**CITATION:** Summitt Energy Management Inc. v. Ontario Energy Board, 2013 ONSC 318
**DIVISIONAL COURT FILE NO.:** 624/10
**DATE:** 20130409

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**DIVISIONAL COURT**
**KITELEY, DUCHARME, DALEY J.J.**

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| **B E T W E E N:** | ) | |
| Summitt Energy Management Inc. | ) | *W. Burden, S. Selznick & J. I. Knol*, for the Applicant |
| Appellant | ) | |
| **- and -** | ) | |
| Ontario Energy Board | ) | *M. Philip Tunley, A. Gonsalves & M. A. Helt*, for the Respondent |
| Respondent | ) | |
| | ) | **HEARD at Toronto: December 11, 2012** |

**REASONS FOR JUDGMENT**

**BY THE COURT**

## I. INTRODUCTION

[1] Pursuant to s. 33 of the *Ontario Energy Board Act*, 1998, S.O. 1998, c. 15, Schedule B (the "Act") Summitt Energy Management Inc. ("Summitt") appeals from an order of the Ontario Energy Board ("Board"), dated December 14, 2010, in which a Hearing Panel of the Board ("Hearing Panel") assessed and imposed an administrative mandatory penalty, issued a compliance order and directed that compensation and restitution be made by Summitt in favour of certain consumer complainants. Summitt requests that the Court quash the order of the Board and stay any further proceedings by it.

[2] For the reasons that follow, the appeal is dismissed.

## II. THE HEARING

[3] Summitt is a retail energy marketer that offers fixed-priced natural gas and electricity programs to homeowners and businesses in Ontario. As such, it is licensed and regulated by the Board.

[4] On June 17, 2010, following its investigation of several consumer complaints regarding Summitt's business activities, the Board issued a Notice of Intention to make an Order for Compliance, Suspension and Administrative Penalty against Summitt.

[5] In the Notice of Intention, the Board alleged that 5 of Summitt's sales agents had contravened various sections of the Act, Ontario Regulation 200/02 (the "Regulation") and the Code of Conduct of Gas Marketers and the Electricity Retailer Code of Conduct (the "Codes") in relation to 28 consumer contracts.

[6] These consumer complaints were the subject of a hearing before a two member Panel of the Board. Compliance Counsel called Christine Marijan to give evidence about the investigation that had begun in the fall of 2009 and which included direct communication with complainants who had contacted the Board to complain about their contact with Summitt. In addition, 19 of the 28 complainants listed in the Notice of Intention were called with respect to the contraventions alleged including the allegations against 5 salespersons.

[7] In the course of the hearing, Compliance Counsel sought to establish that from August, 2008 to January, 2010 Summitt had contravened:

> Subsection 88.4(2)(c) and 88.4(3) of the Act in 19 instances through the actions of 5 of its sales agents by engaging in unfair practices as defined in Section 2 of Ontario Regulation 200/02;
>
> Sections 2.1 of the Code of Conduct for Gas Marketers and the Electricity Retailers Code of Conduct respectively (the "Codes") through the actions of 5 of its sales agents who engaged in unfair marketing practices as defined in section 2.1 of the Codes; and
>
> Subsection 88.9(1) of the Act in 10 instances by failing to deliver a written copy of the contract to the consumer within the time prescribed by regulation.

[8] It was also urged by Compliance Counsel that Summitt would likely contravene the above-mentioned provisions again in respect of its ongoing door-to-door sales activities.

[9] Summitt called as witnesses each of the five sales agents whose conduct was the subject of the complaints as well as the supervisor of the agency who provided one of those agents and Summitt's own Director of Compliance and Regulatory Affairs.

## III. THE DECISION OF THE BOARD

[10] The Board issued its Decision and Order on November 18, 2010, which was followed by a clarifying Order on December 13, 2010. In its Decision and Order, the Hearing Panel noted that the proceeding was the Board's first opportunity to hear, under oath, testimony of customers of an energy retailer with respect to the practices of door-to-door retail sales persons in the energy retail market.

[11] In its reasons, the Board expressed the view that the investigation was carried out in such a fashion as to ensure that no person at the Board, "who might be engaged in the adjudication of any compliance action would be exposed in any manner whatsoever to conduct or the fruits of the investigation."

[12] It was also noted that the Board's staff had no knowledge of any aspects of the investigation leading up to the filing of the Notice of Intention, and that the Hearing Panel had no knowledge of any aspect of the investigation prior to the publication of the Notice. Rather, from the time of the publication of the Notice of Intention, all of the information that was available to, or was considered by the Board, was on the public record.

[13] In considering the allegations made against Summitt in the Notice of Intention, the Board examined several key components of Summitt's door-to-door sales activity namely: (a) the nature of Summitt's sales force; (b) Summit's two-part contract; (c) the representations regarding comparative pricing; (d) the representation of the "Provincial Benefit"; and (e) the nature of and the role of the "reaffirmation" call.

### *A. The nature of Summitt's sales force*

[14] The Board noted that Summitt's retail sales staff was made up of employees and/or independent contractors or subcontractors. Summit provided its subcontractors with training materials but left the actual training of the salespersons to the subcontractor. It was noted that in most cases, the retail salespersons were given scarcely a few hours of training and mentoring before they were sent out to meet customers. The Board concluded that it was clear from the testimony of Summitt's salespersons that a few hours of training was not adequate training for sales persons expected to sell very significant contracts to relatively uninformed consumers.

### B. *Summitt's two-part contract*

[15] The Board noted that it was beyond the scope of the proceeding to make any specific determination with respect to the actual contractual effect of the sales effort engaged in by Summitt's retail sales persons; however, the Board did find that the presentation of the two-part contract document to the customer, referred to by its retail sales persons as a "brochure," fell short of reasonable notice of the contents and the significance of the contractual documents.

[16] The Board considered the ambiguity it found in the two-part contract form used by Summitt when considering the evidence of the consumer complainants in this proceeding.

### C. *The representations regarding comparative pricing*

[17] The Board had serious concerns with respect to representations made by Summitt's retail salespersons and in Summitt's brochures. In particular, it found that the brochures misrepresented the actual market price of the commodities at the time the sale was being made and illustrated a fixed price that was lower than what the customer was actually being offered under the Summitt program. As a result, the price comparison dramatically overstated the potential benefit of a fixed price contract.

### D. *The representation of the Provincial Benefit*

[18] The Board also found that Summitt's comparative pricing information was misleading. It did not adequately inform electricity consumers that when a customer, who is supplied electricity by the local distribution company, changes to an electricity supplier such as Summitt, the Provincial Benefit, established by the provincial government for the purpose of collecting a variety of costs from consumers, is added to the energy retailer's contract price as a separate line item on the bills. Further, the comparative pricing information did not take into account the additional charge payable by a customer in respect of the Provincial Benefit.

### E. *The nature of and the role of the reaffirmation call*

[19] Section 88.9(4.1) of the Act provides for a cooling off period for retail energy contracts, which consists of a 10 day period after which the customer can "reaffirm" the original contract.

[20] The Board concluded that the reaffirmation call method used by Summitt, as a genuine consumer cooling-off device, was fatally undermined. The retail salespersons represented to the customers that the calls were for the purpose of confirming that the retail salesperson had in fact attended at their home or that the calls were for the purpose of quality assurance.

