THE SUPERIOR COURT OF JUSTICE
OF ONTARIO

File No. 02-CV-227522 CM 3

B E T W E E N :

BRIAN PAYNE ON HIS OWN BEHALF AND ON BEHALF OF ALL MEMBERS OF COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA

AND JUDY DARCY ON HER OWN BEHALF AND ON BEHALF OF ALL MEMBERS OF CANADIAN UNION OF PUBLIC EMPLOYEES

Plaintiff

-and-

JAMES WILSON AND
HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

Defendant

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--- Before **THE HONOURABLE MR. JUSTICE ARTHUR GANS in the Court House at** 361 University Avenue, in the City of Toronto, in the Judicial District of York, commencing Friday, April 19, 2002.

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A P P E A R A N C E S :

Sean Dewart, Esq.	-	for Applicants
L.A. Richmond, Esq.	-	for Applicants
Steven Shrybman, Esq.	-	for Applicants
Sara Blake	-	for Respondents
Harry Underwood, Esq.	-	for Respondents
Richard Stephenson, Esq.	-	for Intervenor, P.W.U.

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ORAL JUDGMENT OF

THE HONOURABLE MR. JUSTICE ARTHUR GANS

FRIDAY, APRIL 19, 2002

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FRIDAY APRIL 19, 2002

--- on commencing at ten o'clock

THE COURT: Good morning.

INTRODUCTION.

Hydro One Inc. ("Hydro One"), the corporate name for the new millenium, is one of the amoebic offspring of Ontario Hydro created by the Government in 1998. Ontario Hydro was itself the last corporate incarnation of what started out as the Hydro Electric Power Commission of Ontario ("HEPCO") in 1906 when the generation, transmission and provision of hydro-electric power to the citizens of the Province was in its infancy.

Ontario Hydro was one of the defining characteristics of the Province, one with which its residents could identify, and one by which the Province was known internationally. Its creation and basic foundation was the primary reason a knighthood was bestowed upon Sir Adam Beck in 1914. His sculpted image stands watch over University Avenue.

After almost a decade of soul searching, including the appointment of a blue-ribbon Advisory Committee and the preparation and publication of a White Paper entitled, *Direction for Change - Charting a Course for Competitive Electricity and Jobs in Ontario* in November 1998, the government passed the *Energy*

Competition Act, **1998, S.O. 1998, c.15 (the "Energy Competition Act"*) in December 1998. It enacted two comprehensive statutes, namely the Electricity Act, 1998*, S.O. 1998, c.15, Sched.A (the "*Electricity Act*") and the *Ontario Energy Board Act, 1998*, S.O. 1998, c.15, Sched. B (the "*Energy Board Act*") as schedules to the *Energy Competition Act*. This statutory regime purports to implement the major recommendations of the White Paper and establish a broad legislative framework for commission in certain areas. Of importance in respect to the matter now before me, the regime purports to divide Ontario Hydro into various publicly owned or controlled parts.**

ISSUES

By way of a Preliminary Prospectus filed March 28th, the Province proposes to offer for sale all of the common shares of Hydro One. This concept was first previewed in the Legislature on the last day of the session this past December. Hydro One is a multi billion dollar corporation created under the *Electricity Act*. It is the Ontario Hydro entity responsible for electricity transmission and certain electricity distribution and energy service businesses.

In issue in this application is whether or not the Province has the legislative authority to offer these shares for sale under section 48

of the *Electricity Act*, the effect of which will call for the privatization of Hydro One. Put otherwise and more appropriately, the question is whether or not the *Electricity Act* in some fashion restricts the Government's right to dispose of the shares which are held by a member of the Executive Council for and on behalf of Her Majesty in right of the Province of Ontario. The applicable section provides as follows:

48(1) The Lieutenant Governor in Council may cause two corporations to be incorporated under the Business Corporations Act and shares in those corporations may be acquired and held in the name of Her Majesty in right of Ontario by a member of the Executive Council designated by the Lieutenant Governor in Council.

(2) The Lieutenant Governor in Council may make regulations,

(a) Designating one of the corporations incorporated pursuant to subsection (1) as the Ontario Electricity Generation Corporation for the purposes of this Act;

(b) Designating the other corporation incorporated pursuant to subsection (1) as the Ontario Electric Services Corporation for the purposes of this Act.

(3) No corporation shall be designated under subsection (2) unless, at the time of the designation, all voting securities of the

corporation are held by or on behalf of Her Majesty in right of Ontario or an agent of Her Majesty in right of the Ontario.

It is the applicants' position that the proposed IPO contravenes the aforesaid legislation because there is no authority in the Province to dispose of or otherwise alienate the shares in issue. As a fall-back to this position, the applicants assert that the Province must, as a condition precedent, seek leave of the Ontario Energy Board before it can sell the shares on the market. I decline to render judgment on this last-mentioned issue, and it was accordingly traversed to the Divisional Court for argument, ultimately on consent of the parties.

