Case Study 1 – Ontario Energy Board

The Ontario Energy Board (OEB) regulates utilities in the public interest. The Board is responsible for setting rates of return on the sale of electricity throughout the province and is guided by two objectives as set out in s.1(1) of the Ontario Energy Board Act (the OEB Act):

> 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.

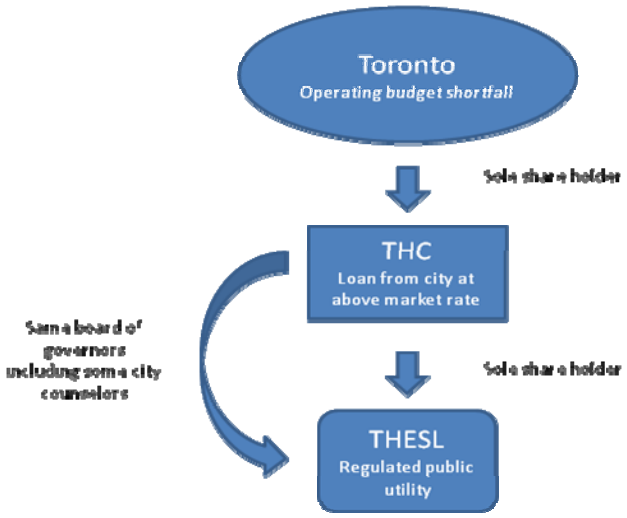
s. 78 of the act gives the OEB the power to make orders with regard to setting rates:

> **78**. (3) The Board may make orders approving or fixing just and reasonable rates for the transmitting or distributing of electricity and for the retailing of electricity in order to meet a distributor's obligations under section 29 of the *Electricity Act, 1998*. 1998, c. 15, Sched. B, s. 78 (3).

s. 23 allows the OEB to attach conditions to its orders:

> **23.** (1) The Board in making an order may impose such conditions as it considers proper, and an order may be general or particular in its application. 1998, c. 15, Sched. B, s. 23.

The Toronto Hydro Electric Systems Ltd. (THESL) is a hydroelectric company regulated by the OEB. Its sole shareholder is Toronto Hydro Corporation (THC) whose sole shareholder is the City of Toronto. Some city counselors sit on the Board of Directors of THC, and THC and THESL have the exact same board of directors.



The Affiliates Relationship Code (ARC), not yet in effect, will soon require any electricity distributor's Board of Directors to be made up of 1/3 independent directors – considered to be those who are not "directors of the affiliates of the licensed distributor or members of the City Council." The ARC is implemented under s.70(1) of the Act:

> **Licence conditions**
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> **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).

The Ontario Business Corporations Act (OBCA) speaks directly to the ability of directors to delegate their authority:

> **Delegation by directors**
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> **127.** (1) Subject to the articles or by-laws, directors of a corporation may appoint from their number a managing director or a committee of directors and delegate to such managing director or committee any of the powers of the directors. 2006, c. 34, Sched. B, s. 21 (1).
>
> **Limitations on authority**
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> (3) Despite subsection (1), no managing director and no committee of directors has authority to,
>
> (d) declare dividends;

It is settled law that directors may not delegate their authority to declare dividends. However, the OEB Act indicates in s. 128 that where any other act conflicts with it, the OEB Act is to prevail:

> **128.** (1) In the event of conflict between this Act and any other general or special Act, this Act prevails.

THESL applied to the OEB to set rates for the upcoming year. In rendering its decision, the panel recognized that there had been "… a very dramatic increase in the dividend payouts ... The level of dividends appears to be greater than the net income of the utility over at least a two year period." The panel "…expressed concern that THESL was paying increased dividends and an above market rate of interest while it was "under-investing by about $60 million" in capital expenditures." The panel continued:

> 6.4.4 The question arises as to whether the Board should restrict the dividend payout by the utility. To the extent a utility pays all of its retained earnings to the