[21] The Board also addressed the standard of proof imposed on Compliance Counsel. During the hearing the Board and counsel referred to the alleged violations and non-compliance by Summitt as "offences". The Board concluded that it was dealing with strict liability offences and accordingly the standard of proof was the balance of probabilities. The Board also held that the defence of due diligence was available with respect of the alleged violations and with respect to penalty.

[22] The Board considered the testimony of the consumer complainants, and assessed their credibility and reliability. The Board concluded that the evidence offered by the complainants and the tendered documentary evidence satisfied the Board that compliance counsel had proven the contraventions by Summitt on a balance of probabilities.

[23] In its reasons for decision, the Board examined the investigation of Summitt's business practices. Summitt had expressed concerns with respect to the fairness of that investigation; however, the Board concluded that there was no evidence that the compliance staff had acted inappropriately in the manner in which they investigated the consumer complaints.

[24] The Board held that Summitt was liable for the acts of 5 agents in respect of 43 distinct contraventions of the Act and the Codes in their dealings with 17 of the 28 consumer contracts.

[25] In considering the evidence of the consumer complainants, the Board did so with regard to the statutory provisions contained in Part V.1 of the Act, which generally deal with unfair practices by a retail electricity or gas marketer.

[26] Contraventions of these provisions trigger the Board's authority under ss. 112.1, 112.2, 112.3, 112.4, and 112.5 of the Act to impose penalties. These include suspension or revocation of licenses, and the imposition of monetary penalties. The Board concluded that its authority to impose these penalties flowed from s. 112.5 and Ontario Regulation 331/03.

[27] Having found that Summitt, through its retail salespersons, had contravened the Act and the Codes, the Board also considered its authority in respect of legislative compliance found in ss. 112.3 and 112.4 of the Act. The Board ordered Summitt to thereafter take all necessary steps to ensure compliance with ss. 88.4 and 88.9 of the Act, and s. 2.1 of the Codes.

[28] Although Compliance Counsel sought an order suspending Summitt's door-to-door sales activities pending the completion of an audit of its operations and processes relating to these activities, the Board determined that a suspension order was not appropriate. It required that Summitt undertake a review and audit of its sales practices on terms specified by the Board.

[29] Compliance Counsel also sought compensatory and restitutionary orders as a result of Summitt's violations. It was Summitt's position that compensatory or restitutionary orders were beyond the jurisdiction of the Board.

[30] The Board concluded that its statutory jurisdiction was sufficiently broad and clear to permit it to make orders to remedy a contravention by providing compensation and restitution in accordance with the provisions of s. 112.3 (1) of the Act.

[31] The Board ordered that Summitt cancel, without penalty or cost, the electricity or natural gas supply contracts entered into by 17 of the complainants, and to compensate those customers in accordance with the formula set forth in the Decision. Summitt was also ordered to repay 17 customers any liquidated damages relating to the cancellation of their electricity or natural gas supply contracts. Summitt was also directed to provide to 2 of the customers a letter indicating unequivocally that Summitt had no claim with respect to them and to take steps necessary respecting any collection agency and credit rating issues with respect to those 2 customers.

[32] As to the imposition of administrative penalties, the Board concluded that Summitt committed the contraventions with a view to economic gain, both on the part of the retail salespersons and the organization. The Board concluded that the contraventions fell into the high end of the moderate category of contraventions. The unfair practices achieved a higher level of turpitude: the nature of the contraventions fell within the major category and the effect into the moderate category.

[33] Further, the Board concluded that the 8 contraventions of s. 88.9 of the Act fell into the moderate category and the administrative penalty for these violations was set at $9,000 for each contravention.

[34] The Board concluded that the 15 violations of s. 88.4 of the Act were in the moderate category and warranted an administrative penalty of $9,000 per contravention while 2 major contraventions of s. 88.4 resulted in a penalty of $13,500.

[35] In the result, Summitt was ordered to pay administrative penalties totalling $234,000.

## IV. ISSUES IN THE APPEAL

[36] The following issues are raised on this appeal:

(a) Applicable standard of review - Certain grounds of appeal call for a standard of review of correctness while others call for a reasonableness standard;

(b) Motion for the admission of fresh evidence on appeal - and if granted, whether a reasonable apprehension of bias is established. Summitt brought a motion at the appeal hearing seeking an order allowing for the admission of fresh evidence, and for leave to file an Amended Notice of Appeal asserting that there was a reasonable apprehension of bias on account of the Board's choice of independent legal counsel;

(c) Standard of proof - the Board applied the civil standard of proof. It is Summitt's position that the criminal standard of proof beyond a reasonable doubt was the standard that ought to have been applied;

(d) Due diligence – whether due diligence is available as a defence to the allegations or in the penalty phase;

(e) Requirement of separate penalty hearing - Summitt contends that the liability and penalty phases of the hearing before the Board should have been kept separate, so that matters relating only to penalty were not known or considered by the Board prior to determination of Summitt's liability;

(f) Restitution – Summit takes the position that the Board does not have jurisdiction to grant the equitable remedy of restitution in favour of the complainants;

(g) Abuse of process - Summitt argues that the proceeding was an abuse of process because the Board had led Summitt to believe that it was compliant with its regulatory obligations;

(h) Procedural Fairness – Summitt submits that it was denied procedural fairness in the conduct of the proceeding by the failure to disclose all relevant documents, including the 2009 Retail Compliance Plan; by the compressed timetable; and by reliance on a binder offered by Compliance Counsel to the Board that contained additional complaints which binder was not properly in evidence.

## V. STANDARD OF REVIEW

**[37]** Various standards apply. First, if the Appellant establishes bias, an abuse of process or a breach of procedural fairness then there must be a new hearing. Second, the Board's ruling on the standard of proof and its treatment of due diligence are

subject to a standard of review of correctness. They are issues of general law that are both central to the legal system as a whole and outside the Board's specialized area of expertise. Third, as for the failure to have a separate penalty hearing and whether the Board had jurisdiction to order restitution, the appropriate standard of review is reasonableness.

## VI. FRESH EVIDENCE

[38] In its motion, Summitt seeks leave to: (i) adduce fresh evidence on its appeal; and (ii) revise its Amended Notice of Appeal to include as an additional ground of appeal a reasonable apprehension of bias by reason of Patrick Duffy of Stikeman Elliott LLP ("Stikeman Elliott") having acted as the independent legal counsel ("ILC") retained to advise the Board in the compliance proceeding. The fresh evidence is relevant only to the ground of bias.

[39] Section 134(4)(b) of the *Courts of Justice Act*, RSO 1990, c C.43 permits this Court to admit fresh evidence on appeal in a proper case. It provides:

> 134 (4) Unless otherwise provided, a court to which an appeal is taken may, in a proper case, ...
>
> > (b) receive further evidence by affidavit, ... or in such other manner as the court directs;...
>
> to enable the court to determine the appeal.