APPLICANTS AND STANDING

The applicants are each members of two large unions. These unions, in their own right, are the recognized bargaining agents for over 200,000 employees, and I dare say, residents in the Province. The Communications, Energy, and Paperworkers Union of Canada (CEP), does not represent any individuals working for any hydro companies as such. However, many of its 50,000 Ontario members work in large-scale manufacturing industries in resource-based small communities. Those industries and communities rely upon the continued availability of affordable sources of

electricity. The Canadian Union of Public Employees (CUPE), on the other hand, does represent thousands of employees who do work for electric utilities and some of the hydro corporations.

Interestingly enough, 3,000 employees of Hydro One are members of the Power Workers Union, (PWU), which opposes the application. I was told that the PWU is a CUPE local.

Counsel for the Minister of Energy, Science and Technology (the "Minister") advances two arguments at the outset, which I would note are not endorsed, for obvious reasons, by the PWU:

1. The *Rights of Labour Act* is a complete bar to the instant application. Unions have capacity to sue solely for purposes of matters relating to labour relations; and

2. Because the private rights of the applicants are not directly affected, and because no public interest issue is engaged or could be advanced by the present applicants who do not have any experience in the subject matter of the IPO, the matter is not otherwise justiciable, as is required for a court to grant public interest standing.

In my respectful opinion, the two arguments aforesaid must fail. While I do not intend to repeat Mr. Richmond's (one of the applicants' counsel) argument in detail,

including the historical background to which it was tied, I have come to the following conclusions based on a review of the *Rules of Civil Procedure* and the case law with which I was provided. (see *Stamos v. Belanger* (1994), 94 C.L.L.C. 12263 (Ont. Gen. Div.) and *McMillin et al. v. Yandell et al. (1971)*, 22 D.L.R. (3d) 398 (Ont. H.C.J:))

1. Rule 12.08, which was recently introduced in 1999, appears to be a complete answer to the problems suggested by counsel for the Minister. This rule vests in one or more members of a trade union the right to commence suit or, as in this case, an application without the necessity of passing over the procedural and substantive hurdles engendered by the *Class Proceedings Act, 1992*, S.O. 1992, c.6 and Rules.

(see the unreported decision of Cameron J. in Stewart and Service Employees International et al. v. Brown et al. (1 March 2000), Toronto 00-CV-185840 (Ont. S.C.J.) and see the commentary found in G.D. Watson and C. Perkins J., *Holmstead and Watson: Ontario Civil Procedure*, (Toronto: Carswell, Vol 6) at s. 16, rule 12.08.)

Regrettably, no motion in writing was made before the court seeking the requisite designation for the named applicants under the above rule or, as a fall-back position, under

Rule 10.01. Thankfully, counsel for the Minister did not voice any objection to this procedural oversight, if not irregularity. Accordingly, an order will go *nunc pro tunc,* authorizing the applicants, in the manner as styled, as the representative plaintiffs for and on their own behalf and on behalf of the other members of their respective unions for whom they purport to act.

2. The question of standing has been considered in countless cases, four of which, including the oft-cited decision of the SCC in *Finley v. Canada (Minister of Finance)*, [1986]2 S.C.R. 607, have been provided to me by counsel for the Minister. The applicable test for deciding this issue has been distilled as follows:

A. Do the plaintiffs have a sufficient personal interest in the matters in issue; or

B. If not, does the court have a discretion to recognize public interest standing in the circumstances of the present case; and.

C. If the court does have such a discretion, should it be exercised in favour of the applicants?

It has long since been recognized that unions have an interest in matters which transcends the "realm of contract negotiation and administration" (*Lavigne v. Ontario Public*

Service Employees Union (1991), 81 D.L.R. (4th) 545 (S.C.C.)("*Lavigne*") at 603). To borrow Chief Justice Dickson in *Slaight Communications Inc. v. Davidson* (1989), 59 D.L.R. (4th) 416 (S.C.C.) at 426, "...the interests of labour do not end at some artificial boundary between the economic and political". Inherent in this proposition is the notion that interests of labour are expansive and are meant to include more than, "mere economic gain for workers" (per Wilson, J. at 603 of *Lavigne*).

While I agree with Counsel for the Minister that the applicants, except as individual consumers of hydro, may not have a direct personal interest in the IPO and all that it entails, there is a public interest standing that should be recognized in the circumstances of this case. While not directly on point since, admittedly, the case dealt with the principles of *ultra vires* acts of a corporation, the comments of Macleod J. in *Bury v. Saskatchewan Government Insurance*, [1990] S.J. No. 693 (Q.B.) Online: QL(SJ) ("*Bury*") (aff'd (1991), 75 D.L.R. (4th) 449 (C.A.) are instructive:

"In my view each applicant individual is sufficiently connected to Saskatchewan as a resident of the province, (a citizen) to qualify that individual to bring the action under the public interest rule of standing in

the circumstances of this case. Saskatchewan Government Insurance is a Crown corporation. It is owned wholly by Her Majesty the Queen in Right of Saskatchewan. In any private corporation, a shareholder would have the right to require that the company conduct its affairs in accordance with its governing constitution. Similarly, in a Crown corporation, while the citizens of the province do not have shares as such, they have a public interest in requiring that the corporation conduct its affairs in accordance with the constitution of the corporation."

