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**ELECTRICAL SAFETY AUTHORITY REVIEW PANEL FOR LICENSING**

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**B E T W E E N:**

**ORANGEVILLE HYDRO LIMITED  
(the “Applicant”)**

**- and -**

**DIRECTOR, LICENSING AND CERTIFICATION  
(the “Director”)**

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**Decision**

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Review Panel: Frank Zechner, Shelly Cunningham and Robert Nelson

Hearing Date: February 11, 2011

File Number: 7003365

Appeal Number: NOAL 10-02

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**APPEARANCES**

Director, Licensing and Certification )  
 ) Richard Steinecke, Counsel  
 ) Lucy Impera, Director, Licensing  
 ) and Certification  
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Orangeville Hydro Limited )  
 ) Alan H. Mark, Ogilvy Renault LLP  
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## **I. BACKGROUND**

[1] A hearing in this matter was held on Friday, February 11, 2011 before the Review Panel comprised of Frank Zechner, Shelly Cunningham and Robert Nelson. There were no objections to the jurisdiction of the Review Panel to hear this matter and there were no other preliminary objections.

[2] Orangeville Hydro Limited (“Orangeville Hydro” or the “Applicant”) and the Director, Licensing and Certification (the “Director”) (collectively the “Parties”) agreed that two bound volumes described as the Appeal Record (the “Record”), Volumes 1 and 2 constituted the entirety of the evidence that was to be considered by the Review Panel and by agreement the Record was marked as Exhibit 1. Documents referred to in this decision will be referenced by the Tab number in which they appear in the Record.

[3] Both parties also filed outlines of the submissions that they made, as well as Briefs of Authorities.

[4] The issue, broadly speaking, before the Review Panel was the Director’s proposed action to revoke the Applicant’s Limited Provisional Electrical Contractor License (the License”) on the basis set out in subsection 113.2(2) of the *Electrical Act, 1998* (the “EA”) for the Applicant’s purported failure to meet the requirements of section 71(1) of the *Ontario Energy Board Act, 1998* (the “OEBA”).

[5] On March 17, 2010, a Notice of Proposal was issued by the Director to the Applicant (**Tab 3**) proposing to revoke the License on the basis that the License that was issued was issued to a Licensed Distribution Company, namely Orangeville Hydro. It was asserted by the Director that the Applicant was prohibited

from operating as an Electrical Contracting business by virtue of subsection 71(1) of the OEBA.

[6] The Director stated as follows:

The most relevant words of subsection 71(1) read as follows: “a ... distributor shall not, except through one or more of its affiliates, carry on any business activity other than... distributing electricity.” Section 1(1) of Ontario Regulation 570/05 made under the Electricity Act, 1998 defines “electricity contractor” as follows: “a person who is licensed to operate an electrical contracting business under this Regulation”. It also defines “electrical contracting business” as a business that is engaged in the carrying out of electrical work”. Section 4(1) of that same regulation requires an electrical contractor to ensure that all electrical work “is carried out in accordance with all applicable laws.” Specifically, Orangeville Hydro Limited has been performing street lighting maintenance work on roadway lighting systems and offering to perform maintenance work on roadway lighting systems owned by the Town of Orangeville, which is currently not part of the distribution system. Therefore Orangeville Hydro Limited is in contravention of s. 113.2(2)(a) and (f) of the Electricity Act, 1998.

[7] The Director then set out the relevant subsections of the ESA, s. 113.2(2)(a):

a license may be revoked by the Director if the Director has reason to believe that the applicant or authorization holder will not carry out the activities in accordance with the law.

and s. 113.2(2)(f)

a license may be revoked by the Director if the Director has reason to believe that the applicant or authorization holder failed to comply with or meet a requirement of this Part, the regulations or an order of the Authority.

[8] The Director then outlined subsection 4(1) of Regulation 570/05 that she was relying on with respect to 113.2(2)(f):

(a)n electrical contractor shall ensure that all electrical work carried out on the electrical contractor’s behalf is carried out in accordance with all applicable laws, including the Electrical Safety Code and the laws relating

to health and safety, employment standards, consumer protection, business tax and business practices.

[9] The Applicant filed a Notice of Appeal of the Notice of Proposal on March 31, 2010 (**Tab 4**). The grounds for appeal advanced by the Applicant included that:

1. the Notice of Proposal did not comply with subsection 113.1(1) of the EA in that the Director has failed to give any or sufficient reasons for the proposed revocation;
2. the Director and the Electrical Safety Authority (the “ESA”) were proposing to revoke Orangeville Hydro’s License for reasons that were beyond their jurisdiction; and
3. the Director and the ESA provided no evidence that Orangeville Hydro had or would carry on any activity that it was or will not be permitted to carry on.