[40] In its written submissions, the Board argues that we should apply the four-part test for admission of fresh evidence on appeal as set out by the Supreme Court of Canada in *R v. Palmer* as follows:

> (a) The evidence should generally not be admitted if, by due diligence it could have been adduced at trial; (this general principle will not be applied as strictly in a criminal case as in civil cases);
>
> (b) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial;
>
> (c) The evidence must be credible in the sense that it is reasonably capable of belief; and,

(d) It must be such that, if believed, it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.[1]

[41] Their position is that the fresh evidence is inadmissible because Summit was not duly diligent; because the evidence is not relevant as it does not relate to bias on the part of the Board; and because the admission of the new evidence cannot affect the result unless it gives rise to a reasonable apprehension of bias.

[42] In response, Summitt relies on the decision of the Ontario Court of Appeal in *Leader Media Productions Ltd. v. Sentinel Hill Alliance Atlantis Equicap Limited Partnership*[2] for the proposition that the *Palmer* test does not apply where, as here, the material "is not directed at a finding made at trial, but instead challenges the very validity of the trial process."

[43] In his oral submissions, Mr. Tunley indicated that he was not opposed to the Court considering the fresh evidence and we shall do so. This evidence would be admissible under *Leader Media Productions Ltd.* as it is directed at the validity of the hearing process itself.

## VII. REASONABLE APPREHENSION OF BIAS

[44] As mentioned above, Summitt seeks leave to revise its Amended Notice of Appeal to include as an additional ground of appeal a reasonable apprehension of bias by reason of Patrick Duffy of Stikeman Elliott LLP ("Stikeman Elliott") having acted as the independent legal counsel ("ILC") retained to advise the Board in the compliance proceeding below. Summitt bases its argument of reasonable apprehension of bias entirely on the following two facts:

(a) Stikeman Elliott's representation of certain of the Appellant's competitors during the period 2008 - 2011, including involvement by Stikeman Elliott in other proceedings before the Board and/or other regulatory agencies on behalf of such parties; and

(b) Stikeman Elliott's Membership in the Ontario Energy Association (OEA), of which the Appellant and Appellant's counsel are also members, and involvement by Stikeman Elliott in certain OEA Committees.

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[1] *R v. Palmer*, [1980] 1 SCR 759 at 13

[2] (2008), 90 O.R. (3d) 561 (C.A.); see also *R. v. Rajaeefard* (1996), 27 O.R. (3d) 323 (C.A.), at p. 325 *and R. v. Widdifield* (1995), 25 O.R. (3d) 161 (C.A.), at p. 169.

Having admitted the fresh evidence with respect to this issue, we also granted leave to Summitt to revise its Amended Notice of Appeal to include as an additional ground of appeal a reasonable apprehension of bias.

[45] Bias is "a state of mind that is in some way predisposed to a particular result or that is closed with regard to particular issues."[3] In this case there is no allegation of actual bias and there is no suggestion of reasonable apprehension of bias on the part of the decision-maker itself. Rather the submission is that there is a reasonable apprehension of bias because of the participation of the ILC for the two reasons set out above. We accept that an apprehension of bias can be created by issues that relate only to those assisting the actual decision-maker.[4]

[46] The test for reasonable apprehension of bias was set out in the dissent of Justice de Grandpré in *Committee for Justice and Liberty v. National Energy Board*, and has since been confirmed by the Supreme Court, as follows:

> [T]he apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. According to the Court of Appeal, the test is "what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude. Would he think that it is more likely than not that [the decision maker], whether consciously or unconsciously, would not decide fairly?" (Emphasis added)[5]

[47] This means that the reasonable person would understand: (1) the role of a member of the Ontario Energy Board, a quasi-judicial function. In particular, she would understand the obligation of Board Members to base their decisions on the evidence before them and the applicable law; (2) the ethical restraints and rules of professional conduct that govern lawyers and the fiduciary relationships they have with their clients. In particular, she would understand the rules relating to a lawyer's relationship to clients, quality of service, confidentiality, avoidance of conflicts of interest;[6] and encouraging respect for the administration of justice; (3) the nature of the industry, in particular the nature of the retail energy marketing sector; (4) the nature of the Ontario Energy Association, including its scope of activities and membership.

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[3] *R v. R.D.S.*, [1997] 3 SCR 484 (S.C.C.) at para. 105.

[4] *The King v. Sussex Justices, Ex Parte McCarthy*, [1924] 1 K.B. 256; *Hutterian Brethren Church of Starland v. Starland No. 47 (Municipal District)* (1993), 9 Alta. L.R. (3d) 1 (Alta. C.A.); *Mitchell v. Institute of Chartered Accountants of Manitoba*, [1994] M.J. No. 65 at para. 17, 18, 24 (Q.B.); aff'd [1994] M.J. No. 551 (C.A.)

[5] *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 SCR 369 (S.C.C.). *R v. R.D.S.*, *supra*, note 3.

[6] The Law Society of Upper Canada, *Rules of Professional Conduct*, in particular rules 2.02, 2.03, 2.04 and 4.06.

[48] We shall consider the two bases for the allegation of a reasonable apprehension of bias separately. At the outset we note that the factual record is understandably sparse given the ruling of Perell J. quashing the subpoenas obtained by Summitt against Marika Hare, a member of the Board and Patrick Duffy, the ILC. We also must take note of the Board's comment at pg. 3 of the decision that since the publication of the Notice of Intention to Make an Order for Compliance, Suspension and Administrative Penalty against Summitt "all of the information that has been made available to or considered by the Board has been on the public record." [Emphasis added.]

**A. The fact that the ILC's law firm had acted for competitors of Summitt**

[49] Here Summitt raises two concerns about the fact that Stikeman Elliott, the ILC's law firm, was acting for Summitt's competitors at the same time that the ILC was advising the Board. First, they point out that Summitt operates in a very small and highly competitive industry sector. Its competitors stood to benefit from any difficulties encountered by Summitt, such as large monetary fines, suspension of its license, and/or loss of reputation. They submit that the ILC, as a result of his duty of loyalty to other clients, would have an incentive to encourage an adverse result for Summitt in order to benefit his other clients. Second, they point out that they had brought a motion for an order providing for the exchange and filing of written interrogatories. They suggest that if this motion had been granted they would have sought information about their competitors, including other clients of the ILC.

[50] We conclude that neither of these arguments supports a finding of a reasonable apprehension of bias. The other cases relating to legal advisers to decision-makers are readily distinguishable as the adviser has a direct association or interest with one of the parties in the actual *lis*. In this case, all we have is the fact that the ILC's law firm acted for competitors in the same industry in completely unrelated matters.

[51] To find a reasonable apprehension of bias would require the reasonable, right minded and informed person mentioned in *Committee for Justice and Liberty v National Energy Board* to assume that (1) the members of the Board ignored their duty to base their decision on the evidence before it and the applicable law; and (2) that Mr. Duffy, the ILC, acted unethically in advising the Board. At a minimum, he would be breaching his duty of honesty and candour to his client, the Board; his obligation to avoid conflicts of interest and his obligations to the administration of justice. We also reject the submission that a reasonable, right minded and informed person would think that his duty of loyalty to other clients would move the ILC to seek an outcome in this case that would comparatively advantage his other clients by encouraging a result that negatively affects Summitt. This submission is based on a misunderstanding of a lawyer's duty of loyalty to a client.

