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Subject: **DCC123 Comments on OEB File EB-2007-0772**

1 Introduction

Durham Condominium Corporation No. 123 (DCC 123) is a 12-storey condominium building located in Whitby, Ontario. Whitby Hydro is our LDC, and we have a master meter provided by Whitby Hydro. Another condominium, not yet registered, has recently been constructed on lands adjacent to DCC 123. Due to history, circumstance, and agreements in place, the new condominium does not obtain electricity directly from Whitby Hydro. Instead, DCC 123 conveys electricity to the new condominium.

In January of 2007 the developer of the new condominium, known as Yacht Club Condominiums (YCC) expressed their intention to have a smart sub-meter provider install smart sub-meters in YCC. At that time I began an in-depth investigation into smart meters and their use in condominiums. I corresponded with the Ministry of Energy and made a presentation to legal counsel to the Ministry. DCC 123 retained Andrew Roman of Miller Thomson LLP to prepare a legal opinion, and to prepare a letter to the Minister. We raised ten issues of concern with the draft regulation and smart meters in condominiums. As a result of undertaking this investigation, we were able to convince the developer to not install smart meters at that time. Also, the Ministry made substantial changes to the regulation, which addressed some of our concerns.

It was a great relief to us that O. Reg. 442/07 did not make smart meters in condominiums mandatory, because there are still a number of problems that must be resolved. However, I am mindful of the fact that the board of directors of either condominium may at some point decide to use the services of a smart sub-meter provider.

It is our position that the draft SSM Code needs to be corrected and enhanced to properly regulate smart sub-meters in condominiums.

As DCC 123 does not have a current or pending smart meter installation in its building or in the adjacent condominium, and since O. Reg. 442/07 is now in place, DCC 123 is not retaining Miller Thomson on this matter at this time. Accordingly, I am now submitting comments directly to the OEB on behalf of DCC 123.

2 Use of Phrase "Exempt Distributors"

The use of the phrase "exempt distributors", and its definition in section 1.2.1 of the draft SSM Code, is problematic for a number of reasons. This definition is as follows:

> "exempt distributor" means a distributor as defined under section 56 of the Act who is exempted from various requirements in the Act by Ontario Regulation 161/99—Definitions and Exemptions (made under the Act);

2.1 Permitted Exemptions

It is our understanding that the SSM Code is intended to apply to installations of smart sub-meters in condominiums. However the definition of "exempt distributors", as written, allows for various exemptions. For example, section 4 of O. Reg. 161/99 provides exemptions from clauses 57 (a) and (b) of the Act for certain municipal corporations that own distribution systems. These LDCs would therefore be captured under the SSM Code definition as "exempted from various requirements in the Act", and therefore be considered "exempt distributors". It is doubtful that this is the intention of the SSM Code.

2.2 Classification of Condominiums as Distributors

From section 56 of the OEB Act:

> "distribute", with respect to electricity, means to convey electricity at voltages of 50 kilovolts or less;
>
> "distribution system" means a system for distributing electricity, and includes any structures, equipment or other things used for that purpose;
>
> "distributor" means a person who owns or operates a distribution system;

Does a condominium corporation "distribute" electricity? Is a condominium corporation a "distributor"? These questions are not entirely without doubt. There is no language in the OEB Act specifically pertaining to condominiums; only section 53.17 of the Electricity Act mentions condominiums.

The first question is relatively easy. A condominium corporation does distribute electricity, because it does convey electricity at 50kV or less. However, just because someone distributes electricity as that term is defined in the OEB Act does not mean that it is a "distributor" as that term is defined in the Act.

The first part of the definition of "distribution system" in the OEB Act tells us that a distribution system "means a system for distributing electricity". That is merely circular and unhelpful. There are no further definitions that assist in determining the intended meaning of 'distribution system'.

It appears intentional that there is no link between the meanings of 'distribute' and 'distributor' with respect to electricity. Linkage between 'distribute' and 'distribution' is provided only in the context of 'gas distributor' (means a person who delivers gas to a consumer and "distribute" and "distribution" have corresponding meanings). This linkage is not provided in the context of an electricity 'distributor'.

We have obtained a legal opinion from Mr. Andrew Roman of Miller Thomson LLP (Attachment 'A' below) that concludes that condominium corporations do not own or operate distribution systems and therefore are not distributors as intended by the OEB Act. Therefore, condominium corporations are not subject to the authority of the OEB, and are not in need of any exemption, such as the one provided by O. Reg. 161/99. However, the OEB apparently considers condominium corporations to be distributors, and treats them as such (see section 2.2.1 below). We are not familiar with any decision of the OEB that would explain how it arrived at this conclusion. Clearly, this uncertainty regarding the relationship between the condominium corporation and the OEB must be resolved by a statutory instrument from the Ministry if costly and time-wasting litigation between condominium corporations and the OEB is to be avoided.

2.2.1 The Role of the OEB

We have reviewed the OEB report titled "Compliance Office Quarterly Activity Report 3rd Quarter 2006 – 2007". In section 1, at the bottom of the second page, is the following statement:

- Following an allegation of a customer, the CCO determined that the bill format of a condominium corporation (an unlicenced distributor) was not compliant with regulatory requirements. The CCO advised the company of the requirement to ensure the bill meets the simplification bill and regulated price plan requirements and is awaiting a plan outlining how the company intends to come into compliance.

This statement is worrisome. First, it defines a condominium corporation as an unlicenced distributor. Second, it indicates that the OEB has asserted its jurisdiction over the condominium corporation.

Why does the OEB consider a condominium corporation to be a "distributor"? Review of the OEB "Regulatory Treatment of Sub-metering for Electricity Staff Discussion Paper" EB-2005-0252, April 26, 2005 may shed some light on this. On the first page, the first sentence of the Background section states the following:

> "Under the OEB Act, a distributor is a person who owns or operates a system for conveying electricity at voltages of 50 kilovolts or less." [emphasis added]

A review of the definitions in the Act reveals that this use of the definitions in the Act (see section 2.2 above) is incorrect, and therefore the statement is false. Although a condominium does 'distribute' electricity, it is not necessarily a distributor merely because it conveys electricity at those voltages. However, a statement that properly combines the definitions in the Act in order to describe a distributor is as follows:

> Under the OEB Act, a distributor is a person who owns or operates a system for distributing electricity, and includes any structures, equipment or other things used for that purpose.

