

CITATION: West Whitby Landowners Group Inc. v. Elexicon Energy, 2024 ONSC 4338
OSHAWA COURT FILE NO.: CV-22-570
DATE: 20240802

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: West Whitby Landowners Group Inc., Applicant/Responding Party

AND:

Elexicon Energy Inc. and Ontario Energy Board, Respondents

BEFORE: The Hon. Justice S.E. Fraser

COUNSEL: Christopher R. Lee and Kirendeev Purba for the Applicant

Laura Wagner and Teagan Markin, for the Respondent, Elexicon Energy Inc.

M. Philip Tunley, for the Respondent, Ontario Energy Board

HEARD: May 3, 2024

ENDORSEMENT

I. Overview

- [1] This motion concerns whether this Court has jurisdiction over a dispute between Elexicon Energy Inc. (“Elexicon”), a licensed municipal electricity distributor and formerly Whitby Hydro Electric Corp., and the Applicant, the West Whitby Landowners Group (“WWLG”) which is a corporation established as a cost-sharing trustee for eleven developers. Collectively, WWLG is developing residential subdivisions comprising of 3913 lots in the Town of Whitby.
- [2] The developments required electricity. WWLG and Elexicon negotiated an Offer to Connect. A dispute arose between WWLG and Elexicon over who would pay for a municipal electrical substation. This turned on the classification of the electrical substation in issue, namely, whether it was an enhancement to or an expansion of the existing grid. The parties agreed that if they could not resolve the dispute themselves, the dispute would be referred to the Ontario Energy Board (the “Board”) for resolution. The Board was not a party to their agreement.
- [3] They could not agree and the issue was referred to the Board for resolution. The Board provided its opinion, sided with Elexicon, concluding that it was an expansion. The consequence of this was that WWLG would have to pay for the substation.
- [4] WWLG then filed a complaint with the Board, asking that the matter be referred to a full panel of the Board.

- [5] WWLG commenced an application for judicial review in the Divisional Court. The Divisional Court dismissed the application finding, among other things, that the Board was not exercising as statutory power of decision when it provided its opinion about the substation.
- [6] In this Application, WWLG asks this Court to decide the matter, arguing that the effect of the Divisional Court ruling is to say that the Board did not decide the issue. It argues that Elexicon and the Board are now taking a different position than they did before the Divisional Court. Before the Divisional Court, they argued that the Board did not make a decision. Here, WWLG submits, they assert that the matter was decided by the Board.
- [7] WWLG submits that Elexicon, a government actor, should not be immune from review and that WWLG should be able to seek redress through this Court, given that the Divisional Court determined that the Board was not exercising a statutory power of decision when it opined that the municipal substation was an expansion.
- [8] The Board was added as a party to this proceeding on consent to address the jurisdiction of this Court to grant the relief sought.
- [9] For reasons set out in more detail below, I allow the motion and dismiss this Application. I do so because I find that the parties bargained for the Board to resolve the dispute, that by statute the Board has exclusive jurisdiction over the classification of the substation, and this Application is an attempt to relitigate the Board's interpretation and decision not to send the complaint to a panel.

II. Issues

- [10] The issues in this Application are:
- a. Does this Court have jurisdiction to dismiss an Application under Rule 21.01(3)?
 - b. Does this Application constitute an abuse of process as an attempt to litigate a matter already decided?
 - c. Does the Ontario Energy Board have exclusive jurisdiction to decide the matters in the within application?
- [11] To examine these issues, I first examine this Court's jurisdiction under Rule 21.01(3). Then, I describe the Offer to Connect which forms the agreement between the parties. Next, I analyze the decision of the Divisional Court after which I will address issues (b) and (c) in turn. I will then address whether the matter should be dismissed or stayed under Rule 21.01(3).

III. Analysis

A. *Jurisdiction of the Court*

- [12] The parties agree that this Court has jurisdiction to dismiss an application under Rule 21.01(3) and to stay a proceeding on terms that are just under s. 106 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended.
- [13] Rule 21.01 refers to an action. However, Rule 14.09 provides that an originating process that is not a pleading may be struck out in the same manner as a pleading. This Court held that Rule 21.01 applies to applications and that the rule can be used to strike out an application on the same grounds. See *Martin v. Ontario*, 2004 CarswellOnt 6385 (ONSC), at para. 8.
- [14] I accept that I have jurisdiction to dismiss or stay this Application.