[10] On December 9, 2010 the Director issued a decision (**Tab 2**) affirming her conclusions set out in the Notice of Proposal that the Applicant’s asserted breach of subsection 71(1) of the OEBA. At paragraph 48 of her decision she states:

The law is clear. A licensed distributor is only permitted to undertake activities related to the distribution and transmission of electricity, with some exceptions... none of which relate to performing street lighting maintenance work. Moreover, it is explicit that any business activities other than transmitting or distributing electricity (such as the aforementioned electrical contracting business activities) may only be undertaken through an affiliate company.

[11] Later, in her decision, at paragraphs 49 and 50 the Director states:

The Director has been appointed with the responsibility for administering the licensing legislation and regulations and must carry out this delegation in accordance with the law. To knowingly authorize an entity to carry out activities that are in contravention of the law would be a breach of the EA and thus place the ESA at risk.

As a limited provisional electrical contractor license grants authority to undertake activities that the Applicant would legally not be permitted to

do, it would be unlawful for the Director to allow the Applicant to continue to hold the license as the licensed distributor.

[12] On December 23, 2010, the Applicant filed a Notice of Appeal of the Director's Decision before the Review Panel (**Tab 1**). The grounds for the Appeal claimed that the Director and the ESA had exceeded their jurisdiction by proposing to revoke Orangeville Hydro's license for the reasons stated by the Director. The Applicant cites, *inter alia*, the following reasons for this:

- (a) subsection 113.2(2) of the *Electricity Act* does not prohibit the holding of a Limited Provisional Electrical Contractor License by an electricity distributor;
- (b) the *Electricity Act* does not require or permit the ESA to make determinations as to whether a licensee has the corporate authority to carry on the business of an electrical contractor pursuant to any other statute or regulation;
- (c) the authority of the ESA pursuant to subsection 113(2)(a) of the *Electricity Act* only permits the ESA to make a determination of whether the licensed activity is carried on in a manner which complies with the legal requirements governing how the activity is carried out. The ESA has no authority under subsection 113.2(a) to determine whether the licensee has the corporate authority to engage in the activity;
- (d) the authority of the ESA in granting or revoking a licence is limited to the matters set out in section 4(1) of Ontario Regulation 570/05, namely, "the Electrical Safety Code and the laws relating to health and safety, employment standards, consumer protection, business tax and business practices";
- (e) corporate authority to carry on electrical contracting is not a matter a licensee is required to establish as a prerequisite for the issuance of a Provisional Electrical Contractor Licence under subsection 10(2) of Regulation 570/05;
- (f) the ESA has no authority to inquire into, or make any determination as to, whether a distributor licensed by the OEB is permitted, by that licence, to engage in any electrical contracting work;
- (g) pursuant to subsection 19(6) of the OEB Act, the OEB has the exclusive jurisdiction to determine whether any activity carried on by a licensed electricity distributor is in contravention of Part VIII of the *OEB Act* or

- any condition of a licence issued to an electricity distributor;
- (h) the OEB has not made any order, nor imposed any restriction on the Licence of Orangeville Hydro, that would prohibit Orangeville Hydro from engaging in the electrical contracting activities permitted under the Licence;
  - (i) the Director erred in law when she held that Orangeville Hydro was “not complying with their primary statute as prescribed under the *OEBA* section 71(1)” as she does not have jurisdiction to determine this issue. This issue falls expressly within the OEB’s exclusive jurisdiction to determine;
  - (j) the Director in any event erred in concluding that Orangeville Hydro was in contravention of subsection 71(1) of the OEB Act;
  - (k) the Director erred in law when she confirmed the proposed action to revoke Orangeville Hydro’s Licence on the basis that she had “serious concerns that [Orangeville Hydro] will likely not comply with the *EA* and associated regulations”, being an assumption with no basis in fact or law and a ground not specified in the Notice of Proposal;
  - (l) the ESA will exceed its legal authority if the Licence is revoked for the reasons proposed;

## **II. ISSUES AND DECISION**

### **A. Scope of Review**

[13] The first issue to be dealt with by the Review Panel is the scope of review with respect to the decision of the Director. There are two aspects to this issue. The first deals with the interpretation of the *OEBA* that was made by the Director and the breach of which is, in effect, a prerequisite finding, in order to establish the basis for the possibility of the proposed revoking of the license. The second issue is the scope of review with respect to the exercise of the Director’s discretion under s.113.2(2), assuming that there has been a breach of the law.