[52] It should also be emphasized that Summitt does not claim that the ILC actually did anything improper. While the factual record is understandably sparse there is no basis to assume that the ILC did anything improper. Moreover, given the Board's

statement that "all of the information that has been made available to or considered by the Board has been on the public record" there can be no suggestion that the ILC surreptitiously gave information to the Board that worked to Summitt's detriment.

[53] Finally, the reasonable, right minded and informed person would understand that when the Ontario Energy Board retains independent legal counsel it should retain counsel with relevant experience and expertise. There is no question that Mr. Duffy had that expertise and given that fact, it is not a surprise that he or his firm may have acted for other parties in the same sector of the energy industry. Indeed, the only surprise is the claim by Summitt and its counsel that they were unaware of this fact. Given the small size of this particular sector of the energy industry, the pool of counsel with relevant experience is likely to be small. This is another factor that rebuts any suggestion of reasonable apprehension of bias.

**B. <u>The fact that the ILC was a member of the OEA</u>**

[54] Here Summitt claims that, as a result of their involvement in the OEA, Stikeman, Elliott was in a position to know, prior to the hearing, (1) the strengths and weakness of the training materials used by Summit and others in the industry, as well as details concerning the manner in which the training materials had been prepared; and (2) the strategic comments submitted by industry, including Summitt, concerning the new government regulations governing the industry, and of Summitt's interpretation of the new regulations.

[55] Of course, we do not know what Stikeman, Elliott did know. But accepting for the sake of argument that they might have had access to the foregoing information, it does not create a reasonable apprehension of bias. As for the strengths and weaknesses of the training materials, the Board made the determinations it did based on the record before it and expressly affirmed that everything it considered was on the public record. Therefore, while we do not regard any prior knowledge of (1) the strengths and weaknesses of these materials or (2) the development of these materials to be particularly significant, we reject the suggestion that any such prior knowledge created a reasonable apprehension of bias. As for the industry's lobbying with respect to the new regulations or Summitt's understanding of them, this is irrelevant. The Board did not consider the new regulations but based its decision on Summitt's procedures and their sufficiency with respect to each of the various infractions.

[56] Here again, the Board's need for qualified independent legal counsel would be understood by the reasonable, right minded and informed person. Thus, it would be no surprise that the Board's ILC or his firm might be active in the OEA. It would be more surprising if they were not. In this regard we note that Summitt's counsel are also members of the OEA.

### C. A closing observation on bias

[57] Given the Board's need for expertise it is likely that any ILC retained by a Board will have had prior practice experience in the energy sector. Parties before the Board can take comfort from the fact that any lawyer retained as an ILC has a duty under Rule 2.04 of the *Rules of Professional Conduct* to avoid conflicts of interest. However, should any party or their counsel have any concerns about the scope of the proposed ILC's prior practice or her membership in professional or industry organizations, etc. they would be well-advised to raise them at the outset. The ILC can respond in a manner consistent with his or her professional responsibilities as directed by the Board. Where this is not done, this type of allegation of bias will likely not be well received on appeal. We do not make this observation because of any concern with bias in this case. Rather we do so as a means of lessening the number of similar allegations of bias arising for the first time on appeal.

## VIII. STANDARD OF PROOF: WAS SUMMITT CONVICTED OF "STRICT LIABILITY OFFENCES"?

[58] Summitt submits that the matters before the Board are strict liability offences and, relying on *R. v. Sault Ste. Marie*[7] counsel argue that the prosecution has the burden of proving beyond a reasonable doubt that the defendant committed the *actus reus* of the offence. In the present case, the Board applied the civil standard of a balance of probabilities. Therefore Summitt submits that it was improperly convicted on a lower standard of proof than the law requires.

[59] Counsel for the Board, relying on *R. v. Wigglesworth*,[8] rejects the contention that these are quasi-criminal, strict liability offences. Instead they submit these are merely regulatory compliance proceedings. Thus, this is a civil matter, where proof is on the civil standard.

[60] The resolution of this question is complicated by how the matter was dealt with before the Board. All counsel at the hearing referred to these matters as offences and seemed to accept that the classification of offences in *Sault Ste. Marie* as "absolute liability", "strict liability" and full "mens rea" applied to these compliance proceedings. Summitt argued that these were strict liability offences while Compliance Counsel argued that they were absolute liability offences. Relying on the presumption of strict liability in *Sault Ste. Marie*, the Board concluded that the "enforceable provisions engaged in this proceeding" were strict liability offences. In reaching this conclusion the Board expressed the view that the overall legislative regime and the subject matter of the Act were not amenable to an absolute liability regime. The Board also considered that the imposition of absolute liability would be unjust given: (1) the fact

[7] [1978] 2 S.C.R. 1299
[8] [1987] 2 S.C.R. 541 at para. 23.

that Summitt was vicariously liable for the actions of its sales persons; and (2) the potential size of the monetary penalties as well as the possibility of suspension or revocation of Summitt's licence. Consequently the Board concluded, "The Board will apply a strict liability standard, and will consider the due diligence defence advanced by Summitt as a defence to liability per se."

[61] Despite this apparent acceptance of *Sault Ste. Marie* before the Board neither counsel for Summitt nor Compliance Counsel made any reference to the requirement in *Sault Ste. Marie* that, for strict liability offences, "the prosecution must prove beyond a reasonable doubt that the defendant committed the prohibited act."[9] Instead Compliance Counsel referred the Board to *F.H. v. McDougall* where the Supreme Court confirmed that the balance of probabilities standard applies in all civil cases, and that "evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test." At para 49 of *McDougall* the Court clarified that:

> in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.

During the hearing, Summitt did not dispute this reliance on *McDougall* nor the applicability of the civil standard for proof, but rather endorsed this position. Consequently, the Board noted that it was "not controversial that Compliance Counsel has the obligation to prove on a balance of probabilities each of the allegations upon which it seeks a finding of non-compliance."

[62] Despite the fact that all parties agreed at the hearing that the appropriate standard of proof was the civil standard of balance of probabilities, the appropriate standard of review on this question of law is correctness and, if the Board applied the incorrect standard of proof, the decision cannot stand.

[63] Not surprisingly, given how this matter unfolded before the Board, in their written submissions counsel for Summitt offered little in the way of argument to support the conclusion that *Sault Ste. Marie* applies to these proceedings. However, that matter was squarely raised before this Court by the Respondent. In considering this issue we will review: (a) the language and scheme of the Act; (b) the nature of the proceedings; and (c) the available penalties.

## A. The scheme of the Act

[64] Section 126 of the Act sets out the offences as follows:

> 126. (1) A person is guilty of an offence who,

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[9] *Sault Ste. Marie* at p. 1325

(a) undertakes an activity without a licence for which a licence is required under this Act and for which a person has not been granted an exemption from the requirement to hold a licence;

(b) knowingly furnishes false or misleading information in any application, statement or return made under this Act or in any circumstances where information is required or authorized to be provided under this Act;

(c) fails to comply with a condition of a licence or an order of the Board made under this or any other Act;

(c.1) fails to comply with an assurance of voluntary compliance given under section 112.7;

(c.2) fails to comply with an assurance of voluntary compliance entered into under section 88.8 before that section was repealed;

(d) contravenes this Act, the regulations or a rule made under section 44; or

(e) contravenes the *Energy Consumer Protection Act, 2010* or the regulations made under it.