I am also of the view that discretion should be exercised in favour of the applicants in the circumstances of this case, notwithstanding the argument that the applicants are neither experts in the electricity sector nor in the interpretation of the underlying statutes. I do not accept the suggestion that the applicants are mere busy bodies or officious intermeddlers. They are neither.

Having regard to the subject matter and importance of the issue that is called into question by this application, namely the legislative authority for the proposed IPO, it is and was essential that the matter be canvassed as fully and accurately as possible, which it was, on all sides.

The Minister's counsel also urged me to dismiss the application on the ground that it could not be brought under rule 14.05(d) since the rights of the applicants were not affected, *per se*, by the statutory interpretation that was in issue. She could not direct me to any case that concluded that the "rights" as found in the rule should be modified by the word "their". I do not agree that the rule should be limited in such fashion because such would, by definition, eliminate any legislative challenge on a public interest standing basis by way of application as opposed to action. No such circumscription on the use of the application rule exists, to my knowledge, nor do I think such a restriction would be appropriate when, as in the instant case, there are no material facts in dispute. Again, so long as the applicants have standing, the matter is justiciable, and there are no facts in dispute, resort to the application rule is the most efficacious way to bring this most important issue to court.

THE LEGISLATIVE REGIME

As previously indicated, the issue before the Court is whether or not there is any express or implied limitation in respect of the Minister's ability to privatize Hydro One.

Mr. Dewart, one of the applicants' counsel, candidly acknowledges that the Crown

has the power of a natural person to enter into contracts, among other things. This would include a contract for the disposition of the shares that the Minister currently holds of Hydro One (see *J.E. Verreault & Fils Ltée v. Quebec (Attorney General)* [1977] 1 S.C.R. 41). It is his position that this power can be circumscribed by statute, either expressly or by implication. Respondents' counsel do not really take issue with this last proposition. It is common ground among the parties to this application that neither the *Electricity Act* nor any other Ontario statute expressly limits the Minister's ability to dispose of the subject shares of Hydro One. Therefore, what is truly in issue in these proceedings is whether or not the power described above is limited by implication.

The starting point for my analysis is found in R. Sullivan, *Driedger on the Construction of Statutes*, 3rd ed. (Toronto:Butterworths, 1994) ("*Driedger*") at 132. Previous versions of *Driedger* were cited with approval by the SCC in *Rizzo & Rizzo Shoes Ltd. (Re)* (1998) 154 D.L.R. (4th) 193. In *Driedger*, the learned author made the following observation about the "modern rule" of interpretation:

"There is only one rule in modern interpretation, namely courts are obliged to

determine the meaning of legislation in its total context, having regard to the purpose of the legislation, the consequences of proposed interpretations, the presumptions and special rules of interpretation, as well as admissible external aids. In other words, the courts must consider and take into account all relevant and admissible indicators of legislative meaning. After taking these into account, the court must then adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with the legislative text.

"(b) Its efficacy, that is, its promotion of the legislative purpose; and

"(c) Its acceptability, that is, the outcome is reasonable and just."

With that as the backdrop, I now start down the ever-twisting road of interpretation is an effort to discern the intention of the Legislature, at its end.

Both sides of this debate, for all intents and purposes, start and finish with the words, "...and shares in those corporations may be acquired and held in the name of Her Majesty..." as found in s.48.1 of the *Electricity Act*.

The applicants argue that the right to dispose of the shares is circumscribed by the

Minister's obligation to acquire and hold the shares because the statute does not in any way contemplate the sale or disposition of same. The applicants further argue, having regard to the very nature and importance of Hydro One both historically and economically, that the Minister would require a clear mandate permitting the sale to otherwise step outside the boundaries of the enabling legislation (see *Bury* and the *Queen v. CAE Industries Ltd.* et al. (1985), 20D.L.R.(4th 347 (F.C.A.)). Put otherwise, the applicants suggest that because the "ownership" of the shares is not merely incidental to the day-to-day functions of the Minister, and arises from, and only as a result of his mandate under the *Electricity Act*, any disposition of the shares would require clear and precise language. Basically, the applicants argue that there is a world of difference between one's ability to "acquire and hold" and one's ability to, "alienate the same at the pleasure" (see the *Interpretation Act*, R.S.O. 1990, c. I.11, s.27) In support of these last-mentioned propositions, the applicants direct me to a multitude of statutes from which they urge that convention mandates a clear delineation of powers.

The respondents' position, in essence, is that the language of the statute is at most permissive, in that it imposes no obligation on

the Minister to hold the shares after acquisition for any period of time, if at all, once the companies created thereby have been "designated" in accordance with s.48(2) of the *Electricity Act*. In other words, it is their position that there is nothing in the enabling legislation nor indeed in the *Ontario Business Corporations Act*, R.S.O. 1990, c. B.16 (the "*OBCA*") under which Hydro One was incorporated, that would or could impose any restriction on a shareholder to dispose of his or her shares at pleasure. Furthermore, for there to be a valid restriction on the unalterable right to contract, the statutory reference which purports to delimit one's right of alienation must be more than a mere "touching" or glancing blow. While conceding that the limitation need not be a knock-out punch, as it were, Mr. Stephenson, counsel for the PWU, in his usual clear and precise fashion, argued that the limitation had to be something more than what the applicants suggested arose in respect of the words "acquire and hold." It was his position that in order to find a limitation I would have to hold that without one, the objects and intentions of the legislation would not be served.