> shareholder, it will become more dependent on borrowing and this may have an adverse effect on its credit rating.
>
> 6.4.5 A related question is the independence of the directors. The evidence in the hearing is that the directors of the utility and the parent, Toronto Hydro Corporation are currently identical. And none of the members of management are to be on the Board. This is an unusual situation.
>
> 6.4.6 There is a requirement that at least one third of the directors of the distributor [footnote omitted] must be independent but that rule will not apply to this utility until July 1, 2006. In the course [of] these hearings the utility has confirmed that it will comply with the requirement and at that time, the independent directors will be appointed.
>
> 6.4.7 Given the unusual high level of dividend payout and the concern expressed by a number of Parties, the Board believes that it is appropriate that any dividend paid by the utility to the City of Toronto should be approved by a majority of the independent directors.
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> 6.4.8 Much of the controversy in this case has been dominated by discussion about non arms length transaction [sic] between the utility and the City of Toronto, whether it relates to dividend payouts, payment of interest on loans or the purchase of goods and services. The introduction of independent directors will be a step in the right direction. The requirement that independent directors approve dividend payouts to affiliates will give the public greater assurance that the interests of ratepayers are not subservient to those of the shareholders. The Board believes this is in keeping with the policy intent of Section 2 of the ARC.
>
> 6.4.9 This provision will be reviewed by the Board in the next rate case. At a minimum it will signal the Board's serious concern with the state of inter-affiliate relations.

Thus as a condition of setting rates for the distribution of electricity, the OEB required that any dividend paid by THESL to THC had to be approved by a majority of THESL's independent directors.

Determine and apply the appropriate standard of review to the OEB's decision to impose such a condition.

Case Study 2 – Board of Arbitration

The Company has had an Alcohol and Drug Policy since 1992. The policy includes random testing of employees in safety-sensitive positions for alcohol using a breathalyzer and for drugs using urinalysis. The policy complies with the Ontario *Occupational Health and Safety Act* which requires that an employer "take every precaution reasonable in the circumstances for the protection of a worker". Safety violations under the act are strict liability offenses giving rise to substantial penalties.

The two objectives of the Alcohol and Drug Policy are:

1. to create a safe work environment by reducing the risk of accidents in which drugs and alcohol are a contributing factor; and

2. to deter the use of alcohol, drugs and other substances where their use may negatively affect work performance and safety.

A union employee, a former alcoholic, had previously filed a complaint under the *Ontario Human Rights Code* which was ultimately decided by the ONCA in 2000. The ONCA held that drug and alcohol testing was prima facie discriminatory based on handicap. It went on to conclude that random alcohol testing was reasonably necessary to enhance workplace safety because it was capable of showing current impairment, while random urinalysis for drugs was not. Urinalysis did not contribute to the company's ability to enhance safety as it could not show impairment at the time of the test.

Based on expert advice that testing for current impairment by cannabis was possible using buccal swabs, the company re-instated random drug testing and advised employees as follows:

> Starting July 1, 2003, employees in safety-sensitive and other specified positions – including senior management, corporate department managers and senior operating personnel and their direct reports - will be selected to take a Breathalyzer test for alcohol, as they do today, and to provide an oral fluid sample, which will be tested for marijuana.

The Union filed a grievance in October 2003 challenging the random alcohol and drug testing policy, this time under a portion of the collective agreement which required that individuals be treated with respect and dignity. The relevant portions of the Collective Agreement follow:

> **3.02** ...The Union and the Company are committed to a work place environment that is free of harassment and <u>where individuals are treated with respect and dignity.</u>
>
> **19.01** It is agreed by both parties that emphasis shall be placed upon the need for safe and healthy working conditions and practices on the Company premises. The Company shall continue to make provisions for the safety and health of its employees during the hours of employment.

A labour arbitration board, in a preliminary award, held that the Union's failure to challenge the Company's policy of random alcohol testing, which had been in place since 1992, was an implied acceptance of the policy.

The Board limited its consideration of the permissibility of random drug testing under the Collective Agreement to a determination of whether random testing by buccal swab for impairment by cannabis was contrary to the requirement that individuals be treated with respect and dignity.

The Board was presented with expert evidence that cannabis use within Canadian society was increasing, and that random testing had a deterrent effect on its use. Evidence was led that no bargaining unit employee had ever tested positive for drugs, though a post-incident urinalysis test of one contractor's crane operator had returned positive, resulting in his dismissal. Evidence that buccal swabbing was capable of showing impairment at the time of testing was also presented, and considered in light of the fact that while test results would indicate impairment at the time of testing, results of the test would not be available until several days after the test was taken. The sensitivity of the buccal swab testing method is such that it is capable of showing that a subject has smoked marijuana within the preceding four hours.

