes potential comparators from other jurisdictions and/or an external study of THESL's productivity achievement over time. The Board encourages the company to review the studies in which Hydro One Networks or Ontario Power Generation have been involved to determine whether similar studies might be appropriate for THESL. The capital planning evidence could be an efficiency expert's analysis of THESL's capital spending prioritization and cost/benefit analysis.

Cost Awards

The Board may grant cost awards to eligible stakeholders pursuant to its power under section 30 of the *Ontario Energy Board Act, 1998*. When determining the amount of the cost awards, the Board will apply the principles set out in section 5 of the Board's *Practice Direction on Cost Awards* (the "Practice Direction"). The maximum hourly rates set out in the Board's Cost Awards Tariff will also be applied.

In assessing requests for cost awards, the Board will be mindful of the criteria outlined in Procedural Order No. 1 which were designed to ensure that costs are only awarded where the party seeking costs provides assistance to the Board in examining relevant issues and that only reasonable costs are awarded. Parties intending to make cost award claims in this proceeding should review these criteria before filing their claims.

THESL will be required to absorb the costs of this application, including intervenor costs and the Board's costs, within its current revenue envelope; no incremental recovery will be allowed.

All filings with the Board must quote the file number EB-2011-0144, and be made through the Board's web portal at www.errr.ontarioenergyboard.ca, and consist of two paper copies and one electronic copy in searchable / unrestricted PDF format. Filings must be received by the Board by 4:45 p.m. on the stated date. Parties should use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at www.oeb.gov.on.ca. If the web portal is not available, parties may e-mail their documents to the attention of the Board Secretary at BoardSec@ontarioenergyboard.ca. All other filings not filed via the Board's web portal should be filed in accordance with the Board's *Practice Directions on Cost Awards*.

THE BOARD ORDERS THAT:

1. Intervenors shall file with the Board and forward to THESL their respective cost claims within 21 days from the date of this Decision.

2. THESL shall file with the Board and forward to intervenors any objections to the claimed costs within 28 days from the date of this Decision.

3. Intervenors shall file with the Board and forward to THESL any responses to any objections for cost claims within 35 days of the date of this Decision.

4. THESL shall pay the Board's costs incidental to this proceeding upon receipt of the Board's invoice.

DATED at Toronto, January 5, 2012

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary

TAB 11

Ontario Energy Board

Commission de l'Énergie de l'Ontario

Ontario

EB-2011-0087

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, (Schedule B);

AND IN THE MATTER OF an Application by Marie Snopko, Wayne McMurphy, Lyle Knight, and Eldon Knight under section 19 of the *Ontario Energy Board Act, 1998*, S.O. 1998, for an Order of the Board determining that the contracts, filed with the Application, between the Applicants and Union Gas Limited / Ram Petroleums Limited have been terminated;

AND IN THE MATTER OF an Application by Marie Snopko, Wayne McMurphy, Lyle Knight, and Eldon Knight under section 38(2) of the *Ontario Energy Board Act, 1998*, S.O. 1998 for an Order of the Board determining the quantum of compensation the Applicants are entitled to have received from Union Gas Limited and Ram Petroleums Limited;

AND IN THE MATTER OF a Motion filed by Union Gas Limited.

BEFORE: Cathy Spoel
Presiding Member

Ken Quesnelle
Member

Karen Taylor
Member

DECISON

Background

On March 16, 2011 Marie Snopko ("Snopko"), Wayne McMurphy ("McMurphy"), Lyle Knight and Eldon Knight (the "Knights") (collectively the "Applicants") filed an application with the Ontario Energy Board under section 19 and section 38(2) of the *Ontario Energy Board Act, 1998* (the "Act"). The Applicants identified Union Gas Limited ("Union") and Ram Petroleums Ltd. ("Ram") as respondents in the Application. The Applicants have requested a decision on two issues (a) the validity of Gas Storage Agreements (GSA) between Union and the Applicants pursuant to section 19 of the Act; and (b) a determination of the compensation the Applicants are entitled to receive from Union and Ram. The Board has assigned Board File No. EB-2011-0087.

The Applicants are landowners in the Edys Mills designated storage area operated by Union. Prior to 1993, the Applicants entered into a number of agreements with Ram, in particular petroleum and natural gas lease agreements, and gas storage agreements (the "Pre-1993 Agreements"). The Applicants' Gas Storage Lease Agreements and related events chronology is as follows:

- Snopko's Gas Storage Lease Agreement (GSLA) with Ram was signed on October 3, 1987 by George John Graham, predecessor in title. The term of the GSLA was 7 years from the date of signing and renewable annually as long as Lessee "shall have installed facilities for storage and /or utilizes the said lands within first 7 years of this lease" [1] .

- McMurphy's Gas Storage Lease Agreement with Ram was signed on October 11, 1989.

- Knights held 3 Gas Storage Lease Agreements with Ram for their properties within Edys Mills: Agnes Knight signed the GSLA with Ram on May 25, 1989; Lyle and Margaret Knight signed the GSLA with Ram on May 25, 1989 for one of their two properties within Edys Mills and signed another agreement for the second property also on May 25, 1989.

[1] Graham (predecessor on title for Snopko's lands), McMurphy and Knights all signed the same form of the Gas Storage Lease Agreement with Ram. There are 3 GSLAs for Knights as there were 3 properties in question. The GSLAs may be found in the Volume 1 in the Tabs to Union's Motion record. All GSLA's had the term of 7 years and were extendable on yearly basis, provided that the storage operation commences within first seven years. Note that the operation of Edys Pool started in 1993 and all GSLAs were signed in 1989, meaning that all the GSLA's were valid in the period from 1993 to 1999. For the period from 1999 to 2008, as all the Applicants signed the amendments (2007) the leases were also valid. For the period from 2009 to 2013 only Knights signed the amendments of their GSLAs.

- In 1989 prior to the storage designation, Ram sold its interest in the Edys Mills Pool to Union and assigned the storage leases to Union by undertaking the following steps:

    - In August 1989, the Applicants and Ram entered into a Consent Agreement by which the Applicants consented to Ram assigning the leases to Union provided Ram takes back a sublease of all oil production rights; and

    - After the Consent Agreement was signed, Ram assigned its interest in the Gas Storage Lease Agreements to Union.

- On March 16, 1992 Union filed an application for a regulation designating the Edys Mills Pool as a gas storage area with the Board under section 35(2) of the *Ontario Energy Board Act*, R.S.O. 1990, c. 013[2] (E.B.O. 174). On March 16, 1992, Union also applied under section 21(1) of the *Ontario Energy Board Act*, R.S.O. 1990, c. 013 to the Board for an order authorizing Union to inject gas into, store gas in, and remove gas from the Edys Mills proposed gas storage pool (E.B.O. 174) and for leave to construct pipelines in the Edys Mills Pool (E.B.L.O. 243).

- On September 22 to 24, 1992 the Board held a hearing in Sarnia and approved, by way of an oral decision, the recommendation to the Lieutenant Governor in Council for designation of the Edys Mills Pool, the authorization to operate the Edys Mills Pool as well as leave to construct pipelines in the Edys Mills Pool.

- The Reasons for the Decisions were issued by the Board on November 12, 1992.

- The Edys Mills Pool was designated for storage by Ontario Regulation 719/92 on November 30, 1992.

- Union was granted an authorization to operate the Edys Mills Storage Pool and leave to construct pipelines under Board Order E.B.O. 174/E.B.L.O. 243

[2] Note that the sections of the Act dealing with the storage changed in the current *Ontario Energy Board Act*, R.S.O. 1998.

dated February 1, 1993. Collectively, the regulation designating the Edys Mill Pool and the Board's order granting Union the right to inject, store and remove gas from the Edys Mill Pool are referred to as the "Designation Order" in this Decision.

- In 2000, the Lambton County Storage Association ("LCSA", of which the Applicants Snopko and McMurphy were members) commenced a proceeding at the Board for just and equitable compensation pursuant to section 38(2) of the *Ontario Energy Board Act, 1998*. Following a protracted process and lengthy negotiations, Union and the LCSA reached a settlement on compensation in 2004. Expressly included in the settlement were all claims which were, or could have been raised in the storage compensation hearing before the Board, including claims for disturbance damages, crop loss and loss of opportunity. The settlement had retroactive effect and covered the years 1999-2008 inclusive.

- On March 23, 2004 the Board issued a Decision and Order (RP-2000-0005, the "Compensation Order") which accepted the settlement agreement and covered all compensation matters over which the Board has jurisdiction for the period 1999 to 2008. In RP-2000-0005 the Board determined that Snopko, McMurphy and Knights all have valid storage rights agreements with Union for the period 1999 to 2008.

- Based on the terms of the Compensation Order, Union made individual compensation offers to all LCSA and non-LCSA members in the Edys Mill Pool, including Snopko, McMurphy and Knights.

- On May 5, 2004 Snopko signed a compensation agreement with Union for the period from 1999 to 2008 for the compensation schedule and amounts as set in the Compensation Order.

- On August 17, 2004 Knights signed a compensation agreement with Union for the period from 1999 to 2008 for the compensation schedule and amounts as set in the Compensation Order.

- On January 28, 2005 McMurphy signed a compensation agreement with Union for the period from 1999 to 2008 for the compensation schedule and amounts as set in the Compensation Order.

- In 2007 Union and its storage pools landowners reached a Compensation Agreement which covers the period 2009-2013 (the “2007 Compensation Agreement”).

- On April 3, 2007 Knights signed the 2007 Compensation Agreement with Union.

- Snopko and McMurphy have not signed the 2007 Compensation Agreement. Snopko and McMurphy do not have gas storage rights agreements with Union for the period after 2008 to the present.

The Applicants stated in their Application that on April 25, 2006 they terminated the Gas Storage Agreement with Union. The Applicants brought the same claims as presented in this Application to the Ontario Superior Court of Justice (“Superior Court”). Union brought a motion before the Superior Court to have the claim dismissed. On January 6, 2008 the Superior Court granted Union’s motion, concluding that the Board has exclusive jurisdiction to hear matters related to just and equitable compensation in respect of the gas or oil rights or any damage resulting from these operations. The Applicants appealed the Superior Court decision. The appeal was heard on January 22, 2010. On April 7, 2010 the Court of Appeal dismissed the Applicants’ appeal and concluded that the OEB has the exclusive jurisdiction to hear the case.

On March 16, 2011 the Applicants filed an application with the OEB, which is the subject of this Decision, regarding (a) the validity of Gas Storage Agreements (GSA) between Union and the Applicants pursuant to section 19 of the Act; and (b) a determination of the compensation the Applicants are entitled to receive from Union and Ram. The Applicants’ requested that the Application be bifurcated, with determination of the status of the contracts heard first.

On April 18, 2011, Union filed a letter with the Board and copied the Applicants’ Counsel (“Union’s April 18 Letter”). In Union’s April 18 Letter, Union stated that the Board should decline the Applicants' request to bifurcate the Application at this time. Union also stated that it would bring motions challenging the Applicants' standing to assert some or all of their claims on the basis of the compensation agreements and the relevant limitations law.

On May 26, 2011 the Board issued a Notice of Application and Procedural Order No. 1 (“Notice and PO 1”).

In the Notice and PO 1 the Board provided procedural direction for Union to file its motion(s) and for the parties to respond as well as for Union to reply to all submissions received. The Board determined that Union's motions would be heard in writing.

As set in the Notice and PO 1, Union filed its Motion Record on June 23, 2011. On July 21, 2011 the Applicants filed the Response to Union's Motion. On August 5, 2011 Union filed Reply Submissions. This filing completed the record with regard to the motion proceeding.

Test for Summary Judgment

Both parties refer to Rule 20 of the Ontario Rules of Civil Procedure in describing the appropriate test for summary judgment. Although the Rules of Civil Procedure apply to civil proceedings before the Ontario Court of Appeal and the Ontario Superior Court of Justice, and not strictly speaking to proceedings before the Board, the Board accepts that the Rules of Civil Procedure and precedents relating thereto are appropriate references for this proceeding.

Rule 20 (Summary Judgment) has recently been amended. A copy of Rule 20 is attached as an Appendix A to this decision. Union argues that the Applicants rely on the old version of the rule, and that the cases they cite do not reflect the recent amendments.

Rule 20.04(2) states: "The court shall grant summary judgment if: (a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence." The task before the Board on this motion, then, is to determine if there is a genuine issue requiring a hearing with respect to the issues identified by Union.

A recent decision of the Superior Court of Justice describes the factors a court should consider on the hearing of a summary judgment motion:

> The new rule does not change the burden of a party in a summary judgment motion. Rule 20.01 provides that a party who seeks summary judgment must move with supporting affidavit material or other evidence to support its motion. Pursuant to Rule 20.02(2), a responding party "may not rest solely on the allegations or denial in the party's pleadings but must set out affidavit material or other evidence, specific facts showing there is a genuine issue requiring a

> trial". In other words, consistent with existing jurisprudence, each side must "put its best foot forward." The court is entitled to assume that the record contains all the evidence which the parties will present if there is an actual trial, although in some circumstances the interests of justice may require that a material issue should be determined at trial, upon a full evidentiary record.[3]

As proceedings before the Board are not, strictly speaking, governed by the Rules of Civil Procedure, the Board does not necessarily expect that every provision of every Rule be strictly followed on all occasions; or that every decision of the courts relating to the Rules will always apply before the Board. Indeed, the Board has its own *Rules of Practice and Procedure*, though it is not uncommon for the Board to refer to the Rules of Civil Procedure where something is not addressed in detail in its own rules.[4] The Board does accept, however, that the court's guidance in the Cuthbert decision should be followed on summary judgment motions before the Board – in other words, that parties should be expected to put their best foot forward.

Relief Sought by Applicants

Prior to 1993, the Applicants entered into a number of agreements with Ram, in particular petroleum and natural gas lease agreements, and gas storage agreements (the "Pre-1993 Agreements"). The Pre-1993 Agreements were assigned to Union in 1989 through a consent agreement. The Application alleges that Union has committed various breaches of the Pre-1993 Agreements, and that the Applicants are entitled to further compensation.

The Application was filed with the Board on March 16, 2011. The Applicants seek a determination that the contracts listed in Schedule A to the Application have been terminated and an order for the following damages from the Respondents:

a) damages against the Respondent Ram for misrepresentation and breach of contract in the amount of $2,500,000;
b) damages against both Respondents for negligence in the amount of $2,500,000;

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[3] *Cuthbert v. TD Canada Trust*, 2010 ONSC 830, para. 12.
[4] In the context of the Board's Rules, a motion for summary judgment is essentially akin to a motion to dismiss without a hearing (Rule 8 and Rule 18). The Board's ultimate authority to dismiss a matter without a full hearing comes from section 4.6 of the *Statutory Powers Procedure Act* ("SPPA"). As required by both Rule 18 and section 4.6 of the SPPA, the Board has allowed the Applicants to make full submissions on the proposed dismissal.

c) damages against both Respondents for loss of income in the amount of $1,500,000;
d) damages against the Respondents for unjust enrichment in the amount of $2,000,000;
e) damages for storage of natural gas on and in the Applicants' lands without a contractual right estimated at the amount of $2,500,000 or the disgorgement of all net profit from the date of termination of the contracts to the date of termination of storage;
f) damages for nuisance against the Respondent Union in the amount of $1,500,000;
g) punitive damages for Union operating a gas storage system on the Applicant's land and for dealing with the Applicants in a high handed manner without due regard for their rights in the amount of $10,000,000;
h) prejudgment and post judgment interest in accordance with the Courts of Justice Act or a reasonable equitable interest to be determined by the Board; and
i) the Applicants' costs of these proceedings.

Positions of the Parties respecting the motion

Union makes two arguments concerning why the Board should not hear any portions of the application relating to the Pre-1993 Agreements: there was significant delay in seeking the relief on the part of the Applicants; and that almost all of the claims for compensation are futile because Union has binding compensation agreements with the Applicants (which, together with the Designation Order, have superseded all the Pre-1993 Agreements).

Union alleges that the particulars with respect to the Applicants' claims regarding the pre-1993 agreements were known, or ought to have been known, for between 16 and 21 years, depending in the claim in question. Union states that the Applicants did not bring these claims to court until 2008; and, after the claims were dismissed by the Court of Appeal, delayed almost another year before filing the current application with the Board. Union argues that these delays are unreasonable, and the Board should decline to hear this portion of the Application on this basis.

Union further argues that, delay issues aside, any hearing related to the pre-1993 Agreements would be a waste of time as those agreements were replaced in 1993 by the Designation Order and in 2004 by the Compensation Order. Union argues that the

Designation Order grants it the rights to "inject gas into, store gas in and remove gas from … Edys Mill Pool … and to enter into and upon the land in the area and use land for such purposes…" In addition, Union reached a full settlement with the Applicants with respect to all compensation issues for the period 1999-2008, which was approved through an order of the Board in 2004 (the "Compensation Order"). Union has also entered into an agreement with the Knights for the period 2009-2013. Union concedes that it has no specific compensation agreement with Snopko and McMurphy for the period since 2009, and is not seeking to have that portion of the Application dismissed through this motion.

The Applicants argue that Union's assertions with respect to the futility of the Applicants' claims are not relevant to most of the Applicants claims, and are not an appropriate basis for a claim for summary judgment. The Applicants further argue that Union has breached the conditions of the Designation Order, and that Union therefore enjoys no rights under the Designation Order.

Union responds that the import of the Pre-1993 Agreements is in fact a cornerstone of the Application, and that the Applicants' submissions on this motion have done nothing to rebut Union's assertions that any request for relief relating to the Pre-1993 Agreements is futile. Union further responds that the Applicants' claims that Union has breached the Designation Order have not been supported by any evidence, and are in any case irrelevant to the current proceeding as the appropriate remedy for such a breach would be an application to amend or revoke the Edys Mills Pool pursuant to s. 36.1(1)(b) of the Act.

Board Decision

A. Standing versus jurisdiction

Section 38 or the Act provides:

> **38.** (1) The Board by order may authorize a person to inject gas into, store gas in and remove gas from a designated gas storage area, and to enter into and upon the land in the area and use the land for that purpose. 1998, c. 15, Sched. B, s. 38 (1).

Right to compensation

(2) Subject to any agreement with respect thereto, the person authorized by an order under subsection (1),

(a) shall make to the owners of any gas or oil rights or of any right to store gas in the area just and equitable compensation in respect of the gas or oil rights or the right to store gas; and

(b) shall make to the owner of any land in the area just and equitable compensation for any damage necessarily resulting from the exercise of the authority given by the order. 1998, c. 15, Sched. B, s. 38 (2).

Determination of amount of compensation

(3) No action or other proceeding lies in respect of compensation payable under this section and, failing agreement, the amount shall be determined by the Board. 1998, c. 15, Sched. B, s. 38 (3).

Appeal

(4) An appeal within the meaning of section 31 of the *Expropriations Act* lies from a determination of the Board under subsection (3) to the Divisional Court, in which case that section applies and section 33 of this Act does not apply. 1998, c. 15, Sched. B, s. 38 (4); 2003, c. 3, s. 31.

The Applicants argue that the Board has jurisdiction over the matters for which they seek relief, and that the Board should therefore proceed to hear the case on its merits. They point out that the recent Court of Appeal decision (which dealt with the same prayer for relief) confirmed that the Board has exclusive jurisdiction over compensation for issues relating to gas storage, and that Union has repeatedly expressed the same opinion. As no one appears to challenge the Board's jurisdiction over this matter, the Applicants submit that the matter should not be dismissed at the pre-hearing stage.

Union argues in its response that the Applicants have confused jurisdiction with standing. Union accepts that the Board has exclusive jurisdiction over just and equitable compensation for gas storage pursuant to section 38 of the Act. What Union challenges is the Applicants' standing to bring these matters to the Board in the current case. Union states that although the Board has exclusive jurisdiction to deal with just and equitable compensation under the Act, no person has standing to raise an issue of just and reasonable compensation under the Act where that person is a party to an existing, unchallenged agreement dealing with compensation. As described below, it is

Union's position that the Applicants (with the exception of the Snopko and McMurphy claims from 2009 onwards) have existing and unchallenged agreements with Union respecting compensation. Union further argues that that the majority of the Applicants' claims are time barred, as they were aware, or should have been aware, of the claims for at least 16 years before they came to the Board.

The Board agrees with both parties that it has the jurisdiction to hear all claims relating to just and equitable compensation for the storage, injection, and removal of gas from the subject lands. Indeed, the Ontario Court of Appeal confirmed the Board's jurisdiction in this regard in the Snopko decision.[5] The mere existence of jurisdiction, however, does not automatically amount to a genuine issue requiring a hearing. On a motion for summary judgment, the Applicants must "put their best foot forward" and satisfy the Board that they are at least potentially entitled to some actual relief with respect to their application.

B. The Right to Inject, Store and Remove Natural Gas, and the Designation Order

The Board finds that Union's rights to inject gas into, store gas in and remove gas from the Edys Mill Pool, and to enter into and upon the land in the area and use land for such purposes is governed solely by the Designation Order, and has been since 1993. The Designation Order supersedes any previous agreements with respect to Union's rights to inject, store and remove gas. Whether previous contracts between the parties relating to the right to inject, store or remove gas have been formally cancelled or not is essentially irrelevant as these rights are now governed by the Designation Order.

Although the Applicants alleged in its responding argument that Union had committed unspecified breaches of the Designation Order, they provided no evidence or particulars to support this contention. Even if there had been breaches of the Designation Order (which was not alleged in the pre-filed Application) it is not clear that such breaches would be the proper subject of a hearing under section 38 of the Act. Section 36.1 of the Act addresses amendments or revocations of designation orders, and the Applicants have sought no relief under this section of the Act. Regardless, there would be no basis for any finding in this proceeding that Union has committed any breaches of the Designation Order. Any claims for damages based on Union not having the right to inject, store, or remove gas from the Applicants properties, or for having breached the Designation Order, are therefore dismissed.

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[5] Pp. 7-9.

C. Just and Equitable Compensation

It is agreed by both parties that the Board, absent an agreement regarding compensation by the parties, has complete jurisdiction over all compensation issues relating to the injection, storage and removal of gas from the Edys Mill Pool since that time. The Board agrees with Union, however, that the issue on this motion with respect to compensation is not so much one of jurisdiction, but one of standing. For the reasons described below, the Board dismisses all claims regarding the sufficiency of compensation paid by Union to the Applicants, with the exception of amounts possibly owing to Snopko and McMurphy for the period 2009 forward.

Pre-Designation Order

Prior to the Designation Order, the Board had no jurisdiction over gas storage (or compensation related thereto) on the Applicants' lands. The Board will therefore not consider any compensation claims relating to the period prior to the imposition of the Designation Order in 1993.

1993 to 1999

Prior to the effective date of the Compensation Order (see below), Union either took over from Ram or entered into various agreements with the parties that covered compensation for gas injection, removal and storage (the "Gas Storage Leases"). Although the Gas Storage Leases were not reviewed or approved by the Board, the Act is clear that the Board is only responsible for setting just and equitable compensation where the parties cannot reach an agreement.

There has been no suggestion by the Applicants that Union did not pay the compensation owing under the Gas Storage Leases for the period from 1993 to when the Compensation Agreement came into effect in 1999. The Applicants have not suggested that the portions of the Gas Storage Leases dealing with compensation were not binding. The Board therefore has no basis upon which it could make any determination that further compensation for this period is appropriate, and dismisses all claims for additional compensation for the period 1993-1999.

The Compensation Order (1999-2008)

The Compensation Order, which was binding on all of the parties to this proceeding, specifically covered all claims that were, or could have been, raised in that application. [6] In other words, the Compensation Order covered all compensation matters over which the Board has jurisdiction for the period 1999-2008. As these matters were dealt with in a final manner by the Board in the Compensation Order, no party affected by it may seek additional or other relief for the period of time it covers. The fact that the Board has jurisdiction over compensation does not mean that the Board can revisit the issue. The Board will therefore not hear any portions of the Application which relate to compensation for the 1999-2008 period.

2009 to 2013

The Board will not hear any portion of the Application relating to compensation for the Knights for the period after 2008, as they accepted the terms of the 2007 Compensation Agreement which covers the period 2009-2013. However, the Applicants are requested to advise the Board in writing if they wish to proceed with the claims in the Application by Snopko and McMurphy for compensation post-2008, as Snopko and McMurphy are not signatories to the 2007 Compensation Agreement.

Damages respecting roadway acreage

The Application raises the issue of compensation for roadway acreage for Snopko. The exact amount being sought is not itemized, and is presumably subsumed within the headings of damages described at paragraph 41 of the Application. Union argues that it entered into a complete and final agreement (the Roadway Agreement") with Snopko in 1992 respecting compensation for roadways on her property, and that she therefore can be permitted to no further compensation through this Application. The Applicants do not directly respond to this submission in their responding motion record.

The Roadway Agreement (a copy of which was provided as an exhibit to the Wachsmuth affidavit) is a full and final release for roadways located on Snopko's property. The Board agrees with Union that the Roadway Agreement precludes Snopko from seeking further compensation with respect to roadways, and it will not entertain any claims for relief in this regard.

Unreasonable delay

[6] Union motion record, p. 1682.

Given the findings above, the Board does not consider it necessary to address Union's argument that the relief sought relating to the Pre-1993 Agreements should be dismissed on account of unreasonable delay, and the Board makes no findings in this regard.

Conclusion

As described in greater detail above, the Board dismisses all claims relating to Union's rights to inject, store, or remove natural gas from the Applicants' lands. Irrespective of the Pre-1993 Agreements, the terms and conditions upon which Union holds these rights are now solely governed by the Designation Order. No specific breaches of the Designation Order have been alleged, and there would be no basis for the Board to make any findings in this regard.

The Board also dismisses all claims for just and equitable compensation, save for those made by Snopko and McMurphy for the period after 2008. Prior to 1993, the Board has no jurisdiction over just and equitable compensation. From 1993-1998, compensation issues were covered by Gas Storage Leases, and no party has suggested that Union did not make the appropriate payments. From 1999-2008, all compensation issues were covered by the Compensation Order and the subsequent agreements Union reached individually with all of the Applicants. For the period 2009-2013, the Knights have entered into another agreement with Union regarding compensation. The Board will not overturn any of these agreements, and indeed no party has even specifically requested that it do so. The only remaining issue is whether Snopko and McMurphy are entitled to any additional compensation after 2008, and the Board will hear this issue if the Applicants choose to pursue it.