[65] Summitt was not charged with any of the foregoing offences. Rather the proceeding before the Board was commenced by a Notice of Intention to Make an Order for Compliance, Suspension, and Administrative Penalty issued on the Board's own motion, as authorized by ss. 112.2(1) and (2) of the Act. The Notice of Intention sought remedies under ss. 112.3, 112.4 and 112.5 of the Act. All of these provisions appear in Part VII.1 of the Act, entitled Compliance. Section 126 of the Act is in Part IX of the Act entitled Miscellaneous.

[66] Thus, the language and scheme of the Act suggest that these are not offences but rather are compliance proceedings.

**B. <u>The nature of the proceeding</u>**

[67] That conclusion is further supported by the nature of the proceedings. These proceedings are neither criminal nor quasi-criminal. Rather, they are protective and preventative rather than penal in nature. They concern economic, contractual activity with a focus on regulatory compliance and consumer protection. We accept the Respondent's submission that these proceedings are "private, domestic or disciplinary matters which are regulatory, protective or corrective and which are primarily intended to maintain discipline, professional integrity and professional standards or to regulate conduct within a limited private sphere of activity." [10] They are also "proceedings of an administrative nature instituted for the protection of the public

[10] *Wigglesworth*, at para. 23.

in accordance with the policy of a statute."[11] This is supported by the language of s. 112.5(1.1) of the Act which provides that "The purpose of an administrative penalty is to promote compliance with the requirements established by this Act and the regulations." These proceedings are analogous to disciplinary or regulatory proceedings under the *Law Society Act*, R.S.O. 1990, c. L.8; the *Securities Act*, R.S.O. 1990, c. S.5 or the *Regulated Health Professions Act*, 1991, S.O. 1991, c. 18. According to the analysis in *Wigglesworth*, these are not offences within the meaning of s. 11 of the *Canadian Charter of Rights and Freedoms*. This is another reason to reject Summit's contention that they were convicted of quasi-criminal offences.

### C. Nature of the penalties

[68] As was made clear in *Wigglesworth*, one indicia of a quasi-criminal offence is that a conviction may lead to a "true penal consequence."[12] The relevant provisions in this case are ss. 112.3, 112.4 and 112.5 of the Act. Section 112.3 empowers the Board to order a person to comply with an enforceable provision of the Act and to take such action as necessary to remedy a contravention or prevent a future contravention. Section 112.4 empowers the Board to suspend or revoke the licence of a person who has contravened an enforceable provision. Section 112.5 empowers the Board to impose an administrative penalty. The Board ordered Summitt, among other things, to procure a review and audit of the sales practices of its retail sales persons, to pay an administrative penalty in the amount of $234,000, and to make restitution to certain of the complainants.

[69] Summitt points to the size of the fine and the fact that its licence could have been suspended or revoked which would have effectively put it out of business. The size of the fine does not constitute a true penal consequence. First, the highest administrative penalty assessed against Summit for an act of non-compliance was $13,500.[13] Second, and more importantly, as the Court of Appeal in *Rowan v. O.S.C.* held, much greater administrative monetary penalties are not *prima facie* penal.[14] Also, *Rowan* makes clear that the nature of the penalty is to be assessed on the basis of the penalty imposed rather than on penalties that are theoretically possible.[15] Thus, the mere possibility of the suspension or revocation of Summit's license is not a true penal consequence and does not make these proceedings quasi-criminal.

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[11] *Supra*, at para. 23.
[12] *Supra*, at para. 21.
[13] The Board set the administrative penalties as follows: (1) $9,000 for each of 15 moderate violations of s. 88.4 of the *Act*; (2) $13,500 for two major contraventions of s. 88.4 of the *Act*; (3) $9,000 for each of eight moderate violations of s. 88.9 of the *Act*.
[14] 2012 ONCA 208 at para. 52.
[15] *Supra*, para. 46.

### D. Conclusion

[70] For all of these reasons, we conclude that these compliance proceedings are not quasi-criminal offences. Rather these are regulatory compliance matters that aim to regulate professional standards within the limited private sphere of energy retailing. Thus, the classification of criminal and quasi-criminal offenses into categories of "absolute liability", "strict liability" and full "mens rea" as defined in *Sault Ste. Marie* is irrelevant to compliance proceedings under Part VII.1 of the *Act*.[16] These are not quasi-criminal offences and do not require proof beyond a reasonable doubt. Rather, they are a civil matter, where proof is on the civil standard of a balance of probabilities.

## IX. DUE DILIGENCE DEFENCE

[71] Summitt submits that the Board made several errors in law with respect to Summitt's "due diligence defence." First, the Board unreasonably rejected Summitt's due diligence defence before it determined whether the *actus reus* of the offences had been proven. Second, the Board unreasonably put Summitt's training and compliance programs as a whole on trial rather than assessing whether Summitt was duly diligent with respect to the specific charges at issue. Third, the Board improperly relied on Summitt's "14 Point Compliance Program" when it determined Summitt was not duly diligent.

[72] The short answer to all of these complaints is that the only error the Board made was to accept that the defence of due diligence was available to Summitt at the liability phase of these proceedings. As explained in Part VIII, *supra*, this was not a quasi-criminal standard of proof and hence no such defence is available for compliance proceedings such as this. Due diligence is only relevant to the determination of penalty. Obviously, however, this error redounded to the benefit of Summitt and does not assist them on appeal. While it is not necessary to consider Summitt's other complaints, we can do so briefly as they are without merit.

[73] The Board did not improperly consider and reject Summitt's due diligence defence before determining whether the alleged non-compliant acts had occurred. In the Decision and Order, it simply made sense, "[b]efore dealing with the specific allegations" of non-compliance, to first describe the organization of Summitt's door-to-door sales activities. This provided context to explain and understand the testimony of the individual complainants about their encounters at the door with the sales agents, and why each complainant felt he or she was misled. The Board's review of the evidence in this order was reasonable. It does not mean that the Board assessed the issues in the same order. To the contrary, the Board clearly heard the evidence of the

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[16] A similar conclusion was reached in *Gordon Capital Corp. v. Ontario (Securities Commission)*, (1991), 50 O.A.C. 258 (Ont. Div. Ct.) at p. 265 with respect to regulatory proceedings under s. 26(1) of the *Securities Act*, R.S.O. 1980, c. 466.

complainants and found their evidence sufficient to establish the contraventions and then called on Summitt to establish its due diligence defence.

[74] Similarly, the Board did not unreasonably put Summitt's training and compliance programs as a whole on trial. Rather the Board considered Summitt's general program and related it to the individual infractions that had been established.