[14] Mr. Steinecke, on behalf of the Director, suggested that the test was one of reasonableness. He offered in support of this

proposition the *College of Physicians and Surgeons of Ontario and Payne*, 2002 CanLII 39150 (ON S.C.D.C.) decision. This case is distinguishable based on the fact that, in the *Payne* case, the Board members overseeing the Registration Committee were prevented from being members of a health profession, unlike the Registration Committee, which required physicians to be the majority. In *Payne*, the Court held that where the issue related to the competence to practice medicine the Board should show deference to the Registration Committee. The Court in *Payne* was dealing with a situation unlike the Review Panel here which is comprised of a cross section of knowledgeable members of the electrical industry.

[15] Mr. Mark, on behalf of the Applicant, asserted that the test to be applied was one of correctness. He cited the case of *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 in support of the proposition that when a matter is outside the specialized area of the administrative decision maker the issue will always attract the correctness standard. Mr. Mark, in his submissions, emphasised that the OEBA, and its interpretation, was not within the expertise of the Director and was within the exclusive jurisdiction of the OEB. Specifically he noted, on this point, s. 19(6) of the OEBA which states:

(t)he Board has exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it by this or any other Act.

[16] The Review Panel agrees with Mr. Mark that the standard of review is correctness and that this standard should most certainly be applied when dealing with the issue of the Director's interpretation of a statute apart from the EA.

[17] Assuming though, without deciding, that the Director was correct in her view with respect to the breach of the OEBA, the more difficult question arises with respect to the question of the exercise of the Director's discretion with respect to the

consequences of an (for these purposes) assumed breach. The legislature through s.113.2(2) has clearly given the Director discretion whether to revoke or not to revoke a license when the Director has reason to believe that the applicant or authorization holder will not carry out the activities in accordance with the law. The Director clearly believes that the Applicant will not comply (and has not complied) with the OEBA, however the Director still has discretion with respect to whether or not to revoke the license. The exercise of this discretion is also subject to appeal before a review panel.

[18] It is the decision of the Review Panel that the standard to be applied to the Director's exercise of this discretion is also one of correctness. The Review Panel is supported in its conclusion in this regard by subsection 14 (11) of Regulation 187/09:

(t)he Review Panel may, by order, confirm, amend, rescind or impose terms and conditions to the decision of the Director or make whatever other decision that the Review Panel deems appropriate.

[19] The legislature has seen fit to give to the Review Panel wide authority to insert itself into the decision making process. While it may be that the Review Panel may choose to give deference to the Director in the exercise of certain decision making exercises that are conferred her under the EA in any individual case, the Review Panel clearly has great latitude to impose its perspective and to make the decision that it deems appropriate.

[20] Although not determinative, the Review Panel is also supported in its view on this matter in that a hearing before a Review Panel is a hearing *de novo*.

## **B. Breach of OEBA**

[21] The fact that Orangeville Hydro was performing street lighting maintenance work was not in dispute. What was in dispute is the ability of the Director, or this Review Panel for that matter, to come to a clear conclusion as to whether the activity that Orangeville Hydro was engaged in, and, presumably will continue to engage in, was a breach of the OEBA. The Applicant vigorously disputed that they were in breach of the OEBA as a result of their activities.

[22] The Director suggested that the decision in *1798594 Ontario Inc., Toronto Hydro Energy Services Inc. and Toronto Hydro-Electric System Limited v. Ontario Energy Board* (unreported, File No. 's EB-2009-0180, EB-2009-0181, EB-2009-0182, EB-2009-0183, February 11, 2010 Ontario Energy Board) ("*Toronto Hydro*") was conclusive of the matter. Reference was also made to statements made by the Ontario Energy Board ("OEB") staff that supported the assertion that Orangeville Hydro was not in compliance with the OEBA.

[23] The Review Panel agrees that the above does lend some support for the assertion that the Applicant may not be in compliance with the OEBA. However it is the view of the Review Panel that such a conclusion is far from certain, notwithstanding the *Toronto Hydro* decision.

[24] The *Toronto Hydro* decision is an ownership question and the issue before the OEB was whether the distributor could own the street lighting assets. It deals with issue of defining "distributing electricity" under s.71(1) of the OEBA and does not define what is meant by "not carry out any business activity". As well, the OEB specifically left open the question the classification of expressway lighting. The case did not, in this Review Panel's opinion, fully

and finally determine the issue as to whether the Applicant's activities are in breach of the OEBA.