The Applicants are requested to advise the Board in writing if they wish to proceed with the claims in the Application by Snopko and McMurphy for compensation post-2008.

ISSUED at Toronto, December 8, 2011
ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary

Ontario Energy Board

Commission de l'Énergie de l'Ontario

Ontario

EB-2011-0087

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, (Schedule B);

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AND IN THE MATTER OF a Motion filed by Union Gas Limited.

BEFORE: Cathy Spoel
Presiding Member

Ken Quesnelle
Member

Karen Taylor
Member

DECISON

Background

On March 16, 2011 Marie Snopko ("Snopko"), Wayne McMurphy ("McMurphy"), Lyle Knight and Eldon Knight (the "Knights") (collectively the "Applicants") filed an application with the Ontario Energy Board under section 19 and section 38(2) of the *Ontario Energy Board Act, 1998* (the "Act"). The Applicants identified Union Gas Limited ("Union") and Ram Petroleums Ltd. ("Ram") as respondents in the Application. The Applicants have requested a decision on two issues (a) the validity of Gas Storage Agreements (GSA) between Union and the Applicants pursuant to section 19 of the Act; and (b) a determination of the compensation the Applicants are entitled to receive from Union and Ram. The Board has assigned Board File No. EB-2011-0087.

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- Knights held 3 Gas Storage Lease Agreements with Ram for their properties within Edys Mills: Agnes Knight signed the GSLA with Ram on May 25, 1989; Lyle and Margaret Knight signed the GSLA with Ram on May 25, 1989 for one of their two properties within Edys Mills and signed another agreement for the second property also on May 25, 1989.

[1] Graham (predecessor on title for Snopko's lands), McMurphy and Knights all signed the same form of the Gas Storage Lease Agreement with Ram. There are 3 GSLAs for Knights as there were 3 properties in question. The GSLAs may be found in the Volume 1 in the Tabs to Union's Motion record. All GSLA's had the term of 7 years and were extendable on yearly basis, provided that the storage operation commences within first seven years. Note that the operation of Edys Pool started in 1993 and all GSLAs were signed in 1989, meaning that all the GSLA's were valid in the period from 1993 to 1999. For the period from 1999 to 2008, as all the Applicants signed the amendments (2007) the leases were also valid. For the period from 2009 to 2013 only Knights signed the amendments of their GSLAs.

- In 1989 prior to the storage designation, Ram sold its interest in the Edys Mills Pool to Union and assigned the storage leases to Union by undertaking the following steps:

    - In August 1989, the Applicants and Ram entered into a Consent Agreement by which the Applicants consented to Ram assigning the leases to Union provided Ram takes back a sublease of all oil production rights; and

    - After the Consent Agreement was signed, Ram assigned its interest in the Gas Storage Lease Agreements to Union.

- On March 16, 1992 Union filed an application for a regulation designating the Edys Mills Pool as a gas storage area with the Board under section 35(2) of the *Ontario Energy Board Act*, R.S.O. 1990, c. 013[2] (E.B.O. 174). On March 16, 1992, Union also applied under section 21(1) of the *Ontario Energy Board Act*, R.S.O. 1990, c. 013 to the Board for an order authorizing Union to inject gas into, store gas in, and remove gas from the Edys Mills proposed gas storage pool (E.B.O. 174) and for leave to construct pipelines in the Edys Mills Pool (E.B.L.O. 243).

- On September 22 to 24, 1992 the Board held a hearing in Sarnia and approved, by way of an oral decision, the recommendation to the Lieutenant Governor in Council for designation of the Edys Mills Pool, the authorization to operate the Edys Mills Pool as well as leave to construct pipelines in the Edys Mills Pool.

- The Reasons for the Decisions were issued by the Board on November 12, 1992.

- The Edys Mills Pool was designated for storage by Ontario Regulation 719/92 on November 30, 1992.

- Union was granted an authorization to operate the Edys Mills Storage Pool and leave to construct pipelines under Board Order E.B.O. 174/E.B.L.O. 243

[2] Note that the sections of the Act dealing with the storage changed in the current *Ontario Energy Board Act*, R.S.O. 1998.

dated February 1, 1993. Collectively, the regulation designating the Edys Mill Pool and the Board's order granting Union the right to inject, store and remove gas from the Edys Mill Pool are referred to as the "Designation Order" in this Decision.

- In 2000, the Lambton County Storage Association ("LCSA", of which the Applicants Snopko and McMurphy were members) commenced a proceeding at the Board for just and equitable compensation pursuant to section 38(2) of the *Ontario Energy Board Act, 1998*. Following a protracted process and lengthy negotiations, Union and the LCSA reached a settlement on compensation in 2004. Expressly included in the settlement were all claims which were, or could have been raised in the storage compensation hearing before the Board, including claims for disturbance damages, crop loss and loss of opportunity. The settlement had retroactive effect and covered the years 1999-2008 inclusive.

- On March 23, 2004 the Board issued a Decision and Order (RP-2000-0005, the "Compensation Order") which accepted the settlement agreement and covered all compensation matters over which the Board has jurisdiction for the period 1999 to 2008. In RP-2000-0005 the Board determined that Snopko, McMurphy and Knights all have valid storage rights agreements with Union for the period 1999 to 2008.

- Based on the terms of the Compensation Order, Union made individual compensation offers to all LCSA and non-LCSA members in the Edys Mill Pool, including Snopko, McMurphy and Knights.

- On May 5, 2004 Snopko signed a compensation agreement with Union for the period from 1999 to 2008 for the compensation schedule and amounts as set in the Compensation Order.

- On August 17, 2004 Knights signed a compensation agreement with Union for the period from 1999 to 2008 for the compensation schedule and amounts as set in the Compensation Order.

- On January 28, 2005 McMurphy signed a compensation agreement with Union for the period from 1999 to 2008 for the compensation schedule and amounts as set in the Compensation Order.

- In 2007 Union and its storage pools landowners reached a Compensation Agreement which covers the period 2009-2013 (the "2007 Compensation Agreement").

- On April 3, 2007 Knights signed the 2007 Compensation Agreement with Union.

- Snopko and McMurphy have not signed the 2007 Compensation Agreement. Snopko and McMurphy do not have gas storage rights agreements with Union for the period after 2008 to the present.

The Applicants stated in their Application that on April 25, 2006 they terminated the Gas Storage Agreement with Union. The Applicants brought the same claims as presented in this Application to the Ontario Superior Court of Justice ("Superior Court"). Union brought a motion before the Superior Court to have the claim dismissed. On January 6, 2008 the Superior Court granted Union's motion, concluding that the Board has exclusive jurisdiction to hear matters related to just and equitable compensation in respect of the gas or oil rights or any damage resulting from these operations. The Applicants appealed the Superior Court decision. The appeal was heard on January 22, 2010. On April 7, 2010 the Court of Appeal dismissed the Applicants' appeal and concluded that the OEB has the exclusive jurisdiction to hear the case.

On March 16, 2011 the Applicants filed an application with the OEB, which is the subject of this Decision, regarding (a) the validity of Gas Storage Agreements (GSA) between Union and the Applicants pursuant to section 19 of the Act; and (b) a determination of the compensation the Applicants are entitled to receive from Union and Ram. The Applicants' requested that the Application be bifurcated, with determination of the status of the contracts heard first.

On April 18, 2011, Union filed a letter with the Board and copied the Applicants' Counsel ("Union's April 18 Letter"). In Union's April 18 Letter, Union stated that the Board should decline the Applicants' request to bifurcate the Application at this time. Union also stated that it would bring motions challenging the Applicants' standing to assert some or all of their claims on the basis of the compensation agreements and the relevant limitations law.

On May 26, 2011 the Board issued a Notice of Application and Procedural Order No. 1 ("Notice and PO 1").

In the Notice and PO 1 the Board provided procedural direction for Union to file its motion(s) and for the parties to respond as well as for Union to reply to all submissions received. The Board determined that Union's motions would be heard in writing.

As set in the Notice and PO 1, Union filed its Motion Record on June 23, 2011. On July 21, 2011 the Applicants filed the Response to Union's Motion. On August 5, 2011 Union filed Reply Submissions. This filing completed the record with regard to the motion proceeding.

Test for Summary Judgment

Both parties refer to Rule 20 of the Ontario Rules of Civil Procedure in describing the appropriate test for summary judgment. Although the Rules of Civil Procedure apply to civil proceedings before the Ontario Court of Appeal and the Ontario Superior Court of Justice, and not strictly speaking to proceedings before the Board, the Board accepts that the Rules of Civil Procedure and precedents relating thereto are appropriate references for this proceeding.

Rule 20 (Summary Judgment) has recently been amended. A copy of Rule 20 is attached as an Appendix A to this decision. Union argues that the Applicants rely on the old version of the rule, and that the cases they cite do not reflect the recent amendments.

Rule 20.04(2) states: "The court shall grant summary judgment if: (a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence." The task before the Board on this motion, then, is to determine if there is a genuine issue requiring a hearing with respect to the issues identified by Union.

A recent decision of the Superior Court of Justice describes the factors a court should consider on the hearing of a summary judgment motion:

> The new rule does not change the burden of a party in a summary judgment motion. Rule 20.01 provides that a party who seeks summary judgment must move with supporting affidavit material or other evidence to support its motion. Pursuant to Rule 20.02(2), a responding party "may not rest solely on the allegations or denial in the party's pleadings but must set out affidavit material or other evidence, specific facts showing there is a genuine issue requiring a

trial". In other words, consistent with existing jurisprudence, each side must "put its best foot forward." The court is entitled to assume that the record contains all the evidence which the parties will present if there is an actual trial, although in some circumstances the interests of justice may require that a material issue should be determined at trial, upon a full evidentiary record.[3]

As proceedings before the Board are not, strictly speaking, governed by the Rules of Civil Procedure, the Board does not necessarily expect that every provision of every Rule be strictly followed on all occasions; or that every decision of the courts relating to the Rules will always apply before the Board. Indeed, the Board has its own *Rules of Practice and Procedure*, though it is not uncommon for the Board to refer to the Rules of Civil Procedure where something is not addressed in detail in its own rules.[4] The Board does accept, however, that the court's guidance in the Cuthbert decision should be followed on summary judgment motions before the Board – in other words, that parties should be expected to put their best foot forward.

Relief Sought by Applicants

Prior to 1993, the Applicants entered into a number of agreements with Ram, in particular petroleum and natural gas lease agreements, and gas storage agreements (the "Pre-1993 Agreements"). The Pre-1993 Agreements were assigned to Union in 1989 through a consent agreement. The Application alleges that Union has committed various breaches of the Pre-1993 Agreements, and that the Applicants are entitled to further compensation.

The Application was filed with the Board on March 16, 2011. The Applicants seek a determination that the contracts listed in Schedule A to the Application have been terminated and an order for the following damages from the Respondents:

a) damages against the Respondent Ram for misrepresentation and breach of contract in the amount of $2,500,000;
b) damages against both Respondents for negligence in the amount of $2,500,000;

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[3] *Cuthbert v. TD Canada Trust*, 2010 ONSC 830, para. 12.
[4] In the context of the Board's Rules, a motion for summary judgment is essentially akin to a motion to dismiss without a hearing (Rule 8 and Rule 18). The Board's ultimate authority to dismiss a matter without a full hearing comes from section 4.6 of the *Statutory Powers Procedure Act* ("SPPA"). As required by both Rule 18 and section 4.6 of the SPPA, the Board has allowed the Applicants to make full submissions on the proposed dismissal.

c) damages against both Respondents for loss of income in the amount of $1,500,000;
d) damages against the Respondents for unjust enrichment in the amount of $2,000,000;
e) damages for storage of natural gas on and in the Applicants' lands without a contractual right estimated at the amount of $2,500,000 or the disgorgement of all net profit from the date of termination of the contracts to the date of termination of storage;
f) damages for nuisance against the Respondent Union in the amount of $1,500,000;
g) punitive damages for Union operating a gas storage system on the Applicant's land and for dealing with the Applicants in a high handed manner without due regard for their rights in the amount of $10,000,000;
h) prejudgment and post judgment interest in accordance with the Courts of Justice Act or a reasonable equitable interest to be determined by the Board; and
i) the Applicants' costs of these proceedings.

Positions of the Parties respecting the motion

Union makes two arguments concerning why the Board should not hear any portions of the application relating to the Pre-1993 Agreements: there was significant delay in seeking the relief on the part of the Applicants; and that almost all of the claims for compensation are futile because Union has binding compensation agreements with the Applicants (which, together with the Designation Order, have superseded all the Pre-1993 Agreements).

Union alleges that the particulars with respect to the Applicants' claims regarding the pre-1993 agreements were known, or ought to have been known, for between 16 and 21 years, depending in the claim in question. Union states that the Applicants did not bring these claims to court until 2008; and, after the claims were dismissed by the Court of Appeal, delayed almost another year before filing the current application with the Board. Union argues that these delays are unreasonable, and the Board should decline to hear this portion of the Application on this basis.

Union further argues that, delay issues aside, any hearing related to the pre-1993 Agreements would be a waste of time as those agreements were replaced in 1993 by the Designation Order and in 2004 by the Compensation Order. Union argues that the

Designation Order grants it the rights to "inject gas into, store gas in and remove gas from ... Edys Mill Pool ... and to enter into and upon the land in the area and use land for such purposes..." In addition, Union reached a full settlement with the Applicants with respect to all compensation issues for the period 1999-2008, which was approved through an order of the Board in 2004 (the "Compensation Order"). Union has also entered into an agreement with the Knights for the period 2009-2013. Union concedes that it has no specific compensation agreement with Snopko and McMurphy for the period since 2009, and is not seeking to have that portion of the Application dismissed through this motion.

The Applicants argue that Union's assertions with respect to the futility of the Applicants' claims are not relevant to most of the Applicants claims, and are not an appropriate basis for a claim for summary judgment. The Applicants further argue that Union has breached the conditions of the Designation Order, and that Union therefore enjoys no rights under the Designation Order.

Union responds that the import of the Pre-1993 Agreements is in fact a cornerstone of the Application, and that the Applicants' submissions on this motion have done nothing to rebut Union's assertions that any request for relief relating to the Pre-1993 Agreements is futile. Union further responds that the Applicants' claims that Union has breached the Designation Order have not been supported by any evidence, and are in any case irrelevant to the current proceeding as the appropriate remedy for such a breach would be an application to amend or revoke the Edys Mills Pool pursuant to s. 36.1(1)(b) of the Act.

Board Decision

A. Standing versus jurisdiction

Section 38 or the Act provides:

38. (1) The Board by order may authorize a person to inject gas into, store gas in and remove gas from a designated gas storage area, and to enter into and upon the land in the area and use the land for that purpose. 1998, c. 15, Sched. B, s. 38 (1).

Right to compensation

(2) Subject to any agreement with respect thereto, the person authorized by an order under subsection (1),

(a) shall make to the owners of any gas or oil rights or of any right to store gas in the area just and equitable compensation in respect of the gas or oil rights or the right to store gas; and

(b) shall make to the owner of any land in the area just and equitable compensation for any damage necessarily resulting from the exercise of the authority given by the order. 1998, c. 15, Sched. B, s. 38 (2).

Determination of amount of compensation

(3) No action or other proceeding lies in respect of compensation payable under this section and, failing agreement, the amount shall be determined by the Board. 1998, c. 15, Sched. B, s. 38 (3).

Appeal

(4) An appeal within the meaning of section 31 of the *Expropriations Act* lies from a determination of the Board under subsection (3) to the Divisional Court, in which case that section applies and section 33 of this Act does not apply. 1998, c. 15, Sched. B, s. 38 (4); 2003, c. 3, s. 31.

The Applicants argue that the Board has jurisdiction over the matters for which they seek relief, and that the Board should therefore proceed to hear the case on its merits. They point out that the recent Court of Appeal decision (which dealt with the same prayer for relief) confirmed that the Board has exclusive jurisdiction over compensation for issues relating to gas storage, and that Union has repeatedly expressed the same opinion. As no one appears to challenge the Board's jurisdiction over this matter, the Applicants submit that the matter should not be dismissed at the pre-hearing stage.

Union argues in its response that the Applicants have confused jurisdiction with standing. Union accepts that the Board has exclusive jurisdiction over just and equitable compensation for gas storage pursuant to section 38 of the Act. What Union challenges is the Applicants' standing to bring these matters to the Board in the current case. Union states that although the Board has exclusive jurisdiction to deal with just and equitable compensation under the Act, no person has standing to raise an issue of just and reasonable compensation under the Act where that person is a party to an existing, unchallenged agreement dealing with compensation. As described below, it is

Union's position that the Applicants (with the exception of the Snopko and McMurphy claims from 2009 onwards) have existing and unchallenged agreements with Union respecting compensation. Union further argues that that the majority of the Applicants' claims are time barred, as they were aware, or should have been aware, of the claims for at least 16 years before they came to the Board.

The Board agrees with both parties that it has the jurisdiction to hear all claims relating to just and equitable compensation for the storage, injection, and removal of gas from the subject lands. Indeed, the Ontario Court of Appeal confirmed the Board's jurisdiction in this regard in the Snopko decision.[5] The mere existence of jurisdiction, however, does not automatically amount to a genuine issue requiring a hearing. On a motion for summary judgment, the Applicants must "put their best foot forward" and satisfy the Board that they are at least potentially entitled to some actual relief with respect to their application.

B. The Right to Inject, Store and Remove Natural Gas, and the Designation Order

The Board finds that Union's rights to inject gas into, store gas in and remove gas from the Edys Mill Pool, and to enter into and upon the land in the area and use land for such purposes is governed solely by the Designation Order, and has been since 1993. The Designation Order supersedes any previous agreements with respect to Union's rights to inject, store and remove gas. Whether previous contracts between the parties relating to the right to inject, store or remove gas have been formally cancelled or not is essentially irrelevant as these rights are now governed by the Designation Order.

Although the Applicants alleged in its responding argument that Union had committed unspecified breaches of the Designation Order, they provided no evidence or particulars to support this contention. Even if there had been breaches of the Designation Order (which was not alleged in the pre-filed Application) it is not clear that such breaches would be the proper subject of a hearing under section 38 of the Act. Section 36.1 of the Act addresses amendments or revocations of designation orders, and the Applicants have sought no relief under this section of the Act. Regardless, there would be no basis for any finding in this proceeding that Union has committed any breaches of the Designation Order. Any claims for damages based on Union not having the right to inject, store, or remove gas from the Applicants properties, or for having breached the Designation Order, are therefore dismissed.

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[5] Pp. 7-9.

C. Just and Equitable Compensation

It is agreed by both parties that the Board, absent an agreement regarding compensation by the parties, has complete jurisdiction over all compensation issues relating to the injection, storage and removal of gas from the Edys Mill Pool since that time. The Board agrees with Union, however, that the issue on this motion with respect to compensation is not so much one of jurisdiction, but one of standing. For the reasons described below, the Board dismisses all claims regarding the sufficiency of compensation paid by Union to the Applicants, with the exception of amounts possibly owing to Snopko and McMurphy for the period 2009 forward.

Pre-Designation Order

Prior to the Designation Order, the Board had no jurisdiction over gas storage (or compensation related thereto) on the Applicants' lands. The Board will therefore not consider any compensation claims relating to the period prior to the imposition of the Designation Order in 1993.

1993 to 1999

Prior to the effective date of the Compensation Order (see below), Union either took over from Ram or entered into various agreements with the parties that covered compensation for gas injection, removal and storage (the "Gas Storage Leases"). Although the Gas Storage Leases were not reviewed or approved by the Board, the Act is clear that the Board is only responsible for setting just and equitable compensation where the parties cannot reach an agreement.

There has been no suggestion by the Applicants that Union did not pay the compensation owing under the Gas Storage Leases for the period from 1993 to when the Compensation Agreement came into effect in 1999. The Applicants have not suggested that the portions of the Gas Storage Leases dealing with compensation were not binding. The Board therefore has no basis upon which it could make any determination that further compensation for this period is appropriate, and dismisses all claims for additional compensation for the period 1993-1999.

The Compensation Order (1999-2008)

The Compensation Order, which was binding on all of the parties to this proceeding, specifically covered all claims that were, or could have been, raised in that application. [6] In other words, the Compensation Order covered all compensation matters over which the Board has jurisdiction for the period 1999-2008. As these matters were dealt with in a final manner by the Board in the Compensation Order, no party affected by it may seek additional or other relief for the period of time it covers. The fact that the Board has jurisdiction over compensation does not mean that the Board can revisit the issue. The Board will therefore not hear any portions of the Application which relate to compensation for the 1999-2008 period.

2009 to 2013

The Board will not hear any portion of the Application relating to compensation for the Knights for the period after 2008, as they accepted the terms of the 2007 Compensation Agreement which covers the period 2009-2013. However, the Applicants are requested to advise the Board in writing if they wish to proceed with the claims in the Application by Snopko and McMurphy for compensation post-2008, as Snopko and McMurphy are not signatories to the 2007 Compensation Agreement.

Damages respecting roadway acreage

The Application raises the issue of compensation for roadway acreage for Snopko. The exact amount being sought is not itemized, and is presumably subsumed within the headings of damages described at paragraph 41 of the Application. Union argues that it entered into a complete and final agreement (the Roadway Agreement") with Snopko in 1992 respecting compensation for roadways on her property, and that she therefore can be permitted to no further compensation through this Application. The Applicants do not directly respond to this submission in their responding motion record.

The Roadway Agreement (a copy of which was provided as an exhibit to the Wachsmuth affidavit) is a full and final release for roadways located on Snopko's property. The Board agrees with Union that the Roadway Agreement precludes Snopko from seeking further compensation with respect to roadways, and it will not entertain any claims for relief in this regard.

Unreasonable delay

[6] Union motion record, p. 1682.

Given the findings above, the Board does not consider it necessary to address Union's argument that the relief sought relating to the Pre-1993 Agreements should be dismissed on account of unreasonable delay, and the Board makes no findings in this regard.

Conclusion

As described in greater detail above, the Board dismisses all claims relating to Union's rights to inject, store, or remove natural gas from the Applicants' lands. Irrespective of the Pre-1993 Agreements, the terms and conditions upon which Union holds these rights are now solely governed by the Designation Order. No specific breaches of the Designation Order have been alleged, and there would be no basis for the Board to make any findings in this regard.

The Board also dismisses all claims for just and equitable compensation, save for those made by Snopko and McMurphy for the period after 2008. Prior to 1993, the Board has no jurisdiction over just and equitable compensation. From 1993-1998, compensation issues were covered by Gas Storage Leases, and no party has suggested that Union did not make the appropriate payments. From 1999-2008, all compensation issues were covered by the Compensation Order and the subsequent agreements Union reached individually with all of the Applicants. For the period 2009-2013, the Knights have entered into another agreement with Union regarding compensation. The Board will not overturn any of these agreements, and indeed no party has even specifically requested that it do so. The only remaining issue is whether Snopko and McMurphy are entitled to any additional compensation after 2008, and the Board will hear this issue if the Applicants choose to pursue it.

The Applicants are requested to advise the Board in writing if they wish to proceed with the claims in the Application by Snopko and McMurphy for compensation post-2008.

ISSUED at Toronto, December 8, 2011
ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary

TAB 12

RP-2003-0044

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

AND IN THE MATTER OF applications by Centre Wellington Hydro, Veridian Connections Inc., EnWin Powerlines Ltd., Erie Thames Powerlines Corp., Chatham-Kent Hydro Inc., Essex Powerlines Corp., Cooperative Hydro Embrun Inc. and Hydro One Networks Inc. pursuant to subsection 74(1) of the *Ontario Energy Board Act, 1998* to amend Schedule 1 of their Transitional Distribution Licences.

AND IN THE MATTER OF a ruling regarding the limits of the Board's jurisdiction with respect to existing customers in service area amendment applications.

BEFORE:

Paul Sommerville
Presiding Member

Cathy Spoel
Member

DECISION

The Board received a number of applications from licensed electricity distributors seeking amendments to expand their service areas. By Procedural Order No.1, dated March 28, 2003, the Board combined this group of applications into a single proceeding. The purpose of this combination of cases was to enable the Board to consider the issues raised by service area amendment applications and to develop, to the extent possible, a series of principles to assist the Board in its consideration of current and future like applications. With the exception of a small number of applications which, for circumstances unique to each, were heard and determined on an expedited basis, all the outstanding service area amendment applications will be determined in the course of the combined proceeding.

The combined proceeding has been assigned file No. RP-2003-0044.

11 The Board has issued an Issues List for the combined proceeding and the Board has received some written filings from the applicants and intervenors in the proceeding directed to the development of a series of principles to guide the Board in its consideration of service area amendment applications, and expects to receive more.

12 During the Issues Conference a number of parties expressed interest in receiving from the Board a ruling regarding the scope of its jurisdiction in the consideration of service area amendments with respect to existing customers. The Board agreed to expedite the hearing of this jurisdictional issue. Accordingly, the Board issued Procedural Order No. 4, which invited parties to the proceeding to make submissions on the jurisdictional issue. Written submissions were received and considered by the Board, and oral submissions were provided at a hearing on May 20, 2003.

13 This ruling arises from that hearing.

14 Any consideration of the scope of the jurisdiction of the Board on any subject begins with the basic proposition that the Board has no inherent jurisdiction. Such powers as it has stem from, and are strictly limited by, the enabling legislation. An equally fundamental proposition is that where powers have been bestowed upon the Board by enabling legislation, the Board cannot, without justification which must itself be provided for within the enabling legislation, refuse to exercise them.

15 Several sections of the *Ontario Energy Board Act, 1998*, S.O. 1998, c.15 Sch. B ("the Act") confer jurisdiction on the Board to determine and amend electricity distributor service areas. Sections 63 and 65 of the Act confer joint jurisdiction on the Board and the Director of Licensing to issue distribution licences. Subsection 70(11) of the Act requires that a licence specify the area in which the distributor is authorized to distribute electricity.

