Ontario Energy Board

Commission de l'Énergie de l'Ontario

Ontario

EB-2011-0316

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

AND IN THE MATTER OF a Notice of Intention to Make an Order for Compliance and an Administrative Penalty against Summitt Energy Management Inc., Licence Numbers ER-2010-0368 and GM-2010-0369

BEFORE: Ken Quesnelle
Presiding Member

Cathy Spoel
Member

DECISION AND ORDER

The Ontario Energy Board (the "Board"), on its own motion under section 112.2 of the *Ontario Energy Board Act, 1998* (the "Act"), issued a Notice of Intention to Make an Order for Compliance and an Administrative Penalty (the "Notice of Intention") stating that it intends to make an Order under sections 112.3 and 112.5 of the Act requiring Summitt Energy Management Inc. ("Summitt") to comply with a number of enforceable provisions as defined in section 112.1 of the Act and to pay an administrative penalty in the amount of $15,000 for breaches of enforceable provisions. By way of letter dated September 7, 2011, Summitt, in accordance with the opportunity provided in the Notice of Intention, requested that the Board hold a hearing on this matter. The Board is therefore holding a hearing into this matter. The parties to this proceeding are Summitt

and the staff members of the Board (assisted by external counsel) assigned to bring this matter forward ("Compliance").

The Board issued Procedural Order No. 1 on November 22, 2011, which established December 22nd as a provisional date for the hearing of any motions pertaining to the hearing, as well as the schedule for filings pertaining to potential motions.

In accordance with Procedural Order No. 1, a Notice of Motion was filed by Summitt, and the motion was heard by the Board on December 22, 2011.

In a letter dated February 21, 2012, the Counsel for Summitt requested that the Board set aside a date to hear two additional motions:

1. A motion by Compliance (the "Compliance Motion") to amend the August 25, 2011 Notice of Intention and;

2. A cross-motion by Summitt (the "Summitt Motion") for a determination of the proper statutory interpretation of sub-sections 17 and 18 of Section 7(1) of new Ontario Regulation 389/10 under the *Energy Consumer Protection Act*, 2010, c. 8; namely whether those sub-sections create:

    (i) A physical placement offence (i.e. that the sub-sections are offended if the ordering or physical placement of the signing lines or boxes for the parties to sign on a form of agreement are in an incorrect order); or

    (ii) A temporal signing offence (i.e. that the sub-sections are offended if the actual chronological signing of the signatures of the parties on a contract occurs in an incorrect order).

Summitt also requested a timetable for written submissions and that the deadline for written submissions takes place prior to the Motion's Day hearing.

On February 24, 2012, the Board issued Procedural Order No. 2 that set the date for the Motion's Day.

On March 20, 2012, the Board heard oral argument on both motions.

The Compliance Motion

Compliance's Motion sought an order from the Board amending the Notice of Motion to correct what Compliance refers to as a "typo" in the original Notice of Motion. The proposed amendment would change the wording of a paragraph on page 2 of the Notice of intention by substituting the words "before (i.e. physically above)", for "after", as shown below:

> With respect to 25 electricity contracts and 25 gas contracts reviewed, Summitt has failed to ensure that the person signing the contract on behalf of Summitt does so before (i.e. physically above) ~~after~~ the acknowledgement that has to be signed and dated by the consumer or the account holder's agent; contrary to section 7(1)17 and 7(1)18 of Ontario Regulation 389/10 and section 12 of the ECPA. A list of the contracts referred to in this paragraph is attached at Appendix A.

Compliance submitted that the original wording could best be characterized as a typo or a mistake. Compliance submitted that the Board has the implied authority under section 112.2 of the Act to amend any notice of intention issued pursuant to that section.

In Compliance's view, therefore, the real question to decide is: should the Board amend the Notice of Intention? Compliance submits that the appropriate standard for this consideration is the civil standard; in other words, if there is no prejudice to Summitt that cannot be overcome through costs or an adjournment, the amendment should be granted. Compliance submits that, given the relatively early stage of the proceeding, in all likelihood there is no prejudice to Summitt at all resulting from the proposed adjournment. Any prejudice that does result could be rectified through either an award of costs or an adjournment.