This statement is substantially different. Thus, the statement by the OEB, which is written as a basic premise to its discussion paper, is incorrect. If this is an indication of the mindset of the OEB, then this would explain why the OEB is asserting its powers over condominium corporations. The OEB's lack of jurisdiction over condominiums must be clarified and confirmed in the regulations, if not through a legislative amendment.

Instead of asserting its powers over condominium corporations, the OEB should be acting to protect condominium corporations, in the same way that it protects other consumers.

2.3 Proposed Correction

As described above, it is our position that condominiums are not distributors as defined in the OEB Act, and therefore any exemption is irrelevant. Therefore, it is our position that the draft SSM Code as written does not properly apply to smart sub-meters in condominiums.

To solve this problem within the draft SSM Code, we propose that the phrase "exempt distributor", and its definition, be removed in their entirety. Instead, we simply propose in its place the use of the phrase "master consumer", which is defined in section 1.2.1 of the draft SSM Code.

3 Payment of the Master Bill

We note that section 4.4 of the draft SSM Code is very brief. The draft SSM Code contains a significant layer of protection for the end consumer, but none for the condominium corporation or developer that may be responsible for payment of the master bill.

3.1 Customer Relationship

The OEB is accustomed to a top-down customer relationship, which follows the flow of electricity from the generator to the consumer. In the case of condominiums, there is a case where this is backwards.

As described in section 2.2 above, the master consumer does not sell electricity, either to the end consumer or to the smart sub-meter provider. It simply conveys electricity as a matter of necessity.

As described in section 2.2 above, the master consumer is not a distributor and does not have a distribution system. It simply has an electrical installation out of necessity, as one of many parts of the building infrastructure.

In this case the master consumer is a customer of the smart sub-meter provider. Therefore, the OEB must ensure that the SSM Code includes protections for the condominium corporation or developer as a consumer of services provided by the smart sub-meter provider.

Also, keep in mind that a condominium corporation is simply a collective of the same unit owners that will have smart sub-meters installed in their units. The business of the condominium corporation is to operate and maintain the condominium buildings and lands; it is not to sell electricity.

Therefore, with respect to the SSM Code, the master consumer is a customer of the smart sub-meter provider. However, a different set of protections is needed for the condominium corporation or developer than is needed for the end consumer who has a smart sub-meter.

3.2 Payments Made by the Smart Sub-Meter Provider

The OEB must keep in mind that condominium corporations are not-for-profit, and typically do not maintain significant cash on hand. Some concerns that come to mind are as follows:

How quickly must the smart sub-metering provider pay invoices from the master consumer?

What recourse does the master consumer have if the smart sub-metering provider fails to pay its bill(s)? Keep in mind that the master consumer is obligated to continue to pay the LDC, no matter what.

In the event that an end consumer fails to pay its bill, does the smart sub-metering provider have the right to withhold any portion of its payment to the master consumer? Will this be handled differently if the smart sub-metering provider has collected a security deposit from the end consumer?

These questions and others need to be addressed with respect to the relationship between the smart sub-meter provider and the master consumer.

3.3 Conflicting Rate Structures

The rate structure for smart sub-metered individual units is not the same as the rate structures that are available to condominium corporations that are >50kW customers. Condominium corporations may have a master meter that is billed on RPP rates under a multi-unit declaration, or they may have a master meter that is billed on spot market rates.

In a condominium smart meter scenario, where the LDC is responsible for all the unit smart meters, the LDC can calculate the common element consumption and demand, and continue to bill the condominium corporation or developer for the common elements on the same basis as is currently in place. At the same time the LDC can bill the unit owners at smart meter rates.

However, in the event that a smart sub-meter provider is responsible for the unit meters, then there is no way for the condominium corporation to resolve the incompatibility between the rate structure under which it purchases electricity from the LDC, and the rate structure under which electricity is ultimately conveyed to the end consumer.

Accordingly, the OEB must ensure that the master consumer can convey electricity to the smart sub-meter provider, or to an adjacent condominium, under the same rate structure that the master consumer purchases the electricity from the LDC. This is required so that the master consumer can easily and reasonably meet the requirement that it is conveying electricity without profit. How the rate structure incompatibility is to be resolved by the smart sub-meter provider, which is between the condominium corporation and the end consumer, is another problem altogether.

3.4 Consumption and Demand

Since the master consumer is usually a >50kW customer, the master bill will usually contain both consumption-based and demand-based charges. The master consumer requires the ability to determine the apportionment of both consumption and demand between the common elements and the smart sub-meters, the totals of which are registered by the master meter. Accordingly, the OEB must ensure that a mechanism is in place to have smart sub-meter providers properly account for the sum of the consumption and the sum of the demand registered by the smart meters under its jurisdiction in each condominium.

There must be recourse in the event that the smart sub-meter provider fails to report, or under-reports, either consumption or demand to the master consumer. Also, these sums must be reported on a timely basis, so that the master consumer can calculate its invoices to the smart sub-meter provider.

3.4.1 Apportionment of Consumption

The master consumer needs to be able to apportion the consumption-based electricity and regulatory charges that appear on the master bill, between the common elements and the smart sub-meters.

Consumption is relatively easy to register and apportion between the common elements and the smart sub-meters. The common elements consumption is simply the consumption registered on the master meter, less the sum of the consumption registered on the smart sub-meters as reported by the smart sub-meter provider.

However, there is one uncertainty that must be resolved. In the event that the master consumer is being billed as a >50kW customer under the RPP, and is using a multi-unit residential premises declaration, then the electricity charge may be split into two tiers. For example, in the summer of 2007 the electricity charge was 5.3¢/kWh for the first 600kWh per unit per month, and then 6.2¢/kWh thereafter. How does a master consumer under this master billing arrangement, using the services of a smart sub-meter provider, apportion these rates between the common elements and the smart-sub meters? Should the lower rate first be allocated to the smart-sub meter consumption? Should the lower rate first be allocated to the common elements consumption? Or should the lower rate be applied based on some proportion between the consumption of both the common elements and the smart sub-meters?

3.4.2 Apportionment of Demand

The master consumer needs to be able to apportion the demand-based delivery charge and transformer allowance credit that appear on the master bill, between the common elements and the smart sub-meters.