16 Section 74(1) of the Act explicitly authorizes the Board to consider applications for amendments to licences and to grant them where it finds it in the public interest to do so:

17
> 74(1) Subject to subsections (2) and (3), the Board may, on the application of any person, amend a licence if it considers the amendment to be,
>
> (a) necessary to implement a directive issued under section 27, 27.1 or 28; or
>
> (b) in the public interest, having regard to the objectives of the Board and the purposes of the *Electricity Act, 1998*.

18 Subsections 74(2) and 74(3) are not relevant to the issues before us.

19 In addition, subsection 70(6) of the Act explicitly addresses the question of the non-exclusivity of licence service areas:

20

> 70(6) Unless it provides otherwise, a licence under this Part shall not hinder or restrict the grant of a licence to another person within the same area and the licensee shall not claim any right of exclusivity.

21

Taken together these provisions of the Ontario Energy Board Act unequivocally establish the Board's jurisdiction to specify and expand or reduce service areas by way of licence amendment even where such amendments will result in overlapping service areas, provided that the Board finds that it is in the public interest to do so.

22

It was argued by some of the parties that the Board's jurisdiction to so amend service areas is limited by the application of Subsection 70(13) and a general, presumed prohibition against the expropriation of assets without compensation.

23

Subsection 70(13) provides as follows:

24

> 70(13) A licence under this Part shall not require a person to dispose of assets or to undertake a significant corporate reorganization.

25

The line of reasoning advanced by some parties urging the Board to regard this subsection and a presumed prohibition against expropriation without compensation as a restraint on the Board's authority to grant licence service area amendments that may effect existing customers consists essentially of the proposition that granting such service area amendments is tantamount to a confiscation of existing distribution assets. These parties assert that assets used in providing service to existing customers become devalued or stranded when a competing distributor is granted rights to serve in the same area. This stranding or devaluation of the incumbent assets is equivalent, they argue, to a compelled disposition of those assets, and is therefore prohibited.

26

This argument fails on a number of grounds.

27

First, not every order which may affect existing customers will involve a devaluation or stranding of assets. The facts in each application will determine whether assets may be stranded.

28

Second, it is the Board's view that the prohibition in Subsection 70(13) operates only where a licence requires a disposition of assets by a person. It is our view that unless the Board's order required the disposition of assets, the subsection would have no application.

29

Further, if an order of the Board did result in some devaluation or stranding of assets, the simple determination that assets had become devalued or stranded is not by any reasonable interpretation a forced disposition or any species of confiscation. The stranding of or devaluation of incumbent distribution assets may be an important consideration for the Board in its determination of the public interest, and is an essential question in any licence amendment application, but it is not a circumstance which operates to deny the Board jurisdiction per se. The Board finds that the prohibition in subsection 70(13) does not restrict the Board's jurisdiction to consider or grant every licence serv-

ice area amendment application which may affect existing customers. The section may operate to limit the Board's powers in respect of some applications, but the effect of the subsection will depend on the facts of the individual case.

30 An argument was made by some parties that customers of distribution systems were themselves a species of asset of the distribution service provider. Under this line of reasoning, granting an application for an expansion of service area into an incumbent's service area would or could have the effect of forcing the disposal of such "assets" in a manner that contravened the prohibition contained in Subsection 70(13).

31 While the ongoing business of a company may for certain purposes be characterized as "goodwill" and treated as an asset of that company, the Board does not agree that it goes so far as to allow the characterization of individual customers as assets of a business in this context.

32 Third, the Board does not accept that any service area amendment involving existing customers will necessarily involve expropriation without compensation. It is not clear that the devaluation or even the stranding of assets constitutes expropriation. Further, the Board is empowered through the operation of Subsection 70(2) (c) to require a successful applicant to enter into agreements which can redress any demonstrable inappropriate prejudice to an incumbent service provider and to ensure that compensation is provided.

33 Subsection 70(2)(c) provides in part as follows:

34 70(2) The conditions of a licence may include provisions,

(a) specifying the period of time during which the licence will be in effect;

(b) requiring the licensee to provide, in the manner and form determined by the Board, such information as the Board may require;

(c) requiring the licensee to enter into agreements with other persons on specified terms (including terms for a specified duration) approved by the Board relating to its trading or operations or for the connection to or use of any lines or plant owned or operated by the licensee or the other party to the agreement;

35 By this means a diminution of value in or stranding of incumbent assets which the Board considers to be contrary to the public interest can be addressed. The Board's consideration of the public interest could, in such circumstances, be at least partially dependent on the completion of an appropriate contractual arrangement.

36 If the legislature had intended to inhibit competition for distribution customers and prevent their migration to other providers, it could have done so explicitly. In fact, in providing for the presumption of non-exclusivity of service areas in subsection 70(6), and endowing the Board with the power to amend licences in subsection 74(1), it is clear to the Board that the legislature intended that the Board exercise a very broad jurisdiction with respect to licensing in general and service areas in

particular, provided that the public interest is protected. In subsection 70(2)(c) the Legislature has provided the Board with a tool to address circumstances where the protection of the public interest requires an arrangement between the incumbent service provider and the new participant.

37 In summary, the Board finds that neither subsection 70(13) nor the avoidance of expropriation without compensation removes all jurisdiction in the Board to consider and grant service area amendment applications involving existing customers. Not every order affecting existing customers will involve asset devaluation or stranding. Even if asset devaluation or stranding is involved, this may not constitute forced disposition or expropriation without compensation. In some cases, depending on the facts, the nature or breadth of the order the Board can make may be restricted by s.70(13) and the need to avoid expropriation without compensation. However, the Board is of the view that these factors do not operate as a jurisdictional bar to consideration of service area amendment applications which involve existing customers.

38 Having reached this conclusion, the Board wishes to state that it is very aware of the serious public interest concerns involved in granting service area amendment applications that affect existing customers. The Board will consider very seriously both the regulatory policy issues and the practical implications of such applications.

39 **DATED** at Toronto, June 23, 2003.

40 ONTARIO ENERGY BOARD

_____

Paul Sommerville
Presiding Member

_____

Cathy Spoel
Member

Ontario Energy Board | Commission de l'Énergie de l'Ontario

RP-2003-0044

IN THE MATTER OF APPLICATIONS BY

Centre Wellington Hydro	**EB-1999-0269**
Veridian Connections Inc. (1)	**EB-1999-0260**
Enwin Powerlines Ltd.	**EB-1999-0281**
Erie Thames Powerlines Corp.	**EB-2002-0462**
Chatham-Kent Hydro Inc.	**EB-1999-0216**
Essex Powerlines Corp.	**EB-2002-0524**
Cooperative Hydro Embrun Inc.	**EB-2002-0482**
Veridian Connections Inc. (2)	**EB-2003-0020**
Hydro One Networks Inc.	**EB-2003-0031**

FOR

AMENDMENTS TO THEIR LICENSED SERVICE AREA

DECISION WITH REASONS

2004 February 27

Ontario

RP-2003-0044

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

AND IN THE MATTER OF applications by Centre Wellington Hydro, Veridian Connections Inc., EnWin Powerlines Ltd., Erie Thames Powerlines Corp., Chatham-Kent Hydro Inc., Essex Powerlines Corp., Cooperative Hydro Embrun Inc. and Hydro One Networks Inc. pursuant to subsection 74(1) of the Ontario Energy Board Act, 1998 to amend Schedule 1 of their Distribution Licences.

BEFORE:

Paul Sommerville
Presiding Member

Arthur Birchenough
Member

Cathy Spoel
Member

DECISION WITH REASONS

February 27, 2004

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1 INTRODUCTION

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1.1 The Applications

14

Applications were filed with the Ontario Energy Board pursuant to subsection 74(1) of the *Ontario Energy Board Act, 1998*, S.O. 1998, c.15, Sched. B ("OEB Act"), by nine distributors for amendments to their licensed service area. The applicants and the Board's assigned file numbers are listed below:

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•	Centre Wellington Hydro	EB-1999-0269
•	Veridian Connections Inc. (1)	EB-1999-0260
•	Enwin Powerlines Ltd.	EB-1999-0281
•	Erie Thames Powerlines Corp.	EB-2002-0462
•	Chatham-Kent Hydro Inc.	EB-1999-0216
•	Essex Powerlines Corp.	EB-2002-0524
•	Cooperative Hydro Embrun Inc.	EB-2002-0482
•	Veridian Connections Inc. (2)	EB-2003-0020
•	Hydro One Networks Inc.	EB-2003-0031

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1.2 The Proceeding

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Notices of Application were published for all nine individual applications. Procedural Orders requesting submissions from intervenors and responding submissions from the applicants were issued with respect to Centre Wellington Hydro Ltd., Veridian Connections Inc.(1), and Chatham-Kent Hydro Inc. The Board received submissions and requests from intervenors to deal with these applications by way of oral hearings.

18

On March 28, 2003, the Board issued Procedural Order No. 1 combining the nine individual proceedings into one proceeding. The purpose of this combination of cases was to enable the Board to consider the issues raised by service area amendment applications and to develop, to the extent possible, a series of principles to assist the Board in its consideration of current and future like applications.

19

The Board assigned file number RP-2003-0044 to this combined proceeding. All applicants and intervenors to the individual proceedings became parties to the single combined proceeding. The Board indicated that it intended to proceed in this matter by way of an oral hearing. Given the potential for the issues raised to affect other parties, particularly distributors, the Board considered it appropriate to make provision for the intervention of persons other than those already party to one of the individual proceedings. A schedule for the filing of evidence and for an interrogatory process was set out in Procedural Order No. 1, and later extended in Procedural Orders No. 5 and No. 6.

1.3 Parties

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The following parties participated in the combined proceeding RP-2003-0044:

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	Applicants	Representative(s)
1	Centre Wellington Hydro Ltd. (Centre Wellington)	Mr. Andy Chan Mr. Mike McLeod Mr. Doug Sherwood
2	Chatham-Kent Hydro Inc. (Chatham-Kent)	Mr. Tom Brett Mr. James Fisher Mr. Jim Hogan Mr. David Kenney Mr. Raymond R. Payne
3	Cooperative Hydro Embrun Inc. (Embrun)	Mr. Benoit Lamarche
4	ENWIN Powerlines Ltd. (ENWIN) one of SW Applicants	Ms. Giovanna Gesuale Ms. Carol Godby Mr. David Southam
5	Erie Thames Powerlines Corporation (Erie Thames) one of SW Applicants	Mr. Jeff Pettit Ms. Carol Godby Mr. David Southam
6	Essex Powerlines Corporation (Essex) one of SW Applicants	Mr. Mark Aliner Mr. Raymond Tracey Ms. Carol Godby Mr. David Southam

7	Hydro One Networks Inc. (Hydro One)	Ms. Mary Anne Aldred Mr. Michael Engelberg Mr. Brian Gabel Mr. Blair Macdonald Mr. Glen MacDonald Ms. Anne Powell Mr. Donald Rogers
8	Veridian Connections Inc. (Veridian)	Mr. George Armstrong Mr. Andy Chan Mr. Mike McLeod Mr. Axel Starck

	Intervenors	**Representative(s)**
9	Barrie Hydro Distribution Inc.	Ms. Barb Gray
10	Bluewater Power Distribution Corporation	Ms. Janice L. McMichael
11	Boniferro Mill Works Inc.	Mr. Jim Boniferro Mr. Robert W. Reid
12	Brantford Power Inc. a member of LDC Coalition	Mr. George Mychailenko Mr. J. Mark Rodger Mr. James C. Sidlofsky
13	Chatham & District Chamber of Commerce	Mr. Reg MacDonald
14	County of Hastings / Hastings Manor	Mr. J. Colin Rushlow

15	Electricity Distributors Association (EDA)	Ms. Kelly Friedman Mr. Charlie Macaluso Mr. Wayne Taggart
16	Enersource Hydro Mississauga Inc. a member of LDC Coalition	Mr. Chris Buckler Mr. J. Mark Rodger Mr. James C. Sidlofsky
17	FortisOntario Inc.	Mr. Tom Brett Mr. Timothy Curtis
18	Grand River Raceway / The Woolwich Agricultural Society	Dr.C. E.(Ted) Clarke
19	Great Lakes Power Limited	Mr. Jim Deluzio Mr. Charles Keizer Mr. Andrew Taylor
20	Hamilton Hydro Inc. a member of LDC Coalition	Mr. Cameron McKenzie Mr. J. Mark Rodger Mr. James C. Sidlofsky
21	Hydro Connection Inc.	Mr. Paul Jemmett

22	Hydro One Networks Inc. (Hydro One)	Ms. Mary Anne Aldred Mr. Michael Engelberg Mr. Brian Gabel Mr. Blair Macdonald Mr. Glen MacDonald Ms. Anne Powell Mr. Donald Rogers
23	Hydro Ottawa Limited a member of LDC Coalition	Ms. Lynne Anderson Mr. J. Mark Rodger Mr. James C. Sidlofsky
24	Hydro Vaughan Distribution Inc. a member of LDC Coalition	Mr. Eric Fagen Mr. James C. Sidlofsky
25	Local Union 636 of the International Brotherhood of Electrical Workers	Mr. J. R. Wacheski
26	Markham Hydro Distribution Inc. a member of LDC Coalition	Ms. Paula Conboy Mr. James C. Sidlofsky
27	Milton Hydro Distribution Inc.	Mr. Don Thorne
28	Municipality of Central Elgin	Mr. Lloyd Perrin Ms. Carol Godby Mr. David Southam
29	Municipality of Chatham-Kent	Mr. Brian Knott Mr. Jim Wickett

30	Municipality of Leamington	Mr. William J. Marck Ms. Carol Godby Mr. David Southam
31	Newmarket Hydro Ltd.	Ms. Gaye-Donna Young
32	Oshawa PUC Networks Inc.	Ms. Christine Dade
33	Power Workers' Union (PWU)	Mr. Andrew Lokan Mr. Richard P. Stephenson
34	Richmond Hill Hydro Inc.	Mr. Mike Psotka
35	St. Catharines Hydro Utility Services Inc. a member of LDC Coalition	Mr. John Kerklaan Mr. J. Mark Rodger Mr. James C. Sidlofsky
36	The Corporation of The City of Windsor	Mr. Mark Nazarewich Ms. Carol Godby Mr. David Southam
37	The Corporation of the Town of Tecumseh	Ms. Laura Moy Ms. Carol Godby Mr. David Southam
38	Toronto Hydro- Electric System Limited (Toronto Hydro)	Mr. Rick Zebrowski Ms. Colleen Walwyn Mr. J. Mark Rodger

39	Town of Amherstburg	Mr. Dave Mailloux Ms. Carol Godby Mr. David Southam
40	Township of Centre Wellington	Mr. Brett Salmon
41	Upper Grand District School Board	Mr. Tom Smith
42	Vulnerable Energy Consumers Coalition (VECC)	Mr. Michael Janigan Mr. Bill Harper Ms. Sue Lott
43	Westario Power Inc. (Westario Power)	Mr. Guy Cluff Mr. Scott Stoll
44	Wirebury Connections Inc. (Wirebury)	Mr. David Matthews Mr. Dennis O'Leary
45	Ontario Energy Board Staff	Ms. Jennifer Lea Mr. David Brown Mr. Robert Gordon Mr. Gordon Ryckman Ms. Judy Duan

Expert Witnesses

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25

- Mr. David Southam from RDII Utility Consulting & Technologies Inc. on behalf of the Southwest Applicants

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- Dr. John Chamberlin and Dr. Bruce Humphrey from KEMA-Quantec Incorporated on behalf of Hydro One

27 • Dr. Adonis Yatchew from University of Toronto on behalf of Toronto Hydro and the LDC Coalition

28 • Mr. John Todd from Elenchus Research Associates on behalf of Wirebury

29 ## 1.4 Issues

30 Procedural Order No.1 expressed the Board's intent to develop principles to ensure a consistent approach to service area amendment applications. To focus this process the Board prepared a draft issues list. The Board directed that an Issues Conference be held on April 29, 2003 to enhance and finalize the draft issues list and that an Issues Day proceeding take place on May 1, 2003. Procedural Order No. 2 rescheduled these events and made provision for certain filings.

31 On May 6, 2003, the Board issued Procedural Order No. 4 approving the Issues List for the Combined Proceeding. The Board panel accepted the Proposed Issues List, including a Supplemental Issues List, which was developed and accepted by all parties at the Issues Conference. As a result of this consensus, the Issues Day scheduled for May 2, 2003 was cancelled.

32 During the Issues Conference a number of parties expressed interest in receiving from the Board a ruling regarding the scope of its jurisdiction in the consideration of service area amendments with respect to existing customers. The Board agreed to expedite the hearing of this jurisdictional issue. Accordingly, the Board, in Procedural Order No. 4, invited parties to the proceeding to make submissions on the jurisdictional issue. Written submissions were received and considered by the Board, and oral submissions were provided at a hearing on May 20, 2003. The Board issued its Decision on the jurisdictional issue on June 23, 2003.

33 ## 1.5 Critical Connection Hearings

34 On April 17, 2003, the Board issued Procedural Order No. 3 which indicated that applications from Embrun (EB-2002-0482), Chatham-Kent (EB-1999- 0216), Centre Wellington (EB-1999-0269) (only with respect to supply of Grand River Raceway), and Veridian (2) (EB-2003-0020) might have to be dealt with on an urgent basis in response to information filed by these parties regarding critical in-service requirements. The Board stated that it would hear these requests for expedited amendment orders in oral hearings. The Board further indicated that decisions regarding these specific applications would not set precedents for future decisions, might be interim in nature, and might contain certain conditions or restrictions deferring to the final decision of the Board in the combined proceeding.

35 The expedited applications were heard and decided as follows: Centre Wellington on May 12, 2003, Veridian on May 13, 2003, Chatham-Kent on May 14, 2003, and Embrun on May 15, 2003.

36 The remaining individual applications are outstanding, awaiting this decision of the Board on the principles to be considered in service area amendment applications.

1.6 Expert Evidence and Final Submissions on Principles

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38 On October 27, 2003, the Board issued Procedural Order No. 7 providing for the delivery of final oral submissions to the Board on the principles that should guide the Board in determining service area amendment applications and setting hearing dates for the remaining applications.

39 The Board subsequently received motions from Hydro One, Toronto Hydro and the LDC Coalition seeking a variance or cancellation of Procedural Order No. 7. The motions sought an opportunity to call evidence from certain expert witnesses. On November 7, 2003, the Board issued Procedural Order No. 8 suspending the dates for argument set out in Procedural Order No. 7, and made provision for the hearing of the motions.

40 On November 13, 2003, the Board heard and decided the motions. The motion of Hydro One was granted, and those of Toronto Hydro and the LDC Coalition were granted in part. The provisions made in Procedural Order No. 7 were varied so as to provide for an opportunity for the oral testimony of the following experts: Dr. John Chamberlin and Dr. Bruce Humphrey (Kema-Quantec), Dr. Adonis Yatchew, Mr. John Todd, and Mr. David Southam. The Board set dates for the filing of, and interrogatory process on, Dr. Yatchew's evidence.

41 The experts testified on December 15 to18, 2003. Final oral submissions by parties on the principles to be applied to service area amendments were made on December 18 and 19, 2003.

1.7 Access to the Record of the Proceeding

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43 Copies of the evidence, exhibits, arguments, interrogatory responses, and transcripts of the proceeding are available for review at the Board's offices. The Board, with industry participation, has developed standards and processes for the electronic regulatory filing ("ERF") of evidence, submissions of parties, Board orders and decisions. This Decision with Reasons will be available in ERF form shortly after initial copies are issued in hard copy. The ERF version will have the same text and numbered headings as the initial hard copy, but may be formatted differently.

44 The Board has considered all of the evidence, submissions and arguments in this proceeding, but has summarized the evidence and the positions of the parties only to the extent necessary to provide context for its findings.

2 LEGISLATIVE OBJECTIVES

Section 70(11) of the OEB Act requires that a licence specify the area in which a distributor is authorized to distribute electricity. Section 74(1) of the OEB Act allows the Board to amend electricity licences where the amendment is in the public interest. In exercising its power under section 74(1), the Board must have regard to the objectives of the Board as set out in section 1 of the OEB Act and the purposes of the *Electricity Act, 1998*, S.O. 1998, c. 15, Sched. A ("Electricity Act"). The objectives of the OEB Act relevant to this proceeding and the corresponding purposes of the Electricity Act are identical. In making determinations in the public interest respecting licensing matters, the Board will consider the objectives together with all other relevant considerations.

2.1 Facilitation of Competition and Non-Discriminatory Access

The first two objectives in the OEB Act in relation to electricity read as follows:

1 To facilitate competition in the generation and sale of electricity and to facilitate a smooth transition to competition.

2 To provide generators, retailers and consumers with non-discriminatory access to transmission and distribution systems in Ontario.

The SW Applicants and Wirebury argued that the word "sale" in the first objective includes the distribution of the commodity, not merely the retailing of electricity, and that it is therefore an important objective of the Board to facilitate competition in distribution. Wirebury further argued that the phrase "non-discriminatory access to ... distribution systems" implies competition in distribution. It argued that this interpretation of the Board's objectives is consistent with section 28 of the Electricity Act, which promotes customer choice by allowing customers to make a request for connection.

Hydro One and Toronto Hydro, among others, argued that the word "sale" in the first objective does not include distribution, and that where the legislature intended to govern "distribution" in section 1 of the OEB Act, it explicitly used that word. In their view, the absence of the word "distribution" in the first objective is a clear indication that the facilitation of competition in distribution was not intended. With regard to the second objective, Hydro One argued that non-discriminatory access does not mean the facilitation of customer choice for connections among common wires infrastructures in licensed service territories. Rather, the second objective refers to the ability of customers to purchase electricity from their choice of generator or retailer and the obligation of the monopoly wires transmitter and distributor to wheel this commodity to the customer.

VECC argued that the existence of the second objective demonstrated that the legislature did not intend that distribution services should be subject to competition. In its view, the only reason that

any reference to non-discriminatory access was needed was because distribution was intended and understood to be a monopoly business.

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Board Findings

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The Board is of the view that the phrase "sale of electricity" in objective 1 is intended to govern the sale of the commodity per se, and does not include distribution. The fact that the legislation does not refer explicitly to distribution in this objective, while doing so elsewhere in the OEB Act, is an important indication that the legislature did not intend to require the Board to facilitate competition in electricity distribution. This interpretation is reinforced by the following quotation from the Ministry of Energy's White Paper, Direction for Change:

56

> "However, transmission and local distribution remain natural monopolies, and are not amenable to direct competition"

57

This Paper, which was referenced by a number of Intervenors, was an important contributor to the policy development leading up to the creation of the new electricity market.

58

The Board agrees with VECC and others that objective 2 is a further indication that the legislators viewed distribution as a natural monopoly service. The Board finds that "non-discriminatory access" does not equate to competition, and that, in fact, the use of this language by the legislature reinforces our conclusion that the legislature regarded distribution to be a monopoly business. The ability of a customer to request a connection under section 28 of the Electricity Act does not imply that competition must exist in distribution.

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2.2 Protection of the Interests of Consumers

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The third objective reads as follows:

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3 To protect the interests of consumers with respect to prices and the reliability and quality of electricity service.

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Board Findings

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It was argued by some that the third objective reinforces the importance of customer preference in service area amendments. However, in the Board's view, the protection of consumer interests encompasses broader considerations than the immediate and narrow interest of a given consumer at a given point in time. In our view the term requires the Board to consider the protection of the interests of other consumers in the proposed amendment area, the remaining customers of each utility, and the interests of electricity consumers throughout the province, over a time period that includes more than the short-term implications of any given action. Individual customer preference must be balanced with the interests of all consumers with respect to prices and the reliability and

quality of electricity service. The preference of a particular customer or group of customers cannot be relied upon to yield results that are necessarily in the overall public interest.

64 The Board finds that the protection of the interests of the larger group of consumers affected by any service area amendment application must take precedence over the preference of any individual consumer. The more general interest of consumers will be protected through the rational optimization of existing distribution systems.

2.3 Economic Efficiency and Maintenance of a Financially Viable Industry

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66 Objectives 4 and 5 read as follows:

67 4 To promote economic efficiency in the generation, transmission and distribution of electricity.

68 5 To facilitate the maintenance of a financially viable electricity industry.

69 The Board heard a considerable body of expert evidence touching on the implications of these objectives for the Board's consideration of service area amendments. Each expert witness provided evidence on the question of what constitutes an economically efficient outcome in the distribution sector. Dr. Yatchew, on behalf of Toronto Hydro and the LDC Coalition, indicated that the preservation of economic efficiency in Board decisions on service area amendments would require:

70 • the maintenance of exclusive service areas

71 • preservation of economies of contiguity, density, and scale for the distribution system

72 • consistency with existing electricity networks

73 • smooth and contiguous service area boundaries

74 • favouring a connection at the lowest economic incremental cost.

75 Dr. Yatchew stated that electricity distribution is a spatial natural monopoly where the justification for exclusive service areas arises from the economies of contiguity and customer density that exclusivity achieves. Overlapping service areas or fragmentation of service areas through embedding would reduce overall economies of contiguity, density and scale. System planning would become less efficient and may be characterized by redundancies, competitive rushing to low cost, high density areas and avoidance of less dense areas with high service costs. This phenomenon is sometimes referred to as "cream skimming" or "cherry picking".

76 In the case of so-called “border competition” for connections that lie close to the boundary of two contiguous utilities Dr. Yatchew indicated that efficient service area amendment decisions could be made on the basis of least incremental cost of providing services. He argued that this approach should be tempered by a regard for the integrity of future system planning. The distributor with the least incremental cost of providing the connection should not always be the one chosen to make the connection. In addition, if choosing the lower incremental cost utility were to introduce a problematic lack of smoothness in utility boundaries, or would unreasonably complicate future planning processes then the decision should go the other way.

77 Mr. Todd, on behalf of Wirebury, drew a distinction between existing customers on the one hand and new customers in “unserved” and “underserved” locations on the other. With respect to existing customers, Mr. Todd accepted the standard view of the natural monopoly model that competition would likely not bring efficiency benefits and would also be unsustainable due to duplication of capital. However, with regard to new customers in unserved and underserved locations, Mr. Todd indicated that it was at least possible that efficiency benefits could be found, and losses avoided, if decisions on service area amendments focused directly on avoiding duplication of facilities rather than prohibiting competition per se.

