

**ONTARIO
SUPERIOR COURT OF JUSTICE
(Divisional Court)**

B E T W E E N :

UPPER CANADA TRANSMISSION INC. (ON BEHALF OF
NEXTBRIDGE INFRASTRUCTURE, LP)

Appellant

- and -

THE ONTARIO ENERGY BOARD

Respondent

NOTICE OF APPEAL

The Appellant, Upper Canada Transmission, Inc. (On Behalf of NextBridge Infrastructure, LP) (“**UCT**”), appeals to the Divisional Court from the Decision and Order of the Ontario Energy Board (the “**OEB**” or the “**Board**”) dated December 20, 2018 (the “**Decision**”). The Decision restricts and denies the recovery of costs prudently incurred by UCT in developing a transmission facility called the “East-West Tie Line” (“**Development Costs**”) by (i) imposing a condition on the recovery of Development Costs that purports to require UCT to transfer proprietary and commercially valuable information obtained by UCT in the environmental assessment process to Hydro One Networks Inc., a competitor of UCT (the “**Property Transfer Order**”); and (ii) disallowing the recovery of other Development Costs (the “**Disallowed Costs**”) in an arbitrary and legally unreasonable manner (the “**Disallowance Order**”).

THE APPELLANT ASKS that the Decision be set aside and that judgment be granted as follows:

1. An Order:
 - (a) allowing UCT's appeal;
 - (b) revoking the Property Transfer Order;
 - (c) setting aside the Disallowance Order and either
 - (i) directing the OEB to permit recovery of the Disallowed Costs, or
 - (ii) directing the OEB to rehear the Disallowed Costs portion of its decision and to apply the principles approved by this Court in respect of those costs; and
2. Such further relief as counsel may advise and this Honourable Court may permit.

THE GROUNDS OF APPEAL are as follows:

3. The Decision was the culmination of the OEB's "Transmission Designation" process, initiated in respect of a transmission line between the Thunder Bay and Wawa transmission stations (the East-West Tie Line).
4. On July 31, 2017, after first having been designated by the OEB as the applicant to carry out development work for the East-West Tie Line, UCT filed its leave to construct application pursuant to s. 92 of the *OEB Act, 1998* for leave to construct that line.
5. As part of the leave to construct application, and consistent with the Transmission

Designation process and earlier OEB decisions, UCT sought recovery of its Development Costs.

6. On February 15, 2018, Hydro One, the largely provincially-owned incumbent transmitter, filed a competing leave to construct application. Unlike UCT, Hydro One did not complete all relevant development work. In particular, Hydro One did not prepare an environmental assessment under the Ontario *Environmental Assessment Act* (the “EA”), the cost of which would have been at least \$20 million and taken approximately two years to complete.

7. The Board heard the two leave to construct applications together. In the resulting Decision, it made the two orders that are the subject of this appeal.

Property Transfer Order

8. Although it approved UCT’s Development Costs related to an EA, the Board held that UCT’s recovery of such costs would be made contingent on it transferring EA work (subject to any third party confidentiality concerns such as Traditional Environmental Knowledge studies) to Hydro One. The OEB thus imposed the Property Transfer Order.

9. By imposing the Property Transfer Order, the OEB erred in law and/or acted unreasonably and/or exceeded its jurisdiction.

10. First, UCT owns the EA and the underlying data and intellectual property. The Board, an economic regulator, does not have the explicit or implicit authority under the *OEB Act, 1998* or the *Environmental Assessment Act* to order the transfer of an EA or any other type of property.

11. Second, even if the Property Transfer Order were permissible, which UCT denies, the Board had already held in the Transmission Designation process that UCT was entitled to recover its approved Development Costs.

12. Third, even if the Property Transfer Order were permissible and the Board had not already held that UCT was entitled to its approved Development Costs, the Board had held that it would consider the Property Transfer Order only if UCT failed to file a reporting obligation, which was not the case for UTC's development work. UCT met all of the Board's relevant requirements, relied on the Board's finding that the cost of development work would be recoverable in pursuing that work and commenced the leave to construct application.

Disallowance Order

13. The OEB erred in law and/or acted unreasonably and/or exceeded its jurisdiction by denying recovery of the Disallowed Costs.

14. The Disallowance Order misapprehends the Board's legal role in approving costs, which is to ensure the reasonableness of those costs following a prudence review. Although the Board has broad latitude in developing a methodology to evaluate costs, it does not have a generalized power to deny costs unreasonably, nor to expropriate property and transfer it to the utility of its choice. All of the costs subject to the Disallowance Order were prudently incurred.

15. Sections 33 and 78 of the *OEB Act, 1998*.

16. Section 134(1) of the *Court of Justice Act*, R.S.O. 1990, c. C-43; and

17. Such further grounds as counsel may advise and this Honorable Court may permit.

THE BASIS OF THE APPELLATE COURT'S JURISDICTION IS: Section 33 of the *Ontario Energy Board Act*. Leave to appeal is not required.

The Appellant requests that this appeal be heard at Toronto.

January 18, 2019

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PROCEEDING COMMENCED AT TORONTO

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