The respondents further argued, again in a most compelling fashion, that a cautionary note should be sounded in respect of the reliance

one might put on other "similar" but not identical statutes. In the first place it was argued that one must be mindful of the overall legislative framework within which any such analogue was to be measured. Secondly, to contrast the powers of those to whom the *ultra vires* principle applied was, if anything, short-sighted and often misleading. In this vein, counsel for the respondents were of the view that the rationale of the Court of Appeal of Saskatchewan in *Bury* was of limited application to the case at bar.

LEGISLATIVE INTENT

Unlike many statutes where a court is obliged to discern legislative intent from the wording of the legislation alone without regard to any stated legislated objectives, s.1 of the *Electricity Act* sets out, in detail, the Act's overarching purposes:

1. The purposes of this Act are,

(a) To facilitate competition in the generation and sale of electricity and to facilitate a smooth transition to competition.

(b) To provide generators, retailers and consumers with non-discriminatory access to transmission and distribution systems in Ontario;

(c) To protect the interests of consumers with respect to prices and the reliability and quality of electricity service;

(d) To promote economic efficiency in the generation, transmission and distribution of electricity;

(e) To ensure that Ontario Hydro's debt is repaid in a prudent manner and that the burden of debt repayment is fairly distributed;

(f) To facilitate the maintenance of a financially viable electricity industry; and

(g) To facilitate energy efficiency and the use of cleaner, more environmentally benign energy sources in a manner consistent with the policies of the Government of Ontario.

It is interesting to observe that the aforesaid objectives, except for s.1(e), are incorporated by reference in the *Energy Board Act* and that the Board is obliged to have regard to these objectives when discharging its duties under that Act. It is also worthy of note that the objectives, to a great degree, track the enumerated objectives set out in the White Paper which the applicants urged me to consider.

At the risk of doing a disservice to the arguments of counsel, I will attempt to briefly set out the essential elements of the *Electricity Act*. Putting the matter in its simplest terms, the *Electricity Act* is designed to meet the objectives set out in s.1, as above. It is intended to cover all elements of the complex electricity delivery system, which

comprises a vast network of interconnected generation, transmission and distribution lines, plants and related facilities. It calls for the "corporatization" of Ontario Hydro, in part, by the creation of two OBCA companies, one of which is Hydro One, and certain other non-share capital corporations and similar vehicles. One of the last-mentioned non-OBCA entities was created or set up to house the many billions of dollars of debt amassed over the last several decades by Ontario Hydro. Others are designed to facilitate the regulation of the retail, distribution, and system operations of the old Hydro.

The two OBCA companies are to function independently of the Government, save for the financial and other reporting duties prescribed by statute. It was and is hoped that each will discharge its separate functions of generation and transmission efficiently, profitably and responsibly.

As suggested, the debt incurred by Ontario Hydro on an historic basis was hived out of the former operation in an effort to establish the two OBCA companies and other regulatory vehicles as debt-free enterprises, albeit enterprises into which some very valuable operating assets will be and have been transferred. The debt, which is being housed in a non-share capital corporation (the

"Financial Corporation"), is to be discharged from all manner of revenue generation, except for one critical source to which reference will be made. By that I mean that under Part V and VI of the *Electricity Act*, a detailed intricate scheme was put in place which calls for the reduction of the debt, curiously labeled the "residual stranded debt", something of a contradiction in terms having regard to the amount of the debt remaining. This system of payments and deemed payments, whether it comes from the sale of assets, dividends generated from the operation of the OBCA companies or payments in lieu of taxes, is designed to reduce, if not eliminate, the residual stranded debt.

Absent from the legislative scheme is the fact that there is no provision for paying down the "legacy" debt from the sale of the shares of either OBCA company. This conclusion was discoverable after undertaking a microscopic examination of the *Electricity Act*, and a consideration of the interrelationship of its various sections, if not the fine print of the Prospectus at p.18. In other words, any dollar generated from the proposed Hydro One IPO is not directed by a statute, in this case the *Electricity Act, towards discharging the large debt with which the beleaguered Ontario Hydro was saddled. Any money generated from the IPO*

will be, if not must be, paid into the Consolidated Revenue Fund. In theory then, it can be used for any and all government programs (see the Financial Administration Act, *R.S.O. 1990, c.12, ss. 1 and 2). It cannot, as the legislation presently stands, be used automatically to discharge the legacy or stranded debt.*

The mere fact that the prospectus references the Government's pronouncement that proceeds from the IPO, "...will be used to pay down the legacy debt and the liabilities of Ontario Hydro," arguably, does not bind the new Minister of Finance to do so. Such a pronouncement, even if somehow elevated to a "representation", does not have the force of a legislative mandate and, as was argued by the Minister's counsel in another context, does not give rise to an estoppel.