78 Some parties criticized Mr. Todd’s distinction between existing customers, and unserved and underserved customers, as a weak or false distinction in practice. In their view, many distribution customers could at one time or another be considered unserved or underserved, leading to a situation where service area amendments involving those customers would bring about the harms to efficiency envisioned in Dr. Yatchew’s evidence.

79 Mr. Todd further testified that economic theory provides three broad categories of efficiencies: technical (producing a given output at minimum cost); allocational (making correct choices over varying quantities of alternative goods – for example how much electricity distribution versus natural gas distribution should be produced– as guided by appropriate price signals); and dynamic (correct timing of cost minimizing investments). In cases where no duplication of investment or other effort is anticipated, Mr. Todd expressed the view that competition between distributors could generate efficiency benefits in the technical and dynamic areas, but is unlikely to have a significant effect on allocational efficiency.

80 The SW Applicants argued that economic efficiency is promoted when an electricity distribution service area corresponds to municipal planning areas, as this correspondence promotes a more unified, timely and cost-effective municipal infrastructure servicing response. In their view, their proposal for overlapping service areas would also increase the contiguity, density, and economies of scale of the SW Utilities. Local economic development would be promoted by a match between municipal and electric distribution service areas.

81 Chatham-Kent suggested service area expansion to the municipal borders by the municipally owned distributor would improve rationalization of distribution assets. Distribution costs, including capital costs, operating and maintenance costs, and settlement costs with the IMO, would decrease as a result of fewer wholesale metering points, fewer substations and the reduction of non-distribution assets.

82 Hydro One argued that the introduction of competition into the distribution business and the potential for greater uncertainty for future load growth could have adverse impacts on credit ratings of incumbent distributors. In Hydro One's view, competition would result in a deterioration in utilities' earnings and financial profile and increased business risk. Hydro One noted that its credit rating and that of other distributors is based on their respective service territories being considered to be monopoly common carrier wires franchises, not subject to competition and boundary changes. Any downgrade would increase the cost of capital and place upward pressure on distribution rates. This would reduce economic efficiency in the sector as a whole.

83 **Board Findings**

84 The promotion of economic efficiency in the distribution sector is one of the Board's guiding objectives in the regulation of the electricity sector. The Board is persuaded that economic efficiency should be a primary principle in assessing the merits of a service area amendment application. Economic efficiency would include ensuring the maintenance or enhancement of economies of contiguity, density and scale in the distribution network; the development of smooth, contiguous, well-defined boundaries between distributors; the lowest incremental cost connection of a specific customer or group of customers; optimization of use of the existing system configuration; and ensuring that the amendment does not result in any unnecessary duplication or investment in distribution lines and other distribution assets and facilities. The Board recognizes that there may be applications where all these components of economic efficiency do not apply.

85 In addressing economic efficiency, applicants should demonstrate that the proposed amendment does not reduce economies of contiguity, density and scale, and preferably that the amendment enhances these economies. Generally, the applicant should be able to demonstrate that it can provide the lowest cost connection, and that the proposed connection is consistent with existing networks, avoiding duplication. An increase, or at least no decrease in the smoothness of the boundaries between the utilities is also desirable.

86 The Board does not believe that significant weight should be put on differences in current distribution rates even though current rates may be a significant factor in determining customer preference. In fact current rates, insofar as they are not a predictor of future rates, may misinform customer preference. As Dr. Yatchew indicated, an applicant demonstrating that its rates are lower than the rate of the incumbent utility would not be a satisfactory demonstration that its costs to serve the amendment area will be lower on a sustainable basis.

87 In its consideration of the economic efficiency of any given amendment proposal, an important factor will be the extent to which a proposal builds upon existing, well-developed electricity distribution assets from high or medium density systems. In many instances this will favour proposals that represent the extension of an existing local distribution system into a contiguous area. Proposals that are attempts to stretch distribution assets to create outposts of service will not be favoured.

88 The marked emphasis on economic efficiency which will characterize the Board's consideration of service area amendments related to connection proposals will also serve to give effect to the fifth objective, which concerns the maintenance of a financially viable industry.

89 A consistent application of the Board's emphasis on economic efficiency should result in connection decisions which optimize the existing infrastructure. This enhances the local distribution company's return on its investments, and should result in rewards for shareholders, and ratepayers. Ensuring that connection decisions are made on the basis of an effective use of existing infrastructure will create a system-wide, indeed a province-wide avoidance of unnecessary expenditures, and the attendant implications for electricity rates. Inefficient connection activities work to the prejudice of local distribution utilities, and their customers.

90 Further findings with respect to economic efficiency, and the implications of those findings on service area amendment applications, are found in section 4.3 of this Decision.

3 TYPES OF SERVICE AREA AMENDMENTS

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92 This proceeding examined three generic categories of service area amendments.

93 The first, overlap, would permit more than one distributor to serve a particular customer, group of customers or geographic area.

94 The second, embedding, would entail allowing an existing or newly licensed distributor to establish a distribution system nested within a host distributor's service area. Typically, the party seeking to embed would seek to establish a retail or distributor point of supply from the host utility. The embedded service area could be exclusive or overlapping.

95 The third, contiguous border amendments, would allow an existing distributor to seek to serve a customer, group of customers or geographic area that is contiguous to its service area but within the existing service area of the neighbouring distributor. Under this category, the licensed service area could be transferred from the incumbent to the applicant, or it could become an overlapping service area for both the applicant and incumbent distributor.

96 The individual applications in this proceeding are driven by two types of customer involvement. The first situation pertains to a specific customer or group of customers who have requested service from the applicant. The second type of amendment is not related to specific customers but to a request made as a result of municipal planning considerations. In these cases, an applicant seeks to expand its service territory out to a municipal boundary or to an area where there is expected to be future development and the need for either new or significantly expanded distribution facilities. The second situation often involves both new and existing customers.

97

3.1 Overlapping Service Areas

98 It has been proposed that in some circumstances overlapping service areas should be approved to allow more than one distributor to supply a service area. Within the area of overlap, two or more distributors would directly compete for new, and possibly existing, customers. The area of overlap could include the higher growth urban development area of municipalities or, as some parties have proposed, it could extend to the full municipal boundaries.

99

Experts' Evidence

100 Mr. Southam and Mr. Todd were the main proponents of overlap. Mr. Southam testified that overlap would be beneficial because it would allow both new and existing customers choice in their electrical distributor. Customers seeking electricity service within municipal boundaries often do not understand why they cannot be served by the local municipal distributor. He also indicated it would provide municipalities with greater input and control of the electrical infrastructure as it pertains to the implementation of economic development initiatives in the municipality.

101 Mr. Todd indicated the main benefit of overlap is the fact that it would introduce an element of competition to the distribution function that would create incentives for innovation, cost reduction and improved customer service. In his model there is no proposed switching of existing customers. Competition would only be for "unserved or underserved" customers. The winning distributor would then provide monopoly service. Mr. Todd did agree, however, that the use of an overlapping concept would result in a greater incentive for existing customers in the overlapping area to want to switch from a higher rate distributor to a lower rate distributor. Mr. Todd also indicated that if overlap were permitted, the amendment process would likely be less cumbersome since it would not require the processing and approval of many individual amendments. It would thus reduce regulatory burden on the Board and for distributors by reducing the number of individual amendment applications requiring Board approval of specific boundary changes.

102 Dr. Yatchew, Dr. Chamberlin and Dr. Humphrey argued against the overlapping concept.

103 Dr. Yatchew indicated that the introduction of overlapping service areas would result in higher costs overall. Customer density would tend to be diluted, resulting in higher average costs. There would also be increased potential for suboptimal capital planning or redundancies with more than one firm competing for customers in the area. There would be a tendency for distributors to rush to construct facilities to serve the most profitable customers and a tendency to avoid investment for supply of the less profitable customers in the overlapping area. This would increase the potential for inefficiencies and the need for additional regulatory scrutiny. Dr. Yatchew also indicated that establishing a reasonable benchmark for a PBR regime could be difficult because system evolution and customer growth would be less predictable.

104 Dr. Chamberlin and Dr. Humphrey from KEMA-Quantec indicated that with overlapping service areas, stranded cost and duplication of facilities would likely occur. They also indicated that with overlap there may be greater confusion about a distributor's obligation to serve and customer confusion about connection choices. Basic tasks such as operation, maintenance and storm recovery would also become more complex and costly, resulting in longer restoration times, reduced reliability and increased risk of electrical safety problems because of the duplication of lines, increased technical complexity and the need for additional safety protocols to permit more than one workforce to operate in the same area. Planning and load forecasting would become more complex and uncertain, resulting in greater business risk and associated increased cost of capital.

105 **Positions of the Parties**

106 Hydro One was of the view that there is no unserved area in Ontario's electricity distribution system. The Hydro One licence extends to those parts of the province not already included in the service area of any other distribution company, and where Hydro One has a distribution line. In its view, the incumbent distributor has already planned and built upstream assets in service areas. Overlapping or new embedded service areas will, in its view, lead to higher cost to the industry as a whole due to inefficiency evidenced by duplication of facilities, stranding of the incumbents' assets and financial uncertainty.

107 Westario supported permitting service area amendments which would result in overlapping service areas, arguing that it would allow for competition among distributors and benefit consumers. By providing a larger service area, the distributor is able to plan for the possibility of servicing other customers in that vicinity. Westario argued that overlap is administratively more efficient as it removes the necessity for many service area amendment applications.

108 In Westario's view, customers in the overlapping area should be allowed to choose their distributor. To prevent existing customers being adversely affected by a service area amendment, the customer switching cost should include the costs of reimbursing the incumbent for any stranding. The issue of stranding assets could be taken into account in any offer to connect.

109 Westario did not fully support the use of municipal boundaries for the licensed service areas. Electrical system and municipal boundaries may not be in concert with each other, and the physical infrastructure developed over time may provide the more efficient and practical solution. Westario supported more emphasis being placed upon the economics, service quality indicators and system reliability, rather than customer preference at the early stages of establishing a service area. However, once the service area is established, the ability of the customer to chose the distributor would assume increasing importance.

110 Wirebury supported overlapping service areas, arguing this would appear to be the most cost effective and efficient way to manage future competition for distribution services as per section 70 (6) of the OEB Act. In its view such an approach would augment an existing distributor's obligations to the customer, as any overlapped distributor would have the same obligations. Hydro One should continue to be the default electricity distributor. In Wirebury's view, service area amendments should not be limited to contiguous expansion as this would restrict the benefits of competition to new customers on the fringes of existing service areas.

111 The SW Applicants proposed overlapping distribution licences out to their municipal boundaries to incorporate new customers and increase their contiguity, density, and economies of scale. The SW Applicants assert that due to the progressive urbanization of rural areas, customers are demanding the service and rates associated with urban utilities. In their view, overlapping service areas would provide discernible benefits to customers in response to these demands. A distribution service area corresponding to municipal planning would ensure local economic development and an easier and more unified, standardized, timely and cost effective municipal servicing response. The SW Applicants are also of the view that permitting overlapping distribution service areas is the only lawful way to proceed.

112 The SW Applicants believe that all licensed distributors in an overlapping service area would have an obligation to serve any customer requesting connection. Customers should have non-discriminatory access to the distribution system, in exchange for just and reasonable charges. Moreover, there should not be any difference in the treatment of either new or existing customers. Factors that affect customers include current rates, serving advantages such as timeliness, cost and ease of connection and emergency response time and reliability. The distribution service to customers should be analysed on a case-by- case basis according to customer needs and the capacity and characteristics of distribution facilities in the vicinity. An overall cost-benefit analysis of service area amendments should not be used.

113 Veridian proposed that service area amendments should only be permitted which result from a rational expansion of a distributor's existing system or "managed competition". Its proposal would be limited to new customers in the overlapping service areas at the periphery of existing contiguous licensed distribution service areas, where new customers can connect to the distributor of their choice. A rational and efficient expansion of distribution infrastructure would be represented by the least cost connection, based on the discounted cash flow methodology in the Distribution System Code.

114 Veridian argued that the degree to which service areas should overlap would be based on the degree to which there are unserved or underserved areas with the potential for new customer growth. Veridian emphasized that decisions regarding which distributor will serve a customer in an unserved or underserved area must be made within very short time frames, well before the connection is required. Rates should not be considered when deciding on service area amendments.

115 Chatham-Kent believes that overlapping service territories are permitted under subsection 70(6) of the OEB Act and that in some circumstances overlapping will reduce the potential for the duplication of assets, and will help meet the Board's objectives to promote efficiency in the distribution system. Consideration should be given to the elimination or reduction of the duplication of distribution assets, minimization of load transfers and economic impacts on customers.

116 The PWU argues that overlapping service areas should not be permitted due to inefficiency. They will result in dilution of customer density, suboptimal planning and the potential for gaming. They will also lead to customer confusion and increased risks to worker safety.

117 VECC took the position that overlapping service areas should not be approved by the Board. First, overlapping service areas would increase costs for all utilities. Secondly, they would significantly increase the likely occurrence of underutilized and stranded assets. Thirdly, too much reliance would be placed on customer preference.

118 FortisOntario recommended that distributors be allowed to apply for overlapping service areas before specific developments create the need for more rushed decision making. The basis for decision making on the applications would be based on broad service territories in anticipation of future customers or potential development rather than actual development.

119 FortisOntario argued that customers in overlapping service areas should be allowed to choose their distributor. This would allow customers to select providers based on their own priorities, such as rates, connections charges, reliability and the quality of customer service. Making the choice available to customers would not constitute cherry picking, but rather, would reflect the underlying economic reality. Choice will ultimately provide benefits to all distribution customers while providing a degree of market discipline. Competition for customers provides a management incentive and forces a distributor to improve, such as offering new and innovative services.

120 In Toronto Hydro's view, overlapping service areas are not in the public interest, as they contribute to inefficiencies in electricity distribution. This includes the duplication of distribution infrastructure and confusion with respect to distributors' obligations to connect and serve customers. Potential

adverse impacts on incumbent distributors include the inability to recover stranded costs, cherry picking of high profit customers, higher borrowing costs resulting from lower growth potential, and a disincentive for long term planning. Current rates should have no bearing on service area amendments.

121 Toronto Hydro suggested that the "cherry picking" of high-value customers would have adverse impacts on system planning and the rates of remaining customers in the incumbent's service area. Where an incumbent has planned and expanded its distribution system to accommodate customers moving into the incumbent's service area, there is no merit in permitting the transfer of customers to the neighbouring distributor.

122 **Board Findings**

123 The main benefits of overlap were argued to be the provision of greater customer choice at the time of connection, and the ability to provide this choice in a timely and efficient manner with minimal regulatory requirements on the part of distributors and the Board. However, the Board has heard evidence that there are considerable risks that result from the creation of overlapping service areas. These include the loss of customer density and the economies resulting from it, inefficient capital planning processes and costly redundancies, and competitive rushing to attractive areas, or avoidance of unattractive areas. The Board finds that these risks are real, and will create economic inefficiencies and therefore additional costs to electricity ratepayers.

124 There are few, if any, examples of successful overlapping service area models elsewhere in the world. Almost all other jurisdictions employ exclusive service territories for electricity distribution. This seems to confirm the cautionary note sounded by Drs. Yatchew, Humphrey, and Chamberlin. Indeed, the electricity distribution business did not begin using an exclusive service areas model. The business was originally organized as an overlapping service area environment. The organization of the business evolved to its present state as a result of the recognition that a service area competitive model created inefficiencies in what is a natural monopoly. While there have been suggestions that technological change could create circumstances which would make overlapping service areas less inefficient, such changes have yet to materialize.

125 The existence of overlapping service areas complicates some of the most basic service requirements for a distributor, such as operation, maintenance and storm recovery. This has the potential to increase costs to the distributor and reduce customer confidence in reliability in the affected service area. Overlap has implications for safety, arising from duplication of lines and other assets, and increased technical complexity resulting in confusion in emergency situations. Additional safety protocols are required to permit two (or more) workforces to work in the same area.

126 In addition, overlap creates more complexity, uncertainty and risk with respect to load forecasting and planning of the distribution system. It is obvious that in a service area where two distribution entities have equal access to customers, and duplicative obligations to serve, that each will experience virtually unresolvable difficulties in developing reliable load forecasts, revenue projections, and capital spending plans. This kind of uncertainty must ultimately be reflected in the availability and cost of capital. At the end of the day, it is the customers who carry the burden for these fundamental problems in design.

127 Overlap is not necessary to allow customers some choice of distributor. Given the nonexclusive nature of service areas, some customers have the ability to request connection to an alternate distributor. It is hoped that the regulatory process associated with service area amendment applications will be minimal, once distribution system operators appreciate that only optimizing proposals will succeed. In the Board's view, the risks involved in the creation of overlapping service areas far outweigh the benefits.

128 The Board has considerable flexibility in establishing service areas, and in dealing with amendment applications. Section 70(6) of the OEB Act provides:

> 129 70(6) Unless it provides otherwise, a licence under this Part shall not hinder or restrict the grant of a licence to another person within the same area and the licensee shall not claim any right of exclusivity.

130 This section gives the Board a range of options, from creating overlapping service areas to prohibiting any incursion into service areas by making the licence explicitly exclusive. The Board has chosen a middle course; to issue licences with non-overlapping service areas, but to receive and consider applications for service area amendments that promote optimal use of distribution resources, and overall economic efficiency. Subject to the proposed connection being in the public interest, customers will be able to exercise a choice of distributor.

131 In summary, the Board finds that creating overlapping service areas is not an appropriate model for distribution in Ontario and should not be considered except in the most compelling circumstances. Except in special cases, when a service area amendment is granted, the service areas of both the applicant and incumbent distributor generally will be adjusted to ensure that the customer becomes part of the clearly defined territory of one or the other distributor, but not both.

132 The Board recognizes there are historic situations in Ontario where overlapping service areas exist, for example in the Cornwall area. In these situations, the Board would prefer not to impose a specific solution on the parties. Rather, the Board would look favourably upon consensual service area amendment applications, by the parties involved, which would either reduce or eliminate the service area overlap and allow for clearly defined, non-overlapping, smooth and contiguous service areas. The Board does not generally encourage the expansion of existing historic overlap areas or creation of new overlapping service areas to accommodate expansion of distribution systems.

3.2 Embedded Service Areas

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134 The business model of discontiguous embedded distribution proposed by Wirebury received considerable attention in the hearing. An integral part of Wirebury's proposal involved the provision of service to "unserved" and "underserved" distribution customers. Wirebury proposed to operate as a licensed, rate-regulated distributor serving customers such as multi-unit condominiums, rental buildings and new sub-divisions.

135 Underpinning Wirebury's argument was the view that customer preference and competition for distribution services provide value to electricity customers in Ontario. Wirebury argued that its model would help improve service quality, reduce customer confusion and create new economies of scale. Wirebury suggested that its model would provide new entrants and established distributors the opportunity to offer customers lower cost services and improved access to market innovations like energy controls and time-of-use rates. In Wirebury's view, limiting competition for distribution services to boundary disputes would limit the benefits of competition, restrict customer choice and create preferential access to distribution systems.

136 Wirebury indicated that its embedded distribution model would best be implemented administratively if the Board were to establish an overlapping service area for the host and embedded distributor.

137 **Experts' Evidence**

138 The experts noted that Ontario's distribution system currently has a number of embedded distributors, which exist as a result of historic and legislative circumstances. Previous to the passage of the *Energy Competition Act* in 1998, legislative arrangements had allowed for the development of embedded distributors in newly municipalised areas and the concurrent expansion of municipal distribution systems to enlarged municipal boundaries. The experts cited examples of several utilities currently operating in Ontario which serve multiple discontiguous areas. Notwithstanding their individual views on the merits of new embedding, the experts supported further rationalization of Ontario's distribution system.

139 Mr. Todd supported the introduction of qualified competition in the distribution sector and took the view that the market should be allowed to determine whether potential options for facilitating competition in the distribution sector, such as new embedding, succeed or fail. In his view, market outcomes would be the test of the economic efficiency of new embedding. Should a particular embedding model fail, the risk would be borne by the shareholders, but there would be no harm to the overall public interest.

140 Mr. Todd was supportive of customer choice as an overriding principle, arguing that the customer should be able to opt for the competitor that provides the lowest incremental cost of connection or can provide a better quality of service. Mr. Todd noted that an incumbent distributor may not be able, in all situations, to supply or connect a customer at the lowest incremental cost, while a competitor might offer lower costs or better service. The threat of competition would push incumbents to reduce their costs, improve service and become more efficient. Mr. Todd was of the view that allowing new embedding, such as proposed by Wirebury, would not lead to a proliferation of distribution companies in Ontario. Rather, existing distributors would look to improve their financial performance and have an increased incentive to rationalize.

141 Mr. Todd noted that Ontario currently has many embedded distributors and also gave examples of other jurisdictions where embedding exists, such as in New Zealand, Australia and the U.K. Mr. Todd indicated that the U.K. regulator, OFGEM, has a process for licensing embedded distributors.

142 Mr. Todd indicated that some forms of distribution competition will increase forecasting uncertainty but will not significantly impact on cost or economic efficiency. In the case of new embedded distribution, Mr. Todd argued there would be no impact on the load forecast for the incumbent's facilities if the non-incumbent distributor utilizes the incumbent's upstream assets. In addition, there would be no duplication and stranding of the physical delivery assets as the infrastructure built to deliver the load would be as fully utilized as if the incumbent distributor were directly serving the customer.

143 Mr. Todd disagreed that allowing new embedding would result in discontiguities, except possibly in plant maintenance and making maintenance calls. However, this type of discontiguity applies to all distributors in Ontario and is not specific to a new embedded distributor. Mr. Todd indicated that mechanisms can be developed to handle this type of discontiguity efficiently, such as remote reading of meters.

144 Mr. Todd did not favour competition in distribution for existing customers, supporting instead a natural monopoly model:

145 > "The distribution function is naturally monopolistic in that it would be both economically inefficient and unsustainable to allow more than one distributor to offer service to a customer or group of customers using duplicative facilities. As a consequence, allowing customers to choose an alternate distributor, where doing so would strand some portion of the distribution network of the incumbent distributor without compensation, would not be efficient."

146 Key to Mr. Todd's point of view was his definition of the terms "unserved" and "underserved". Mr. Todd favoured allowing distribution competition for new customers in unserved and underserved areas. Mr. Todd defined "unserved" as any customer, lot, or location that does not have service. This could include new residential, commercial or industrial developments (often referred to as "greenfield development") or a redeveloped industrial or commercial site (often referred to as "brownfield development"). "Underserved" refers to standards of service, established by a regulator, that should be available to every customer. This would be a situation where a customer prefers a form of service that is not available from its existing distributor, such as interval meters. This could also include residents in a high-rise development, where the building is bulk metered but the building manager or the residents prefer to be individually metered.

147 During cross-examination, Mr. Todd agreed that underserved customers are potentially existing customers. For instance, residents of an apartment building who are not individually metered are not technically customers at the present time, but service from a new embedded distributor would entail switching customers over from the building owner or management. He further agreed that a new embedded distributor would be as vulnerable to having unserved and underserved customers within their service areas as other distributors.

148 Dr. Yatchew opposed the Wirebury model from an economic efficiency perspective. He argued that the Wirebury model would allow discontiguous utilities to serve dispersed pockets of customers in

urban areas which would not be in the interests of the distribution system as a whole. The creation and proliferation of discontiguous utilities would result in a loss of economies of contiguity and result in diseconomies of scale and density for the incumbent distributor. Discontiguities should not be created except in exceptional circumstances and system wide scale and density economies should not be compromised.

149 Dr. Yatchew noted that contiguity is a fundamental feature of distribution systems worldwide. The creation and proliferation of unnecessary discontiguities, particularly in urban or suburban areas, would be economically inefficient. In comparing a situation where a utility has many scattered pockets of customers, and one where those same customers are transplanted to a single contiguous area, Dr. Yatchew indicated that the utility with customers concentrated in one contiguous area would have lower operating and maintenance costs and likely lower capital costs. The costs of achieving a given level of service and targeted response times would be lower.

150 Dr. Yatchew examined a situation where a discontiguous embedded distributor were to grow and gain some economies of scale. In this situation, it would dilute the density of the host utility, thereby losing economies of density. Dr. Yatchew's analysis concluded that if the embedded utility has few customers and is highly fragmented, it suffers from diseconomies of scale and density and from discontiguity, but has relatively less impact on the host utility. On the other hand, if the embedded distributor has few pockets, and those pockets are large, then there is greater adverse impact on the host utility. Dr. Yatchew contended that in addition to this adverse density effect, there will be adverse effects on capital planning and potentially adverse affects on borrowing and financing costs.

151 Dr. Yatchew noted that the Wirebury concept is not common in other jurisdictions, and that the contiguous model continues to be the dominant form of distribution. In his view, the reason is that contiguity matters a great deal. If it did not, one would observe checkerboard service areas. Dr. Yatchew also indicated that adoption of the Wirebury model would result in all utilities being in a position to "play the same game". Under such a scenario, it would not be inconceivable that Hydro One, Toronto Hydro or other large utilities could be successful at carving out embedded areas in territories of other, perhaps smaller distributors.

152 With regard to embedding in rural areas of Ontario, Dr. Yatchew argued that a distributor serving multiple discontiguous service areas may not always be an inappropriate model. While opposing the proliferation of discontiguities within an urban area, Dr. Yatchew indicated that the development of a discontiguous service system, whereby a single utility provides service to several smaller, reasonably densely populated areas, themselves surrounded by a relatively low density rural population, may very well be an improvement in the status quo which entails very small distributors individually serving each of those locations. There would be some gains in economies of scale and contiguity.

153 Dr. Yatchew did not advocate abolishing multiple discontiguous utilities. He alluded to the rationalization process, which has occurred over the last few years, where a number of smaller distributors have been absorbed by Hydro One. In his view, rationalization resulted in a more efficient provision of service because the individual small utilities lacked sufficient population density around them to achieve minimum efficient scale. Dr. Yatchew noted that some mergers have resulted in a multiple discontiguous embedded distribution system. He cited the example of

Veridian, which acquired several small discontiguous pockets at various locations, but noted these discontiguities were surrounded by a largely low density population base.