[75] Summitt's complaint about the Board's references to its "14 Point Compliance Plan" is that the Board should not have considered it with respect to liability because: (1) it was tendered by Summitt only with respect to penalty; and (2) this plan was developed after the issuance of the Notice by the Board and was not relevant to the standard of care required at the time of the contraventions. Neither complaint has merit. The Board said the following about the plan:

> **78** To this point we have described what we have found to be deficiencies in the Summitt due diligence program. It is perhaps as important to provide our opinion on what we consider to be a conforming due diligence approach.
>
> **79** To identify the components of such a program we need look no farther than the proposal made by Summitt at the conclusion of the hearing, referred to as its "14 Point Program". In the Board's view with the exception of the deficiency highlighted above with respect to the retail salespersons' obligation to state that Summitt is not the consumer's natural gas or electricity distributor, it is the Board's view that the 14 points represent a reasonable and comprehensive due diligence program. Of course as also noted above, a due diligence program is only as good as it is effective. And the components of the program are of no independent value unless they form part of an operational due diligence activity.
>
> ...
>
> **81** The timing of the implementation of the 14 Point Program is noteworthy. None of it was adopted prior to the issuance of the Notice in June 2010. It cannot therefore serve in any degree as a defence to the allegations made in this proceeding. Quite to the contrary, the adoption of this comprehensive due diligence program after the Notice was issued really highlights the deficiencies of the system existing at the relevant time. This is even more telling when one considers that Summitt was involved in the development of better and more comprehensive practices through its involvement in the Ontario Energy Association working group from about 2008. The system in place governing the actions of the retail salespersons described in this proceeding was, or should have been, known to Summitt to be deficient in its content and its operationality.
>
> **82** It is also to be noted that the Board's acceptance of the 14 Points as a viable due diligence program is rooted in the current regulatory regime and its requirements. Changes to the regulatory requirements, as

> are expected to be implemented in the near future will require a re-examination and possible re-calibration of the due diligence program.

[76] It is clear from the foregoing that the Board's findings of deficiencies in Summitt's compliance plan were made independently of their consideration of the 14 Point Compliance Plan. Contrary to Summitt's submission, their "due diligence defence" was not rejected because it did not comply with the later standards reflected in the 14 Point Compliance Plan. The Board's subsequent reference to the 14 Point Compliance Plan was illustrative only and meant to "provide [the Board's] opinion on what we consider to be a conforming due diligence approach." In that context, this reference to the Plan was a proper exercise of the Board's function as a proactive regulator, offering guidance to the industry and the public, generally. The references to the Plan played no part in their determination of liability. With one exception,[17] all of the other references to the 14 Point Compliance Plan were all in the part of the decision dealing with the appropriate penalty just as Summitt anticipated.

## X. LACK OF A SEPARATE HEARING ON PENALTY

[77] The Supreme Court has made it clear that a separate penalty hearing is not required as an element of procedural fairness in administrative proceedings. In *Therrien*, the Court held that the Quebec Conseil de la Magistrature "was fully justified, out of concern for efficiency, in refusing to hold a separate hearing."[18] Where the tribunal gave the appellant an opportunity to be heard on the issue of sanctions, the requirements of procedural fairness were met.

[78] Here, the Board did give Summitt the opportunity to be heard on the issue of the appropriate remedies. That included the opportunity to make submissions as to whether further evidence *or submissions* should be received on that issue. Summitt did not object when that approach was proposed at the conclusion of the hearing, or when it was confirmed in Procedural Order No. 4. Rather, Summitt made submissions on remedy without objection, and even tendered additional evidence on that issue, in the form of its "14 Point Compliance Plan".

[79] Given the foregoing facts it is not surprising that Mr. Burden abandoned most of this argument in oral argument. However, Mr. Burden maintained that the Board improperly used the "14 Point Compliance Plan," which Summitt had tendered with respect to possible penalties, on the liability phase.

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[17] At para. 112, the Board mentioned the 14 Point Compliance Plan when discussing the dealings that Retail Salesperson, M.G. had with J.G. However, the Board simply noted that the failings they had identified were addressed in the 14 Point Compliance Program implemented by Summitt in June 2010. The Board did not base any finding of liability on this fact.

[18] *Re: Therrien*, [2001] 2 SCR 3 at para. 89.

[80] The excerpt from the decision in paragraphs 78 – 82 above makes it apparent that this assertion is incorrect.

## XI. DID THE BOARD HAVE JURISDICTION TO ORDER RESTITUTION TO CERTAIN COMPLAINANTS?

[81] In the Decision and Order, the Board ordered Summitt to make restitution to the complainants in respect of whose contracts the Board made a finding of non-compliance. Despite the Board's statement that it was making "no finding" as to whether the contracts were enforceable[19] the Board ordered Summitt to, among other things:[20]

> (a) Cancel without penalty or cost the electricity or natural gas supply contracts entered into by the complainants, in those cases where Summitt had not already done so;
> (b) Compensate the complainants who were subject to the contracts in an amount equivalent to the difference between the sums paid by them pursuant to the contracts and the prevailing prices, together with interest; and
> (c) Repay any liquidated damages that were paid by the complainants who canceled their contracts and pay such liquidated damages to Summitt, together with interest.

Summit submits that the Board exceeded its jurisdiction in making the restitutionary orders.

[82] In this regard Mr. Burden relies on *Garland v. Consumers' Gas Company*[21] in which the plaintiff brought a class action for the recovery of late payment amounts charged by Consumers' Gas under a Board Order, which the courts found to be in violation of the criminal interest rate provisions of the *Criminal Code*. The Supreme Court stated that the plaintiff's claim for restitution was "a private law matter under the competence of civil courts and consequently the Board does not have jurisdiction to order the remedy sought." This statement relates to the nature of the suit in that case, being a civil claim for recovery of monies based on unjust enrichment. The Court's analysis does not apply where the Board clearly has jurisdiction in a compliance proceeding initiated on its own motion against one of its own licensees, and exercises the express remedial authority under s. 112.3 of the Act.

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[19] Decision and Order, p. 8 [AB & C, Tab 3]
[20] Decision and Order, p. 52 [AB & C, Tab 3]
[21] [2004] 1 S.C.R. 629

[83] Mr. Burden argues that the Board erroneously relied on the Supreme Court of Canada's decision in *Royal Oak Mines Inc. v. Canada (Labour Relations Board)*[22] in holding that section 112.3(1)(a) of the Act gave it the jurisdiction to make a restitutionary order. He notes that the *Canada Labour Code*, the statute being considered in that case, specifically gave the Labour Board the jurisdiction to order an equitable remedy. As the Act does not specifically give the Board the jurisdiction to order an equitable remedy, he submits that the Board exceeded its jurisdiction when it ordered restitution.

[84] It is certainly correct that the Act does not expressly speak of equitable remedies. Section 112.3(1)(a) of the Act provides that the Board "**may make an order** requiring the person to comply with the enforceable provision and to **take any such action** as the Board may specify to remedy a contravention that has occurred." By any measure this is a clear and broad grant of remedial powers.