This apparent lacuna to the legislation is in marked contrast to the obligations thrust upon municipalities slated to take over the former electrical utilities. If any municipality sells any of the assets of or shares in respect of any local utility which it owns or controls, the funds generated therefrom must be paid over to the Financial Corporation and in turn utilised to retire the legacy debt (see the *Electricity Act* s.94). Again, no such similar requirement is imposed on the Minister

as "trustee", for the benefit of the Province, of the shares in the OBCA companies, including Hydro One. If there is parallelism between the mechanics in respect of the ownership of Hydro One by the Minister and the ownership of the local utilities by the municipalities, as was argued by Mr. Stephenson, then the parallel structure not only breaks down, but is torn asunder by this omission.

I pose the question yet again: If the Minister has an unfettered power to sell the shares of Hydro One, why wouldn't there be some simple language in the *Electricity Act* directing, if not mandating, the payment of the proceeds of disposition to the Financial Corporation? Alternatively, does not the absence of such a provision undermine a stated purpose of the Act, namely the prudent and equitable repayment of the legacy debt (s.1(e))?

One might argue that this omission was purposeful so that the Government could have the option to pay but a portion of funds to the Financial Corporation, albeit through somewhat of a circuitous route through the Consolidated Revenue Fund. Indeed, this may be the very modality by which Government might be able to subscribe for the $290 million of "its" common shares, just before completion the offering, presumably, through a company as yet to be

incorporated. Again, if this methodology is followed and money is commingled in the Consolidated Revenue Account, arguably, the debt is discharged from taxpayer dollars and not as was anticipated by s.1(e), aforesaid.

In my opinion, as was urged upon me by the applicants, the reason for this very significant omission, if not self-evident, admits of logical. The legislature, in its wisdom, did not intend to embark upon a privatization program at this stage in the reorganisation and corporatization of Ontario Hydro. I need therefore not go so far as to say that if a corporation is owned solely by the Crown and created solely for the public benefit, with roots deep in the fabric of the community, public ownership cannot be relinquished absent express language, as the Saskatchewan Court of Appeal did at *Bury* at page 472. Such a notion although appealing is not necessary, having regard to the conclusion reached aforesaid.

However, I would have thought that the notion of privatization should have been set out in clear and unequivocal terms in the "purposes" portion of the *Electricity Act*, as were a whole range of other important social and economic matters. Privatization of a long-standing important public institution, such as Ontario Hydro, is not something I would

have thought would or should occur without addressing the issue head on. The fact that it wasn't set out as a stated purpose is consistent with the conclusion that the *Electricity Act*, as comprehensive a piece of legislation as it is, is not intended to deal with privatization, as such, let alone through any implied ability to alienate personal property as a natural person.

Furthermore, in my respectful opinion, other sections of the *Electricity Act*, read alone and in conjunction with sections of the OBCA, lead to the conclusion that the Minister intends to remain the holder of all outstanding voting securities of Hydro One, until the requisite amendments to the former act are put in place (see in particular ss.50, 52 and 53 of the *Electricity Act and ss. 108(3) and (4), and s. 154 of the* OBCA) By way of example, s. 53 of the Electricity Act reads as follows:

53. The Generation Corporation and the Services Corporation shall submit such other reports and information to the Minister of Energy, Science and Technology or the Minister of Finance as each of those ministers may require from time to time.

The *OBCA* specifies precisely what, and when, shareholders are entitled to receive by way of corporate information. In general, this information is restricted to financial

statements, or in the case of an offering corporation, such as the proposed class for Hydro One, the auditors and annual reports (s. 154). Unless required by articles, by-laws or an unanimous shareholders' agreement, a corporation is not normally obliged to provide a shareholder, and in no instance a non-shareholder, with "...such reports and information..." that the shareholder (Minister) or the non-shareholder (Minister of Finance), may require.

In my opinion, s.53 in its present form permits the Minister and his or her cabinet colleague, the Minister of Finance, to receive any and all information about the operation of Hydro One that each considers important. That provision is perfectly consistent with Cabinet's overarching responsibility for a company like Hydro One so long as the Minister holds title to the shares of the company, as trustee, and indeed, so long as the legacy debt remains outstanding, if not significant, as it is today.

In my opinion, s.53, again in its present form, is otherwise inconsistent with the Minister having anything less than complete control of Hydro One through the ownership of the voting securities. Indeed, I would be so bold as to suggest that if the situation were otherwise, this would mean that Hydro One would

have a greater reporting obligation than is required under the *Securities Act*, R.S.O. 1990, c. S.5 or the *OBCA* in absolute and in relative terms to other offering corporations. Arguably, therefore, the interrelationship of that section with the stated purposes of the *Electricity Act* and the operation of other corporate/securities statutes would lead to an absurd, if not an unlawful, result.

The conclusions expressed above, respectfully, are consistent with the statements of the then Minister of Energy, Science and Technology, when he introduced the legislation in the House in November 1998 and bears repeating:

"As a shareholder in Ontario Hydro, we don't talk about privatization because, first of all, that company needs a number of years, and the successor companies will need a number of years to get their value back up, to enhance their value. Ontario Hydro is a badly devalued and demoralized entity right now. We do not want a fire sale, so we are not talking about privatization. We are talking about introducing competition and commercializing, making sure that the new successor companies have to, by law, act in a prudent manner and in a business-like manner.