154 Dr. Yatchew discussed the potential for regulatory imperfections to create opportunities for arbitrage by an entrant who can selectively choose those locations which work to his advantage. He described a potential scenario where a single low wheeling rate is established for discontiguous embedded utilities. Homeowners could declare their houses redeveloped by putting in an apartment and apply for service from such utilities and thus bypass standard distribution charges. As a result, conventional distributors in Ontario would have an incentive to behave similarly, to develop locational rates, and possibly create subsidiaries to engage in regulatory arbitrage.

155 Dr. Yatchew indicated that it was conceivable that many Wirebury-type companies could be created if there are regulatory arbitrage opportunities. Moreover, once it is recognized that a single wheeling rate may be inappropriate, there could be a proliferation of wheeling rates. In response to cross-examination regarding the potential for developing zonal wheeling rates to resolve the problem of having many individual wheeling rates for every customer, Dr. Yatchew testified that it is not obvious that zonal wheeling rates would resolve the problem of regulatory arbitrage. He noted the complexity in determining zonal rates in Toronto, where there may need to be many zones and posed the question as to whether there would need to be the same wheeling rate to an apartment, as to a house, or to a commercial building.

156 Dr. Yatchew testified that multiple discontiguous embedded utilities could increase regulatory burden. First, there could be many applications for distributor status and rates. Second, there may be many more utilities to regulate. Third, complex locational tariffs and multiple wheeling rates could emerge. Fourth, capital expenditures may require increased regulatory scrutiny. Fifth, there are likely to be disputes over predatory behaviour, which would need to be adjudicated.

157 Dr. Yatchew concluded that any change in a distributor's service area should serve the public interest, clearly demonstrating there are net benefits to the distribution system as a whole. He supported service area amendments in bordering regions between contiguous utilities where they are economically efficient.

158 Mr. Southam noted that his clients are composed of multiple discontiguous or non-contiguous embedded distribution systems as opposed to contiguous distribution systems. He did not see the need for new distribution systems to be contiguous with existing embedded systems. Mr. Southam was of the view that contiguity is a possible, but not necessary, feature of an efficient distribution system. He cited examples of efficient distribution systems in Ontario that have multiple non-contiguous embedded distribution systems, such as Erie Thames, which is comprised of 10 embedded systems.

159 Mr. Southam did not believe further embedding would adversely affect system planning in Ontario. He noted that constant conversation occurs between host utilities and embedded distributors with respect to load forecast. The introduction of competition would not necessarily provide a potential incentive for reduced cooperation between embedded and host utilities. However, if competition did result, down the line, in a reduction in cooperation, then the licensees would have recourse to the Board.

160 In reference to avoiding duplication of assets, Mr. Southam anticipated that many new connections in overlapping service areas would be embedded connections because it would be a more cost-effective and efficient way of serving these new customers.

161 Dr. Chamberlin testified that the widespread use of embedding would leave society as a whole worse off as overall costs would be higher. Embedding contributes to uncertain service area boundaries and the associated undesirable consequences. Dr. Chamberlin also indicated that the use of embedding would provide opportunities for distributors to take advantage of temporary rate differentials and situations where wheeling rates are not fully compensatory to avoid costs associated with upstream functions.

162 Further, Dr. Chamberlin argued that the concept of unserved and underserved customers lacked clarity. In his view, there is not an "unserved" customer. While there may be physical areas that do not yet have service, there is an entire network upstream of that location which has been built to supply network distribution services to those areas. In his view, this is an integral part of a utility's planning process.

163 Dr. Chamberlin found it difficult to distinguish between underserved customers and the entire body of existing customers. In his view, the examples of underserved customers cited in Wirebury's evidence "appear to be nothing more than existing customers which are those customers taking service from the incumbent utility who desire additional electric distribution services such as different metering technology." The issue for Dr. Chamberlin is that if underserved customers are nothing more than existing customers, then "Mr. Todd seems to be recommending that all existing customers should have the right to switch distribution providers."

164 **Positions of the Parties**

165 Several parties, including Hydro One and PWU, expressed concern that the increased complexity involved in embedding would jeopardize safety. The LDC Coalition noted that new embedding can contribute to safety hazards for host distributor field staff and increase customer costs due to additional equipment required at every interface between two different systems. This equipment is only required as a result of the insertion of an embedded distributor in the host distributor's system.

166 The LDC Coalition opposed allowing service area amendments requiring new embedded distribution supply points. The LDC Coalition argued that the embedding concept should be rejected on grounds that it is economically inefficient and contrary to provincial policy which encourages the rationalization and consolidation of the Ontario distribution sector. Embedding would dilute scale economies, create unnecessary discontiguities, increase risks of structural instability and adversely impact capital planning and financing. The host distributor rate would be bypassed with a potential windfall profit to the embedded applicant.

167 The LDC Coalition also argued that the embedding concept would increase regulatory burden. There could be many more applications for distributor licences and rates, more utilities to regulate, complex locational tariffs and multiple wheeling rates, more disputes over predatory behavior and increased need for regulatory scrutiny.

168 Wirebury addressed the issue of whether embedded distribution would create an unspecified further degree of planning uncertainty. Wirebury indicated that planning is always uncertain and requires regular review and revision based upon what actually transpires. By contrast, the construction of facilities occurs on a more just-in-time basis which may only be a matter of months. Wirebury indicated that it would be uneconomic to overbuild the distribution system before demand is imminent.

169 The SW Applicants were not opposed to embedding. They were of the view that rational customers would generally choose the lowest cost connection option which would often be the embedded system, thereby eliminating uneconomic duplication of facilities

170 Veridian opposed wide open competition in electricity distribution, new embedding, additional load transfers or metering points. Veridian believed that embedded distribution networks create inefficiencies, contribute to complexity in system operations and regulatory burden and impair accountability to customers.

171 The PWU indicated that the embedding model should be approached with extreme caution. It appears to give free reign to cream skimming which would result in higher average costs and lower revenues for host distributors and higher rates for ratepayers across Ontario.

172 **Board Findings**

173 The Board is mindful of the objectives set out in section 1 of the OEB Act. It is the view of the Board that the creation of new embedded distribution areas would be inconsistent with the Board's objectives to promote economic efficiency in distribution, to facilitate the maintenance of a financially viable industry, and to protect the interests of consumers.

174 With respect to the objective of promoting economic efficiency in the generation, transmission, and distribution of electricity, the Board finds persuasive the arguments that the establishment of new embedded distribution sites and points of supply would be economically inefficient for Ontario's distribution system. The establishment of new embedded areas, particularly in urban and high customer density areas, would result in diseconomies of contiguity for Ontario's electricity distribution system and loss of economies of scale and density for incumbent distributors. The proliferation of embedded areas would result in a more complex, and checkerboard spatial pattern for Ontario's distribution system. It is not clear that new embedded distributors would be able to achieve minimum scale efficiencies, which is currently the case for most incumbent distributors, particularly those situated in high density urban areas. Additional embedded supply points would contribute to undue complexity in system planning and operations, leading to diminished service quality and lack of transparency with regard to accountability for system reliability.

175 The Board notes that as a result of the historical development of the electrical distribution system in Ontario, there already exist embedded distribution systems, some of which consist of multiple discontiguous areas. These exist because prior to 1998, Ontario Hydro was required to serve rural areas of the province, but most incorporated villages, towns and cities had their own electrical distribution utilities. These were regulated by Ontario Hydro and embedded within Ontario Hydro's

distribution system. As municipal boundaries were adjusted from time to time to include built up areas, the service area of the municipal electric utility was adjusted to match. By 1998, many municipalities were amalgamated and reorganized and electric utility service boundaries no longer necessarily followed municipal boundaries. Some of these distribution systems were acquired by Hydro One, and some were acquired by or amalgamated into other distribution systems. In some cases, embedded systems disappeared into a larger system which swallowed up their service areas. In others the system now consists of several discontiguous areas under common ownership and management. Still others continue to consist of one contiguous system which may or may not be embedded within another. These developments occurred for reasons unrelated to the optimization of the distribution system as a whole. This decision is not intended to address the appropriateness of any of these situations, which are likely to continue to evolve.

176 However, the Board recognizes that these configurations can result in unnecessary duplication of distribution assets, such as substations. The Board encourages parties in these situations to consider a more optimal utilization of their assets through a pooling of interests, an asset sale from one party to the other, merger and acquisition, or some other form of business rationalization. The Board would give serious consideration to service area amendments resulting from this type of rationalization.

177 The Board is concerned that any proliferation of new embedded distribution areas and points of supply will increase the potential for uncertainty in coordinating the long-term planning of upstream transmission and distribution assets. There would be additional pressures to ensure effective network system coordination between the host and any embedded distributor. Efficient upstream and downstream distribution system planning may be more complex with the addition of new parties. There may also be additional risks for system safety and reliability, particularly when coordinating a response to local system outages or a major catastrophic failure.

178 The Board is not persuaded by the argument by the proponents of embedding that the market should be allowed to determine whether the concept succeeds or fails, based on the overriding principle of customer choice. In the view of the Board, as discussed elsewhere in this decision, customer choice is but one of a number of factors which should be considered in determining whether new embedded distribution is in the public interest.

179 With respect to the protection of the interests of consumers with respect to prices, the Board recognizes that the individual customer, in many cases a developer, would potentially derive some benefit by connecting to an alternate distributor. The issue remains as to how the interests of the individual customer are balanced with the interests of the remaining customers of the incumbent distributor. Wheeling rates in Ontario may not be fully compensatory, leaving opportunities for regulatory arbitrage by licence embedded distributors. In addition, if a new embedded distributor targets service to lower cost customers (usually small dense areas), the remaining customers served by the host distributor may well face higher rates than if the embedded distributor did not exist. Loss of such loads will necessarily have implications for the customers of the host distributor. Is it equitable and fair to all customers that an embedded distributor can take advantage of this regulatory arbitrage to create a two-tiered rate structure, one for customers of the embedded distributor, and one for the remaining customers of the incumbent distributor? In the view of the Board, this would not be in the public interest.

180 Moreover, the Board is not convinced by evidence that suggests that the rate arbitrage problem can be alleviated through an appropriate wheeling or LV rate which reflects the true wheeling cost to the host distributor. Given the complexity of the network system in Ontario, the wheeling rate might have to be dependent on upstream transmission and distribution lines, upstream distribution stations, and different classifications of distribution lines. Hence, each embedded area may require its own LV or wheeling rate, and a large urban area, such as Toronto or the GTA, may require zonal or specific customer-type wheeling rates. This would entail considerable regulatory processes above and beyond what is required to establish existing distribution rates.

181 The Board was also concerned by the imprecision in the evidence presented by the proponents of the embedded model regarding which type of customers would be potential candidates for embedding: new or existing customers. The Board found persuasive the arguments that the term "underserved customer" lacked precision and could potentially refer to both new and existing customers. The Board was not persuaded by the argument that an existing customer load, for example a bulk load apartment building, would somehow become redefined as a new customer when the metering arrangements are changed and each individual in the apartment building is separately metered. As Mr. Todd agreed, the issue is about switching the building. The load doesn't change, and the same individuals living in the apartment are still there. Given the criticality of the definition of "underserved customer" for Mr. Todd's analysis, the Board is concerned about its elusive nature. It is not even remotely clear as to what criteria would be required to establish whether a customer was existing, or underserved and therefore eligible to be switched, according to his construction.

182 The proponents of discontiguous embedded distribution argue that the benefit to customers from individual interval metering is an important rationale for creating an embedded distribution system. They have suggested that customers who do not have such meters are, by definition "underserved". In the Board's view, the desire to compete for the provision of interval metering is not a strong enough justification to permit service area amendments which would facilitate the creation of new embedded distribution systems. As most of the experts noted in the oral hearings, the distribution sector is a natural monopoly. Rates are set by regulation and distributors are licensed by the Board, which acts as regulator. It may be that the advent of individual meters will become a key element in the province's effort to conserve energy, and to avoid peak demand shortages. This development is dependent on a number of factors, some of which fall outside the control or scope of the distribution sector of the industry. The proliferation of individual interval meters is not in any event dependent upon, or even best served by, the creation of new embedded distribution operators. The sale and installation of such meters can occur completely independent of the advent of new embedded distributors. Further, it is to be noted that sections 5.1.3 and 5.1.5 of the Distribution System Code currently require that all licensed distributors install interval meters for new customers with demand in excess of 500 kW, and provide an interval meter for any customer that requests one.

183 The Board notes that section 4.0.1 of Ontario Regulation 161/99, as amended, provides an exemption from licensing for owners and operators of distribution systems in a broad range of settings including condominium buildings, residential complexes, industrial, commercial, or office buildings, and shopping malls. The exemption extends to distribution systems located entirely on land owned or leased by the distributor. For the exemption to apply, the distributor must simply recover its reasonable costs associated with the distribution, and not impose upon consumers a price which includes a profit. Services provided by the distributor can include the installation of meters or any other physical enhancement.

184 The Board accepts that the complexity produced by embedded distributors, particularly if the concept proliferates, could well compromise system safety and reliability. Maintenance and service restoration after outages will be more difficult. The costs of these difficulties will be passed on to the ratepayer, including those ratepayers who have not received any benefit from embedded distribution.

185 In summary, the Board is of the view that at this stage of the development of the electricity market in Ontario the public interest would not be served by the creation of new embedded distribution systems and points of supply. The electricity market in Ontario has proven to be dynamic, and it will continue to evolve. As new organizational structures and business models emerge the Board will consider their appropriateness, guided by the principles enunciated in this decision.

186 The Board finds that applications for service area amendments to create new embedded distribution systems or points of supply, particularly within urban, suburban and other non-rural areas of high customer density in Ontario, are generally not in the public interest.

187 The Board recognizes that Ontario's distribution system is currently comprised of a number of embedded distributors, created due to historical circumstances and the legislative and regulatory regime in existence prior to the break up of Ontario Hydro and restructuring of the sector in 1998. Subsequently, a number of these embedded systems have been subject to rationalization through mergers and acquisitions. The Board encourages service area amendments which contribute to the further rationalization of embedded distribution systems and elimination of inefficient retail points of supply in Ontario's electricity distribution system.

3.3 Contiguous Border Amendments

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Position of the Parties

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190 All parties to the proceeding agreed that some service area amendments at the borders between contiguous distribution companies can be economically efficient and in the public interest. This can occur, for example, where an applicant utility may be able to serve a prospective customer or group of customers at a lower cost or more efficiently than the incumbent utility. Such situations could also occur when two neighbouring utilities agree that a realignment of the service area boundary could eliminate existing load transfers or be economically efficient, and that the public interest would be served if a service area amendment were initiated. Some parties have argued that through this process, existing customers should not be forced to change distributors. It was also argued that these amendments should not be so frequent as to potentially undermine the stability of the industry, that the amendments should be executed in the context of an appropriate vision of how the distribution industry should evolve with time and that the resulting amended boundaries should be smooth.

191 Hydro One argued that as contrasted with amendments for rationalization for a particular customer, distributors should not be permitted to seek amendments to extend their service territories to municipal boundaries, or to cover entire subdivisions or significant parcels of land of an incumbent's territory in order to reflect the planning objectives of a particular municipality.

192 Centre Wellington argued that there should be contestability for new customers at the boundaries of existing contiguous distribution companies, and the customer should be able to choose, based on offers of connection presented by two distributors. Centre Wellington noted that utilities that expand in a contiguous manner are likely to be economically efficient.

193 The EDA supports the development of shoulder-to-shoulder utilities with exclusive service areas while allowing the economically rational expansion of territories. Because of the capital-intensive nature of distribution infrastructure, efficiencies in the distribution sector are driven by economies of scale and density. Non-overlapping territories with rational expansion is the only way to improve efficiency and to ensure no stranding without compensation, no cherry picking and no duplication of assets. The EDA argues that service areas should be allowed to expand with the commensurate shrinking of neighbouring territories if the applicant can show that the expansion of its service territory will have positive impacts on the overall commercial viability of the distribution sector and distribution customers.

194 Toronto Hydro took the position that distribution is a natural monopoly and does not support competition or customer choice. Service areas should be aligned where possible with municipal boundaries, as electricity infrastructure provides a vital service to a local community. Where possible, distributor service areas should be contiguous across a naturally occurring area. Toronto Hydro was of the view that a service area amendment would be only advisable under limited circumstances typically relating to a new customer on the boundaries of existing service areas where the cost of connecting the customer to the neighboring distributor, which includes the compensation to the incumbent utility for all stranded distribution assets, is less than the cost of connecting the customer to the incumbent.

195 **Board Findings**

196 The Board finds that service area amendments at the borders between contiguous distribution companies should be encouraged where there is agreement between the distributors and any affected customers that a realignment of the boundary would be economically efficient, consistent with system planning needs, and in the public interest.

197 The Board finds that amendments that involve contiguous distribution companies, but that are opposed by the incumbent distributor, may be in the public interest where the amendment results in the most effective use of existing distribution infrastructure, and a lower incremental cost of connection for the customer or group of customers.

198 It is the Board's intention to process expeditiously service area amendment applications that are consented to by the contiguous distributors involved and the individual customer(s). Applications for consent amendments will need to be in conformity with the principles outlined in the next section: customer preference, economic efficiency, and impacts on distributors and their customers, but the level of detail needed to persuade the Board that the proposed amendment is in the public interest will be less than that required for contested applications.

199 In a contested application, the onus will be on the applicant to demonstrate that the amendment is in the public interest. Amendments that are consistent with the principles articulated by the Board in this decision, and supported by evidence that demonstrates their advantages, will have a greater chance of success.

200 At the same time, the Board expects incumbent distributors to give proper consideration to rational and efficient service area realignment, even where it results in the loss of some territory. Amendments should not be resisted where the proponent is clearly the most efficient service provider for the affected customer. The distributors affected by a proposed amendment should evaluate a proposal in light of the principles in this decision, and respond in a reasonable fashion. For example, the Board discourages the creation of new points of supply to facilitate the distribution of electricity to an existing or new customer by an incumbent distributor, when a bordering and contiguous distributor can provide the same distribution service more efficiently. A service area amendment could facilitate the more efficient use of existing infrastructure, and avoid passing on to the customer the metering costs associated with the new retail point of supply.

4 PRINCIPLES FOR DEALING WITH SERVICE AREA AMENDMENTS

4.1 Summary of Principles Already Discussed

The Board has articulated certain principles earlier in this decision:

1 Overlapping service areas will not generally be found to be in the public interest. Applicants for service area amendments that propose overlap should provide clear evidence that in the particular case, the advantages of overlap outweigh the disadvantages.

2 New embedded service areas will not generally be found to be in the public interest. Applicants for service area amendments that propose embedding should provide clear evidence that in the particular case, the advantages of embedding outweigh the disadvantages.

3 Amendments to service areas at the border of contiguous distributors may be in the public interest. Applicants should file evidence demonstrating that the proposed amendment is in the public interest, addressing economic efficiency, the impacts on the distributors involved and their customers, both inside and outside the amendment area, the mitigation of these impacts, and customer preference.

4 Applicants for service area amendments are encouraged to obtain the consent of all affected parties before filing the application. Consent applications will be expeditiously processed, and the evidence required will be less than for an opposed application.

5 Economic efficiency is a primary consideration in assessing a service area amendment application. All applicants should address the effects of the proposed amendment on economic efficiency.

In the remainder of this decision, the Board will address in more detail the issues of customer preference, impacts on customers in the amendment area and impacts on distributors and their customers. Filing and process requirements will be summarized in the last section of the decision.

4.2 Customer Preference

Positions of the Parties

There were differing views among the participants to the proceeding as to the importance of customer choice as a guiding principle for assessing service area amendments. The parties generally support-

ing increased competition in distribution and overlapping service areas were supportive of customer choice as an overriding or guiding principle.

213 The parties generally opposed to increased competition in distribution and overlapping service areas, including Hydro One, Toronto Hydro, the LDC Coalition, VECC, the Power Workers Union, and EDA, supported the view that customer choice should not come at the expense of the interests of other customers or the broader public interest. Centre Wellington, while supporting customer choice and overlapping service areas, also supported protecting the broader public interest.

214 The SW Applicants argued that a specific customer's preference for an applicant distributor should receive 70 per cent of the weighting in any Board decision regarding a service area amendment application. FortisOntario supported the concept of giving as many customers as possible the choice of distributors.

215 Wirebury argued that customer choice is the paramount decision factor in the Board's service area amendment process, absent a material safety or a public interest reason to deny such a request. Wirebury argued that limiting the benefits of customer choice to new customers or restricting competition to distributor boundaries would be discriminatory and contrary to the Board's objectives which, in its view, support the continued use and expansion of competition for distribution services.

216 Hydro One argued that customer preference should not come at the expense of other customers or the broader public interest. Customer choice can be a criterion in determining the service provider for new or prospective customers where the preferences expressed do not result in a detrimental impact or loss of opportunity to the incumbent distributor and its customers.

217 Toronto Hydro argued that the interests of the individual customer must not outweigh the other aspects of the public interest when the Board is considering a service area amendment. Moreover the interest of the developer as a customer cannot outweigh the interests of the end-use customer, who will ultimately be responsible for the rates resulting from the developer's preferences. The LDC Coalition supported the position of Toronto Hydro.

218 Hydro Embrun supported the view that a new customer should be able to request service from the distributor of choice as per section 28 of the Electricity Act. A distributor should be able to offer a connection to a new customer if the new customers are positioned along the lines of the its distribution system. New customers should be able to compare construction costs between electricity distributors. Hydro Embrun noted that where an amendment affects existing customers, the Board would have to consider it on a case by case basis.

219 Chatham-Kent argued that customer preference should play a significant role in the Board's consideration of service area amendments. Chatham-Kent supported the SW Applicants proposed a weighting of 70 per cent for customer preference when there is an actual customer requesting service.

220 The PWU was of the view that local distribution remains a natural monopoly that is not amenable to direct competition. Customer preference should have very limited significance in particular service area amendment applications.

221 VECC indicated that while customer preference is an important consideration, it cannot be relied upon to yield results that are necessarily in the overall public interest. In addition, customers should not be allowed to exercise choice at the expense of other customers, particularly those who do not have the same opportunities.

222 The EDA proposed that the applicant for a service area amendment must demonstrate that there are net benefits to the distribution system as a whole, rather than the benefits or costs to any one customer or group of customers.

223 **Board Findings**

224 The establishment of the appropriate weight to be afforded customer preference in the consideration of service area amendment applications is nothing short of establishing the appropriate balance between the requirements of the distribution system as a whole, including the interests of existing customers on the one hand, and the particular interests of a given customer, with a given connection proposal at a given point in time.

225 It is understandable that those who favour a competitive marketplace for the distribution activity place customer preference as the highest value in the consideration of service area amendment applications. Those who wish to secure customers through aggressive competition want to be able to rely on the customer's decision to opt for their service to be dispositive of the issue, or nearly so.

226 On the other hand, those who emphasize the ongoing interests of the existing customers and their reliance on optimization of system assets to control rates suggest that customer preference ought not to be a determinative factor in service area amendment applications. Distribution rates are intended to cover the costs associated with the provision of the system, plus an approved rate of return. The calculation of rates starts with the overall revenue requirement for providing the service to the service area, divided by the forecast commodity throughput. Whether they want to or not, all customers of the system are accordingly dependent on each other for the control of rates. Costs not paid by one customer, must be made up for by another.

227 Some parties also expressed concerns that while property owners or developers can control the destiny of end-use customers, that is, tenants or home buyers, their interest may be different from this group. The developers' prime driver in expressing a preference for one service provider over another may well be based on the contribution in aid of construction costs, rather than the ongoing rate structure, which will affect the end user. End users, it is argued, may be prejudiced by developers or property managers pursuing their immediate interest, at the risk of long term exposure to higher rates.

228 Hydro One also emphasized its view that to the extent that customer preference is based on distribution rates, such rates ought not to be a major factor in the consideration of such applications. While the immediate rate structure may be very influential in driving a customer's preference for one service provider over another, these rates should be understood to be transitional, and unreliable given the fact that a new generation of distribution rates will be implemented based on a much more acute cost and rate calculation. Hydro One has expressed the view that most local distribution rates are too low, and will rise following the completion of the Board's second generation rate design process.

229 The Board's duty to protect the interests of consumers as expressed in the objectives, means that the interest of any particular market participant must cede to the system's requirements where these interests conflict. Insofar as the Board has indicated elsewhere in this decision that it does not generally support the fostering of competition in the distribution activity, in its consideration of service area amendments, it will favour those applications which show that a given connection proposal represents the most economically efficient use of existing resources within the distribution system.

230 In many cases, the interests of the individual customer will align with the interests of other customers, and the system as a whole. Each market participant must accept the interdependence which is fundamental to the system. Each participant has a right to expect that others engaged in the same system meet their respective costs, without subsidization or penalty. That is as true for new customers as it is for others.

231 The Board agrees that current distribution rates are not necessarily the best guide to service choices. The Board expects that over time the rate making methodologies will yield ever more accurate representations of cost. It should be noted however, that Hydro One's concern in this area may not be completely addressed by this evolution. That is because its rates in areas contiguous to well developed local distribution systems are often significantly higher than those offered by the local distribution system. This arises from the fact that Hydro One's rates are based on the low density areas it serves which lie, by definition, between the service areas of urbanized systems. While the local distribution companies' rates may rise through the application of better rate setting methodologies, the fact remains that Hydro One's rates may suffer from fundamental differences in the cost and service structures as between Hydro One and the local distribution systems. The resulting rate differential may prevent Hydro One from being the distributor of choice for a new connecting customer. The extension of low density based service to areas contiguous to local distribution systems is often not an optimization of the system resources.

232 However, while recognizing certain disadvantages faced by Hydro One in its efforts to attract customers, these circumstances cannot be permitted to compromise the optimized growth of the system as a whole in the areas where most growth actually occurs - that is in the areas within and contiguous to existing urbanized zones currently served by well developed electricity distribution systems. Support for the societal role played by Hydro One must be funded otherwise than in protection of its geographic service area at the expense of orderly growth in the system.