Summitt generally agreed with Compliance that the Board has the power to amend the Notice of Intention, though not necessarily pursuant to section 112.2 of the Act, as suggested by Compliance.

Summitt did take significant issue with Compliance's characterization of the error in the original notice as a typo. Summitt submitted that the proposed amendment to the Notice of Intention in fact brings the exact opposite meaning to the Notice of Intention. It is also not a spelling or grammatical error, and cannot properly be described as a typo.

In Summitt's view, the error in the original Notice of Intention is such that it makes the entire Notice of Intention a nullity, and it therefore cannot be corrected by an amendment. Summitt submits that the Notice of Intention does not set out an offence known to the law; in other words that the matters set out in the Notice of Intention – even if true – do not amount to an offence. It is therefore an offence "unknown to the law" and is void *ab initio*.

Summitt further argues that, to the extent the Board chooses to consider the appropriateness of an amendment, the appropriate standard by which to consider this request is the standard found in the *Provincial Offences Act* ("POA") and related case law. The test for an amendment under the POA is stricter than the civil test preferred by Compliance. Although Summitt recognizes that this is a proceeding under section 112.2 of the Act, and not section 126 to which the POA would directly apply, it submits that the Board should nevertheless apply the POA standard in this case as the evidentiary record in the current proceeding could form the evidentiary record of a future proceeding under section 126 of the Act.

Summitt further argues that it would suffer prejudice if the amendment were allowed, and that this prejudice could not necessarily be remedied by costs or an adjournment. For example, a delay may make it more difficult for Summitt to prepare evidence from its own agents, or perhaps the customers involved.

Compliance responded that, although it agreed that a Notice that did not allege an offence known to law would be a nullity, this was not the case currently before the Board. Compliance noted that the Notice of Intention cited the proper section of the regulation, and referred directly to the contracts at issue in which the signature line is (allegedly) in the wrong (physical) place. The use of the word "after" instead of "before" was simply a mistake. It did not render the underlying "charge" a nullity. To declare the Notice of Intention a nullity for what amounts to a typo would amount to a triumph of form over substance.

Compliance further noted that the POA would only apply in proceedings under section 126 of the Act. As this was a proceeding under section 112.2, the POA has no application. It rejected Summitt's arguments that the record from this proceeding could in theory be used in a future prosecution under section 126 on the grounds that the record from virtually any Board proceeding could in theory be used in a future proceeding under section 126. By Summitt's logic, therefore, the POA standards should be used in all Board proceedings, which clearly cannot be the case. Regardless, it was Compliance's view that the amendment results in little or no prejudice to Summitt, and should be granted under either the civil or the POA standard.

Board Decision

The Board will allow the motion and permit the amendment to the Notice of Intention as requested by Compliance.

The Board does not accept that the standards applicable to the POA apply to this proceeding. This is not a proceeding under section 126 of the Act. The fact that a theoretical possibility exists that there may be a future proceeding under section 126 related to the same subject matter, and that a party may seek to use evidence from the current proceeding in that forum, does not justify a wholesale imposition of POA standards. As Compliance notes, virtually any proceeding before the Board could ultimately be the subject of a section 126 proceeding. Regardless, even if the standards applicable under the POA applied here, the Board finds that an amendment would still be appropriate.

The Board does not agree with Summitt's submission that the original Notice of Intention sets out an offence "unknown to law" and is therefore a nullity. The use of the word "after" instead of "before" is indeed an unfortunate error in the original Notice of Intention. It is certainly possible that this error has caused confusion to Summitt, and may have resulted in unnecessary costs.

However, the Board does not accept that the error renders the original Notice of Intention a nullity. The Notice of Intention cites the proper section and subsections of the regulation (which themselves set out the correct order), and references the relevant contracts that are alleged to contravene those subsections. The Board accepts that the improper wording in the Notice of

Intention was a drafting error, and the Board does not believe that Compliance is attempting now to fundamentally change the nature of the allegation to fit the evidence (indeed, all of the evidence and disclosure in the proceeding to date is from Compliance).