"But of the reasons we are not talking about privatization is my dream for Ontario

Hydro is that, once again, it will begin to return a healthy profit back to the shareholder -- and the shareholder is the people of Ontario -- that money in the future could be used to either lower electricity rates again or, once the debt is paid off, clearly that's money that could go into general revenues that can support health care and education and other priorities that the government of the day might have. That's one vision of where the money should go once Ontario Hydro is a major player in the North American market."

In my respectful opinion, not only does three years not amount to "a number of years", as was suggested by the Minister's counsel, but the Minister's comments about not then "talking about privatization" are telling. While admittedly, such statements do not bind subsequent legislatures, they do provide insight into the context and purpose of the legislation at the time of its introduction to the House.

Furthermore, the interpretation just advanced is equally consistent with the Government's White Paper, previously referenced, which was presented to the House as a precursor to the legislation. Nowhere in the White Paper is there anything more than an oblique reference to privatization. Indeed,

the six step plan "...to put the proposed new companies on a sound financial basis, and to advance the public discussion about potentially stranded debt and the options dealing with it" does not conclude with any form of statement that privatization is a viable option or at least an option that could introduced without public discussion. I have annexed for ease of reference the Executive Summary and pages 22 to 24 of the White Paper, the latter of which includes reference to the aforesaid six point plan.

I hasten to observe that any reliance on the reports of Hansard and even the White Paper is to play a truly limited role in the interpretation of a statute (see *Rizzo* at 208). That having been said, such evidence can nevertheless be admitted to assist the Court in understanding both the background and purpose of the legislation.

CONCLUSION

A declaration will therefore issue in terms of paragraph 1(b)(i) of the notice of application. I will hear submissions on whether such declaratory relief can or need be issued in respect of the relief sought in paragraph 1(c).

--- whereupon unreported submissions commenced

Oral Judgment
A. Gans, J.
Fri. Apr. 19/02

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Certified:

Anne-Marie Borthwick, C.S.R.
Official Court Reporter

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SCHEDULE A

EXECUTIVE SUMMARY

The Government has developed a plan for introducing full competition into Ontario's electricity system in the year 2000. Implementation of the plan involves legislative change, and is subject to approval by the Legislative Assembly.

Competition among suppliers will create the conditions for lower electricity prices, thereby supporting investment and job creation across the province. It will ensure that investments in electricity generation and transmission are made prudently and that assets are managed carefully and responsibly. It will mean more choices for customers and will lead to new technologies and approaches that are safe, reliable and better for the environment.

The *Advisory Committee on Competition in Ontario's Electricity System*[1] made recommendations on how to open up Ontario's electricity market. The Government agrees with the Advisory Committee that the need for change is compelling.

Neighbouring provinces and states are restructuring their electricity sectors and are expecting lower prices. Ontario needs to keep pace to preserve its industrial competitiveness. Favourable electricity prices are critical to attracting investment, and to creating and preserving jobs.

The business record of Ontario Hydro has been unsatisfactory, as shown most recently in a highly critical assessment of Ontario Hydro's nuclear division prepared by a team of U.S. experts. Ontario Hydro's problems have continued over a number of years, and are in large part due to the fact that the corporation is a monopoly, and has not been subject to the discipline of the marketplace.

New opportunities are emerging as the North American electricity industry changes from one based on monopoly to one based on competition. Ontario needs to restructure its electricity industry in order to create a business climate which supports new technologies, new services, and new ways of doing business.

The Government's main restructuring objective is to support investment and jobs through the lowest possible electricity prices and the best possible electricity service. The Government continues to place a high priority on safety, reliability, and sound environmental practices, and has designed its restructuring plan to maintain and improve on current performance. Other major objectives include the establishment of more commercially oriented electricity companies and the restoration of financial soundness in the provincially owned part of the electricity industry.

[1] The Committee, chaired by the Honourable Donald S. Macdonald, reported in June 1996.

The Government has developed a nine-part plan for restructuring the electricity industry, re-organizing Ontario Hydro into new companies, and putting the new companies on a sound business and financial footing. It proposes to introduce legislation covering this plan in 1998. If approved, key parts of the plan would be proclaimed and implemented as soon as possible. The Government proposes to consult widely on the legislation and on a number of specific issues that require further consideration and public discussion.

The plan would:

- create a competitive market in the year 2000 for both wholesale and retail customers
- establish an Independent Market Operator, and provide for an interim supply market for replacement power
- separate monopoly operations from competitive businesses throughout the electricity sector
- provide the Ontario Energy Board with an expanded mandate to protect electricity consumers
- take steps to ensure environmental protection
- encourage cost savings in the local distribution sector
- establish a level playing field on taxes and regulation
- restructure Ontario Hydro into new companies with clear business mandates, and,
- take action to put the new electricity companies on a sound economic and financial footing.