The Board reviewed the body of arbitral jurisprudence and summarized the "Canadian model" for alcohol and drug testing in safety sensitive workplaces as follows:

- No employee can be subjected to random, unannounced alcohol or drug testing, save as part of an agreed rehabilitative program.
- An employer may require alcohol or drug testing of an individual where the facts give the employer reasonable cause to do so.
- It is within the prerogatives of management's rights under a collective agreement to also require alcohol or drug testing following a significant incident, accident or near miss, where it may be important to identify the root cause of what occurred.
- Drug and alcohol testing is a legitimate part of continuing contracts of employment for individuals found to have a problem of alcohol or drug use.
- The cases generally recognize that an employee's refusal or failure to undergo an alcohol or drug test in the three circumstances described above may properly be viewed as a serious violation of the employer's drug and alcohol policy, and may itself be grounds for serious discipline. The failure or refusal to take an alcohol or drug test, however, like the registering of a positive test, does not necessarily justify automatic termination. The appropriate disciplinary sanction in such a case remains subject to the general just cause provisions of the collective agreement and is an issue to be determined on a case by case basis, having regard to all of the relevant facts.

After reviewing the above "Canadian model" the majority concluded:

> … As reflected in the authorities reviewed above, any drug testing of an employee is a highly extraordinary measure which, even in a safety sensitive environment, can only be resorted to where justification is established. In the case at hand the justification cannot be characterized as the immediate prevention of impaired employees working in the refinery. As explained above, the manner in which the test is taken and analyzed over a period of days is such that the impaired employee is not in fact detected as impaired at the moment of the test, as would be the case with a breathalyzer test. The employer interest that is served, therefore, has more to do with detecting violators of the policy after the fact, in addition to overall deterrence, rather than with immediate safety.
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> … For these reasons, as regards the first issue, the Board finds and declares that that part of the Company's Alcohol and Drug Policy which mandates random, unannounced drug testing is contrary to the collective agreement, and must be struck down.

The dissenting member of the Board summarized the Company's argument:

> One of the elements setting this case apart from the earlier arbitration awards referred to in the majority's decision is the Union's acquiescence to the imposition of random alcohol testing by way of a breathalyzer. Accordingly, randomness in itself should not be an issue in this case. With randomness per se having been eliminated as a basis for challenge, the only way to distinguish random drug testing from random alcohol testing is to determine if an oral fluid drug test is so much more intrusive than a breathalyzer test for alcohol, so as to render one a violation of the collective agreement but not the other. Employees will continue to be randomly tested for alcohol by a breathalyzer. It is difficult to understand how the addition of a short oral fluid test can turn an exercise which is otherwise acceptable into one which violates the Collective Agreement.

The dissent continued:

> Although it would obviously be preferable if the oral fluid test provided the Company with immediate feed back concerning impairment, as does a breathalyzer test, the Company soon learns whether or not an employee was impaired while at work. This information undoubtedly enhances the Company's ability to provide a safer workplace by dealing appropriately with that employee in whatever manner is appropriate to prevent recurrence.
>
> … In my view, random drug testing for impairment by cannabis using oral fluid testing represents a reasonable and appropriate means of reducing risk and promoting workplace safety. The Company has a legitimate interest in detecting and deterring impairment. Random oral fluid testing accomplishes these objectives. It shows likely impairment. It is an effective deterrent. It intrudes in only a limited way on employees' privacy. It does not contravene the Ontario Human Rights Code. It is not inconsistent with the respect and dignity clause or any other provision of the Collective Agreement. One of the best manifestations of respect and dignity for employees is to provide them with the safest possible working environment.

The dissent concluded that random cannabis testing in safety-sensitive positions was not a violation of the respect and dignity clause of the Collective agreement.

Identify and apply the correct standard of review.