The situation here is similar, though perhaps slightly less clear-cut, to the situation in *R. v. Schmidt*. In that case, a dairy farmer was charged with (amongst other things) distributing unpasteurized milk. The Information (similar functionally to the Notice of Intention in this case) sworn by the Ministry of Natural Resources investigator, however, mistakenly left out the key word "not". The Justice of the Peace amended the Information on his own motion, and apparently without process or complaint from the parties to reflect the "obvious intention of the Prosecution":

> The remaining 16 charges which are contained in 7 Informations sworn by Brett Campbell, investigator for the Ministry of Natural Resources, are that: […]
>
> (5) Michael Schmidt, on the 22nd of August, at 9100 Bathurst Street, Thornhill, City of Vaughan, Ontario, did distribute to Susan Atherton and others a milk product, processed or derived from milk that **was [not]** pasteurized or sterilized in a plant that was licensed under the Milk Act or in a plant outside Ontario that met the standards for plants licensed under the Milk Act, contrary to section 18(2) of the Health Protection and Promotion Act, R.S.O. 1990, c. H.7, as amended. **(Note: This count charges the defendant with having distributed a milk product that was derived from milk that "WAS pasteurized". The intention of the Informant was clearly that the defendant is alleged to have distributed the product from milk that "WAS NOT pasteurized."** I found this to be a simple typographical error, and on my own motion, pursuant to section 34(1) (a) of the Provincial Offences Act, R.S.O. c. P. 33 ("P.O.A."), I have amended this count to reflect the obvious intention of the Prosecution.)[1]

[1] 2010 ONCJ 9 (CanLII), para. 7. Emphasis in original. The bracketed notation is the Justice of the Peace's notation.

Finally, the Board finds that there will be no prejudice to Summitt that cannot be cured by an adjournment or costs. We are still at a relatively early stage of the proceeding. Discovery has been completed, but we remain one or more procedural steps from the actual hearing of this matter on its merits. To the extent that more discovery (or other procedural steps) are necessary, this can be dealt with without prejudice to Summitt. Any delay that results from this amendment will not be so long as to interfere with, for example, the memories of any relevant witnesses.

The Compliance Motion to amend the Notice of Intention is therefore granted.

The Summitt Motion

Summitt's Motion sought a determination of the proper statutory interpretation of paragraphs 17 and 18 of subsection 7(1) of Ontario Regulation 389/10 under the *Energy Consumer Protection Act*, 2010, c. 8; namely whether those sub-sections create:

> (iii) A physical placement offence (i.e. that the sub-sections are offended if the ordering or physical placement of the signing lines or boxes for the parties to sign on a form of agreement are in an incorrect order); or
>
> (iv) A temporal signing offence (i.e. that the sub-sections are offended if the actual chronological signing of the signatures of the parties on a contract occurs in an incorrect order).

Paragraphs 17 and 18 of section 7(1) state:

> 7(1) A contract must contain the following, be clearly legible and, except for the information to be added at the time the contract is entered into, must be in a typeface having a font size of at least 12:
>
> 17. Except as otherwise provided in section 9, the signature and printed name of the consumer, or the account holder's agent signing the contract on behalf of the consumer, and of the person signing the

contract on behalf of the supplier, at the bottom of the contract and before the acknowledgment described in paragraph 18.

18. Except as otherwise provided in section 9, following the signatures referred to in paragraph 17, an acknowledgment to be signed and dated by the consumer or account holder's agent that he or she has received a text-based copy of the contract.

Section 9, which is referred to in both paragraphs 17 and 18, relates to internet contracts, and is not relevant to the issue before the Board on this motion.

Summitt argues that the proper interpretation is the temporal interpretation – i.e. that the sub-sections refer to the timing of the signature, and not to its physical placement. As counsel for Summitt stated in oral argument: "There has to be a contract signed, first step, and then there has to be an acknowledgment signed, next step."[2]

Summitt argues that its interpretation is more consistent with the general intent of consumer protection legislation: "that there actually be a contract in place before the consumer acknowledges that there has, one, that he has received a text-based copy of it, obviously by which he is bound."[3]

Summitt pointed to other instances in the regulation where the word "following" is used, and submitted that none of the other uses of "following" related to physical placement, and that some of them are temporal statements. Similarly, all other uses of the word "before" are temporal in nature. Summitt therefore argues that the temporal interpretation is the one that best fits the context of the regulation as a whole.