The Government proposes to create two new commercial electricity companies to succeed Ontario Hydro. The Ontario Electricity Generation Corporation would take ownership of Ontario Hydro's generation assets, and have a mandate to ensure safety, reliability, and sound environmental performance, while maximizing the value of the generation business to Ontario taxpayers. The Ontario Electric Services Corporation would be a holding company for other electricity businesses, including transmission, distribution, retail, and operating contracts. It would be required to keep its monopoly and competitive businesses separate from each other through an appropriate structure of subsidiary companies.

Existing Ontario Hydro debt will be held by a publicly-owned financial holding company, as recommended by the Advisory Committee.

The Government will work with Ontarians to ensure that the electricity industry is restructured in a timely and well managed way, with the necessary protections for both business and residential customers.

An Independent Market Design Committee composed of industry and customer representatives will have a large role in designing the rules for the new market. Its composition and terms of reference will be announced shortly. Under the plan, a redesigned Ontario Energy Board would ensure that fairness prevails in the operation of the market and the setting of transmission and distribution tariffs. Ontario Hydro and its successors will be expected to work closely with employee organizations to achieve a smooth implementation of the proposed corporate restructuring.

The Government will ensure that Ontarians have opportunities to comment and provide advice every step of the way. It will consult on the drafting of the proposed legislation. It will consult on measures that may be required to recover potentially stranded debt. And it will continue to consult with municipalities and local distribution utilities on aspects of restructuring in the distribution sector.

If adopted, the plan outlined in this paper would ensure the vitality and financial integrity of Ontario's electricity system, increase opportunities within the electricity industry, maximize benefits to electricity consumers, improve reliability, safety and the environment, and, most importantly, support investment and job creation in Ontario's expanding economy. This plan charts a course for competitive electricity and jobs in Ontario.

Ontario Hydro to be Restructured with Clear Business Mandates

The Government proposes to introduce legislation to replace the *Power Corporation Act*. The legislation will provide for the reorganization of Ontario Hydro into three separate corporations: the Independent Market Operator, and two commercial companies, provisionally called the Ontario Electricity Generation Corporation (OEGC), and the Ontario Electric Services Corporation (OESC). The OEGC would take ownership of Ontario Hydro's generation assets, and would have a mandate to maximize their value for the taxpayers. The OESC would be a holding company with a number of businesses, including transmission, distribution, retail, and operating contracts. It would be required to keep its monopoly and competitive businesses separate from each other through an appropriate structure of subsidiary companies.

All the new entities would be given clear business mandates. OEGC and OESC would have the flexibility they need to make operating and investment decisions in each of their business lines, and would be free to engage in joint ventures and other strategic partnerships with both private and public sector companies. They would be expected to operate with a more efficient cost structure, a long term strategic plan, expert and committed staff, an employee incentive plan, and dynamic and skilled business managers. They would be required to make payments to the Province in lieu of corporate income and capital taxes, would have to go to the capital markets for new investment capital, and would pay a normal rate of return to their shareholder, the Province of Ontario. Income in excess of costs, taxes and dividends could be allocated in the best commercial interests of the companies. In short, the companies would be "corporatized", required to operate on a business-like basis, as were electrical utilities in New Zealand, Australia, Norway, and many other countries.

New governance structures would be created. The Government would exercise control through its role as owner and shareholder, focusing its attention on general policy directions and bottom line financial results. It would greatly reduce its involvement in the individual business decisions of the companies. As a responsible shareholder, the Government would establish expectations for performance, using such industry benchmarks as dividend yields, return on equity, interest coverage, capital ratios, and so forth. Management would be held strictly accountable for meeting the targets.

The Board of Directors of the generation company would decide on the appropriate internal structure for this corporation. However, given the especially difficult challenges involving the nuclear assets, the Board would be expected to pay due regard to any views the *Select Committee on Ontario Hydro Nuclear Affairs* may have expressed regarding the future organizational structure for the nuclear business.

As commercial entities, the new provincial companies would not have any oversight role in relation to the local distribution utilities. This responsibility would be assigned to the Ontario Energy Board. In addition, a working group would be established to study how best to organize the electrical safety and inspection activities currently carried out by Ontario Hydro.

The Government will consider options for the science and technology companies that it currently owns to ensure research and development capabilities in the electricity sector.

The Government and Ontario Hydro both recognize the importance of a confident and highly skilled workforce in ensuring a well run electricity system. Ontario Hydro and its successors will be expected to work closely with employees and their bargaining agents as they move forward to design and implement restructuring.

The Government has considered a wide range of options for injecting greater business discipline into its electricity businesses. The proposed plan combines a number of effective techniques – market competition to exert pressure on prices and costs, separate corporate entities for transmission and generation to prevent conflicts of interest, an independent market operator to ensure fair competition and promote the growth of the market, commercial lending rates and tax obligations to level the playing field with private sector competitors, independent regulation of the Province's local wires business to ensure fair prices, and defined, bottom line performance targets to ensure that the new companies maintain their business focus, while meeting safety and environmental standards.

As a result of the proposed restructuring plan, the new provincial electricity companies would have clear business mandates and a proper accountability relationship with the provincial government.