Apportionment of demand is a non-trivial issue. How will the monthly demand peak be properly apportioned? The master consumer will need to know exactly when the master meter demand peak occurred during the master billing cycle period (the "peak time"), as reported by the LDC. Then, the master consumer will need to know the sum of the demand of the smart sub-meters at the peak time, as reported by the smart sub-meter provider. The master consumer can then subtract the total smart sub-meter demand from the master meter registered demand, in order to determine the common element demand at the peak time.

However, if the master consumer is billed based on fifteen-minute demand, and the smart meters report only hourly demand, then there must be a mechanism provided to resolve the differing demand register periods. Will an adjustment factor be used, and if so who will set this factor? Will the LDC convert to clock hour demand readings, to synchronize with the smart meter demand readings?

Once all of the above is done the master consumer will then, and only then, have the data needed to apportion the master meter demand-based charges between the smart sub-meters and the common elements.

For the rationale described above, the bill format provided by the LDC must now be changed. The bill from the LDC to the master consumer must now include the exact date and time of the start of the fifteen-minute (or one-hour) demand peak for that billing period.

These are non-trivial issues that must be regulated, and not left for the master consumer to resolve.

3.5 Assistance for Condominium Directors

As a general comment, it is not realistic for the OEB (or anyone else) to expect volunteer part-time condominium directors to understand the complexities of the legislation and regulations pertaining to smart meters and smart sub-meters. The OEB must remain mindful of this, and provide substantial protection, guidance and education to condominium corporations.

4 Specific Recommended Changes to the SSM Code

These changes to the SSM Code are in addition to the extra protections that should be added for master consumers (as discussed above), which will have to be drafted by the OEB.

In 1.1.1:

The purpose of this Smart Sub-Metering Code (the "Code") is to set out the minimum conditions and standards that a licensed smart sub-metering provider must meet when providing smart sub-metering services on behalf of master consumers ~~exempt distributors~~.

In 1.2.1:

"electrical installation" means the installation of any wiring in or upon any land, building or premises from the point or points where electric power or energy can be supplied from any source to the point or points where such power or energy can be used in or on the land, building or premises by any electrical equipment, including the connection of any such wiring with any of that equipment, and any part of the wiring, and the maintenance, alteration, extension and repair of such wiring.

[Note: This definition of "electrical installation" is copied from O. Reg. 570/05 made under the Electricity Act, and this definition is similar to that contained in the Canadian Electrical Code.]

~~"exempt distributor" means a distributor as defined under section 56 of the Act who is exempted from various requirements in the Act by Ontario Regulation 161/99 – Definitions and Exemptions (made under the Act);~~

"master consumer" means the condominium corporation or the developer for the prescribed location being served by the licensed distributor, or being served by an adjacent condominium corporation or developer;

[Note: The above definition amendment is to include phased condominiums, like our site, where electricity is conveyed to one condominium by another, where only one condominium is served by the LDC.]

In 3.1.3:

Every contract a smart sub-metering provider has with a consumer~~, exempt distributor, or developer,~~ or master consumer shall include the following information:

In 3.4.3:

Prior to the termination of a contract, the smart sub-metering provider shall ensure that all relevant consumer information including, but not limited to, information regarding security deposits and consumption, is properly transferred to the ~~exempt distributor~~ master consumer to allow for the continuous billing of consumers.

In 4.2.9:

(a) adverse effect on the reliability and safety of the smart sub-metering system or the ~~exempt distributor's distribution system~~ master consumer's electrical installation;

(b) imposition of an unsafe worker situation beyond normal risks inherent in the operation of the smart sub-metering system or the ~~exempt distributor's distribution system~~ master consumer's electrical installation;

(c) a material decrease in the efficiency of the smart sub-metering system or the ~~exempt distributor's distribution system~~ master consumer's electrical installation;

(g) the consumer owes the ~~exempt distributor~~ master consumer money for smart sub-metering services or for a security deposit. The smart sub-metering provider shall give the consumer a reasonable opportunity to provide the security deposit consistent with section 4.1.11.

5 Conclusion

The SSM Code must be drafted with the consideration that condominium corporations are customers of the smart meter and smart-sub meter providers, not distributors of electricity. It is our view that the OEB should be regulating to protect condominium corporations as consumers.

Further, it is important to realize that, as a general rule, directors of condominiums are lay-people with little knowledge of this subject, and it is unrealistic to expect anything different. To make matters worse, many property management companies will have only a limited knowledge of the complexities of smart meters and smart sub-meters, and will

be unable to provide proper advice and guidance to condominium directors. Please be mindful of this, to avoid a huge set of headaches in the condominium sector in Ontario.

Sincerely,

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Attachment 'A'

Legal opinion from Andrew Roman of Miller Thomson LLP to Greg Neff of DCC 123, dated February 16, 2007.

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February 16, 2007

Email and Mail

Mr. Greg Neff
Vice President
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Dear Greg:

Re: Regulatory Issues Arising from Conveying Electricity to the New Adjacent Condominium Corporation

Further to our telephone conversation of January 24, 2007, this will provide our legal opinion on the electricity regulatory issues arising from the requirement that DCC 123 convey electricity to an adjacent condominium corporation (which we will refer to as Phase II).

The separate issue of the forthcoming requirement of Phase II to purchase electricity on a time-of-use basis, with the appropriate metering, while DCC 123 wishes to remain on the monthly average billing system (the Regulated Price Plan) will not be covered in this opinion as the new law governing this issue has not yet been released to the public, and it would be merely speculative to try to guess the wording of these regulations, or the exemptions from the application of these regulations that may be permitted.

The issue that is the subject of this opinion arises because the Ontario Energy Board ("OEB") has complex and onerous licensing and other regulatory requirements that apply to every distributor of electricity in Ontario. If DCC 123 is a distributor of electricity, then it will be subject to all of these requirements – unless it can find an exemption somewhere in the current law, or persuade the Province to amend the law so as to grant such an exemption.

THE ISSUE AS ORIGINALLY FRAMED BY THE MINISTER'S POLICY ADVISOR

When you spoke with a policy advisor to the Minister, you were told that the urgent task for DCC 123 was to obtain an amendment that would grant an exemption from Ontario Regulation 161/99. Clause 4.0.1 (1) (a) 1 of that regulation states that an exemption from the OEB's licensing requirements for electricity distributors is available for **a building** (i.e., one building)

that forms part of **a property** (i.e., one property) as defined in the Condominium Act. Phase II would be in a separate second building, on a separate second property, and hence, would not be covered by this exemption. Therefore, DCC 123 will need to obtain a special new exemption in this regulation to cover your special, and perhaps unique situation.