Case Study 3 – Immigration (Pre-Removal Risk Assessment) Officer

O, a citizen of Nigeria, came to Canada in 1998 and unsuccessfully claimed refugee status. He married a person who had been recognized as a refugee and they had a child. His wife, a hospital nurse, had a high-risk pregnancy and has suffered from depression following the child's birth. After several subsequent unsuccessful attempts to regularize his status, O was convicted for theft. He completed a sentence of probation and community service. His conviction resulted in an inadmissibility report under s. 36(1)(a) of the *Immigration and Refugee Protection Act* (IRPA), and disqualified him from making an "In-Canada Application for Permanent Resident Status, Spouse or Common-law Partner in Canada Class". Ordinarily, this meant that O would have to leave Canada and apply for status from Nigeria. Accordingly, O applied for an exemption to this requirement under IRPA, s. 25(1):

> **25.** (1) The Minister shall, upon request of a foreign national who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligation of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations.

In support of his application, O argued that his removal from Canada would interfere with his family life, and be contrary to the International Covenant on Civil and Political Rights (ICCPR):

> 17(1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
>
> 23(1) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
>
> 24(1) Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

Paragraph 3(3)(f) of IRPA states that: "This Act is to be construed and applied in a manner that… complies with international human rights instruments to which Canada is signatory."

In determining whether a humanitarian and compassionate exception is justified, Citizenship and Immigration Canada guidelines require officers to decide whether the applicant's situation shows that he or his family would face "unusual, undeserved or disproportionate hardship" as a result of his departure from Canada to apply for a permanent resident visa from abroad.

The officer rendered the following decision:

> In accordance with the legislation [case law omitted] the interests of the children must be well identified. The basis of this principle… stems from Art. 3 of the Convention on the Rights of the Child. The best interests of the child are an important factor and must be given significant

> weight. However, this does not mean that the interests of the child outweigh all other factors. It is one of many factors to be considered in assessing whether the humanitarian and compassionate factors in the applicant's circumstances are sufficient to warrant an exemption to applying for her permanent residence outside Canada.
>
> In his submission, the applicant made reference to the International Covenant on Civil and Political Rights and the Inter-American Declaration and argued that International law considers that the family has to be able to offer special protection to the child and should the applicant be removed from Canada there would be no more family to protect the child. With regard to international law issues, an officer does not have jurisdiction to deal with international law issues and a Request for Exemption from Permanent Resident Visa Requirement is not the proper venue for resolving such complex issues. Therefore whether his removal will constitute a breach of international law will not be addressed in this decision.
>
> The applicant has alleged that the mother of the child has depression and that if the applicant leaves she will not be able to take care of his baby. According to the evidence submitted, after the birth of their child in October 2005, the applicant's wife suffered from "Major Depressive Episode/Post Partum Depression", but there is no evidence to support that this condition continued. There is no evidence to support that the mother will be unable to take care and raise the child in a safe and health environment. The applicant's wife is 38 years old. She lived for over 10 years in the USA prior to coming to Canada and worked as a registered nurse in the USA. She is accustomed to living and working in North America. The evidence does not support that the applicant's wife will be unable to support herself or take care of herself and her child financially or otherwise in Canada. Should the applicant apply for his permanent residency from outside Canada the child can remain with his mother in Canada. His mother is a nurse and there is no evidence to show that she will be unable to take care of the child. The applicant stated that there will be no more family to protect the child; however, the applicant submitted no evidence to support this statement. The child will be able to remain with his mother in Canada.
>
> The applicant has argued that he will be indefinitely separated from his wife and child because his wife cannot go back to Nigeria. However, according to a letter received from the applicant's lawyer, dated January 16 2007, the applicant's wife, Ms. N, returned to Nigeria to attend the funeral of her father-in-law, since the applicant could not attend, and that she would be returning at the end of January 2007 or at the beginning of February 2007. The evidence does not support that he will not be able to see his child after his removal from Canada, the applicant can maintain a relationship with his son. He will not be the only father separated from his child due to Immigration processing reasons. The applicant and his wife underwent fertility treatment knowing that the applicant had no legal status in Canada and they could anticipate that he might be required to leave Canada, which could affect the applicant's wife and child. If the applicant returns to his country of origin, the applicant's wife may stay in Canada as she is a permanent resident with her child. Family separation is the normal consequence of a removal from Canada. Although the best interest of the child is an important factor, I do not find that the applicant has demonstrated unusual, undeserved, or disproportionate hardship.