B. *Offer to Connect*

- [15] By way of background, the WWLG subdivisions were located in an area intended to be developed since a 2010 amendment to the Official Plan.
- [16] Elexicon holds a license to distribute electricity. It must do so in accordance with the Distribution System Code set out by the Board and the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sched. B (“the Act”). Sections 112.3 to 112.5 of the Act authorize the Board to enforce compliance with the Act and the Distribution System Code.
- [17] The subdivisions required a new municipal substation and two transformers. Initially, Elexicon considered this to be an enhancement. However, in March 2018, Elexicon changed its position and considered the substation to be an expansion such that WWLG would have to fund it at a cost of approximately \$4.2 million. Expansion and enhancement are terms defined in the Distribution System Code.
- [18] In December, 2018, WWLG and Elexicon entered into an Offer to Connect agreement (“OTC”) whereby Elexicon would provide electricity to the new subdivisions.
- [19] When they signed the OTC, WWLG and Elexicon did not agree about whether the substation was an enhancement or an expansion. WWLG objected to Elexicon’s classification of the substation as an expansion arguing that no one had ever had to fund a municipal substation prior to this OTC. Rather, the municipal distributors had funded them.
- [20] In the OTC, Elexicon and WWLG agreed to refer to the Board disputes relating to whether works referred to as an expansion were an expansion or an enhancement. The parties agreed that the Board would make the final determination. The Board was defined as including the Industry Relations office.
- [21] In terms of dispute resolution relating to the substation, the OTC provided that:

“Dispute” means notwithstanding the references to an expansion in recitals (E), (F) and (H) and the applicable schedules of this Agreement, the determination as to whether or not the works contemplated by this Agreement are an enhancement or an expansion are to be made by the OEB, including the determination as to which party is responsible for the costs of same.

...

Notwithstanding the references to an expansion in recitals (E), (F) and (G) and the applicable schedules of this Agreement, and subject to the Arbitration provision in Section 16.06 hereof, Whitby Hydro, West Whitby Group and WWLG have agreed to refer any Dispute on such provisions to the OEB to specifically address the Dispute, including the procedure for determining the Dispute and determination as to which party is responsible for the costs of any works, including but not limited to the MS16 Station, pursuant to the OEB's Distribution System Code.

...

Whitby Hydro, West Whitby Group and WWLG have agreed that they will abide by the OEB's interpretation at the conclusion of the Dispute process and implement any amendments to this Agreement that may be necessary based on the determination of the Dispute by the OEB.

- [22] Other types of disputes were to be dealt with differently under the agreement.
- [23] When the parties could not resolve the dispute, it was referred to the Board. The Board provided an opinion and conclusions stating Elexicon had correctly applied the provisions of the Distribution Code thereby agreeing that the substation was an expansion.
- [24] WWLG requested that the Board decide, not merely offer its views and conclusions. When the Board did not, WWLG lodged a formal complaint with the Board and asked that the matter be put before a panel of the Board for resolution. Each of WWLG and Elexicon made submissions, but WWLG was not provided with a copy of Elexicon's submissions. The Board concluded that the funding should be adjusted such that Elexicon would be responsible for \$710,109.00 but the Board did not refer the matter to a panel and did not respond to a request for reconsideration.

C. Divisional Court Decision

- [25] WWLG applied for judicial review. Before the Divisional Court, Elexicon and the Board asserted that the court had no jurisdiction to review the matter. They argued that the opinions provided by the Board did not have a legally binding effect and did not constitute a decision. Second, they argued that, even if the Board did make a decision, the only decision it made was to not refer the matter for a hearing which was not reviewable. The Divisional Court agreed with the Respondents.

[26] The Divisional Court found the OTC irrelevant to a challenge to the Board’s opinion or whether the matter was referred to a panel. This is because while the parties can agree to be bound by the Board, they have no power to require the Board to do anything other than what it is obliged to do by statute or regulation. It held that WWLG had no standing to ask the Divisional Court to require the Board to hold a hearing.

[27] The Divisional Court dismissed the judicial review application stating at paras. 37, 39, 42, 44 and 45:

[37] In my view, the OEB’s opinion regarding whether the MS16 is an expansion or an enhancement is not a decision giving rise to the public law remedy of certiorari. While the OEB is a public body that makes many decisions of a public character, in this case, the first factor, namely the character of the matter, weighs heavily against the availability of public law remedies. The parties sought the opinion for the purpose of resolving their private dispute. The fact that they agreed to be bound by the OEB’s opinion does not turn the opinion into a decision of a public character. Ultimately, the only decision made by the OEB was not to refer the matter for further investigation or not to make an order against Elexicon which, as reviewed above, is a decision that WWLG does not have standing to challenge.

...

[39] The OEB and Elexicon argue that the OEB did not exercise a statutory power of decision and the Court therefore cannot review the decision. They point to a distinction in the case law between different complaint regimes and submit that the OEB complaint process falls into the category of cases where courts have found that a decision not to take further steps in relation to a complaint is not the exercise of a statutory power of decision.

...

[42] Here, section 105 of the *Ontario Energy Board Act* is similar to the wording of the legislation in *Batacharaya* rather than in *Endicott*. Section 105 of the Act uses the discretionary word “may”, thereby giving the OEB discretion over whether to receive a complaint and how to handle it. Accordingly, the OEB is not exercising a statutory power of decision. Given the legislative scheme at issue, the decision does not affect the “legal rights, powers, privileges, immunities, duties or liabilities” of WWLG, because WWLG has no entitlement to have the complaint handled in any particular way. At most, WWLG has a right to have the OEB consider its complaint, but it has no right to challenge the procedure the OEB follows in handling the complaint or the outcome of the complaint.

...

[44] From the perspective of the statutory scheme, WWLG is in no different position than any member of the public who makes a complaint against an electricity supplier. Pursuant to section 105 of the *Ontario Energy Board Act*, the OEB is given broad discretion over how it will handle the complaint. This includes the ability to help the parties resolve the complaint, which is what the OEB did here by providing its opinion. However, this does not mean that a complainant can seek to judicially review the OEB's opinion. The only statutory decision the OEB makes when receiving a complaint is whether to conduct an investigation and, ultimately, whether to make an order against a regulated entity. The Act makes clear that only the OEB has the power to make such an order and members of the public have no right to compel an investigation or an order against a regulated entity.

[45] Accordingly, in my view, the OEB's opinion on whether the MS16 is an enhancement or an expansion is not subject to judicial review. This was not the exercise of a statutory power. The OEB provided this opinion to the parties because they requested that it do so as part of their dispute resolution process. In addition, WWLG has no standing to challenge the decision of the OEB not to conduct an investigation and not to make an order against Elexicon. At most, if the OEB had not processed the complaint, Elexicon could have challenged its failure to do so. But there is no legal basis on which WWLG can seek to judicially review the process the OEB followed in handling the complaint or the opinion given by the OEB on the nature of the MS16.

D. Does this Application constitute an abuse of process?

- [28] WWLG submits that as the Board provided only its views and conclusions and did not decide the dispute, that this Court has jurisdiction. As part of this argument, it relies on the Board and Elexicon's submissions to the Divisional Court stating such. However, these submissions were made as part of an argument that the Board was not exercising a statutory power of decision.
- [29] The Divisional Court held that WWLG and Elexicon agreed through the Offer to Connect to resolve their private dispute by seeking the opinion of the Board. The OTC states that the parties will abide by the Board's interpretation.
- [30] In addition, when the Board provided its interpretation and WWLG was not satisfied, WWLG filed a complaint, and the Board exercised its discretion not to refer it to a panel. The Divisional Court had held WWLG had no standing to challenge that decision.
- [31] In my view, this Application is an attempt to relitigate the matter. That being said, the question of motive is not the focus of whether a proceeding is an abuse of process. Rather,

the focus is the integrity of the adjudicative process. No one should have to face the same litigation twice where the matter had already been decided by a court or tribunal. It is that concern which is a bar against relitigation. See *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, at paras. 36, 37, 43-45 and *Garland v. Consumers Gas Co.*, [2004] 1 S.C.R. 25, at paras. 70-71.

- [32] In this proceeding, the Applicant asks this Court to adjudicate a matter already determined by the Board. For this reason, I find that the Application is an abuse of process. Accordingly, I find there are grounds to dismiss the Application under Rule 21.01(3)(d).

E. Does the Board have exclusive jurisdiction?

- [33] While I am prepared to dismiss the Application under Rule 21.03(3)(d), I also find the subject matter of this Application is one over which the Board has exclusive jurisdiction.
- [34] The subject matter of this Application is about compliance by Elexicon, a licensed distributor, with the Distribution System Code. The Distribution System Code is issued by the Board under s. 70.1 of the Act.
- [35] The Board's exclusive jurisdiction was recognized by the Court of Appeal in *Garland v. Consumers' Gas Company Ltd.*, 2001, 57 OR (3d) 127, 2001 CanLII 8619, at para. 27, *Garland v. Consumers Gas Co.*, [2004] 1 S.C.R. 25, at paras. 70-71. The question that I must be concerned with is whether the subject matter falls within the Board's exclusive jurisdiction.
- [36] In *Vista Waterloo Hotel Inc. v. 1426398 Ontario Inc. & Ontario Energy Board*, 2021 ONSC 2724, this Court declined jurisdiction recognizing that s. 19(6) provides that the Board shall have exclusive jurisdiction to determine all questions of fact and law and that the Applicant in that proceeding was asking the Court to do what the Board could do, on very similar facts to this case.
- [37] I find that the heart of this proceeding is the interpretation of the Distribution System Code which falls squarely within the Board's jurisdiction under s. 19(6) and 112.3 of the Act. Therefore, I find that I have no jurisdiction to deal with the questions raised in this proceeding.

IV. Order

- [38] This Application is dismissed as an abuse of process and for lack of jurisdiction.
- [39] I encourage the parties to resolve costs themselves. Elexicon has been successful and is presumptively entitled to its costs. I recognize that Elexicon seeks its costs on a substantial indemnity basis. If the parties cannot resolve the issue of costs, costs will be decided based on written submissions sent to my Judicial Assistant at Robyn.Pope@ontario.ca. Elexicon and the Board shall provide written submissions of no more than three double-spaced pages each, with attachments including Offers to Settle and a detailed Bill of Costs within 15

days of this decision. WWLG shall provide its submissions within 10 days of the filing of Elexicon's submissions. There shall be no reply.

[40] I thank the parties for their helpful submissions.

Justice S.E. Fraser

Date: August 2, 2024