REFRAMING THE ISSUE

In our opinion, the issue as originally framed by the policy advisor is much too narrow, and is based on incorrect assumptions, as well as errors of law and logic. The issue needs to be reframed, and then the law should be considered within the new framework.

The starting point should always be a statute, not a regulation. It would be unnecessary to consider whether one needs a regulation to provide exemption from a statute without first determining whether one is covered by the statute. If DCC 123 is not covered by the statute which triggers the OEB's jurisdiction over a distributor of electricity, the *Ontario Energy Board Act* (the "OEB Act"), then it follows that no exemption would be necessary. In that case, all of Ontario Regulation 161/99 would be irrelevant.

Alternatively, if DCC 123 is covered by the OEB Act, and does need an exemption, then we should canvass every possible exemption under any statute or regulation, rather than merely focusing immediately upon Clause 4.0.1 (1) (a) 1, as if that was the only potentially applicable provision.

In accordance with our telephone conversation and subsequent email exchanges, the discussion below is divided into two general categories, Ontario law and Federal Law.

A. Ontario Law (The OEB Act)

The OEB Act gives the OEB jurisdiction over several different kinds of participants in the electricity market, but not specifically over condominium corporations. A condominium corporation would only be covered by the Act if it was a "distributor" of electricity within the meaning of that word in the context of the OEB Act. Accordingly, we will have to examine carefully the various definitions in section 1 of the Act. Before doing so, however, it is important to recognize the difference between certain colloquial expressions used in ordinary conversation and the precise statutory language of the OEB Act.

Ordinary Meanings and Statutory Meanings of Words

In ordinary conversation, we often use words or expressions like "selling electricity" or "supplying electricity" or "providing electricity" or "distributing electricity" or "conveying electricity" as if they meant more or less the same thing. However, it would be a mistake to approach read statutes and regulations in the same casual manner. For example, it is quite possible for a local distribution company ("LDC") such as Whitby Hydro to distribute electricity to an end-user in a statutory sense, without also selling it. The end-user might be purchasing it from a retailer such as Direct Energy, while only purchasing the transportation

component, i.e. the distribution, from the LDC. As we shall see, it is also possible to be conveying electricity without either selling it or distributing it.

In addition to the important distinction between colloquial and statutory use of language, there is an important distinction between reading statutes literally and interpreting statutes properly.

The Proper Approach to Statutory Interpretation

A part of a statute or a regulation does not exist in a vacuum, and cannot be interpreted in isolation. It must be interpreted in the context of other, related statutes, and in its proper factual setting.

In an important recent decision of the Supreme Court of Canada[1] setting out how statutes are to be interpreted, the Court held:

> 48 This Court has stated on numerous occasions that the grammatical and ordinary sense of a section is not determinative and does not constitute the end of the inquiry. The Court is obliged to consider the total context of the provisions to be interpreted, no matter how plain the disposition may seem upon initial reading (see *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, 2002 SCC 3, at para. 34; Sullivan, at pp. 20-21). I will therefore proceed to examine the purpose and scheme of the legislation, the legislative intent and the relevant legal norms.
>
> .....
>
> 49 The provisions at issue are found in statutes which are themselves components of a larger statutory scheme which cannot be ignored:
>
> > As the product of a rational and logical legislature, the statute is considered to form a system. Every component contributes to the meaning as a whole, and the whole gives meaning to its parts: "each legal provision should be considered in relation to other provisions, as parts of a whole" . . . .
> >
> > (P.-A. Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 308)
>
> As in any statutory interpretation exercise, when determining the powers of an administrative body, courts need to examine the context that colours the words and the legislative scheme. The ultimate goal is to discover the clear intent of the legislature and the true purpose of the statute while preserving the harmony, coherence and consistency of the legislative scheme (*Bell ExpressVu*, at para. 27 .... "[S]tatutory interpretation is the art of finding the legislative spirit embodied in enactments": *Bristol-Myers Squibb Co.*, at para. 102.

Applying these principles, we will consider the proper interpretation of various sections of the OEB Act and Regulations in the context of the entire Act and the purpose of these provisions.

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[1] *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006] 1 S.C.R. 140

The OEB Act

Sections 56 and 57: What is a "distribution system"

Section 56 of the OEB Act contains the statutory definitions of "distribute", "distribution system" and "distributor":

> "distribute", with respect to electricity, means to convey electricity at voltages of 50 kilovolts or less;
>
> "distribution system" means a system for distributing electricity, and includes any structures, equipment or other things used for that purpose;
>
> "distributor" means a person who owns or operates a distribution system;

These definitions must be read together with section 57, which states that no person shall own or operate a distribution system unless they are licensed by the OEB to do so.

Thus, the key definition is "distribution system". That is key because the owner or operator of such a system normally must be licensed by the OEB. The owner or operator of a distribution system is defined as a "distributor". DCC 123 will not be a "distributor" unless it owns or operates a distribution system.

There is no definition of either "distribution" or "system". There are, however, definitions of "distribute" and "distributor" which are somewhat helpful. To "distribute" electricity means to convey electricity at voltages of 50 kilovolts or less. As it is unlikely that DCC 123 would be conveying electricity to Phase II at higher voltages, it would be reasonable to assume that DCC 123 will "distribute" electricity. Surprisingly, however, it is possible to distribute electricity without being a "distributor" of electricity under the Act. That is because even though DCC 123 will distribute electricity, it does not necessarily follow that DCC 123 will be a distributor of electricity in the statutory sense, i.e., will be a person who owns or operates a distribution system.

There are two distinct characteristics, both of which must be met in order to be a distribution system: (i) it must be a system for distributing electricity; and (ii) the system includes any structures equipment or other things used for that purpose. The word "and" between these two characteristics a clear indicator that these are two distinct characteristics, and that both of these must be met to fall within the definition.

If the Legislature had intended the definition to require only one of the two single characteristics, it would have used the word "or" rather than "and". If the Legislature had intended the second characteristic to be sufficient to be a distribution system, the definition of "distribution system" would have been reduced to a single characteristic, i.e., worded as: "any structures, equipment or other things used to distribute electricity".