Determine and apply the appropriate standard of review. Would the outcome change if O had presented some evidence that his wife's struggle with depression was ongoing, but the officer had concluded that notwithstanding this evidence, the requisite hardship had not been established?

Case Study 4 - Ontario Energy Board

During an application by a gas company to set rates for the coming year, the Low Income Energy Network (LIEN) asked the Ontario Energy Board (OEB) to rule on whether it had the jurisdiction to establish a low-income rate group funded by the other rate groups. LIEN asked the OEB to rule on whether it could establish a subsidy program for poor gas customers. OEB has the power to set gas rates by virtue of s.36 of the Ontario Energy Board Act:

> **36.** (1) No gas transmitter, gas distributor or storage company shall sell gas or charge for the transmission, distribution or storage of gas except in accordance with an order of the Board, which is not bound by the terms of any contract. 1998, c. 15, Sched. B, s. 36 (1).
>
> (2) The Board may make orders approving or fixing just and reasonable rates for the sale of gas by gas transmitters, gas distributors and storage companies, and for the transmission, distribution and storage of gas. 1998, c. 15, Sched. B, s. 36 (2).
>
> (3) In approving or fixing just and reasonable rates, the Board may adopt any method or technique that it considers appropriate. 1998, c. 15, Sched. B, s. 36 (3).

Interpretation of this section is guided by objective 2 of section 2

> **Board objectives, gas**
>
> **2.** The Board, in carrying out its responsibilities under this or any other Act in relation to gas, shall be guided by the following objectives:
>
> 2. To protect the interests of consumers with respect to prices and the reliability and quality of gas service.

Historically, the OEB has set rates based on cost causality – allowing for recovery of costs and building a margin of profit into the rate.

LIEN's written submission outlines its argument:

> 1. Unaffordable gas and electricity rates cause great hardship to poor consumers in Ontario. Sometimes they are forced to choose between heating or eating; sometimes their supply is disconnected. The Ontario Energy Board's ("Board") statutory objective to protect the interests of consumers with respect to prices and the reliability and quality of gas service is not being met by the current rate fixing system. The interests of low-income consumers are not protected and de facto the service to them is unreliable and inadequate.
>
> 2. The Board's self-acknowledged and judicially acknowledged mandate is to regulate the province's electricity and natural gas sectors in the public interest. Low-income consumers form a substantial proportion of Ontario's population: approximately 18% of households spread throughout the province. Gas rates and service that disadvantage such a

> substantial segment of the public, whether directly through rate structure or indirectly through terms and conditions, are not in the public interest.

In coming to a conclusion the majority of the OEB wrote:

> In this case, the issue is whether the Board does or does not have jurisdiction to establish rates based on rate affordability for low income consumers…
>
> The Board was created and made operational through legislation. The Board has a responsibility to operate to the full depth and breadth of the authority granted in its governing statute. The limits or boundaries of its authority need not, nor should, be a bright line. This would require near unachievable foresight by the legislators to consider all of the possible eventualities. The objectives provided in the Act are intended to be broad enough to allow the Board to operate with discretion in an ever changing environment and focused enough to ensure that the Board operates within the government's policy framework. Determinations on jurisdiction should be guided solely by the question of what can reasonably be considered to have been intended by the legislators in the scoping and crafting of the Board's mandate. There should be no pre-destining bias based on a desire by the regulator to include or exclude any particular issue…
>
> The use of income level as a determinate in establishing utility rates has broad public policy implications. The interplay that this type of income redistribution program would have with other income redistribution programs that would reside outside of the Board's purview could be significant. The consideration of income redistribution should not be done in isolation of the broader government policy environment. The management of the interplay would necessitate a prescriptive statute or directive…
>
> Income redistribution policies are at the core of the work done by democratically elected governments. The Board is of the opinion that had the Government wanted the Board to engage in such a fundamentally important function it would have specifically stated as such. ..
>
> The Board is of the view that there is no compelling evidence to suggest that the objectives contained in the Act encompass, explicitly or implicitly, any accommodation for such a fundamental departure from the manner in which the Board currently regulates. For these reasons … the Board finds that it does not have jurisdiction to develop a rate class with an income level determinant...

Determine and apply the appropriate standard of review