[85] In *Toronto Hydro-Electric System Limited v. Ontario Energy Board*[23] the Ontario Court of Appeal has confirmed the Board's statutory power to determine the scope of its own jurisdiction in circumstances such as those raised in this case, stating that:

> Courts should hesitate to analyze the decisions of specialized tribunals through the lens of jurisdiction unless it is clear that the tribunal exceeded its statutory powers... **If the decision of a specialized tribunal aims to achieve a valid statutory purpose, and the enabling statute includes a broad grant of open-ended power to achieve that purpose, the matter should be considered within the jurisdiction of the tribunal.** Its substance may still be reviewed for other reasons – on either a reasonableness or correctness standard – but it does not engage a true question of jurisdiction and cannot be quashed on the basis that the tribunal could not "make the inquiry" or "embark on a particular type of activity". [Emphasis added]

[86] The Board should be able to interpret its own statute in deciding remedies appropriate to ensure compliance, under the broad discretion given to it. Summitt's argument, which relies on the distinction between equitable and common law remedies, is a technical point that runs counter to the principle of deference to the tribunal, and contrary to the purposes of the *Act*. It also ignores the clear instruction in Re *Rizzo & Rizzo Shoes Ltd.* that:

> the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.[24]

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[22] [1996] 1 S.C.R. 369

[23] (2010), 99 OR (3d) 481 (CA) at para. 24

[24] *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21

[87] In our view the Board had express authority under s. 112.3 of the Act to "remedy a contravention" of any of the enforceable provisions in issue, which the Board found had occurred. The Board's interpretation of this authority to include the specific remedial orders made in this case was a reasonable one, based upon the Board's specialized expertise in the regulation of retail energy marketing, and is entitled to deference on this appeal. Even if a standard of correctness is applied, that standard affords no basis to read down the plain wording of s. 112.3 of the Act to preclude such remedies, as Summitt suggests on this appeal.

## XII. ABUSE OF PROCESS

[88] In its factum, Summitt submitted that the entire proceeding was an abuse of process and as a result, the order should be quashed and the charges should be stayed. Summitt took the position that the Board led Summitt to reasonably believe that it was in compliance with its regulatory obligations and that it would work with Summitt if any perceived deficiencies arose. Summitt based this assertion on the following:

> (1) The settlement on January 30, 2009 of a prior Notice of Intention against Summitt in connection with allegations that Summitt's reaffirmation calls were non-compliant and that Summitt was thereby engaging in unfair marketing practices;
>
> (2) On August 11, 2009, the Board released its RCP. In this report the Board inspected and assessed sales agent training and monitoring and contract management of the five most active licensed energy retailers in Ontario, including Summitt. Part of the Executive Summary included the following statement "[T]he inspections completed as part of Phase 1 provided validation that the licensees operating in the gas and electricity retail markets of Ontario are, for the most part, doing so in accordance with applicable legal and regulatory requirements pertaining to consumer protection;
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> (3) The Board had previously closed the files in relation to 17 of the 19 consumer complaints for which it led evidence at the hearing; and
>
> (4) The Board previously concluded that the complaint by K.S. and R.S. was without merit.

[89] Further Summit submitted that while it was working co-operatively with the Board on compliance-related issues, the Board commenced a secret investigation of Summitt, and then issued the Notice of Intention without any warning and without giving Summitt a reasonable opportunity to address any concerns and, if relevant,

rectify any perceived deficiencies. The Board led Summitt to believe that its programs and materials were compliant with the Act, the Regulation and the Codes and that they met the standards required. To then commence fresh enforcement proceedings was vexatious, unfair and oppressive such as to constitute an abuse of process.

[90] During oral submissions, counsel for Summitt observed that he was not advancing the issue of abuse of process because he conceded that the circumstances did not meet the requisite threshold but he observed that it gave context to his other submissions. When pressed as to whether abuse of process was or was not an issue in this appeal, counsel for Summitt said that he was not abandoning it but he would make no oral submissions.

[91] Summitt raised the issue of abuse of process with Compliance Counsel at various times prior to the hearing, but never brought a motion or otherwise sought relief from the Board in that regard. In anticipation of such a motion, Compliance Counsel called Ms. Christine Marijan, whose investigation led to the proceeding. Counsel for Summitt cross-examined her at length, but in closing submissions did not argue abuse of process. Summitt raised that issue for the first time on appeal.

[92] Having raised the issue with Compliance Counsel and having cross-examined the Board's witness, we conclude that Summitt deliberately did not argue any abuse of process during the proceedings before the Board. It thereby denied the Board any opportunity to lead evidence in response to such allegations. It also denied the Board any opportunity to rectify the alleged abuse before the conclusion of its proceedings. The Board made no ruling on any alleged abuse of process, from which appeal can be taken under s. 33 of the Act. As such, these issues should not now be raised for the first time on appeal.

[93] In any event, we are not persuaded that the enforcement proceedings constituted vexatious, unfair or oppressive conduct. We agree with Compliance Counsel that the earlier proceedings did not, and could not, limit the Board's ability to seek compliance remedies in respect of Summitt's door-to-door sales activities, or the ability of a duly constituted Hearing Panel to make findings in that regard. Furthermore, this is not one of those "clearest cases" where a stay would be an appropriate remedy. It cannot be said that anything done in this case "would violate those fundamental principles of justice which underlie the community's sense of fair play and decency" or where the proceedings are "oppressive or vexatious".[25]

[25] *Blencoe v. B.C. (Human Rights Commission)*, [2000] 2 S.C.R. 307 at para. 118, adopting *R. v. Young* (1984), 40 CR (3d) 289 (CA).

## XIII. PROCEDURAL FAIRNESS

[94] In its factum and in submissions, Summitt raises four issues which it says undermined procedural fairness: (a) inadequate disclosure; (b) the Board's use of the 2009 Retail Compliance Plan; (c) the compressed schedule of the proceeding; and (d) reliance by the Board on the binder that contained complaints from additional consumers.

[95] Counsel agree that a duty of fairness applies to administrative decisions that affect the rights, privileges or interests of a defendant. The following factors are relevant to a determination of the content of the duty of procedural fairness: the nature of the decision being made; the nature of the statutory scheme; the importance of the decision to those affected by it; the legitimate expectations of the person challenging the decision; and the choices of procedure made by the tribunal.[26] Based on those factors, Summitt argues that the doctrine of legitimate expectations supports its assertion that the content of the duty of fairness owed to it was at the high end of the spectrum, akin to a judicial proceeding.

### A. Inadequate Disclosure

[96] After receiving the Notice of Intention and before the hearing date was set, Summitt asked Compliance Counsel to agree to a procedural timetable that included disclosure and written interrogatories. In the absence of agreement, Summitt brought a motion before the Hearing Panel. The motion to set a timetable (including an "issues conference" and a "technical conference") as well as for specific disclosure was dismissed with reasons, except for one item to which Compliance Counsel consented.

[97] In dismissing Summitt's motion, the Board followed recent appellate decisions holding that the strict *Stinchcombe* standard, developed in the context of true criminal proceedings, does not apply to regulatory proceedings, because

(a) no individual rights are at stake;

(b) the sanctions available are administrative rather than penal in nature; and

(c) "To require a Board to disclose all possibly relevant information gathered in the course of regulatory activities could easily impede its work from an administrative standpoint."[27]

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[26] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paras. 23 to 28; *Shooters Sports Bar Inc. v. Ontario (Alcohol & Gaming Commission)*, [2008] O.J. No. 2112 at para. 40.

[27] *Re Toronto Hydro-Electric Systems Ltd.*, EB-2009-0308, October 14, 2009 at paras. 12-21.

[98] Furthermore, the Supreme Court held in *May v. Ferndale Institution*:

> The *Stinchcombe* principles do not apply in the administrative context. In the administrative context, the duty of procedural fairness generally requires that the decision-maker discloses the information he or she relied upon.[28]

[99] As Compliance Counsel pointed out, on June 24, 2010 Summitt was given an extensive disclosure package and further disclosure was made over time. Counsel has failed to persuade us that Summitt was prejudiced as a result of the inability to obtain the increased disclosure. Simply because the motion was dismissed does not constitute inadequate disclosure. The decision by the Board was reasonable. Summitt has failed to establish that the lack of further disclosure constituted a denial of natural justice or led to a failure of procedural fairness.