The New Companies to be Put on a Sound Financial Footing

The Government is also proposing measures to restore financial soundness at Ontario Hydro and the successor companies. The new electricity companies are expected to remain significant players in the Ontario electricity market once the market is opened to competition. However, they will no longer control the price of electricity, and will no longer be assured that their combined revenues will be high enough to allow them to continue to meet the repayment obligation to Ontario Hydro's bondholders. In the absence of special provisions, opening the market could increase the risk to the Government and the taxpayer, since the Province guarantees the repayment of Ontario Hydro's debt. Any debt that Ontario Hydro could not service as a commercial entity in a competitive market is said to be "stranded".

In the Ontario context, a problem of stranded debt could be dealt with in three general ways: new efficiencies in savings through asset reorganization and improved management; a transitional mechanism to ensure that any stranded debt is paid off over time by electricity consumers; or assumption of stranded debt by the Government.

There are many variations and combinations within each of these general approaches. Other jurisdictions are experimenting with alternative recovery methods, but no consensus has emerged on which approach is best. It is clear, however, that different approaches would have different consequences for the provincial finances, and for Ontario businesses and households.

The first step in developing a recovery plan is to assess the magnitude of the potentially stranded debt. The *Advisory Committee* estimated Ontario Hydro's potentially stranded costs to be in the $10-$15 billion range. The high estimate was derived assuming a 30 per cent drop in the price of electrical generation in an open market. Ontario Hydro, in its 1996 *Annual Report*, estimated its stranding risk at between $10 and $21 billion, and proposed a figure of $16 billion for strategic planning purposes. Estimates by investment firms have been in the same range, but with some firms indicating either higher or lower amounts of stranded debt, depending on the assumptions used.

There is a high degree of uncertainty around these—and all—estimates of stranded debt. Many variables are involved in the calculations, and the results are highly sensitive to changes in the assumptions, especially the assumptions about price and electricity sales. Recent developments around nuclear costs and performance add further uncertainty, as does the issue of nuclear decommissioning.

Given the degree of uncertainty, it is essential for the Government to proceed cautiously with regard to the financial dimension of the proposed restructuring, and to retain the flexibility to adjust to changing circumstances. At the same time, the Government is aware of the need to provide as much rate certainty as possible to electricity consumers.

The Government has developed an integrated six step plan to put the proposed new companies on a sound financial basis, and to advance the public discussion about potentially stranded debt and the options for dealing with it.

First, the Government, as shareholder of the new companies, would ensure that they operate as efficiently as possible, and that the potential stranding problem is dealt with in the first instance through cost savings. As described earlier, the Government is proposing that Ontario Hydro be restructured into two commercial companies with new business mandates in order to improve business performance. The Government, on behalf of taxpayers, would insist that prudent assumptions are used in investment planning and budgeting, and that tough performance targets are met. The Government recognizes that cost reduction will be a major challenge, but it will nevertheless be looking for significantly improved cost performance in the years immediately ahead.

Second, the Government would encourage the new commercial companies to explore opportunities for new partnerships with both the private sector and the local distribution utilities. New partnerships are important because they bring new perspectives, new energy, new resources, and discipline to help get costs down. There are opportunities to contract work to the private sector and to lease generation and other facilities to new operators. There are opportunities for voluntary, commercially-oriented agreements between municipalities and the proposed new electricity services company. There are also opportunities for investment capital in the refinancing of the generation company and the provincial and local wires companies.

Third, the Government would dedicate all of the new payments in lieu of taxes to paying down stranded Ontario Hydro debt, as recommended by the *Advisory Committee*. This includes the payments in lieu from the local distribution utilities, as well as those from the new provincial corporations.

Fourth, the Government proposes to phase out its guarantee on new debt incurred by its commercial electricity companies by the year 2000. The Province would continue to guarantee debt previously issued under the guarantee. Phasing out the guarantee is an important step in restoring the financial health of the corporations because it makes investment decisions subject to a direct market test.

Fifth, the Government would, if necessary, introduce transition charges to address any stranded debt not eliminated through other means. There are numerous options for the transition charge, including a direct charge on customers, as proposed by the *Advisory Committee*, and vesting contracts for generators. The Government has concluded that it would be premature to take a position on specific recovery mechanisms or amounts at this time.

The Government is, however, strongly committed to ensuring that any stranded debt is recovered in a manner that is clear and fair to all customer classes. Prior to introducing restructuring legislation, the Government will seek advice on the options for recovering potentially stranded debt and on the principles that should be applied in choosing a course of action.

The sixth action step would be to establish commercially acceptable capital structures for the new commercial companies. As part of the restructuring of Ontario Hydro, the Province will put in place commercial capital structures for the new companies through a debt for equity swap mechanism. The Province will then receive dividends in line with private sector norms.

The steps described above provide an indication of how the Government proposes to deal with the potentially stranded debt at Ontario Hydro, and to establish its new electricity companies on a sound financial footing. The Government's plan is clear, flexible and pragmatic. It ensures that the Province's credit rating is protected, and that electricity consumers in Ontario pay the lowest possible prices for their electricity.

The following table sets out the proposed legislation and implementation schedule for electricity sector restructuring.