The word "includes" in a statute is normally interpreted as including, but not being limited to, the list of words that follows it. Thus, the purpose of all of the words after the "and" is to

indicate that once someone has created a system for distributing electricity, any structures, equipment or other things used for that purpose constitute a part of that system. This is intended to clarify that the definition does not end at some arbitrary physical point, but also extends to any structures, equipment or other things used to convey electricity. Looked at logically, all distribution systems include all structures, equipment or other things used within that system, **but** not all structures, equipment or other things used to convey electricity are part of a distribution system.

It follows that if there is no real "system" for distributing electricity, then it does not matter whether the person owns "structures equipment or other things" that convey electricity, because they cannot be part of a distribution system that does not exist. Read in this way, unless the "structures equipment or other things" that convey electricity are part of a "system", then the owner or operator of those facilities is not a distributor in the statutory sense and is not subject to the jurisdiction of the OEB governing distributors. The condominium corporation that you mentioned that was subjected to a requirement by the OEB to revise its bills to comply with a regulation made under the OEB Act may not have realized that those regulations apply only to distributors, and may not have realized that it was not a distributor.

Merely because DCC 123 will have an electricity line (and other ancillary equipment) that conveys electricity to Phase II does not mean that that line constitutes, or is a part of a "system" for distributing electricity.

While every distribution system includes structures, equipment or other things used for distributing electricity, it would be a fallacy[2] to assume that the reverse is also the case, and that all structures and equipment or other things used to distribute electricity constitute a distribution system. There must be a reason why the OEB Act distinguishes between the activity of distribution (i.e. conveying electricity) and the status of being a distributor. There must be a reason why subsection 57 (a) does not say that no person, unless licensed to do so, shall distribute electricity, but rather, requires only those persons who are "distributors", (i.e., persons who own or operate a "distribution system") to be licensed. This strongly implies a legislative intention to permit persons like DCC 123 to distribute (i.e. convey) electricity, as long as they are not a "distributor" of electricity in the statutory sense of owning or operating a distribution system.

Looking at the relevant sections of the OEB Act purposively, the central purpose of the legislation is to impose upon a certain subset of corporations that convey electricity (a) certain statutory requirements and (b) subjection to the regulatory regime of the OEB. Both of these are imposed for the purpose of protecting consumers from monopoly suppliers who would have an incentive to overcharge consumers in order to maximize their own incomes.

Does DCC own or operate a distribution system? We would first consider the literal words, and then interpret these contextually and purposively. Regrettably, however, a literal reading of the

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[2] For example, it is correct to say that every resident of Toronto is a resident of Ontario, but it would be a fallacy to assume that therefore, every resident of Ontario is also a resident of Toronto.

definitions in the Act are unhelpful. The Act contains no definition of the single word, "system" applicable in this context. We reviewed numerous uses of the isolated word "system", where the word "system" has been judicially defined in other cases, but none of these was sufficiently analogous to be helpful. The statutory definition of the expression "distribution system" as "a system for distributing electricity" is merely circular. Therefore, we must arrive at the intended meaning of the expression more indirectly, by attempting to deduce the legislative purpose in a reasonable manner. In doing so, it is usually helpful to consider other sections of the Act to provide context for the proper interpretation of the expression "distribution system".

It would be a mistake to assume that because the second characteristic of a distribution system mentions physical structures, that the first must also be physical. Distributors in Ontario have a number of different commercial, financial and legal obligations. For example, distributors must register with the Independent Electricity System Operator and provide prudentials in the event of non-payment for the electricity they purchase to resell to their customers[3]. They must also be the default sellers of electricity to any and all consumers who do not wish to purchase electricity from other vendors[4]. They must keep all of the books and records used for distribution separate from books and records used for any of their other permitted activities, to permit easy auditing of their monopoly and non-monopoly activities. Distributors cannot charge for the distribution of electricity or for providing default supply of electricity except in accordance with an order of the Board, which is not bound by the terms of any contract[5]. They cannot construct a generation facility in Ontario without prior notice to, and approval from the

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[3] That is because distributors convey to the numerous consumers in their respective cities electricity with a value many times that of their own charges, so that the insolvency of a distributor could have significant repercussions for generators. This is not the type or scale of business engaged in by condominium corporations.

[4] Compelling every distributor to sell electricity at cost to every consumer connected to its system has two purposes: it drives down the price that any independent seller of electricity can charge to consumers, and it prevents distributors from earning any income on the re-sale to consumers of electricity they purchase from the grid. (Although a few LDCs generate small quantities of electricity on their own, this electricity is treated the same as electricity purchased from the grid.) If the unit holders of a condominium corporation voted unanimously to charge a 5% markup on electricity purchased from the grid and to use that money for some agreed common purpose, there would be no reason why they should not be permitted to do so, as this would not be an abuse of monopoly power by two arm's length entities with conflicting interests. However, such a markup would be unlawful if the Legislature intended to capture such corporations within the definition of "distributor".

[5] Again, to protect consumers from the abuse of monopoly power, the OEB has full control over all charges of distributors to consumers. Consumers have no voice in what distributors charge them, which is the entire raison d'être of imposing this complex web of statutory and regulatory requirements. Unit holders in condominiums determine through their votes what they will charge themselves. As subsection 5 (1) of the Condominium Act states, "A corporation created or continued under this Act is a corporation without share capital whose members are the owners." Therefore, the members of DCC 123 are really conveying electricity to themselves. The members of Phase II will not be the same persons, but will still have equivalent and analogous rights arising from an easement. By contrast, the customers of a distributor are not its owners.

OEB[6]. And they cannot engage in any business other than electricity distribution except through an affiliate[7].

If it is reasonable to expect a corporation that conveys electricity to be able to carry out certain business activities and to fulfill certain legal obligations required by statute, and to be regulated by the OEB to protect consumers from abuse of monopoly power, then that corporation was probably intended by the Legislature to be regulated as a distributor. On the other hand, if the corporation is not exclusively (or at all) in the business of selling and distributing electricity, and cannot reasonably be expected to engage in the same activities and have the same legal duties, and there is no material risk of abuse of monopoly power to the detriment of consumers, then the corporation was probably not intended by the Legislature to be regulated as a distributor.

The Purpose of Licensing and Regulating Distribution Systems

The Legislature regulates these distribution businesses because (i) they are electricity utility monopolies in their respective service areas and (ii) they have the economic incentive to use their monopoly power to enrich their shareholders at the expense of their customers. While it is true that only the condominium corporation has lines that go to each unit, and with DCC 123, has apparatus to supply the common areas within Phase II, and Phase II's unit holders, DCC 123 has neither the economic incentive nor the legal means to abuse that monopoly power. With or without Phase II, DCC 123 is analogous to a co-operative in that it is owned and controlled by its members and, with electricity, controlled by its co-operative, cost-sharing relationship with Phase II. DCC 123 is not in the business of selling or reselling, at a potentially unlimited profit, electricity to either its own unit holders or to those of Phase II. Therefore, there would be no reason for it to be regulated by the OEB, and to force the members of both condominiums to bear the very costly regulatory burden arising from being subject to OEB jurisdiction as a distributor. That would add nothing to consumer protection, but would add greatly to the unit holders' costs.

The typical distribution system is an LDC such as Whitby Hydro. Prior to the passage of the OEB Act, these entities were usually called either PUCs (Public Utility Commissions) MEUs

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[6] Because generation is a competitive activity while distribution is a monopoly, it is essential to prevent a distributor from using revenues from monopoly customers to subsidize its competitive businesses. This is safeguarded by requiring complete structural and accounting separation. If DCC 123 wanted to purchase a generator to supply itself and Phase II there would be no danger that cross-subsidization would occur, to the detriment of consumers, with consumers having no remedy other than the OEB. In the unlikely event that DCC 123 decided to cross-subsidize by charging more than cost for conveying the electricity and less than cost for generation, it would be by means of a democratic vote, either by the condominium's board or by the unit holders, not by abuse of monopoly power.

[7] DCC 123 would have to have two corporations, one to distribute electricity and another, affiliated corporation to provide its regular services to unit holders. Subsection 5 (3) of the Condominium Act states that "The Corporations Act does not apply to the [condominium] corporation." As new corporations can only be incorporated through the Corporations Act, DCC 123 is prohibited by statute from creating an affiliate that would comply with this requirement of subsection 71 (1) of the OEB Act. The Legislature should be presumed not to have enacted two contradictory laws.

(Municipal Electric Utilities). These entities had a monopoly on the sale of electricity to customers within their service areas, and were essentially unregulated except for some degree of control by what was then called Ontario Hydro. When the new legislation was enacted, the OEB was given the power to licence and regulate all of these entities, who were required to incorporate themselves under the Ontario Business Corporations Act, and thus became called LDCs. At the same time, in their monopoly on the sale of electricity was terminated, permitting competitors to sell or "supply" electricity to end-users. However, their natural monopoly on the delivery of electricity continued, as there was no alternative.s

Because the LDCs were the only entities that had a line to everyone's residence or business, the legislation created an obligation on the LDCs to deliver or "distribute" electricity, regardless of whether the LDC was the vendor and the distributor of the electricity or merely the distributor. In other words, the Legislature created a new distinction between selling electricity and distributing it. Consumers have a choice of vendors, but of necessity, have no choice of distributors. LDCs have retained a monopoly on distribution. That is why it was deemed necessary to regulate their rates and their service quality, using principles of public utilities regulation that have been used universally across Canada and US for well over a century.

In addition, the new legislation was concerned that competition in the supply of electricity might not occur at all in some parts of the province, and might be quite limited, at least early in the life of the new law, across the province. For that reason, it created an obligation on the part of every distributor of electricity to be the default supplier of electricity. This obligation meant that a consumer who did not choose to purchase electricity from a competitive supplier could continue indefinitely to purchase electricity from the LDC. To ensure that LDCs did not take advantage of this situation, this default supply was required to be provided without any mark-up beyond what was strictly necessary to recover the LDC's reasonable costs of purchasing and distributing the electricity. In short, the LDC was to be a mere conduit between the generator and the end-user.

This legal obligation of LDCs is found in section 29 of a related statute, the Electricity Act, which states in subsection (1):

> A distributor shall sell electricity to every person connected to the distributor's distribution system... [unless the customer specifically notifies the distributor of an intention to purchase electricity from another supplier]

There is a link between this provision of the Electricity Act and the OEB Act, in subsection 70(9) of the OEB Act. That subsection states that the licence of a distributor must specify the manner in which the distributor will comply with section 29 of the Electricity Act. This means that every distributor must comply with the requirement to sell electricity to every person connected to that distributor's distribution system.

It seems clear from these duties imposed upon distributors that the statutory concept of a distributor and statutory concept of an LDC are virtually identical. Why, then, was it necessary to define distributors and distribution systems? Why did not the legislation simply define LDCs and give them these duties?

The answer is that there are a few narrow exceptions. For example, when Ontario Hydro was broken up into various components, the "wires" part of it, now called Hydro One, has both distribution functions to retail customers in rural areas and high-voltage transmission functions. The statutory definitions of transmission and distribution are different, with different sets of responsibilities. As well, in certain small areas of the province, there are distribution entities that are privately owned, such as the poles and lines of certain paper companies and other large industrial corporations operating in company towns where the company supplies some or all of the electricity to the town, and there is no LDC. The intention was to protect consumers in these towns (from over-pricing or low-quality service) to the same degree as the legislation protects all other consumers in Ontario. Although we cannot say that only LDCs are distributors, we can say that all distributors (most of whom are LDCs or Hydro One) were intended to be licensed and regulated to achieve the two goals of preventing abuse of monopoly power[8] and being the default supplier of electricity to end-users. It is highly doubtful that the Legislature intended these obligations to apply to a condominium corporation that had a single wire under or over the fence to the adjacent condo corporation, but is not selling electricity to the public, or even to that adjacent corporation.

The concept of "selling" electricity is somewhat difficult, given that electricity is not a tangible commodity. It is an invisible current which passes through an electrical circuit of wires. Nevertheless, some of the basic legal concepts of purchase and sale do apply. The key question is whether DCC 123 will merely be conveying electricity to Phase II or will actually be selling it to Phase II. Who is the vendor and who is the purchaser? How does title to the electricity pass from one to the other?

As we understand the proposed arrangements between the two condominium corporations, electricity will not be purchased and resold. Rather, there will be a proportional allocation of the total bill incurred by both corporations. Under these circumstances, the electricity is sold only once, from Whitby Hydro to DCC 123. DCC 123 is the sole customer of Whitby Hydro on that property. DCC 123 does not then turn around and re-sell electricity to Phase II. Instead, the two corporations jointly contribute on some mutually agreed basis to pay the bill sent by Whitby Hydro to DCC 123. Presently, DCC 123 asks its unitholders to contribute a proportionate amount to pay the bill sent by Whitby Hydro, and the new arrangement is effectively just an expansion of the number of participants in that arrangement. Although the matter is not free from doubt, as there are no decided cases dealing with this specific issue, we believe that the relationship between the two corporations is unlikely to be held to constitute a sale of electricity from DCC 123 to Phase II. For that reason, the relationship is merely one of conveying electricity, not selling it. DCC 123 does not and practically cannot comply with section 29 of the Electricity Act. DCC 123 is in the "business" of providing a condominium residence to its unit holders. It is not in the business of distributing electricity.

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[8] This concept of preventing abuse of monopoly power extends to the obligation to provide an electricity connection in a timely manner and at a reasonable cost to any person located in the service area of the distributor. This obligation to provide universal service on demand is not found in the legislation but in the codes of conduct drafted and enacted by the OEB itself. However, this is an obligation in public utility law which is found in virtually every jurisdiction in North America.

Furthermore, although DCC 123 does have some modest equipment necessary to convey this electricity to Phase II, it is doubtful that this would be considered to be a real "distribution system". A real distribution system would charge for the electricity it sold, plus levy a separate charge for the distribution of electricity. DCC 123 does not intend to charge Phase II for any electricity it is selling because it is not selling any electricity, and for any distribution services provided because it is not providing any such service. And, of even greater importance, DCC 123 is not a profit-maximizing shareholder-owned business, it is a condominium corporation owned and managed by its members, the unit holders. As such, DCC 123 has neither the economic incentive nor the legal capacity to use its monopoly power to enrich anyone at the expense of its customers, who are also its owners. Phase II unit holders will be treated exactly the same way as DCC's own unit holders, subject to any legal requirements for metering. In these circumstances, there would be no reason for the Legislature to wish to regulate DCC 123 through the OEB, and the Legislature has not used any language that would indicate such a wish. Again, although the question has not been litigated and there are no judicial decisions on point, for all of these reasons, DCC 123 would have a strong argument that it is not a distributor, does not operate a distribution system, and therefore, is not subject to the distributor provisions of the OEB Act or the Electricity Act.

If DCC 123 is not subject to the OEB, there is no reason why it needs to look to the regulations for an exemption. It is not necessary to be exempt from legislation under which one is not covered. Nevertheless, in case our view that the proposed arrangement between DCC 123 and Phase II would not be covered by the legislation is incorrect, we now consider the regulations.

Ontario Regulation 161/99 Made Under the OEB Act

Section 4.0.1 (1) of this regulation stipulates an exemption from the principal regulatory provisions of the OEB Act governing distributors[9], for a distributor who distributes electricity for a price no greater than that required to recover all reasonable costs under certain circumstances. Although your attention was initially focused on clause (a), which is a complex clause that appears at first blush to be relevant, but perhaps not applicable, that is not the only clause in that subsection.

Of greater importance is clause (c), which states:

> 1. The distributor is not incorporated under section 48[10] or 142[11] of the Electricity Act, 1998.
>
> 2. The distributor is not incorporated under the Business Corporations Act or the Canada Business Corporations Act as an electricity company or an electricity distribution company and was not so incorporated as of January 1, 2002.
>
> 3. The distributor is not Cornwall Street Railway Light and Power Company Limited, Great Lakes Power Limited, Granite Power Distribution Corporation or Canadian Niagara Power;...

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[9] These are clause 57(a) and sections 71, 72, 78, 80 and 86.

[10] This is a reference to Hydro One.

[11] Every LDC is incorporated under this section except for Cornwall.

As we understand the situation of DCC 123, your corporation would comply with all three of these conditions. If that is correct, then clause (c) of this subsection of the regulation would be a specific exemption applicable to DCC 123, and you need to look no further at any other subsections. Of course, if DCC 123 is not a distributor at all then this clause, like the entire regulation, would be inapplicable to DCC 123 as the regulation only exempts, and only needs to exempt, distributors.

Since every condominium corporation is incorporated or continued under the Condominium Act, no condominium corporation is incorporated under the Business Corporations Act or the Canada Business Corporations Act. Therefore, every condominium corporation incorporated on or before January 1, 2002 will be exempted under this clause of the regulation. It follows that clause (a) of subsection 4.0.1 (1), discussed below, is redundant for pre-January 1, 2002 condominium corporations already exempted under clause (c).

This confusion between the regulation and the definition of "distribution system" in the Act, reveals an important (if not often mentioned) feature of regulations. Regulations are often drafted in piecemeal fashion, at different times, by different people, without coordinating the various parts to create a consistent whole. Many regulations are made from an abundance of caution, and may be redundant. Some are even invalid because they go beyond the authority granted in the statute. Regulations are sometimes drafted by Ministry officials who are not lawyers, or, if they are lawyers, are not experienced in legislative drafting. For these reasons, lawyers who are experienced in interpreting statutes and regulations do not give the regulations the same degree of weight as the statute itself.

Similarly, Ministry officials or regulators such as the staff of the OEB will frequently interpret statutes, regulations and their own codes or guidelines in a certain manner, simply because there has never been any external scrutiny of their interpretation. When subjected to such scrutiny, these interpretations may have to change. For this reason, we would encourage DCC 123 to continue its dialogue with Ministry officials and with the OEB, rather than reading the compliance bulletin as if it was a correct statement of the law, engraved on tablets of stone.

Although it may be unnecessary to do so, we turn now to the more complex clause (a), including item 1 on the list of items under that clause. Clause (a) and item 1 state:

> (a) with respect to a distribution system owned or operated by the distributor that is entirely located on land on which **one or more** of the following types of building or facilities is also located:
>
> 1. A building that forms part of a property as defined in the Condominium Act, 1998[12].

[12] "property" means the land, including the buildings on it, and interests appurtenant to the land, as the land and interests are described in the description and includes all land and interests appurtenant to land that are added to the common elements

Because "property" is defined (see footnote 5, below) as land plus buildings [plural] on it, one or more condo buildings forming part of a property in a registered description would clearly be exempt under this Regulation. What about a second, adjacent building that is in a different description, i.e. as a separate condo corporation? The bolded and underlined words "one or more" mean that if the wiring is entirely located on land on which more than one of the following types of buildings is located, that is enough to benefit from this subsection. Because the two condominium corporations will be entirely located on land on which one or more registered condominium buildings are located, that may be enough to qualify under this subsection.

Interestingly, if the two buildings were not on adjacent land, there would have to be some vacant or developed land (not owned by either condo corporation) between them, and the electricity would have to be conveyed across that land. If that was the case, the distribution system would not be entirely located on land on which one or more of these types of buildings was located.

This interpretation also only works because there is a gap in the wording of this subsection of the Regulation. It does not say – although readers might tend to assume – that if more than one condo building is entirely located "on land", that that must be a single piece of land, a single property, or must have the same owner. The subsection may or may not have intended that, but it does not, literally, say that. Therefore, as worded, a dozen separate pieces of land owned by a dozen different condominium corporations, all in a row, could have a common distribution system and could benefit from this subsection.

Once again, the interpretation of this part of this regulation has not been judicially determined, as this particular issue has not yet arisen in the courts. For that reason, we cannot be certain as to how it would be interpreted. Nevertheless, on what appears to be one reasonable interpretation, set out above, DCC 123 would be able to use this item under clause (a) as an exemption.

B. Federal Law (The Electricity and Gas Inspection Act)

Federal law does not regulate provincial distributors of electricity as such, but the Electricity and Gas Inspection Act ("EGIA") does have certain provisions which might be thought to be applicable to DCC 123. The preamble of this statute sets out its purpose as being "An Act relating to the inspection of electric and gas meters and supplies". Its function, therefore, is to cover a range of activities relating to the calibration and inspection of meters, and the resolution of disputes regarding metering.

The EGIA provides the following definitions of a contractor and a purchaser:

> "contractor" means any person or body that has undertaken to supply electricity or gas to any purchaser;
>
> "purchaser" means any person to whom electricity or gas is sold;

DCC 123 is a person to whom electricity (and gas) is sold. Therefore, DCC 123 is clearly a purchaser. Is it also a contractor in the statutory sense? Let us consider both the literal wording and the intention of the legislation.

On the literal wording, whether someone is a contractor depends on whether it has undertaken to "supply" electricity or gas to any "purchaser". The word "supply" is not the same as the word "sell". Thus, it is possible to supply electricity to someone without being the vendor of that electricity. Reading these two above definitions together, one cannot be a contractor without undertaking to supply electricity to a person to whom electricity is sold, although it does not necessarily follow that it must be sold to the purchaser by the contractor rather than by a third party.

Because Phase II will not be directly connected to Whitby Hydro but will only be connected through DCC 123, reading the two above definitions in isolation, it would appear that DCC 123 is a contractor because it will supply electricity (and gas) to Phase II, a purchaser of electricity from Whitby Hydro. However, it is also arguable that there is only one purchaser of electricity from Whitby Hydro, which is DCC 123, as that is the only entity that has a contractual relationship with Whitby Hydro. Thus, there are not two purchasers, DCC 123 and Phase II, but only one purchaser, DCC 123. For that reason, Phase II is not, itself, a purchaser of electricity or gas. Although DCC 123 has undertaken to supply electricity and gas to Phase II, because Phase II is not a purchaser, but merely a user of electricity purchased by DCC 123, the definition of "contractor" is not met. In other words, where there is no purchaser in a statutory sense, there can be no contractor in a statutory sense.

As a result of the literal interpretation, the contractor would be Whitby Hydro and a purchaser would be DCC 123.

Turning now to a purposive approach, we need to consider some of the specific provisions of the EGIA, to see whether it would have been the Parliamentary intention to include regulation of condominium corporations and of the particular situation in this case Section 6 provides a requirement for the registration of contractors, and then requires contractors to adhere to the various provisions of the legislation.

> 6. (1) The director shall maintain, in accordance with the regulations, a register for the registration of contractors.
>
> (2) No contractor shall sell electricity or gas on the basis of measurement unless he holds a certificate of registration issued under the authority of this subsection in respect of the supply of electricity or gas, as the case may be.

Note that subsection (2) uses the word "sell". This recognizes that certain contractors such as electric or gas utilities actively sell electricity, as well as merely supplying or conveying it to some of their customers. Since DCC 123 has no intention of selling electricity or gas to Phase II, but merely in sharing the cost of a collective purchase, there would have been no reason for DCC 123 to register as a contractor under section 6.

Similarly, special powers are given to contractors under section 7, as shown below, for the purpose of carrying out certain activities of contractors, as underlined below.

> 7. (1) A contractor may, at all reasonable times, for the purpose of
>
> (*a*) inspecting, testing, installing, repairing, removing or changing, when it is lawful for him to do so, any meters, wiring, piping, fittings or other apparatus of the contractor for the measurement or conveyance of electricity or gas supplied by him, or
>
> (*b*) ascertaining the quantity or making other measurements of the electricity or gas consumed or supplied,
>
> enter any premises belonging to or occupied by the purchaser to whom the contractor has undertaken to supply the electricity or gas

Obviously, DCC 123 has no intention of inspecting, testing, installing, repairing or removing meters or other apparatus, as that kind of activity would be conducted by experienced technical personnel under contract to DCC 123, and those persons would be registered as contractors. There appears to be no reason why the customers of the contractor, such as DCC 123, should register as well as the contractor, and should need to use the same powers as a contractor. When it comes to the inspection of meters within Phase II, the right of access to those meters would be the subject of a contract between DCC 123 and Phase II, not this statute. Thus, for a whole range of practical purposes, there would appear to be no reason why, in addition to the registration of Whitby Hydro as a contractor and the registration of the contractor installing maintaining and inspecting your electricity and gas meters, DCC 123 should also register as a contractor. (Of course, if you are already registered as a contractor and such registration is inexpensive, you may wish to retain it.)

If you are the owner of any of the electricity or gas meters being used, then you would need to comply with the requirements of the EGIA governing owners, which are fairly straightforward. For example, section 16 states that you must keep your meter in good repair and maintain records required by legislation. As these are straightforward, it is unnecessary for us to provide any legal opinion regarding them.

Please feel free to raise any questions or concerns you may have as a result of the opinion set out above.

Yours truly,

Andrew J. Roman

Andrew J. Roman

c. *Sandy Kilgour*