### B. The Board's use of the 2009 Retail Compliance Plan ("RCP")

[100] In August 2009, the Board released its Retail Compliance Plan which was a non-binding Board staff report, based on an inspection of the offices, records and compliance systems of Summitt and four other retail energy marketers. Its express purpose was to focus Board Staff's future compliance activities.

[101] Summitt objects to the fact that the RCP was not disclosed to it until the day before the hearing commenced. Furthermore, counsel argues that if Summitt had known that the Board was going to use the RCP, Summitt would have sought disclosure of all the data underlying the Report.

[102] Summitt concedes it did not ask for a copy of the RCP when it was referenced in the first witness statement and never requested the underlying data. It submits that a failure to request does not excuse a failure to disclose.

[103] When counsel for Summitt objected to the request to make the RCP an exhibit at the hearing, Compliance Counsel redacted objected parts. However, as Compliance Counsel pointed out, in cross-examination of Summitt's Compliance Manager on the issue of due diligence, the Panel accepted that the RCP had broader relevance and admitted the whole Report. Summitt claims that any reliance on the RCP was unfair because it is hearsay and because Summitt was denied the chance to test the contents.

[104] We are not persuaded that the approach by the Board to the RCP constituted procedural unfairness. Summitt was aware of the 2009 Report because it was mentioned in a witness statement, but more importantly, because it had been one of the subjects of the survey and analysis. Yet Summitt made no request for disclosure when it was referred to in an early witness statement, nor was it included in its motion

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[28] *May v. Ferndale Institution*, [2005] 3 S.C.R. 809 at paras. 91-92.

for disclosure. When the Board asked for an unredacted copy and thereby showed interest in its contents, Summit made no request for an adjournment. Summitt's lack of due diligence is a significant factor in determining whether the earlier non-disclosure affected the fairness of the hearing process.[29]

## C. Compressed schedule

[105] Summitt referred to the Board's Rules of Practice and Procedure in sections 14, and 27 to 33 to support its contention that it had legitimate expectations that it was entitled to make written interrogatories, access alternative dispute resolution procedures and technical, issues and pre-hearing conferences. Instead, the Board forced Summitt to an early hearing without the opportunity to explore those expectations.

[106] On June 17, 2010, the Board issued the Notice of Intention which provided 15 days within which Summit could request a hearing, failing which the Board could proceed with making an order. Also on June 17, 2010, the Board issued an Interim Order for Compliance which required Summitt to take all necessary steps to ensure that its sales agents complied with the Act, the Regulation and the Codes. On June 24, 2010, Summitt requested an extension of time to request a hearing. On June 28th, the Board issued Procedural Order No. 1, in which it extended the time for Summitt to request a hearing to July 9 and ordered Summitt to provide written assurance that it would take steps to ensure its sales agents were complying with the Interim Compliance Order. On June 30th and July 7th, Summitt wrote letters to the Board detailing the response to the Interim Compliance Order. On July 8th, Summitt requested a hearing. On July 9th, the Board ordered an oral hearing to commence the week of August 23rd.

[107] On August 4th, Summitt served a notice of motion seeking disclosure, written interrogatories, an order directing that the parties participate in a technical conference, an issues conference, facilitated mediation or alternative dispute resolution and a pre-hearing conference; a timetable that would incorporate the pre-hearing steps; and an adjournment of the hearing. On August 23rd, the Board denied Summitt's motion in its entirety, with the exception of ordering Compliance Staff to produce some consumer data that had been requested by Summitt's expert, and the Board ordered that the hearing commence on August 30th.

[108] The hearing occurred over the six days of August 30 to September 3 and September 8, 2010.

[109] In comparison with the typical course of litigation, that does represent a compressed schedule. However, that is not the proper comparison. The Board has its own Rules of Practice and Procedure and has experience in their application. As counsel agree, this was a matter of first instance in that it was the first hearing of the

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[29] *R. v Dixon* [N.S.C.C. sub nom *R. v. McQuaid*] [1998] 1 S.C.R. 244

Board at which consumer complainants would give evidence. But that does not mean that Summitt was entitled to expect that all of the Rules of Practice and Procedure would be available. All of the decisions challenged by Summitt are within the discretion of the Board. The Appellants have not demonstrated that any of these decisions were unreasonable or that they adversely affected the procedural fairness of the hearing.

## D. Use of the binder

[110] At the conclusion of the oral hearing, Compliance Counsel submitted to the Board a binder containing allegations of additional consumer complaints against Summitt. Compliance Counsel asked the Board to consider the additional allegations when imposing penalty. Summitt strongly objected to the admission of these additional allegations. The Board directed the parties to make submissions concerning the admissibility of the binder of additional complaints as part of its written closing submissions. In the Decision and Order the Board made no mention of whether it decided to admit the binder of additional allegations into evidence, or whether it relied on any of the additional allegations in its determinations that violations had been established and/or penalty.

[111] Summitt submits that the Board's broad sweeping comments and conclusions concerning Summitt's due diligence program strongly suggest that the Board did consider the additional allegations in its determinations that violations had been established and penalty, as such comments and conclusions extended well beyond the conduct of the 5 agents in respect of the 28 consumer contracts that formed the subject of the charges in the Notice of Intention.

[112] We reject that contention. The Board's findings about the deficiencies in Summitt's systems were based on the evidence before it. Nothing in the reasoning suggests that the evidence was buttressed by the other allegations in the binder.

[113] The Board made no mention of the binder in their reasons. There is no reason to consider that this was an oversight. Compliance Counsel and Summitt made written submissions on the admissibility of that material. The Board could not have considered the materials without first ruling on their admissibility. As the Board made no such ruling, the only proper inference is that it did not admit, consider, or in any way rely on that material.

## E. Conclusion on procedural fairness

[114] We are not persuaded that the doctrine of legitimate expectations supports Summitt's submission that it was owed a duty of fairness at the high end of the spectrum. Without establishing precisely where on the spectrum the duty lay in this case, none of the grounds for challenging the procedural fairness of the hearing have been established.

**ORDER TO GO AS FOLLOWS:**

[115] The appeal is dismissed. As confirmed by counsel in correspondence dated January 17, 2013, the Appellant shall pay to the Board costs on a partial indemnity scale in the amount of $25,000 all inclusive.

KITELEY J.

DUCHARME J.

DALEY J.

**Date of Reasons for Judgment:** Heard at Toronto: December 11, 2012

**Released:** APRIL 9, 2013

**CITATION:** Summitt Energy Management Inc. v. Ontario Energy Board, 2013 ONSC 318
**DIVISIONAL COURT FILE NO.:** 624/10
**DATE:** 20130409

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**DIVISIONAL COURT**
**KITELEY, DUCHARME, DALEY J.J.**

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

Summitt Energy Management Inc.

Appellant

**- and -**

Ontario Energy Board

Respondent

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**REASONS FOR JUDGMENT**

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Kiteley, Ducharme, Daley J.J.

**Released:** April 9, 2013