233 In summary, the Board finds that customer preference is an important, but not overriding consideration when assessing the merits of an application for a service area amendment. Customer choice

may become a determining factor where competing offers to the customer(s) are comparable in terms of economic efficiency, system planning and safety and reliability, demonstrably neutral in terms of price impacts on customers of the incumbent and applicant distributor, and where stranding issues are addressed.

4.3 Economic Efficiency

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The Board considers that economic efficiency comprises the concept of the most effective use of existing distribution resources. It is a concept that involves an objective assessment of the efficiencies attendant upon the connection of a customer by a distribution utility. The assessment involves a consideration of the distribution assets available for the connection, their proximity to the proposed point of connection, and the other costs necessary to effect the connection. Where new assets must be developed to effect the connection, a comparison of the costs associated with such development will inform the assessment of economic efficiency.

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In all instances, the costs associated with the connection should be the fully loaded costs, which capture all of the relevant indirect and direct costs reasonably associated with the project at issue, not merely the price of connection quoted to the prospective connection customer. Costs developed with respect to other connection projects which are not contested will serve as a guide in assessing the authenticity of costs associated with a contested project.

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In determining the efficiency of a given connection proposal, the Board will be strongly influenced by the extent to which a proponent can demonstrate that the proposed connection is reasonably contiguous to an existing, well-developed electricity distribution system. In such cases, it is very likely that economic efficiency will be served in approving that connection.

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Where the proposed connection is not contiguous to a well-developed distribution system, contesting proponents will have to demonstrate that their respective proposals optimize the existing infrastructure to the extent possible.

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In circumstances where a proposed connection lies adjacent to an isolated pocket of distribution customers served by one distributor, and contiguous to a dense, highly developed electricity distribution system operated by another distributor, the Board will have regard to the efficiency of the connection of the pocket, as well as the new connection, in considering competing connection proposals. In this way it is hoped that inefficient historic connections will not serve as support for new proposals which would fail but for their proximity to the old, inefficient connections.

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The Board regards service areas to be rooted in the ability of distribution system operators to connect and serve customers efficiently. The service area defines the area in which a distributor is obliged to make an offer to serve if requested to do so. Existing service areas have developed over time and do not necessarily represent the most efficient way of serving any particular customer. It is not geography that ought to form the basis for service areas, but rather the definition of an area which can be efficiently serviced by a given distribution operator. Applications for amendment which involve broad swathes of geography, without detailed proposals respecting specific customers, should be avoided. The issue is always rooted in the economics associated with connections.

241 Similarly, proposals to align service areas with municipal boundaries are ill-considered unless the proponent can provide concrete evidence that the extended area is needed to provide service to actual customers in the area using assets and capacity in a manner that optimizes existing distribution assets, and does not prejudice existing customers of the utility. Amendments need to be anchored by real customers, with an economic case for the extension that is convincing. Some parties argued that aligning the service areas with municipal boundaries advances distribution system planning. The Board does not regard such alignment to be inherently beneficial. It is apparent that the de-coupling of the electrical utilities from municipal government, which is one of the signal reforms in the recent development of the electricity market, will continue to evolve. It is not unlikely that the pursuit of efficiencies will lead to the continuing consolidation of the distribution industry in Ontario, and any alignment of service areas to specific municipalities will be increasingly irrelevant. In the interim, local distribution companies will profit from early knowledge respecting development in areas contiguous to their highly developed distribution systems. In such cases, applications for amendment to service areas, provided they are supported with convincing evidence respecting the fundamental economic efficiency of the proposal, will have good prospects for success.

242 The emphasis the Board places on economic efficiency may have important implications for Hydro One. It is very likely that in many instances new connections will arise in areas that are contiguous or reasonably contiguous to local distribution systems. The fact that the local utility has well developed distribution assets close to the new connection may make it difficult in many cases for Hydro One to provide the most efficient service.

243 In addition to its submissions on the effects on credit ratings referenced above, Hydro One has presented argument indicating that the distribution system it operates is dependent, in some measure, on its success in procuring distribution loads in its service area. The Hydro One service area consists of every part of the province where there is no other defined service area, and where it has installed a distribution line. This is not a proceeding in which the scope of the Hydro One licence was at issue, and the Board will not address it.

244 It is important, however, to address Hydro One's submissions respecting the impact of the loss of distribution opportunities within its service area. Simply put, Hydro One suggests that all of its distribution customers look to the exploitation of the service area for the maintenance of the lowest achievable distribution rates over the Hydro One distribution service area. Clearly, if Hydro One can procure load in relatively high density areas adjacent to urban areas, the fixed costs of its system can be disbursed over a larger rate base, creating downward pressure on rates.

245 Where Hydro One can demonstrate that its connection proposal is superior to other alternatives as evaluated in light of the principles established in this proceeding, Hydro One should provide the service. The question facing the Board is whether the interests of Hydro One and its customers ought to prevail when its connection proposals are not superior.

246 What is true for Hydro One is also true for every other distribution system operator. All seek to access connection opportunities which will improve the overall ratio of revenue to fixed cost. In every connection proposal the prime consideration must be whether the connection is being effected in a manner that optimizes the resources reasonably brought to bear on the location. The simple fact that a distribution system operator has a defined service area does not guarantee that it will be

insulated from competing systems, who can demonstrate that their proposal is more economically efficient. The efficient and optimized development of the distribution system is a higher value than the interests of any single operator within the system.

247 The Board has made it clear that this decision is prospective in its effect, and is not intended to, and should not be read so as to oblige any distributor to change its status with respect to any customer or distribution asset.

248 The Board notes that inefficiencies have arisen where isolated pockets of customers have been connected by one distributor, but lie adjacent to a well-developed electricity distribution system willing to serve them. In such cases, utilities should use their best efforts to reverse inefficiencies, and to transfer customers to the service provider best able to serve these customers, on terms which avoid the stranding of distribution assets.

249 In summary, the Board finds that significant weight should be given to economic efficiency when assessing an application for a service area amendment. Failure on the part of an applicant to adequately demonstrate the economic efficiency of a service area amendment application will generally constitute sufficient grounds for the Board to turn down the application.

4.4 Impacts on Customers in the Amendment Area

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Positions of the Parties

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252 Hydro One argued that customers should continue to receive a level and quality of service to which they are accustomed at the lowest possible cost in the longer term. Costs should be fairly allocated over the entire customer base, in a manner that does not create a disproportionate benefit for one customer or group of customers and harm for others.

253 Hydro One also argued that existing customers should not be transferred to an applicant distributor from an incumbent distributor, except where there is agreement or consent among both distributors and the customer. Where there is such a transfer by agreement, it should proceed by way of a MAADs application rather than a licence amendment application.

254 In its view, new customers should be served by an applicant distributor rather than an incumbent distributor only in cases, as per section 28 of the Electricity Act, where there is a customer that "lies along" distribution lines, and the applicant distributor can serve it at a lower incremental cost without devaluation, underutilisation or stranding of the incumbent's assets.

255 Chatham-Kent argued that new customers should have the right to choose their distributor. In cases where expansions are in greenfield areas, there would typically not be significant stranding of the incumbent's assets. In its view, in amendment applications for service areas where existing customers are concerned, customers should not be forced to move from one distributor to another. Distributors should continue to be obligated to accept both low and high density customers. Transfer of customers between distributors should be based on a business case between the distributors.

Customers should not have the ability to repeatedly change distributors, as the assets invested are long term.

256 The parties had differing views with respect to whether service area amendments should encompass both existing and new customers, or only new customers.

257 Hydro One argued that existing customers should only be transferred from an incumbent to an applicant distributor where there is agreement between the two distributors. New customers should be transferred only in instances where there is a "lies along" case to be made. Where there is such a transfer by agreement, it should proceed by way of a MAAD application rather than a licence amendment application. Moreover, a MAAD application should be required wherever the transfer of existing customers to the applicant distributor could harm the incumbent distributor or its customers.

258 Hydro One suggested that Section 28 of the Electricity Act should not be interpreted to mean that existing customers who lie along the lines of two distributors should be able to switch distributors. Rather, it is only in limited and specific circumstances that the transfer of existing customers advances the public interest. In Hydro One's view, neither the Electricity Act nor the OEB Act provide sufficient scope for the transfer of existing customers. If so, the " legislation would have established an appropriate mechanism as a clear and intended substitute or provided an additional process for the merger, acquisition, amalgamation or sale of distribution utilities."

259 Hydro One also argued that the provisions of the *Energy Competition Act* "do not provide and were deliberately not intended to provide, the broad latitude for non-negotiated transfers of existing customers from one licence holder to another." According to Hydro One, there are two sections in the OEB Act that support that position; section 86, which provides evidence of the process contemplated by the legislature for transfer of existing assets and customers served by those assets, and subsection 70(13) which prohibits the Board from requiring a distributor to dispose of assets.

260 Veridian argued that new customers in the amendment area should have the choice of provider. Any transfer of existing customers would be by means of a distributor-to-distributor arrangement on a commercial basis. New customers in the amendment area would be served as a result of rational expansion or addition to an existing system. Veridian indicated no interest in providing or establishing new embedded supply points. Veridian did not propose additional load transfers or metering points to accommodate service area amendments.

261 As noted in the discussion on embedding, expert evidence filed by Wirebury concurred with the expert evidence filed by Hydro One that service area amendments should generally not be allowed for existing customers. Mr. Todd favoured allowing competition and service area amendments only for new customers in "unserved" and "underserviced" areas.

262 The SW Applicants submitted that there ought not to be any difference in the treatment of amendment applications relating to either new or existing customers. They argued that the Board ought to give serious consideration to granting a service area amendment where it can be demon-

strated that such a grant would result in lower customer costs than if the amendment had not been granted.

263 Enwin argued that both new and existing customers should have choice of distributor. However, Enwin noted that it would not proactively market its distribution services to existing Hydro One customers in the proposed expansion area. Existing customers would continue to be serviced by the incumbent distributor unless they choose to be serviced by Enwin.

264 The PWU argued that existing customers should not be transferred to a different distributor without the consent of an incumbent distributor except for a compelling case of public benefit. Where it comes to new customers, there may be a broader range of situations in which amendments are justified and particularly in circumstances where the incumbent would have to develop significant new infrastructure to connect the customers.

265 Toronto Hydro argued that while service area amendments for new customers may be supportable in certain limited circumstances, the transfer of existing customers is not supportable, in the absence of agreement between the distributors on the terms of the transfer. Toronto Hydro suggested use of the MAADs process contemplated in sections 85 (since repealed) and 86 of the OEB Act in reviewing amendment applications. The LDC Coalition supported Toronto Hydro's position.

266 **Board Findings**

267 The Board has made it clear that this decision is prospective in its effect, and is not intended to, and should not be read so as to oblige any distributor to change its status with respect to any customer or distribution asset. Service Area amendments should not result in the Board-mandated transfer of customers from one distributor to another. Such transfers should be the subject of bilateral arrangements between distributors, wherein all of the issues engaged by such transfers can be addressed. Such issues involve appropriate compensation for any assets stranded as a result of the arrangement. In this way, the interests of the customers of the surrendering distributor can be reasonably protected. An applicant should file evidence to demonstrate all the effects on customers in the amendment area. Evidence on aspects such as service quality and reliability should be quantitative, not anecdotal.

268 **Load Transfers**

269 Load transfers are arrangements whereby an incumbent distributor permits an adjacent distributor to serve a load located in the incumbent's service area. The arrangement typically arises where the incumbent is not in a position to serve the customer without incurring unreasonable expenditures for system expansion. The neighbouring distributor is obviously better placed to serve the customer.

270 Section 6.5.3 of the Distribution System Code (DSC) requires that during the five year period after its inception, a physical distributor shall be obligated to continue to serve an existing load transfer customer unless otherwise negotiated between the physical distributor and geographic distributor. Section 6.5.4 requires that during the five year period after the DSC comes into effect, a geographic distributor that serves a load transfer customer shall either:

271 a) negotiate with a physical distributor that provides load transfer services so that the physical distributor will be responsible for providing distribution services to the customer directly, including application for changes to the licensed service areas of each distributor; or

272 b) expand the geographic distributor's distribution system to connect the load transfer customer and service that customer directly.

273 The Board recognizes that there are a number of load transfer arrangements in effect which are to be wound down according to these provisions of the DSC. The Board encourages parties to work together to eliminate these load transfers by determining which distributor can most rationally serve the customer(s) in question, from an economic efficiency, system planning, reliability and safety perspective. The Board will look favourably upon service area amendments where applicant and incumbent distributors consent to a rationalization or elimination of load transfer arrangements, including any financial arrangements which may be required.

4.5 Impacts on Applicant and Incumbent Distributors and their Customers

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System Average Costs

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Positions of the Parties

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277 Hydro One argued that the loss of existing customers, arising from a service area amendment, increases an incumbent distributor's system average costs, since the fixed costs will need to be spread over a smaller customer base. This will lead to higher rates for the incumbent distributor's end-use customers, and potentially those served by distributors supplied by Hydro One's distribution system. The reverse scenario is the case for the applicant distributor, which is able to lower its average costs and benefit its existing customers. Even for new customers, except where the customer "lies along" and the applicant distributor can serve the customer at a lower incremental cost without devaluation, the decrease in the applicant distributor's costs occurs only by bringing harm to the incumbent distributor and its customers.

278 Mr. Todd stated that if some new customers within an existing franchise area are served by a distributor other than the incumbent, the incumbent has fewer customers over which to spread its fixed costs. However, Mr. Todd was of the opinion that if the incremental costs incurred by the non-incumbent are less than the costs that would be incurred by the incumbent, then the total distribution costs for all distribution customers will be lower if the non-incumbent provides the new connection. Average costs will be minimized if the distributor with the lowest incremental cost for connecting a location provides service. If each new customer, or newly served area, is served on a monopoly basis by the distributor that is able to do so at the lowest incremental cost, the overall distribution costs that will have to be recovered from Ontario consumers will be lower than if existing service area boundaries are considered to be sacrosanct.

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Board Findings

280 The Board finds that impacts on system average costs can be largely mitigated through the application of the principles already articulated in this decision. The Board has indicated that overlapping and embedded service areas will generally not be found to be in the public interest, and these types of service area amendments held the greatest potential for increasing system average costs. The Board finds that when considering contiguous service area amendments, sufficient attention to the principles of economic efficiency should reduce or eliminate the potential for an adverse effect on system average costs. The avoidance of stranding of assets or the amelioration of such an impact must also be considered.

281 ## Stranding of Assets and Costs

282 ### Experts' Evidence

283 Mr. Southam, on behalf of the SW Applicants, advocated a requirement on the part of the customer seeking a connection to pay for any stranded costs that would be directly created by the connection of that customer to the applicant distributor's system. Mr. Southam defined stranded costs as unrecovered asset costs directly employed in serving existing customers that switch to an applicant utility. The types of assets that could be stranded or underutilized would include distribution lines, transformers and fixed distribution assets, but exclude billing systems. Mr. Southam indicated that embedding may lead to a stranding of assets depending on what the expectation of the host distributor was around the construction of the initial distribution line. For example, a host distributor may decide to construct a distribution line, based on projections of revenues associated with it. If a distribution wheeling rate is subsequently imposed to accommodate an embedded distributor which is materially less than the rates used for the revenue projection, the distributor will be disadvantaged and there ought to be compensation for stranded assets.

284 Mr. Southam indicated that the economic evaluation model in Appendix B of the Distribution System Code does not currently include a provision that would capture stranded asset costs. He indicated that such a provision could easily be incorporated in the same way that upstream costs are currently incorporated into these economic evaluations. In the revised economic evaluation model, the capital contribution from the customer that is proposing to switch would recapture the cost of stranded assets plus any new assets that would be required for customer connection or system expansion.

285 Dr. Chamberlin defined the value of stranded assets to be the unrecovered fixed costs contribution from the departing customer. This includes the fixed cost stream that the customer or group of customers would otherwise pay the utility that made the investments to serve those customers, not just in the direct connections but in all the upstream facilities, services and aspects of their service. Dr. Chamberlin also noted that any loss of future customers would lead to stranding of upstream assets made for future customers.

286 Dr. Chamberlin did not share the view that recovery of stranded costs should be limited to those direct expenses associated with connecting the customer. In order to keep the incumbent and their customers whole, all fixed costs paid by the customers in question would form the basis for stranded cost recovery. The recovery rate would have to be equal to the fixed cost portion of the otherwise

applicable rate charged to the incumbent distribution customers. Anything less would mean the fixed costs would not be fully recovered, and rates to remaining customers of the incumbent utility would have to rise, implying a subsidy from the customers of the incumbent utility to the customers of the new entrants.

287 Mr. Todd indicated that real stranding occurs only where an asset becomes unusable because of its location and the absence of customers. Therefore, stranding and the requisite compensation would occur only where there was switching of existing customers. It would therefore not apply to the case of embedded distribution which only affected new unserved or unserviced customers. Mr. Todd also suggested that taking a too liberal approach to stranding could provide an inappropriate incentive to distributors to invest in assets that may become stranded.

288 Dr. Yatchew indicated the analysis of stranding needs to be done on a case by case basis. The main principle the Board should adopt for assessing stranding is "what is the economic value of the asset being stranded".

289 Hydro One argued that in cases of service area amendments, where there is no agreement between the distributors, compensation must be paid to the incumbent for stranded assets and lost revenues associated with existing and future customers, less the costs that can be mitigated.

290 **Board Findings**

291 The Board has made it clear that this decision is prospective in its effect, and is not intended to, and should not be read so as to oblige any distributor to change its status with respect to any customer or distribution asset. Service Area amendments should not result in the Board-mandated transfer of customers from one distributor to another. Such transfers should be the subject of bilateral arrangements between distributors, wherein all of the issues engaged by such transfers can be addressed. Such issues involve appropriate compensation for any assets stranded as a result of the arrangement. In addition, the Board expects that the offer made to a potential connection customer will recognize the actual costs involved in completing the project, both the contribution in aid of construction, and any rate offering made. Both aspects of the connection transaction must reflect the true costs of connection and the provision of ongoing service to the connecting customer. Existing customers of the connecting utility ought not to be subsidizing any connection, nor should their interests be prejudiced in any other manner.

292 The Board expects that service area amendment applications involving new connections will typically not involve stranding issues. Where stranding issues do arise, they must be resolved in a manner that provides reasonable protection to the customers of the utility whose assets are being stranded. These customers have a reasonable expectation that they will not be unduly prejudiced by the actions or decisions of other market participants. Where parties are unable to resolve issues respecting stranding, the Board will do so. In considering whether assets are stranded, the Board will have regard to the extent to which an asset thought to be stranded is genuinely referable and connected or connectable to the project site, and part of the necessary infrastructure to serve that specific location. Where upstream customers have made significant contributions in aid of construction with a reasonable expectation that future connections will provide contributions in turn as they become connected, the Board may consider some portion of the original contribution to be stranded.

293 The Board heard some argument to the effect that all of the upstream assets of a given utility are to some extent stranded when connections are approved for other utilities within an incumbent's service area. The Board does not adopt this point of view. Stranding will only be recognized to the extent that a utility can demonstrate that the assets involved meet the characteristics outlined in this section.

294 Similarly, the Board heard argument to the effect that utilities ought to be compensated for lost opportunities for revenue where a service area amendment results in a connection within their former service area being made by another utility. The Board does not adopt this point of view. Apart from the stranding of assets demonstrated as outlined in this section, the Board will generally not recognize any other type of compensation.

5 FILING AND PROCESS REQUIREMENTS

295

296

Summarized below are the information filing requirements associated with service area amendment applications. Section 1 summarizes general filing information required for all applications. Section 2 summarizes additional information that is required for applications that are not on consent. Applicants should be aware that the Board may require information in addition to that listed below. Further, as the Board gains experience with processing service area amendment applications, these requirements may evolve.

297

Section 1:

298

General Information Filing Requirements for all Service Area Amendment Applications

299

- The identity of the applicant

300

- For each proposed project, a time line for the construction and completion of the new development, including Municipal approvals, construction schedule, energization requirements through to final occupancy of commercial, industrial or residential units.

301

- Confirmation of consent of or notice to affected parties, including confirmation of notice to the incumbent utility and any written response of the incumbent utility

302

- Description of proposed connection (individual customer; residential subdivision, commercial or industrial development; general service area expansion)

303

- A detailed description of lands in the proposed amendment service area suitable for use in describing the amended area in the distributor's electrical distribution licence – for individual customers this should include the lot and concession number(s) and municipal address including street number, municipality and/or county, and postal code; for proposed general expansion areas, this should include a clear description of the area on the basis of relevant geographic features.

304

- A map showing the proposed amendment area, the location of the proposed connection(s), and the electrical infrastructure in the amendment area and in the contiguous areas of each distributor that is adjacent to the amendment area

305

- Brief description of any other affected customer(s)

306

- Description of how the proposed amendment optimizes the use of existing infrastructure

- Description of any existing load transfers or retail points of supply that will be eliminated [307]
- Description of any additional load transfers or retail points of supply proposed [308]
- Size of load and how the capacity to serve this load will be provided [309]
- Cost, rate and service quality impacts for customers in the amendment area [310]
- Description of any safety and reliability impact of the proposed amendment. [311]
- Description of any assets that may be stranded [312]

Section 2: [313]

Additional Information Filing Requirements for Contested Applications [314]

- Evidence that the customer has been provided an opportunity to obtain an offer to connect from both the incumbent and the applicant. [315]
- Evidence that the incumbent distributor was provided an opportunity to make an offer to connect. [316]
- Copies of the offer(s) to connect, and associated financial evaluations in accordance with Appendix B of the Distribution System Code. The financial evaluations should indicate costs associated with the connection including on-site capital, capital required to extend the distribution system to the customer location, incremental up-stream capital investment required to serve the load, the present value of incremental OM&A costs and incremental taxes, as well as the expected incremental revenue, the amount of revenue shortfall and the capital contribution requested. [317]
- Detailed comparison of the new or upgraded electrical infrastructure necessary for each distributor to serve the proposed connection and load [318]
- Detailed comparison of the impact of connection by each distributor on upstream assets and capacity [319]
- Quantitative (not anecdotal) evidence of quality and reliability of service by each distributor to similar customers in comparable locations and densities. [320]

321

- If applications involve any overlap or new embedding, applicants should be able to demonstrate how economic efficiency is maintained by the amendment, and what special circumstances justify an exception to the general principles.

322

DATED at Toronto, February 27, 2004

_____
Paul Sommerville
Presiding Member

_____
Arthur Birchenough
Member

_____
Cathy Spoel
Member

TAB 13

Ontario Energy Board

Commission de l'Énergie de l'Ontario

Ontario

EB-2004-0445

NOTICE OF APPLICATION

To Amend the Electricity Distribution Licence of Hamilton Hydro Inc.

Hamilton Hydro Inc. has filed an application dated September 24, 2004 with the Ontario Energy Board under the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Schedule B, for an order of the Board amending Hamilton Hydro's distribution licence ED-2002-0566 to include within Hamilton Hydro's service area the proposed commercial plaza/development known as The Brooks at Rymal/20 being developed by 100 Main Street East Limited. The area to be included is in the City of Hamilton and is described as Block 1, Block 2 and Street 'A' part of a plan of "The Brooks of Rymal/20 Phase 1", being a subdivision of Part of Lots 1 and 2 - Block 4, Concession 1.

The parcel of land that is the subject of the application is presently within the service area of Hydro One Networks Inc. Hydro One supports the application and agrees that Hamilton Hydro can serve this location in a more economically efficient manner. Hydro One has consented to allowing Hamilton Hydro to serve this area in question.

Copies of the application are available for inspection at the Board's office and at Hamilton Hydro's office, at the addresses indicated below.

The Board may proceed to dispose of the application without a hearing unless a person requests a hearing in response to this notice. If you wish the Board to hold a hearing in this matter, you must request a hearing by writing a letter to the Board Secretary **on or before November 11, 2004**.

IF YOU DO NOT REQUEST A HEARING IN ACCORDANCE WITH THIS NOTICE, THE BOARD MAY PROCEED WITHOUT YOUR PARTICIPATION AND YOU WILL NOT BE ENTITLED TO FURTHER NOTICE IN THIS PROCEEDING.

Addresses:

Ontario Energy Board
P. O. Box 2319
2300 Yonge Street
26th Floor
Toronto, Ontario
M4P 1E4
Attn: John Zych
Board Secretary
Tel: 1-888-632-6273 (Toll free)
Fax: 416-440-7656
e-mail: Boardsec@oeb.gov.on.ca

Hamilton Hydro Inc.
PO Box 2249, Station LCD 1
55 John Street North
Hamilton, Ontario
L8N 3E4
Attn: Cameron McKenzie
Director, Regulatory Affairs
Tel: 905-317-4785
Fax: 905-522-6570
e-mail: chmckenzie@hamiltonhydro.com

DATED at Toronto November 4, 2004

ONTARIO ENERGY BOARD

Peter H. O'Dell
Assistant Board Secretary

TAB 14

Ontario Energy Board

Commission de l'Énergie de l'Ontario

Ontario

EB-2004-0536

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

AND IN THE MATTER OF an application pursuant to section 74 of the *Ontario Energy Board Act, 1998* by Hamilton Hydro Inc. to amend its Distribution Licence Number ED-2002-0566

DECISION AND ORDER

On December 2, 2004 Hamilton Hydro Inc. filed an application with the Ontario Energy Board pursuant to section 74 of the *Ontario Energy Board Act, 1998*. In its application, Hamilton Hydro Inc. sought an order of the Board to amend Schedule 1 of its distribution licence to include an area currently within the licensed distribution service area of Hydro One Networks Inc., to enable it to serve the customer, Multi-Area Developments Inc. Specifically, Hamilton Hydro seeks to exclude from Hydro One's distribution licence and include in its own licence, lands in the City of Hamilton, described as:

> The south side of Rymal Road, formerly the King's Highway No. 53, extending south to the existing Hydro One Networks Inc. transmission corridor right of way and then west of Swayze Road extending to the east side of White Church Road.

Should read "Twenty"

Principles of the Service Area Amendment Proceeding

In making determinations relating to the issuance, renewal or amendment of a distribution licence, I am to be guided by the applicable objectives listed in section 1 of the *Ontario Energy Board Act, 1998*, and by the policies established by the Board in furtherance of those objectives including the principles established for service area amendments as outlined in the Board Decision RP-2003-0044 dated February 27, 2004, known as the Service Area Amendment Proceeding (the "SAAP decision").

The Board outlined five principles in the SAAP decision. The first three principles state that amendments which lead to overlapping, embedded or non-contiguous service would not generally be found to be in the public interest. The fourth principle indicates that where consent of the affected parties (emphasis added) is provided the evidence required will be less than that required for an opposed application. The fifth principle states the primacy of economic efficiency as a determining factor in a service area amendment application.

Review of the Application

Hamilton Hydro states that it met with Hydro One in November 2004 to discuss the respective offers to connect that were made to Multi-Area Developments Inc. The evidence of Hamilton Hydro states that Hydro One agreed "not to contest" the application. Included in the application was an unsigned letter from Hydro One to that effect.

In response to enquiries by Board staff to confirm its intent, Hydro One filed a letter with the Board dated January 7, 2005 which stated that it would not contest the application. Hydro One also stated that Hamilton Hydro's connection offer is the lowest cost proposal and requires the lowest capital contribution of the customer. However, in the same letter Hydro One submitted that the application if approved would not meet the requirements of the Board's SAAP decision. Hydro One wrote that "long-term costs to service the entire amendment area would not be significantly different between the two LDCs, given the infrastructure currently in place" and that the application "seeks to add areas already containing Hydro One customers and assets and also seeks to add lands slated for future development, but with no definitive development plans." Hydro One further indicated that "depending on how the Hamilton or Hydro One licences are amended..." overlapping or embedded service areas might be created, or Hydro One could be serving customers in an area it is not licensed to serve.

As indicated in the SAAP decision, consent by the currently licensed utility to an amendment proposal may be construed as affirmation of the economic efficiency of the applicant's proposal. Hydro One did not consent to Hamilton's proposal, instead it has chosen not to contest the application. The distinction is meaningful to the disposition of this application.

Efficiency is measured in two ways; cost efficiency, which calculates the cost and benefits of the proposal; and engineering efficiency, which informs costs, and assesses system planning, safety and reliability. Hamilton Hydro did not provide specific and detailed evidence regarding the efficiency of its proposal. In its submission, Hydro One acknowledges that Hamilton Hydro's offer results in the lowest cost of connection and capital contribution to the customer. Hydro One also submits that the long-term costs to service the entire amendment area are not significantly different as between the two utilities. As implied by this submission, the fact that Hamilton Hydro can provide the lowest cost of connection and customer contribution is an important, but not determinative, aspect of economic efficiency.

Hydro One argues that the application does not meet the Board's policy because it might result in embedded customers. The Board's SAAP decision infers that overlapping, embedded or non-contiguous proposals do not generally lead to the most economically efficient service solution. The decision does not preclude the possibility that commingled distribution service may be efficient, but where the applicant is proposing commingled service its evidentiary burden is greater.

In this application Hydro One has raised the possibility of embedded customers. Hamilton Hydro is required to identify and address issues related to embedded customers but its application does not identify any overlapping service. If the application were approved as proposed, Hydro One would lose its right to serve any customers in the amended service area. If there are customers currently in the proposed amendment area then the Board needs to understand, from both a practical and economic perspective, how their service is to be continued.

A service amendment application must consider the economic efficiency of serving the entire proposed area and not just the immediate connection that might initiate the application. A fulsome economic analysis should include the costs of transferring current services, including compensation for any stranded assets. Hydro One is not obligated to undertake asset transfers. If affected customers are not to be transferred, then the applicant must provide a clear description as to how a non-contiguous or overlapping service area with current and potentially future embedded customers provides for the optimal service efficiency.

Hydro One also submits that Hamilton Hydro is seeking to acquire area in which there are no immediate plans for service and that this is contrary to the Board's SAAP decision. No evidence was filed by either party which would allow this claim to be evaluated.

The Board is prepared to move expeditiously on a consent application. A consent application must include clear informed consent from both the current service utility and any existing customers affected by the proposal. The Board also needs to understand clearly the intent of a utility choosing to "not contest" rather than "consent" to an application. It is incumbent upon the applicant, and not the Board, to discover and present any meaningful distinction implied by this choice of words. Inappropriately framed, or inadequately supported applications will necessarily lead to delays.

The proposal as filed, is not a "consent" application. Despite its words to the contrary, Hydro One has, in fact, contested the applicant's proposal. Hamilton Hydro has filed no specific economic evaluation, nor has it addressed the issue of potential embedded customers in an overlapping or non-contiguous service area. Hamilton Hydro has not met the burden of proving its case.

The application is dismissed without prejudice to Hamilton Hydro's right to file another application in which it addresses the issues and files the evidence discussed above.

Under section 7(1) of the Ontario Energy Board Act, 1998, this decision may be appealed to the Board within 15 days.

DATED at Toronto, February 4, 2005

ONTARIO ENERGY BOARD

Original signed by

Mark Garner
Managing Director
Market Operations

TAB 15

Ontario Energy Board

Commission de l'Énergie de l'Ontario

Ontario

EB-2005-0262

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

AND IN THE MATTER OF an application pursuant to section 74 of the *Ontario Energy Board Act, 1998* by Hamilton Hydro Inc. to amend its Distribution Licence Number ED-2002-0566.

By delegation, before: Mark C. Garner

DECISION AND ORDER

On April 4, 2005, Hamilton Hydro Inc. filed an application with the Ontario Energy Board pursuant to section 74 of the *Ontario Energy Board Act, 1998.* In its application, Hamilton Hydro sought an order of the Board to serve the customer, Multi-Area Developments Inc., by excluding from Hydro One's distribution licence and including in its own licence, lands described as:

> The former Township of Binbrook in the former Township of Glanbrook as of December 31, 1973, now in the City of Hamilton and described as Part of Township Lots Six (6) and Seven (7), Block Five (5) in the First Concession of the Geographic Township of Binbrook and known as Summit Park Phase 1 on Plan 62M. These lands are bounded to the north by Rymal Road East, to the east by Fletcher Road, to the west by Dakota Boulevard and to the south by a Hydro One Networks Inc. high voltage transmission line right of way.

This service area amendment is granted.

Background

The application is for a subset of the service area previously proposed to be amended to Hamilton Hydro's licence in its application EB-2004-0536. The previous proposal was rejected because: (1) the incumbent utility, Hydro One, indicated that the long-term cost of

serving the area would not be significantly different as between the two utilities; (2) Hydro One indicated that the proposal could lead to embedded customers within the amended service territory of Hamilton Hydro; (3) Hydro One submitted that Hamilton Hydro was seeking service areas for which it had no immediate plans for service; and, (4) the service area would not form a contiguous border with Hamilton Hydro. The application was dismissed without prejudice to file a reformed proposal.

The current application involves the same Summit Park project that was associated with the previous application, and it is being developed by the same organization, Multi-Area Developments Inc. The scale of the project, however, has been significantly reduced. The project being proposed involves only the first phase, representing approximately 200 lots, of a project that may see as many as 3200 lots developed.

A Letter of Direction was sent to Hamilton Hydro on May 12, 2005. This letter requested that Hamilton Hydro serve notice of the application on Hydro One, Multi-Area Developments and any customers or landowners in the proposed amendment area.

Letters in response to the Notice of Application were as follows:

- On May 13, 2005, a letter from Multi-Area Developments stating it was in agreement with the Application and indicating its agreement to proceed without a hearing;

- On May 15, 2005, a letter from Hamilton Hydro stating that the project developer was the only landowner in the proposed amendment area;

- On May 19, 2005, a letter from Hydro One stating it was not contesting the proposed amendment and indicating its agreement to proceed without a hearing;

- On May 19, 2005, a letter from the Power Workers' Union expressing concerns about Hamilton Hydro's application and requesting that the Board hold a hearing on the matter. In the alternative, the PWU asked that it be provided with copies of the filings related to the application and that it have the opportunity to make written submissions prior to a decision by the Board; and,

- On June 7, 2005, a letter from the Power Workers' Union withdrawing their request for a hearing.

Licensed Service Area

Pursuant to subsection 6(1) of the *Ontario Energy Board Act, 1998*, I have been delegated the powers and duties of the Board with respect to the determination of applications made under section 74 of that *Act*. This Order is made under the authority of that delegation and is based on the evidence filed in support of the application and the submissions of interested parties.

Multi-Area Developments agrees to have Hamilton Hydro provide service to the development. Hydro One stated that it would not contest this licence amendment and it made no other submissions in respect to the substance of the application.

Hamilton Hydro has demonstrated that is has adequate distribution infrastructure in the area to provide service for this phase of the development. There are two high capacity distribution feeders adjacent to the proposed amendment area. Hamilton Hydro also offered Multi-Area Developments a lower cost of connection than Hydro One. The Applicant provided supporting evidence of the cost of connection.

There are no existing customers of Hydro One in the proposed amendment area. Hamilton Hydro has stated the revised service area proposal results in no stranded assets or embedded customers of Hydro One.

The Power Workers' Union raised concern that service to future phases of the development could run counter to the principles in respect to service area amendments as set out in the Board's decision RP-2003-0044. However, they chose not to make a specific submission in respect to the application before the Board.

Hamilton Hydro has addressed those deficiencies raised in the original application and I therefore find that it is in the public interest to amend the distribution licence as proposed by the Applicant.

IT IS ORDERED THAT:

Hamilton Hydro Inc.'s Distribution Licence (ED-2002-0566) is amended as per Schedule 1 as attached to this order.

Under section 7(1) of the *Ontario Energy Board Act, 1998*, this decision may be appealed to the Board within 15 days.

DATED at Toronto, June 15, 2005

ONTARIO ENERGY BOARD

Mark C. Garner
Managing Director Market Operations

TAB 16

Ontario Energy Board

Commission de l'Énergie de l'Ontario

Ontario

EB-2005-0504

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

AND IN THE MATTER OF an application pursuant to section 74 of the *Ontario Energy Board Act, 1998* by Horizon Utilities Corporation to amend Hamilton Hydro Inc.'s Distribution Licence Number ED-2002-0566.

By delegation, before: Mark C. Garner

DECISION AND ORDER

On October 20, 2005, Horizon Utilities Corporation ("Horizon") filed an application with the Ontario Energy Board (the "Board") pursuant to section 74 of the *Ontario Energy Board Act, 1998* (the "Act"). The application was amended on December 11, 2005. In its application, Horizon sought an order of the Board to amend the service area of Hamilton Hydro Inc.'s Distribution Licence ED-2002-0566 (the "Hamilton Hydro Licence") to serve a number of customers that were currently within Hydro One Networks Inc.'s ("Hydro One") service area. If the application is granted, the application would have the effect of excluding this service area from Hydro One's licensed service area and adding it to Horizon's service area by adding it to the Hamilton Hydro Licence. Horizon applied for the following lands to be added into the Hamilton Hydro Licence:

> The former Township of Binbrook in the former Township of Glanbrook as of December 31, 1973, now in the City of Hamilton and described as Part of Township Lots Six (6) and Seven (7), Block Five (5) in the First Concession of the Geographic Township of Binbrook and known as Summit Park Phase 2, on Plan 62M.

The application is approved with the exclusion of four existing Hydro One customers.

Background

Horizon was created by Articles of Amalgamation on March 1, 2005 as a result of the merger of Hamilton Hydro Inc. and St. Catharines Hydro Utility Services Inc. Horizon owns and operates the distribution systems in the service areas of the former Hamilton Hydro Inc. and St. Catharines Hydro Utility Services Inc.

The proposed service area expansion would allow Horizon to supply electricity to customers in the Second Phase of the Summit Park development project as well as four other customers currently served by Hydro One. The proposed development project is located within Hydro One's licensed service area and has been the subject of an earlier service area amendment regarding the Hamilton Hydro Licence. On June 15, 2005, the Board issued a Decision and Order to amend the Hamilton Hydro Licence to include Phase One of the Summit Park development.

The Summit Park Phase Two development is comprised of one hundred and fifty-nine residential homes and townhouse style dwellings. This development has portions both to the north and to the south of the existing Summit Park Phase One development.

There are four Hydro One customers currently in the proposed amendment area. In its application, Horizon requested that Hydro One's distribution licence be adjusted to "ensure that the customers become part of the clearly defined territory of Horizon Utilities."

On November 14, 2005, the Board received a letter from Hydro One stating that it was not contesting the proposed amendment. However, Hydro One commented that there were a number of areas in the application that may not be consistent with the intent of the Board's Decision with Reasons in the RP-2003-0044 Combined Service Area Amendment Proceeding ("Board Decision RP-2003-0044"). One of Hydro One's concerns related to four of its customers who would become embedded within the proposed service territory of Horizon. Hydro One stated that it believed that it is inappropriate for Horizon to seek the transfer of its customers and suggested that Horizon consider amending its application.

A Letter of Direction was sent to Horizon on November 18, 2005. This letter requested that Horizon publish the Notice of Application and Hearing and serve notice of the application on Hydro One, the Power Workers' Union and to the four customers already being served by Hydro One who may be potentially affected by the proposed amendment.

On November 24, 2005, the Board received a letter from the Power Workers' Union stating that it did not oppose the application but did share the concerns expressed by Hydro One and supported Hydro One's suggestion for an amendment to the application. The Power Workers' Union also raised concerns that service to future phases of the development could run counter to the principles regarding service area amendments set out in the Board Decision RP-2003-0044.

Licensed Service Area

Pursuant to subsection 6(1) of the Act, I have been delegated the powers and duties of the Board with respect to the determination of applications made under section 74 of the Act. This order is made under the authority of that delegation and is based on the evidence filed in support of the application, the submissions of interested parties, and the principles established for service area amendments as outlined in Board Decision RP-2003-0044.

Horizon already serves Phase One of the Summit Park development ("Phase One"). Phase Two of the Summit Park development would connect to existing vaults located in the Phase One distribution system. Horizon has demonstrated that it has adequate distribution infrastructure in the area to provide service for this phase of the development. Because Horizon offered its customer, Multi-Area Developments Inc., a lower cost of connection than Hydro One for Phase One, Multi-Area Developments Inc. did not approach Hydro One for an offer to connect for the second phase of the development. Horizon proposes to provide the service to phase two of the development from the facilities it built to service the development's first phase.

In Board Decision RP-2003-0044, the Board clearly set out its view that the transfer of customers from one distributor to another should be the subject of bilateral arrangements between distributors. Horizon should have been aware of this fact and it should have initiated negotiations with Hydro One to arrange for the transfer of the four Hydro One customers. Horizon did not enter into negotiations with Hydro One. Horizon stated that it "understood, from previous conversations with Hydro One staff that the province has not provided direction to Hydro One to divest of customers and therefore compensation [for the four customers] could not be discussed." Horizon did also state that it "is open to negotiations with Hydro One," but this does not appear to have occurred before this application was filed since Hydro One has stated, in its response to this application, that it "...was left out of any discussions with Horizon prior to the filing of this application rather than being included as would normally be the case for service territory applications."

It does not appear that Horizon has met its responsibility of following Board Decision RP-2003-0044 and attempted to negotiate a transfer of Hydro One's customers with Hydro One directly. Horizon's inability to carry out its responsibility has left me no choice but to follow the views of the Board in Board Decision RP-2003-0044, namely that service area amendments "should not result in the Board-mandated transfer of customers from one distributor to another." This means that the four Hydro One customers will remain with Hydro One and will not become part of Horizon's service area.

While I feel that it would have been best for Horizon to enter into negotiations with Hydro One to provide for the transfer of the four Hydro One customers prior to filing this application, I recognize that Multi-Area Developments Inc. needs the service from Horizon to proceed quickly. In this case, I will grant the service area amendment but I will exclude from the Hamilton Hydro Licence the addresses of the four customers of Hydro One.

The addresses excluded from the amended service territory are:

1. 1898 Rymal Road East, RR # 1, Hannon, Ontario, L0R 1P0;
2. 1900 Rymal Road East, RR # 1, Hannon, Ontario, L0R 1P0;
3. 1910 Rymal Road East, RR # 1, Hannon, Ontario, L0R 1P0; and
4. 1912 Rymal Road East, RR # 1, Hannon, Ontario, L0R 1P0.

I would like to point out that were it not for the consideration of the larger public interest served by ensuring timely service to Multi-Area Developments Inc., I would have seriously considered denying this application until such time as it was shown that Horizon had entered into negotiations with Hydro One to provide for the transfer of the four Hydro One customers. I expect that any service area amendment applications will not be filed until the acquiring utility can show that it has attempted to negotiate with the adjoining utility where the negotiations are likely to result in a more efficient rationalization of the distribution system.

IT IS ORDERED THAT:

Hamilton Hydro Inc.'s Distribution Licence (ED-2002-0566) is amended as per Schedule 1 as attached to this order.

Under section 7(1) of the *Ontario Energy Board Act, 1998*, this decision may be appealed to the Board within 15 days.

DATED at Toronto, February 17, 2006

ONTARIO ENERGY BOARD

Mark C. Garner
Managing Director, Market Operations

SCHEDULE 1 DEFINITION OF DISTRIBUTION SERVICE AREA

This Schedule specifies the area in which the Licensee is authorized to distribute and sell electricity in accordance with condition 8.1 of this Licence.

1. The former Police Village of Ancaster in the former Town of Ancaster as of December 31, 1973, now in the City of Hamilton and described as:

   - NW corner of Concession 1, Lot 42 and Old Railway Line
   - Directly NNE to middle of Concession I, Lot 46
   - North to Dundas boundary, along boundary NE to Hamilton boundary, along Dundas/Hamilton boundary
   - SW across Filman Road to include 1245 Filman, travel SW parallel with Hwy 2 to the escarpment
   - S along escarpment (include Ancaster heights survey)
   - S to W border of Concession II, Lot 49 to Railway Right of Way (behind Mohawk Road)
   - SW to Cayuga Drive, W to Railway Right of Way
   - West along Right of Way to far west boundary of Concession III, Lot 47
   - South between Lot 46 and 47 to include 38 Chancery Drive West
   - West, parallel with Golf Links Road to back lot of 23 Cameron Drive in Concession III, Lot 44
   - Follow back of Cameron Drive back lot to 35 Cameron, go south parallel to end of 209 Rosemary Drive, East to the back of 206 Rosemary Drive
   - North along back lots to 104 Rosemary, East to back lot of 103 Rosemary
   - North along back lots of St. Margarets Road to Hwy 2
   - Direct line SW, crossing over Fiddlers Green to middle of Concession III, Lot 41 North back lot of Rembrandt Court to Jerseyville Road W
   - SW along Jersey ville through back lots of Blair, Terrence Park and Oakhill to back lot lien of 211/220 Colleen Crescent

- NE to division of back lot along border of Concession III, Lots 41 & 42
- SW along border to lot line of 145 Terrence Park, across Terrence Park to include back lots of 51 and 55
- SE over Terrence Park between houses 94 and 90
- N along the rear lots of Terrence Park and McGregor Crescent
- NE between houses 69 & 65 McGregor, across McGregor between houses 74 and 62
- Continue rear lots East between houses 54 and 50 McGregor
- North in direct line to Sulphur Springs Road
- West 100 metres, directly NW to Concession II, Lot 42 to Old Railway Line

2. The former Town of Dundas as of December 31, 1980, now in the City of Hamilton.

3. The former Police Village of Lynden in the former Town of Ancaster as of December 31, 1973, now in the City of Hamilton.

4. The former Village of Waterdown in the former Township of Flamborough as of December 31, 1980, now in the City of Hamilton.

5. The expansion area as set out in By-law No. 96-17-H in the former Township of Flamborough as of December 31, 1980, now in the City of Hamilton and defined as :

   East Boundary: Concession 3 East – Centreline of Kerns Road extending north along east boundary of 60' Interprovincial Pipeline easement continuing north along boundary line between Town of Flamborough and City of Burlington.

   North Boundary: Concession 5 East – Centreline of the 50' wide Sun Canadian Pipeline Company easement – extending across Hwy. No. 6, along boundary line between properties 25.50.200.430.56400 and 25.30.200.430.56800/ 25.30.200.430.56600.

   West Boundary: Boundary line between Lots 19 and 20 on Concession 1, Concession 2, Concession 3, and Concession 4 proceeding northerly to north boundary as described above.

   South Boundary: Flamborough/Burlington/Dundas boundaries where the electrical distribution systems of Ontario Hydro and Burlington Hydro are already separated.

Includes to the East: The boundaries of the Town of Lynden as defined in 1. above.

6. The City of Hamilton as of December 31, 2000.

7. The former City of Stoney Creek as of December 31, 2000, now in the City of Hamilton.

8. Plan 62 R-15706, Part of Lot 3, Block 1, Concession 1, former Geographic Township of Binbrook, in the former Township of Glanbrook, now in the City of Hamilton, comprising Part 1 to Part 11 inclusive.

9. Land located "in the former Township of Binbrook, in the former Township of Glanbrook, as of December 31, 1973, now in the City of Hamilton and described as Block 1, Block 2 and Street 'A' part of a plan of "The Brooks of Rymal/20 Phase 1", being a subdivision of Part of Lots 1 and 2 - Block 4, Concession 1".

10. The former Township of Binbrook in the former Township of Glanbrook as of December 31, 1973, now in the City of Hamilton and described as Part of Township Lots Six (6) and Seven (7), Block Five (5) in the First Concession of the Geographic Township of Binbrook and known as Summit Park Phase 1 on Plan 62M. These lands are bounded to the north by Rymal Road east, to the east by Fletcher Road, to the west by Dakota Boulevard and to the south by a Hydro One Networks Inc. high voltage transmission line right of way.

11. The former Township of Binbrook in the former Township of Glanbrook as of December 31, 1973, now in the City of Hamilton and described as Part of Township Lots Six (6) and Seven (7), Block Five (5) in the First Concession of the Geographic Township of Binbrook and known as Summit Park Phase 2, on Plan 62M except for the following addresses (which are excluded):

- 1898 Rymal Road East, RR # 1, Hannon, Ontario, L0R 1P0
- 1912 Rymal Road East, RR # 1, Hannon, Ontario, L0R 1P0
- 1900 Rymal Road East, RR # 1, Hannon, Ontario, L0R 1P0
- 1910 Rymal Road East, RR # 1, Hannon, Ontario, L0R 1P0

TAB 17

Ontario Energy Board

Commission de l'Énergie de l'Ontario

Ontario

EB-2006-0216

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

AND IN THE MATTER OF an application pursuant to section 74 of the *Ontario Energy Board Act, 1998* by Horizon Utilities Corporation to amend its Electricity Distribution Licence ED-2006-0031.

By delegation, before: Mark C. Garner

DECISION AND ORDER

Horizon Utilities Corporation ("Horizon") filed an application with the Ontario Energy Board (the "Board") under section 74 of the *Ontario Energy Board Act 1998*, (the "Act") for an order of the Board to amend its licensed service area in Schedule 1 of its distribution licence ED-2006-0031. The application was received by the Board on September 12, 2006.

This service area amendment is required in order for Horizon to supply electricity to the Summit Park Phase Three development project, which is currently located within Hydro One Networks Inc.'s ("Hydro One") licensed service area. These lands are described as:

> The former Township of Binbrook in the former Township of Glanbrook as of December 31, 1973, now in the City of Hamilton and described as Part of Township Lot Seven (7), Block Five (5) in the First Concession of the Geographic Township of Binbrook and known as Summit Park Phase 3, on Plan 62M except for the following addresses (which are excluded);
> - 70 Fletcher Road East, Hannon, Ontario, L0R 1P0
> - 80 Fletcher Road East, Hannon, Ontario, L0R 1P0

The service area amendment is granted.

Background

Pursuant to subsection 6(1) of the Act, I have been delegated the powers and duties of the Board with respect to the determination of applications made under section 74 of the Act. This order is made under the authority of that delegation and is based on the evidence filed in support of the application and the submissions of interested parties.

Horizon applied for a service area amendment for the purpose of supplying electricity to a proposed residential development known as Summit Park Phase Three. This development is the third phase of the development project. Phase Three consists of forty-nine (49) residential homes. Once all phases are completed, the development will consist of thirty-two hundred (3,200) residential homes and commercial properties. The project is being developed by Multi-Area Developments Inc.

Hydro One supported this service area amendment application. In its letter of support, Hydro One stated that Horizon has an existing distribution system already constructed in Summit Park Phases One and Two (which is contiguous with Phase Three). Hydro One also stated that there are two Hydro One customers on the western boundary but they are not embedded as Hydro One continues to service the area further west and therefore continues to service these two customers.

Horizon served notice of this application to Hydro One, Multi-Area Developments Inc., Power Workers' Union and the two Hydro One customers on the western boundary of the proposed service area amendment. Hydro One was the only party to request intervenor status. Hydro One's submission on November 1, 2006 reiterated its support for Horizon's application, as originally stated in Hydro One's September 7, 2006 letter.

Licensed Service Area

Horizon already serves Phases One and Two of the Summit Park Development. Phase Three is contiguous with the earlier phases and Horizon has demonstrated that it has adequate distribution infrastructure in the area to provide service for this phase of the development. Horizon stated that it offered its customer, Multi-Area Developments Inc., a lower cost of connection than Hydro One. Also, Horizon stated that it has an existing distribution system already constructed in Phase One and Phase Two. As a result, Multi-Area Developments did not approach Hydro One for an offer to connect Phase Three.

There are no existing customers of Hydro One in the proposed amendment area. Horizon has stated that the revised service area proposal results in no stranded assets or embedded customers of Hydro One.

Since there are no objections to allowing the proposed service area amendment and since the proposed amendment is consistent with the Board's policies regarding service area amendments, I find that it is in the public interest to amend Horizon's electricity distribution

licence as proposed by Horizon.

IT IS ORDERED THAT:

Horizon Utilities Corporation's Distribution Licence (ED-2006-0031) is amended as per Appendix A, which is attached to this Decision and Order.

Under section 7(1) of the *Ontario Energy Board Act, 1998*, this decision may be appealed to the Board within 15 days.