Compliance prefaced its arguments with what it refers to as the "golden rule" of statutory interpretation, as described by Professor Sullivan:

> Today there is only one principle or approach. The words of an act are to be read in their entire context and their grammatical and ordinary sense, harmoniously within the scheme of the act, the object of the act, the intention of Parliament.[4]

[2] Transcript dated March 20, 2012, p. 68.
[3] Transcript dated March 20, 2012, pp. 68-69.
[4] Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th Edition, p. 1.

Summitt agrees that this is the proper approach to statutory interpretation.

Compliance argued that context is key, and that words cannot be looked at in isolation. Compliance submitted that, read in context, it is clear that subsections 7(1) 17 and 18 refer to the physical placement of the signature lines.

Compliance first pointed to the opening language of section 7: "A contract must contain the following, be clearly legible and, except for the information to be added at the time the contract is entered into, must be in a typeface having a font of at least 12: […]". Compliance suggests that this language indicates that section 7 is introducing textual requirements, thus the requirements concerning legibility and font size.

Compliance argues that the key phrase in paragraph 17 is "at the bottom of the contract and before the acknowledgement described in paragraph 18." Compliance submits that the phrasing is not ambiguous, but that even if it is ambiguous the "associated words rule" applies. The associated words rule is described by Professor Sullivan as follows:

> The associated-words rule is properly invoked when two or more terms linked by "and" or "or" serve an analogous grammatical and logical function with a provision. This parallelism invites the reader to look for a common feature among the terms. This feature is then relied on to resolve ambiguity or limit the scope of the terms. Often the terms are restricted to the scope of their broadest common denominator.[5]

The concept was also described in *R. v. Goulis*:

> When two words which are susceptible of analogous meanings are coupled together, they are to be understood in their cognate sense. They take their colour from each other, the meaning of the more general being restricted to a sense analogous to the less general.[6]

[5] Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th Edition, p. 227.
[6] (1981) 33 O.R. 2nd 55 at p. 61 (C.A.)

Compliance submits that the associated words rule applies here, and that since the words "at the bottom of the contract" clearly refer to physical placement, then the Board should interpret "before the acknowledgment" to also refer to physical placement.

Compliance further pointed to the language in section 10(1)(b) of the regulation, which states: "If a consumer enters into a contract in person with someone acting on behalf of the supplier the consumer is deemed to acknowledge receipt of a text-based copy of the contract of and when the consumer signs the acknowledgment at the end of the contract." In Compliance's view, the words "at the end of the contract" can mean only one thing: that the drafters of the regulation intended that the acknowledgment be physically placed at the end of the contract.

Compliance noted that, of the 18 paragraphs to section 7, the first 16 unequivocally relate to physical information being placed on the contract. They do not relate in any way to timing or temporal issues. Compliance submits that the Board should consider this context in determining the appropriate interpretation of subsection 17 and 18, and conclude that these subsection also relate to the physical form of the contract. This would be in keeping with the principle of statutory interpretation that a provision should be read in harmony with related provisions.

Finally, Compliance argued that Summitt's interpretation cannot be correct, because it would "create a provision that could not exist".[7] Compliance submits that the "acknowledgment" referred to in paragraph 18 is the text actually appearing on the contract from the outset, not the consumer's actual signature which is added later. It states this because paragraph 18 specifies "an acknowledgement *to be signed and dated by the consumer*" (emphasis added), which can only mean that the acknowledgment and the signature are not the same thing. The acknowledgment, therefore, can only mean the actual text on the contract which is there from the outset, and cannot be something that is added later (i.e. in a temporal sense).

In reply, Summitt re-iterated that its interpretation is more consistent with the intent of consumer protection legislation, and that there is nothing inconsistent

[7] Transcript dated March 20, 2012, p. 100.

about including two matters related to temporal placement in a list that otherwise deals with matters to be included in a contract.

Summitt disputed that the associated words rule applies to this situation. Summitt submitted that that rule applied in circumstances where a series of two or more words have an analogy amongst them, and that in such circumstances one should interpret those words in the same context (for example: liens, claims and encumbrances). The rule does not apply in the current case, where we have two different terms that are conjoined by "and".