[25] The Review Panel notes that the opinions of the OEB staff are just that and, although they do suggest a breach, they are certainly not conclusive of the issue.

[26] The Review Panel notes that the Applicant is a distributor licensed by the OEB and that the OEB has not sought to enforce section 71 of the OEBA with respect to the Applicant. The Director concedes that such enforcement is within the exclusive purview of the OEB.

[27] Obviously the Review Panel is not expert on the issues of compliance with the OEBA and does not feel comfortable determining whether the actions of Orangeville Hydro constitute a breach of the OEBA on the record before it.

[28] For reasons that will become clear, it is unnecessary for the Review Panel to make such a holding with respect to whether the activities engaged in by Orangeville Hydro constitute a breach of the OEBA and the Review Panel declines to do so.

### **C. Exercise of the Director's Discretion under s.113.2(2)**

[29] The Review Panel does take into consideration the appropriateness of the Director exercising her discretion to propose to revoke a license that has been previously been granted for a number of years. The facts and the legislative framework at the time that the Electrical Safety Authority granted the license to the Applicant were identical to those that existed when the Director issued her Notice of Proposal and are still unchanged. The Applicant has been engaged in street lighting activities throughout and the authority that has exclusive jurisdiction with respect to the

enforcement of the OEBA, the OEB, has not taken any actions against the Applicant.

[30] However, the Review Panel does not agree with Mr. Mark's narrow interpretation of what the scope of applicable law that the Director may consider when considering the exercise of her discretion under s.113.2(2). It is the Review Panel's view that it is within the Director's purview under s.113.2(2) to potentially consider breaches of the OEBA. Such consideration in the exercise of her discretion must, however, be tempered with the facts as they present themselves. For example, here the authority responsible for enforcing the OEBA has chosen not to act. Surely, every breach of a statute, as determined by the Director, should not give rise to revoking the authorization holder's license, particularly where the enforcement body has chosen not to act. The exercise of the Director's discretion must be contextual and one of the things that regard should be paid to is the actions or, in this case, the inaction of the enforcement body.

[31] In this regard, the Review Panel disagrees with the Director with respect to the issuance of the Notice of Proposal. It is the view of the Review Panel that the fact that there has been no enforcement action(s) taken against Orangeville Hydro by the OEB means that no revocation of the license should take place at this time, even if there is a breach of the OEBA by the Applicant, as concluded by the Director.

[32] If the Review Panel is in error with respect to the standard of review and the scope of review that they have with respect to the Director's discretion, the Review Panel finds that the Director's exercise of her discretion in the circumstances was unreasonable.

[33] The Review Panel is supported in this conclusion, not only with respect to the inaction of the OEB, but also by the conclusions that the Director herself came to in her decision. The Director in

her decision relied on the asserted breach of the OEBA as a basis for concluding, in essence, that the Applicant was not of suitable character to hold a license issued under the EA. The stated concern was that the Applicant would not likely comply with the EA and the associated regulations. However, Orangeville Hydro, at this point in time had already held a license for a number of years and there was simply no evidence that substantiated this assertion. In fact, the lack of evidence suggests quite the opposite; that Orangeville Hydro does seek to comply with the EA and its regulations and has, thus far, successfully done so.

[34] Mr. Mark submitted that the Director was limited to considering legislation dealing with the scope of the ESA's mandate which he suggested excluded any legislation that did not involve safety, technical matters and consumer protection. On the contrary, it is the view of the Review Panel that the legislation has conferred broad authority to the Director to consider breaches of statutes and/or other law well beyond that of the EA and safety related statutes. One only need refer to Regulation 570/05 s. 4(1) which refers to "all applicable laws, **including** the Electrical Safety Code and the laws relating to health and safety, employment standards, consumer protection, business tax and business practices. [emphasis added]

[35] It may well be that the Review Panel would take a different view if there had been a clear determination that the Applicant was in breach of the OEBA by the body with exclusive jurisdiction to enforce that statute, the OEB. Mr. Mark acknowledged in his submissions that this would be a clear distinction in the factual underpinnings of the instant case if such a determination had been made.

**D. Disposition**

[36] Taking into account all of the evidence and the submissions of the Parties, it is the decision of this Review Panel to rescind the decision of the Director. This does not preclude the Director from exercising her discretion in the future with respect to the Applicant's license should the facts of the matter change or become more clear, including the possibility of enforcement action by the OEB.

[37] The Review Panel would like to thank both Mr. Steinecke and Mr. Mark for their helpful and thoughtful submissions.