DATED at Toronto, November 23, 2006

ONTARIO ENERGY BOARD

Original signed by

_____

Mark C. Garner
Managing Director
Market Operations

Appendix A

AMENDED SCHEDULE 1: DEFINITION OF DISTRIBUTION SERVICE AREA

SCHEDULE 1 DEFINITION OF DISTRIBUTION SERVICE AREA

This Schedule specifies the area in which the Licensee is authorized to distribute and sell electricity in accordance with condition 8.1 of this Licence.

1. The former Police Village of Ancaster in the former Town of Ancaster as of December 31, 1973, now in the City of Hamilton and described as:

   - NW corner of Concession 1, Lot 42 and Old Railway Line
   - Directly NNE to middle of Concession I, Lot 46
   - North to Dundas boundary, along boundary NE to Hamilton boundary, along Dundas/Hamilton boundary
   - SW across Filman Road to include 1245 Filman, travel SW parallel with Hwy 2 to the escarpment
   - S along escarpment (include Ancaster heights survey)
   - S to W border of Concession II, Lot 49 to Railway Right of Way (behind Mohawk Road)
   - SW to Cayuga Drive, W to Railway Right of Way
   - West along Right of Way to far west boundary of Concession III, Lot 47
   - South between Lot 46 and 47 to include 38 Chancery Drive West
   - West, parallel with Golf Links Road to back lot of 23 Cameron Drive in Concession III, Lot 44
   - Follow back of Cameron Drive back lot to 35 Cameron, go south parallel to end of 209 Rosemary Drive, East to the back of 206 Rosemary Drive
   - North along back lots to 104 Rosemary, East to back lot of 103 Rosemary
   - North along back lots of St. Margarets Road to Hwy 2
   - Direct line SW, crossing over Fiddlers Green to middle of Concession III, Lot 41 North back lot of Rembrandt Court to Jerseyville Road W
   - SW along Jersey ville through back lots of Blair, Terrence Park and Oakhill to back lot lien of 211/220 Colleen Crescent
   - NE to division of back lot along border of Concession III, Lots 41 & 42

- SW along border to lot line of 145 Terrence Park, across Terrence Park to include back lots of 51 and 55
- SE over Terrence Park between houses 94 and 90
- N along the rear lots of Terrence Park and McGregor Crescent
- NE between houses 69 & 65 McGregor, across McGregor between houses 74 and 62
- Continue rear lots East between houses 54 and 50 McGregor
- North in direct line to Sulphur Springs Road
- West 100 metres, directly NW to Concession II, Lot 42 to Old Railway Line

2. The former Town of Dundas as of December 31, 1980, now in the City of Hamilton.

3. The former Police Village of Lynden in the former Town of Ancaster as of December 31, 1973, now in the City of Hamilton.

4. The former Village of Waterdown in the former Township of Flamborough as of December 31, 1980, now in the City of Hamilton.

5. The expansion area as set out in By-law No. 96-17-H in the former Township of Flamborough as of December 31, 1980, now in the City of Hamilton and defined as :

   East Boundary: Concession 3 East – Centreline of Kerns Road extending north along east boundary of 60' Interprovincial Pipeline easement continuing north along boundary line between Town of Flamborough and City of Burlington.

   North Boundary: Concession 5 East – Centreline of the 50' wide Sun Canadian Pipeline Company easement – extending across Hwy. No. 6, along boundary line between properties 25.50.200.430.56400 and 25.30.200.430.56800/ 25.30.200.430.56600.

   West Boundary: Boundary line between Lots 19 and 20 on Concession 1, Concession 2, Concession 3, and Concession 4 proceeding northerly to north boundary as described above.

   South Boundary: Flamborough/Burlington/Dundas boundaries where the electrical distribution systems of Ontario Hydro and Burlington Hydro are already separated.

   Includes to the East: The boundaries of the Town of Lynden as defined in 1. above.

6. The City of Hamilton as of December 31, 2000.

7. The former City of Stoney Creek as of December 31, 2000, now in the City of Hamilton.

8. Plan 62 R-15706, Part of Lot 3, Block 1, Concession 1, former Geographic Township of Binbrook, in the former Township of Glanbrook, now in the City of Hamilton, comprising Part 1 to Part 11 inclusive.

9. Land located "in the former Township of Binbrook, in the former Township of Glanbrook, as of December 31, 1973, now in the City of Hamilton and described as Block 1, Block 2 and Street 'A' part of a plan of "The Brooks of Rymal/20 Phase 1", being a subdivision of Part of Lots 1 and 2 - Block 4, Concession 1".

10. The former Township of Binbrook in the former Township of Glanbrook as of December 31, 1973, now in the City of Hamilton and described as Part of Township Lots Six (6) and Seven (7), Block Five (5) in the First Concession of the Geographic Township of Binbrook and known as Summit Park Phase 1 on Plan 62M. These lands are bounded to the north by Rymal Road east, to the east by Fletcher Road, to the west by Dakota Boulevard and to the south by a Hydro One Networks Inc. high voltage transmission line right of way.

11. The former Township of Binbrook in the former Township of Glanbrook as of December 31, 1973, now in the City of Hamilton and described as Part of Township Lots Six (6) and Seven (7), Block Five (5) in the First Concession of the Geographic Township of Binbrook and known as Summit Park Phase 2, on Plan 62M except for the following addresses (which are excluded):

    - 1898 Rymal Road East, RR # 1, Hannon, Ontario, L0R 1P0
    - 1912 Rymal Road East, RR # 1, Hannon, Ontario, L0R 1P0
    - 1900 Rymal Road East, RR # 1, Hannon, Ontario, L0R 1P0
    - 1910 Rymal Road East, RR # 1, Hannon, Ontario, L0R 1P0

12. The City of St. Catharines as at December 31, 1990.

13. The former Township of Binbrook in the former Township of Glanbrook as of December 31, 1973, now in the City of Hamilton and described as Part of Township Lot Seven (7), Block Five (5) in the First Concession of the Geographic Township of Binbrook and known as Summit Park Phase 3, on Plan 62M except for the following addresses (which are excluded);

    - 70 Fletcher Road East, Hannon, Ontario, L0R 1P0
    - 80 Fletcher Road East, Hannon, Ontario, L0R 1P0

TAB 18

Ontario Energy Board

Commission de l'Énergie de l'Ontario

Ontario

EB-2006-0311

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

AND IN THE MATTER OF an application pursuant to section 74 of the *Ontario Energy Board Act, 1998* by Horizon Utilities Corporation to amend its Electricity Distribution Licence ED-2006-0031.

By delegation, before: Mark C. Garner

DECISION AND ORDER

Horizon Utilities Corporation ("Horizon") filed an application with the Ontario Energy Board (the "Board") under section 74 of the *Ontario Energy Board Act 1998*, (the "Act") for an order of the Board to amend its licensed service area in Schedule 1 of its distribution licence ED-2006-0031. The application was received by the Board on November 30, 2006.

This service area amendment is required in order for Horizon to supply electricity to the Summit Park Phase Four development project, which is currently located within Hydro One Networks Inc.'s ("Hydro One") licensed service area. These lands are described as:

> The former Township of Binbrook in the former Township of Glanbrook as of December 31, 1973, now in the City of Hamilton and described as Part of Township Lot Seven (7), Block Five (5) in the First Concession of the Geographic Township of Binbrook and known as Summit Park Phase 4, on Plan 62M except for the following address (which is excluded):
> - 134 Fletcher Road East, Hannon, Ontario, L0R 1P0.

Horizon requested that the Board proceed with the application in an expeditious manner without a hearing, pursuant to subsection 21(4)(b)of the Act as all affected parties were

provided with copies of the application and were asked that any concerns be raised with the Board.

The service area amendment is granted.

Background

Pursuant to subsection 6(1) of the Act, I have been delegated the powers and duties of the Board with respect to the determination of applications made under section 74 of the Act. This order is made under the authority of that delegation and is based on the evidence filed in support of the application and the submissions of interested parties.

Horizon applied for a service area amendment for the purpose of supplying electricity to a proposed residential development known as Summit Park Phase Four. This development is the fourth phase of the development project. Phase Four consists of sixty (60) residential homes. Once all phases are completed, the development will consist of thirty-two hundred (3,200) residential homes and commercial properties. The project is being developed by Multi-Area Developments Inc.

Hydro One supported this service area amendment application. In its letter of support, Hydro One stated that Horizon has an existing distribution system already constructed in Summit Park Phases One, Two and Three (which is contiguous with Phase Four), whereas Hydro One would need to extend its 27.6 kV circuit approximately two kilometres in order to serve Phase Four. Hydro One stated that Horizon would be the most cost-effective distributor for the area that is the subject matter of Horizon's application.

I have proceeded without a hearing under section 21(4)(b) of the Act as no person will be adversely affected in a material way by the outcome of this proceeding.

Licensed Service Area

Horizon already serves Phases One, Two, and Three of the Summit Park Development. Phase Four is contiguous with the earlier phases and Horizon has demonstrated that it has adequate distribution infrastructure in the area to provide service for this phase of the development. Summit Park Phase Four is a natural extension to Horizon's existing urban distribution system.

There are no existing customers of Hydro One in the proposed amendment area. Horizon has stated that the revised service area proposal results in no stranded assets or embedded customers of Hydro One.

Since the proposed amendment is consistent with the Board's policies regarding service area amendments, I find that it is in the public interest to amend Horizon's electricity distribution licence as proposed by Horizon.

IT IS ORDERED THAT:

Horizon Utilities Corporation's Distribution Licence (ED-2006-0031) is amended as per Appendix A, which is attached to this Decision and Order.

Under section 7(1) of the *Ontario Energy Board Act, 1998*, this decision may be appealed to the Board within 15 days.

DATED at Toronto, January 5, 2007

ONTARIO ENERGY BOARD

_____

Mark C. Garner
Managing Director
Market Operations

Appendix A

AMENDED SCHEDULE 1: DEFINITION OF DISTRIBUTION SERVICE AREA

SCHEDULE 1 DEFINITION OF DISTRIBUTION SERVICE AREA

This Schedule specifies the area in which the Licensee is authorized to distribute and sell electricity in accordance with condition 8.1 of this Licence.

1. The former Police Village of Ancaster in the former Town of Ancaster as of December 31, 1973, now in the City of Hamilton and described as:

   - NW corner of Concession 1, Lot 42 and Old Railway Line
   - Directly NNE to middle of Concession I, Lot 46
   - North to Dundas boundary, along boundary NE to Hamilton boundary, along Dundas/Hamilton boundary
   - SW across Filman Road to include 1245 Filman, travel SW parallel with Hwy 2 to the escarpment
   - S along escarpment (include Ancaster heights survey)
   - S to W border of Concession II, Lot 49 to Railway Right of Way (behind Mohawk Road)
   - SW to Cayuga Drive, W to Railway Right of Way
   - West along Right of Way to far west boundary of Concession III, Lot 47
   - South between Lot 46 and 47 to include 38 Chancery Drive West
   - West, parallel with Golf Links Road to back lot of 23 Cameron Drive in Concession III, Lot 44
   - Follow back of Cameron Drive back lot to 35 Cameron, go south parallel to end of 209 Rosemary Drive, East to the back of 206 Rosemary Drive
   - North along back lots to 104 Rosemary, East to back lot of 103 Rosemary
   - North along back lots of St. Margarets Road to Hwy 2
   - Direct line SW, crossing over Fiddlers Green to middle of Concession III, Lot 41 North back lot of Rembrandt Court to Jerseyville Road W
   - SW along Jersey ville through back lots of Blair, Terrence Park and Oakhill to back lot lien of 211/220 Colleen Crescent
   - NE to division of back lot along border of Concession III, Lots 41 & 42

- SW along border to lot line of 145 Terrence Park, across Terrence Park to include back lots of 51 and 55
- SE over Terrence Park between houses 94 and 90
- N along the rear lots of Terrence Park and McGregor Crescent
- NE between houses 69 & 65 McGregor, across McGregor between houses 74 and 62
- Continue rear lots East between houses 54 and 50 McGregor
- North in direct line to Sulphur Springs Road
- West 100 metres, directly NW to Concession II, Lot 42 to Old Railway Line

2. The former Town of Dundas as of December 31, 1980, now in the City of Hamilton.

3. The former Police Village of Lynden in the former Town of Ancaster as of December 31, 1973, now in the City of Hamilton.

4. The former Village of Waterdown in the former Township of Flamborough as of December 31, 1980, now in the City of Hamilton.

5. The expansion area as set out in By-law No. 96-17-H in the former Township of Flamborough as of December 31, 1980, now in the City of Hamilton and defined as :

   East Boundary: Concession 3 East – Centreline of Kerns Road extending north along east boundary of 60' Interprovincial Pipeline easement continuing north along boundary line between Town of Flamborough and City of Burlington.

   North Boundary: Concession 5 East – Centreline of the 50' wide Sun Canadian Pipeline Company easement – extending across Hwy. No. 6, along boundary line between properties 25.50.200.430.56400 and 25.30.200.430.56800/ 25.30.200.430.56600.

   West Boundary: Boundary line between Lots 19 and 20 on Concession 1, Concession 2, Concession 3, and Concession 4 proceeding northerly to north boundary as described above.

   South Boundary: Flamborough/Burlington/Dundas boundaries where the electrical distribution systems of Ontario Hydro and Burlington Hydro are already separated.

   Includes to the East: The boundaries of the Town of Lynden as defined in 1. above.

6. The City of Hamilton as of December 31, 2000.

7. The former City of Stoney Creek as of December 31, 2000, now in the City of Hamilton.

8. Plan 62 R-15706, Part of Lot 3, Block 1, Concession 1, former Geographic Township of Binbrook, in the former Township of Glanbrook, now in the City of Hamilton, comprising Part 1 to Part 11 inclusive.

9. Land located "in the former Township of Binbrook, in the former Township of Glanbrook, as of December 31, 1973, now in the City of Hamilton and described as Block 1, Block 2 and Street 'A' part of a plan of "The Brooks of Rymal/20 Phase 1", being a subdivision of Part of Lots 1 and 2 - Block 4, Concession 1".

10. The former Township of Binbrook in the former Township of Glanbrook as of December 31, 1973, now in the City of Hamilton and described as Part of Township Lots Six (6) and Seven (7), Block Five (5) in the First Concession of the Geographic Township of Binbrook and known as Summit Park Phase 1 on Plan 62M. These lands are bounded to the north by Rymal Road east, to the east by Fletcher Road, to the west by Dakota Boulevard and to the south by a Hydro One Networks Inc. high voltage transmission line right of way.

11. The former Township of Binbrook in the former Township of Glanbrook as of December 31, 1973, now in the City of Hamilton and described as Part of Township Lots Six (6) and Seven (7), Block Five (5) in the First Concession of the Geographic Township of Binbrook and known as Summit Park Phase 2, on Plan 62M except for the following addresses (which are excluded):

    - 1898 Rymal Road East, RR # 1, Hannon, Ontario, L0R 1P0
    - 1912 Rymal Road East, RR # 1, Hannon, Ontario, L0R 1P0
    - 1900 Rymal Road East, RR # 1, Hannon, Ontario, L0R 1P0
    - 1910 Rymal Road East, RR # 1, Hannon, Ontario, L0R 1P0.

12. The City of St. Catharines as at December 31, 1990.

13. The former Township of Binbrook in the former Township of Glanbrook as of December 31, 1973, now in the City of Hamilton and described as Part of Township Lot Seven (7), Block Five (5) in the First Concession of the Geographic Township of Binbrook and known as Summit Park Phase 3, on Plan 62M except for the following addresses (which are excluded);

    - 70 Fletcher Road East, Hannon, Ontario, L0R 1P0
    - 80 Fletcher Road East, Hannon, Ontario, L0R 1P0.

14. The former Township of Binbrook in the former Township of Glanbrook as of December 31, 1973, now in the City of Hamilton and described as Part of Township Lot Seven (7), Block Five (5) in the First Concession of the Geographic Township of Binbrook and known as Summit Park Phase 4, on Plan 62M except for the following addresses (which are excluded);

- 134 Fletcher Road East, Hannon, Ontario, L0R 1P0.

TAB 19

Ontario Energy Board

Commission de l'énergie de l'Ontario

Ontario

EB-2007-0914

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

AND IN THE MATTER OF an application pursuant to section 74 of the *Ontario Energy Board Act, 1998* by Horizon Utilities Corporation to amend Electricity Distribution Licence ED-2006-0031.

By delegation, before: Jennifer Lea

DECISION AND ORDER

Horizon Utilities Corporation ("Horizon") filed an application on November 19, 2007, with the Ontario Energy Board under section 74 of the *Ontario Energy Board Act, 1998* for an order of the Board to amend Horizon's licensed service area in Schedule 1 of its electricity distribution licence ED-2006-0031. The Board assigned the application file number EB-2007-0914.

This service area amendment is required in order for Horizon to supply electricity to the Gardens at Summit Park and Summit Park Phase Six planned residential development in the City of Hamilton, which is currently located within Hydro One Networks Inc.'s ("Hydro One") licensed service area. These lands are described as:

- The former Township of Binbrook in the former Township of Glanbrook as of December 31, 1973, now in the City of Hamilton and described as Part of Township Lot Six (6), Block Five (5) in the First Concession of the Geographic Township of Binbrook and known as The Gardens at Summit Park on Plan 62M.

- The former Township of Binbrook in the former Township of Glanbrook as of December 31, 1973, now in the City of Hamilton and described as Part of Township Lot Five (5), Block Four (4) in the First Concession of the Geographic Township of Binbrook and known as Summit Park Phase Six.

The service area amendment is granted.

Reasons

The evidence filed with the application confirms that it is more economically efficient for Horizon to serve the proposed residential development. The Gardens at Summit Park and Summit Park Phase Six are a natural extension to Horizon's existing urban distribution system. Horizon already serves Phases One, Two, Three and Four of the Summit Park Development and has surplus capacity on two existing 27.6 kV circuits that are contiguous to the Summit Park development.

Hydro One supports the proposed service area amendment and confirms that its distribution facilities in the subject area are not sufficient to supply the load for the development without additional investment. Hydro One also states that Horizon would be the most cost-effective distributor for the area covered by the proposed amendment.

A letter from the developer filed with the application indicates that the developer prefers to receive service from Horizon. There are no other existing customers in the proposed amendment area. Horizon states that the proposed amendment results in no stranded assets and affects no embedded customers of Hydro One. Rates of both distributors will be unaffected by the amendment and there will be no effect on safety, reliability and service quality.

I find that it is in the public interest to amend Horizon's electricity distribution licence as proposed by Horizon.

The applicant requested that the Board decide the application without a hearing. I have done so. All affected parties consented to the application as filed. The evidence filed with the Board demonstrated that the amendment will not produce any adverse effects on the existing customers of the distributors, nor on potential customers who may locate in the subdivision.

IT IS ORDERED THAT:

Horizon Utilities Corporation's Distribution Licence (ED-2006-0031) be amended as per Schedule 1 as attached to this order. The amended licence is attached to this order, with an effective date of December 14, 2007.

Under section 7(1) of the Act, this decision may be appealed to the Board within 15 days.

DATED at Toronto, December, 14, 2007

ONTARIO ENERGY BOARD

Original signed by

_____

Jennifer Lea
Special Advisor, Market Operations

TAB 20

Ontario Energy Board

Commission de l'énergie de l'Ontario

Ontario

EB-2009-0035

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

AND IN THE MATTER OF an application pursuant to section 74 of the *Ontario Energy Board Act, 1998* by Horizon Utilities Corporation to amend its Electricity Distribution Licence ED-2006-0031.

By delegation, before: Jennifer Lea

DECISION AND ORDER

THE APPLICATION

Horizon Utilities Corporation ("Horizon") filed an application on January 29, 2009, with the Ontario Energy Board under section 74 of the *Ontario Energy Board Act, 1998* for an order of the Board to amend Horizon's licensed service area in Schedule 1 of its electricity distribution licence ED-2006-0031. The Board assigned the application file number EB-2009-0035. By letter dated February 5, 2009, the Board requested additional information from Horizon. On February 11, 2009, the additional information was filed with the Board.

This service area amendment is required in order for Horizon to supply electricity to a proposed residential development known in part as the Summit Park Phase 5 in the City of Hamilton, which is currently located within Hydro One Networks Inc.'s ("Hydro One") licensed service area.

The lands are located in the former Township of Binbrook in the former Township of Glanbrook as of December 31, 1973, now in the City of Hamilton and described as Part of Township Lot Five (5), Block Five (5) in the First Concession of the Geographic Township of Binbrook, Block 139 and known as The Summit Park Phase 5 on the registered Plan 62M except for the following address (which is excluded):

- 31 Trinity Church Road in the City of Hamilton.

FINDINGS

Based on the evidence, I find that it is in the public interest to amend Schedule 1 of Horizon's electricity distribution licence to include the lands described above. The following facts are relevant to this decision.

The evidence filed with the application demonstrates that it is more economically efficient for Horizon to serve the proposed development. The proposed service area amendment will enhance the utilization of Horizon's existing urban distribution system. Horizon already serves Phases One, Two, Three, Four and Six and the Gardens at Summit Park of the Summit Park Development. The proposed development, Summit Park Phase Five is contiguous to the existing Summit Park Phases and Horizon has surplus capacity on its existing distribution facilities bordering the developments to supply the proposed load for Summit Park Phase Five. Horizon submits that Hydro One's distribution facilities in the proposed amendment area are not sufficient to supply the load for the proposed development. Hydro One supports the proposed service area amendment and confirms that it would be more economically efficient for Horizon to service the propose development.

A letter from the developer filed with the application indicates that the developer prefers Horizon as a service provider. There are no other existing customers in the proposed amendment area. No assets will be stranded as a result of the proposed amendment. In addition, no negative impact on rates, safety, reliability or service quality of Horizon or Hydro One has been identified as a result of the proposed amendment.

The applicant requested that the Board decide the application without a hearing. I have done so. All affected parties consented to the application as filed. The evidence filed with the Board demonstrated that the amendment will not produce any adverse effects on the existing customers of the distributors, nor on prospective customers who may locate in the subdivision.

IT IS THEREFORE ORDERED THAT:

Horizon Utilities Corporation's Electricity Distribution Licence (ED-2006-00031), specifically Schedule 1 of the licence, is amended to include the lands described as:

Lands located in the former Township of Binbrook in the former Township of Glanbrook as of December 31, 1973, now in the City of Hamilton and described as Part of Township Lot Five (5), Block Five (5) in the First Concession of the Geographic Township of Binbrook, Block 139 and known as The Summit Park Phase 5 on the registered Plan 62M except for the following address (which is excluded):

- 31 Trinity Church Road in the City of Hamilton.

DATED at Toronto, March 13, 2009

ONTARIO ENERGY BOARD

Original signed by

Jennifer Lea
Counsel, Special Projects

TAB 21

Ontario Energy Board

Commission de l'énergie de l'Ontario

Ontario

EB-2009-0059

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

AND IN THE MATTER OF an application pursuant to section 74 of the *Ontario Energy Board Act, 1998* by Horizon Utilities Corporation to amend its Electricity Distribution Licence ED-2006-0031.

By delegation, before: Jennifer Lea

DECISION AND ORDER

THE APPLICATION

Horizon Utilities Corporation ("Horizon") filed an application on February 17, 2009, with the Ontario Energy Board under section 74 of the *Ontario Energy Board Act, 1998* for an order of the Board to amend Horizon's licensed service area in Schedule 1 of its electricity distribution licence ED-2006-0031. The Board assigned the application file number EB-2009-0059.

This service area amendment is required in order for Horizon to supply electricity and provide electricity distribution services to a proposed commercial development known in part as the SmartCentres Commercial Development in the City of Hamilton, which is currently located within Hydro One Networks Inc.'s ("Hydro One") licensed service area.

The lands are located in the former Township of Binbrook in the former Township of Glanbrook as of December 31, 1973, now in the City of Hamilton and described as Part of Township Lot Two (2), Blocks Three (3), Four (4), Five (5), Nine (9), Ten (10) and Eleven (11) except for the following address (which is excluded):

- 2120 Rymal Road East in the City of Hamilton.

FINDINGS

Based on the evidence, I find that it is in the public interest to amend Schedule 1 of Horizon's electricity distribution licence to include the lands described above. The following facts are relevant to this decision.

The evidence filed with the application demonstrates that it is more economically efficient for Horizon to serve the proposed development. The proposed service area amendment will enhance the utilization of Horizon's existing urban distribution system. The proposed development is contiguous to an existing commercial development known as the Brooks of Rymal/20 which is currently serviced by Horizon. Horizon submits that it has surplus capacity on its existing distribution facilities bordering the developments to supply the proposed load for SmartCentres Commercial development while Hydro One's distribution facilities in the proposed amendment area are not sufficient to supply the load for the proposed development without additional investment. Hydro One supports the proposed service area amendment and confirms that it would be more economically efficient for Horizon to service the proposed development.

A letter from the developer filed with the application indicates that the developer prefers Horizon as a service provider. There are no other existing customers in the proposed amendment area. No assets will be stranded as a result of the proposed amendment. In addition, no negative impact on rates, safety, reliability or service quality of Horizon or Hydro One has been identified as a result of the proposed amendment.

The applicant requested that the Board decide the application without a hearing. I have done so. All affected parties consented to the application as filed. The evidence filed with the Board demonstrated that the amendment will not produce any adverse effects on the existing customers of the distributors, nor on prospective customers who may locate in the proposed development.

IT IS THEREFORE ORDERED THAT:

Horizon Utilities Corporation's Electricity Distribution Licence (ED-2006-00031), specifically Schedule 1 of the licence, is amended to include the lands described as:

Lands located in the former Township of Binbrook in the former Township of Glanbrook as of December 31, 1973, now in the City of Hamilton and described as Part of Township

Lot Two (2), Blocks Three (3), Four (4), Five (5), Nine (9), Ten (10) and Eleven (11) except for the following address (which is excluded):

- 2120 Rymal Road East in the City of Hamilton.

DATED at Toronto, March 13, 2009

ONTARIO ENERGY BOARD

Original signed by

Jennifer Lea
Counsel, Special Projects