Summitt argued that the words "at the end of the contract" in section 10(1)(b) are not picked up by mirrored provisions in subsection 7(1)(18), which suggests there was a different intent. Summitt further submitted that the "acknowledgement" must refer to the signature of the consumer confirming that it has received a text based copy of the contract, and that "to be signed" is just an instruction that the acknowledgment is to be signed. Counsel for Summitt stated: "The acknowledgment is the signed document, is the signed space. It would seem to defeat the entire purpose of having it, if it was never signed and the contract was still enforceable."[8] (p. 110)

Board Decision

The Board finds that paragraphs 17 and 18 of subsections 7(1) refer to the physical placement of the signatures, acknowledgment, and printed name, and not the temporal ordering of same.

The "golden rule" requires the Board to read the provisions in their entire context and their grammatical and ordinary sense, harmoniously with the scheme of the act, the object of the act, and the intent of the drafter. Viewed through this lens, it is the Board's determination that the subsections are referring to physical placement.

The words "before" and "following", taken on their own, are open to more than one interpretation. There is no question that in some cases they could be temporal references. However, when read in the context of the section and the

[8] Transcript dated March 20, 2012, p. 110.

regulation as a whole, it is clear that the physical placement interpretation should be preferred in this instance.

Paragraph 17 states: "[the contract shall contain] the signature and printed name of the consumer … and of the person signing the contract on behalf of the supplier, at the bottom of the contract and before the acknowledgment described in paragraph 18." The words "at the bottom of the contract" clearly refer to physical placement – on this point there is no dispute. Irrespective of whether the associated words rule strictly applies here, it appears clear that if the first part of the conjoined phrase (i.e. "at the bottom of the contract") is speaking to physical placement, then the second part (i.e. "before the acknowledgment") must be as well. Had the drafter wished to indicate a temporal meaning to "before the acknowledgment", one would expect completely unambiguous language in this regard. When read in context and in its ordinary and grammatical sense, the provision as drafted should be interpreted to physical, and not temporal, placement.

In addition, the Board has considered the wording of section 10(1)(b), which clearly states that the acknowledgment will be at the end of the contract. Although Summitt correctly observes that this is not identical to the language in paragraphs 17 and 18, the Board considers this to be another strong indication that the intent of the regulation is that the acknowledgment be physically placed at the end of the contract and physically below the signatures of the consumer and supplier.

The Board accepts that the Energy Consumer Protection Act and the regulation are consumer protection legislation. The Board accepts that a chronological ordering of the signatures to the contract and acknowledgment could provide an element of consumer protection. However, the ordinary meaning of the regulation as drafted does not disallow or impede a chronologic ordering that could serve to protect consumers. Paragraph 18 specifies that the acknowledgement is to be signed and dated by the consumer. The consumer is acknowledging that he or she has received a text copy of the contract. The desired ordering of events is actually facilitated by an interpretation based on the ordinary meaning of the words in the regulation.

The Board therefore finds that the language in paragraphs 17 and 18 of subsection 7(1) refer to physical placement, and not to temporal or chronological order.

Other Matters

The Board heard a separate motion by Summitt on December 22, 2011. A decision on that motion is being issued concurrent with this decision. Additional procedural steps, specifically with regard to disclosure and an interrogatory process, can be found in that decision, and they are not repeated here.

THE BOARD THEREFORE ORDERS THAT:

1. The Notice of Intention originally issued by the Board on August 25, 2011, is hereby amended as follows. The paragraph on page 2 that immediately follows the heading "Contract Content Requirements for New Contracts" is amended to state:

> With respect to 25 electricity contracts and 25 gas contracts reviewed, Summitt has failed to ensure that the person signing the contract on behalf of Summitt does so before (i.e. physically above) the acknowledgment that has to be signed and dated by the consumer or the account holder's agent; contrary to section 7(1)17 and 7(1)18 of Ontario Regulation 389/10 and section 12 of the ECPA. A list of the contracts referred to in this paragraph is attached as Appendix A.

ISSUED at Toronto, April 2, 2012
ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary