CITATION: Deltro Electric Ltd. v. Director, Electrical Safety Code, 2018 ONSC 2286
DIVISIONAL COURT FILE NO.: DC-16-595-00
DATE: 20180413

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

WILTON-SIEGEL, THORBURN and CHARNEY JJ.

BETWEEN:	
DELTRO ELECTRIC LTD. Appellant	*Michael Mazzuca* and *Krish Chakraborty*, for the Appellant
- and -	
DIRECTOR, ONTARIO ELECTRICAL SAFETY CODE Respondent	*Lorne Honickman* and *John Philpott*, for the Respondent
- and -	
THE ELECTRICAL SAFETY AUTHORITY REVIEW PANEL Intervenor	*David Cowling*, for the Intervenor
	HEARD at Toronto: January 29 and 31, 2018

CHARNEY J.

REASONS FOR DECISION

Nature of the Proceeding

[1] This is a statutory appeal from a decision of the Electrical Safety Authority Review Panel (the "Review Panel"), dated November 9, 2016. The case involves the validity of the "Wattage Based" inspection fee charged to the Appellant, Deltro Electric Ltd. ("Deltro"), with respect to solar panels installed by Deltro in 2013.

[2] Deltro is appealing the decision of the Review Panel that confirmed the decision of the Director of the Electrical Safety Code (the "Director") that the Wattage Based fee applied to this installation and was validly enacted by the Electrical Safety Authority (the "ESA").

[3] Deltro takes the position that the implementation of the Wattage Based fee by the ESA in 2010 did not comply with the process established in an Administrative Agreement between the ESA and the Minister of Consumer and Business Services (the "Minister"), and that the Wattage Based fee is therefore invalid. It further takes the position that two of the solar projects (referred to as Orillia 1 and Orillia 2) were exempt from the *Ontario Electrical Safety Code* (the "OESC") altogether. Finally, Deltro argues that certain work it was performing (the use of MC4 connectors) was not subject to inspection because it did not constitute an "electrical installation" or "electrical work" pursuant to the OESC.

Facts

[4] The ESA is the "Designated Administrative Authority" established under s. 2 of Ontario Regulation 187/09 under the *Safety and Consumer Statutes Administration Act*, 1996, S.O. 1996, c.19 (the "SCSSA Regulations") with responsibility for electrical safety in Ontario under Part VIII of the *Electricity Act*, 1998, S.O. 1998, c.15. The ESA is dependent on fees charged to the industry it regulates to fund its statutory mandate. These fees are published annually in the ESA "Fee Schedule".

[5] One of the ESA's regulatory activities is the inspection of large photovoltaic (PV) systems, also referred to as solar farms.

[6] Deltro carries on business as a licensed electrical contractor in the construction industry. In 2013, Deltro was contracted to perform various tasks at nine solar farms in Ontario. Between May 30, 2013 and September 12, 2013, Deltro submitted an application for inspection to the ESA with respect to each of these solar farms. Deltro did not include the connection of PV panels using MC4 connectors in its applications.

[7] The ESA issued Notices of Deficiency with respect to the solar farms on the grounds that the applications for inspection did not list all the electrical work being performed. Deltro paid the fees under protest, and obtained the ESA connection authorization for each project. The total fees paid by Deltro in respect of the solar farms were $365,653 plus HST.

[8] The inspection fees paid by Deltro were based on the installations' generation capacity, referred to as a "Wattage Based fee". Wattage Based fees were introduced by the ESA in February 2010. Prior to that date, the inspection fees were based on the number of PV panels being used per project, referred to as a "Device Based fee". Deltro would have paid a lower inspection fee (approximately $211,000) if the Device Based fee had still been in effect in 2013.

[9] While not directly relevant to the appeal, the ESA changed from the Device Based fee to the Wattage Based fee to more accurately reflect the inspection effort in larger solar installations. The ESA concluded that the Device Based approach was inappropriate because each PV panel is not, and does not need to be, inspected. Under the Device Based fee, solar farms that produced

the same amount of power could pay different fees based solely on how many PV panels were used.

[10] The ESA expected that moving to the Wattage Based fee would result in a fee reduction for most new solar farms, but as the wattage of PV panels has increased, many solar farms (like those serviced by Deltro) were faced with an inspection fee increase. The merits of the ESA decision to move from the Device Based fee to the Wattage Based fee are not, however, before this Court.

[11] Deltro appealed each of the Notices of Deficiency to the Director pursuant to s. 9(1) of the SCSSA Regulations. The Director rendered decisions confirming each of the Notices of Deficiency.

[12] Deltro appealed the Director's decision to the Review Panel pursuant to s. 10(1) of the SCSSA Regulations. Although this was an appeal, the hearing before the Review Panel was de novo, and the Review Panel heard evidence from the parties and made factual findings.

Court's Jurisdiction

[13] Deltro appeals the decision of the Review Panel pursuant to s. 12(1) of the SCSSA Regulations, which permits an appeal from a decision of the Review Panel to this Court "on any question that is not a question of fact alone".

Issues on Appeal

[14] The issues on appeal are:

a) Did the Review Panel err in finding that the ESA complied with the process required in the Administrative Agreement when implementing the Wattage Based fee?

b) Did the Review Panel err in finding that Orillia 1 and Orillia 2 were not exempt from the OESC?

c) Did the Review Panel err in finding that the use of MC4 connectors with respect to the solar farms constituted an "electrical installation" or "electrical work" pursuant to the OESC?

d) What remedies are available to Deltro if the Wattage Based fee is invalid?

Standard of Review

[15] The legal questions raised on this appeal are reviewed on a standard of reasonableness in accordance with this Court's decisions in *Mayburry Inc. v. Iafano*, 2014 ONSC 6074, at para. 22. In that case D. Brown J. (as he then was), stated (at paras. 18 and 20):

> [T]he scheme created by the *Electricity Act* vests in the ESA broad authority to ensure compliance with the Electrical Safety Code, including

> issuing orders concerning the connection or disconnection of things which the ESA "considers necessary or advisable for the safety of persons or the protection of property". The *Electricity Act* and the *Safety and Consumer Statutes Administration Act, 1996* place the enforcement and review of such safety-oriented orders in the ESA, the Director and the Review Panel. The issue of electrical safety, including how to ensure the safe connection and disconnection of equipment to power supplies, is a highly technical area in which the Review Panel has expertise. Those factors point strongly to a deferential standard of review.
>
> ...
>
> Although certain categories of questions continue to warrant review on a correctness standard and the presumption can be rebutted through a contextual analysis, those conditions do not exist in the present case. The issue before the Review Panel did not involve one of general law which was of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise. On the contrary, it involved a highly technical question of where to draw the line for purposes of determining whether an electrical installation had been "disconnected" from a power supply. The nature of the question at issue strongly points to a deferential standard of review.

See also: *Valovic v. Electrical Safety Authority Review Panel*, 2016 ONSC 7876 at para. 12

[16] The appellant in this case argues that two of its grounds of appeal warrant review on a correctness standard. The first is whether the Wattage Based fee was validly enacted by the ESA, and the second is whether Orillia 1 and Orillia 2 were exempt from the OESC altogether. The appellant argues that the primary purpose of the Review Panel is to promote electrical safety, whereas this first ground of appeal concerns the issue of whether the ESA followed the prescribed process when implementing the Wattage Based fee. The appellant argues that the Review Panel was not interpreting the OESC when it considered this question, it was interpreting the Administrative Agreement between the ESA and the Minister, and this is outside the purpose and expertise of the Review Panel. Similarly, the appellant argues that the question of whether Orillia 1 and Orillia 2 are exempt from the OESC is a question of statutory interpretation rather than electrical safety.

[17] In our view the appellant's characterization of the Review Panel's purpose and expertise is unduly restrictive. The Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 54, stated:

> Deference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity.

[18] The ESA is part of a comprehensive regulatory scheme enacted by the Legislature to, *inter alia*, "ensure the adequacy, safety, sustainability and reliability of electricity supply in Ontario" (*Electricity Act*, s. 1). That scheme includes both the *Electricity Act* and the *Safety and Consumer Statutes Administration Act*, 1996 (SCSSA). Among the purposes of the latter Act is to "facilitate the administration" of the *Electricity Act* by delegating to the ESA certain powers and duties relating to the administration of the *Electricity Act*. Central to those powers and duties is the ability of the ESA to impose regulatory charges on participants in the industry in order to carry out the administration delegated to it and to comply with the Act. Accordingly, the fee setting process is an integral part of the overall delegation of responsibility under these two statutes.

[19] Before the ESA can operate under the delegation of authority under the SCSSA, the ESA and the Minister must enter into an Administrative Agreement under s. 4 of the SCSSA Regulations. The interpretation of the Administrative Agreement and the validity of the fees imposed pursuant to that Agreement are, therefore, closely connected to the Review Panel's function. The Review Panel recognized this, stating, at para. 139, "the Administrative Agreement must be read in its context, and in harmony with the statutory scheme establishing the ESA." This is consistent with the contextual approach mandated by the Supreme Court of Canada in *Dunsmuir*, at para. 74: "The interpretation of the law is always contextual. The law does not operate in a vacuum. The adjudicator was required to take into account the legal context in which he was to apply the law." The Administrative Agreement is part of that legal context.

[20] In *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, at para. 30, the Supreme Court of Canada, citing *Dunsmuir* at para. 54, held:

> This principle applies unless the interpretation of the home statute falls into one of the categories of questions to which the correctness standard continues to apply, i.e., "constitutional questions, questions of law that are of central importance to the legal system as a whole and that are outside the adjudicator's expertise, . . . '[q]uestions regarding the jurisdictional lines between two or more competing specialized tribunals' [and] true questions of jurisdiction or vires"

[21] The interpretation questions raised in this appeal do not fall into any of these categories. The issues raised on appeal are specific to the administrative regime for the regulation of electricity in Ontario, and fall squarely within the Review Panel's general expertise in relation to that regime.

[22] For the foregoing reasons we find that the standard of reasonableness applies to all of the legal issues in this appeal.

[23] The onus is on the Appellant to show that the decision was unreasonable. Reasonableness is a deferential standard, animated by the principle that certain questions that come before tribunals do not lend themselves to one particular result. It is concerned, among other things, with whether the "decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (see: *Dunsmuir* at para. 47 and *Tribute*

Resources Inc. v. Ontario Energy Board, 2018 ONSC 265, at paras. 45-47 and cases cited therein).

Analysis of the Issues

a) Did the Review Panel err in finding that the ESA complied with the process required in the Administrative Agreement when implementing the Wattage Based fee?

[24] Section 113.17 of the *Electricity Act* authorizes the ESA to establish and collect fees and other charges "and apply them to the expenses incurred by the Authority in administering" Part VIII of the Act. Such fees and other charges must be established "in accordance with the process and criteria that it establishes and that the Minister responsible for the administration of this Part has approved".

[25] That process is set out in Schedule F of the Administrative Agreement between the ESA and the Minister. The relevant provisions of Schedule F provide:

> **Fee Setting Process and Criteria**
>
> ESA will implement a financial system which allows for the identification of direct or indirect costs attributable to each service for which a fee is intended to be established. In addition, ESA will use bench marking to ensure that services are cost effective.
>
> A Fee Review will include requesting and giving due consideration to comments from the appropriate Industry Associations, as well as other stakeholders as identified by ESA.
>
> With the exception of minor adjustments to individual fee items to provide clarity or consistency or to address categories of work previously not provided for in the fee schedule, no new or revised fee or administrative penalty will be implemented until it has been approved by the Board. Further, no new or revised fee or administrative penalty will be made effective unless appropriate notice has been given.
>
> Where ESA intends to make a fee increase which is significantly above the current rate of inflation, ESA will inform the Minister in advance of notice of the fee change. This will enable ESA and the Minister to develop an appropriate approach to notice of fee changes that may involve stakeholder concern.
>
> **Criteria**
>
> In establishing or revising a fee, appropriate consideration will be given to ESA's Business Plan. In addition, the following criteria will be considered and addressed:

- all related costs incurred by the program in the delivery of services, including non-revenue generating activities (e.g., standard setting, administration, investigation) must be offset;

- uniformity of application regardless of geographic location;

- whenever possible, fees and contribution levels should act as an incentive for good performance (e.g., lower defect ratio, lower inspection fees);

- where applicable, normal business practices will be followed (e.g., interest charged on overdue accounts are billable).

...

When informing [the Ministry of Consumer and Business Services] of the results of a fee review or the intent to change fees, ESA will forward the Minister a business case detailing the rationale for the change including the position of the industry and status, an analysis comparing the proposed fees with costs and setting out percentile increases over the existing fee structure.

[26] As indicated in Schedule F, "minor adjustments to individual fee items to provide clarity or consistency or to address categories of work previously not provided for in the fee schedule" do not require Board approval. This form of fee setting was referred to by the ESA as "*ad hoc*" fee setting, and such fees would be considered by the Board in the annual fee setting process along with the ESA's other fees "in the fullness of time" (para. 48).

[27] Once the new Wattage Based Fee was approved by the Fee Committee, the ESA implemented it immediately under its "*ad hoc*" fee setting process without waiting for the annual fee setting process to occur, on the basis that it would provide a significant reduction in fees as quickly as possible (para. 59).

[28] The Review Panel accepted Deltro's position that the introduction of the Wattage Based fee was not just a minor adjustment or a category of work previously not provided for in the fee schedule, and therefore needed Board approval as required in Schedule F. The Review Panel found that the ESA did not comply with certain of the provisions of Schedule F when it first enacted the Wattage Based fee in 2010, but that these defects were cured in subsequent proceedings, and that all of the requirements of Schedule F, including Board approval, were met by the time the Wattage Based fee was applied to Deltro's solar farm projects in 2013.

[29] Deltro challenges this conclusion on two grounds. First, it argues that "Things invalid from the beginning cannot be made valid by subsequent act"1, and therefore the defects cannot be cured.

[30] Second, it argues that the Review Panel erred in law in finding that the several defects had been cured.

[31] With regard to the first argument, Deltro relies on the Supreme Court of Canada's decision in C*anada (Attorney General) v. Hislop*, 2007 SCC 10, 1 S.C.R. 429, which held, at para. 83, that a declaration of constitutional invalidity "involves the nullification of the law from the outset…If the law was invalid from the outset, then any government action taken pursuant to that law is also invalid, and consequently, those affected by it have a right to redress which reaches back into the past."

[32] The difficulty with Deltro's position in this regard is that *Hislop* was dealing with the substantive validity of legislation, not with whether legislation had been enacted pursuant to the proper procedural prerequisites. In other words, *Hislop* was dealing with substantive validity, not procedural validity.

[33] A legislative provision that violates the constitution is ultra vires, even if it was enacted pursuant to the correct process. In contrast, an otherwise valid legislative provision that has not met all of the procedural prerequisites required before it can take effect remains ineffective (as opposed to *ultra vires*) until all of the procedural prerequisites have been satisfied. Once those procedural prerequisites are met (assuming that there are no time limits to meeting the procedural prerequisites), there is no reason why the provision cannot be given effect.

[34] Schedule F imposes no time limits by which the ESA must meet the various requirements set out in its terms. Accordingly, the Review Panel was correct in concluding that any failure to meet those requirements when the fee was first introduced in 2010 could be cured by subsequent compliance, and the question was whether the procedural requirements had been met by the time the Wattage Based fee was applied to Deltro's solar farm projects in 2013.

[35] Deltro argues that the Review Panel erred in relying on the case of *Alberta Liquor Store Association v. Alberta (Gaming and Liquor Commission)*, 2006 ABQB 904 to support the proposition that "a flawed decision by an administrative body may be overtaken by a more recent decision that has been lawfully made". The Appellant is probably correct in that regard; the *Alberta Liquor Store* case was concerned with the standing of the applicant to challenge a decision of the respondent Commission, and does not appear to support the proposition for which it was relied on by the Review Panel. That said, the Review Panel's decision that the ESA can cure procedural irregularities in its 2010 decision by subsequent and cumulative compliance with those procedural requirements is, nonetheless, legally correct.

[36] The second issue was whether all of the procedural failings were indeed cured by 2013.

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[1] *Black's Law Dictionary*, 9th ed., Trayner, Max.482, Maxims of Law p. 1862.

[37] Deltro argues that the ESA did not comply with the requirements set out in Schedule F of the Administrative Agreement when it implemented the Wattage Based fee. In this regard Deltro argues that:

i. the Wattage Based fee was improperly implemented on an *ad hoc* basis,

ii. the ESA did not have a financial system that allowed it to identify the costs attributable to each service,

iii. the ESA failed to conduct stakeholder consultations,

iv. the Wattage Based fee did not have Board approval,

v. the ESA did not give appropriate notice and failed to provide a business case to the Minister.

[38] The Respondent contends that several of these arguments relate to findings of fact made by the Review Panel that are not subject to appeal under s. 12 of the SCSSA Regulations. In particular, the Respondent points to the following findings of the Review Panel which, it argues, are questions of fact alone:

a) The Review Panel found that the ESA implemented a financial system, known as the SAP system, which allows for the identification of direct and indirect costs attributable to each service for which a fee is intended to be established and the ESA uses bench marking to ensure that services are cost effective.

b) In 2012 the ESA engaged in a fee review that included the Wattage Based fee and that consisted of consultations with advisory councils and formal stakeholder consultations.

c) The Wattage Based fee was approved by the ESA Board of Directors in 2010.

d) Between the adoption of the Wattage Based fee in February of 2010 and the publication of the next Fee Guide in August 2010 (which took effect in October 2010), appropriate notice was provided to affected parties on a project basis through the plan review process. Appropriate notice was provided to the public at large through the publication of the next Fee Guide in August 2010. The Wattage Based fee at issue on this appeal was included in the Fee Guides published on the ESA's website and available to the general public annually in each of 2010, 2011, 2012 and 2013.

e) The ESA did not intend to make a fee increase significantly above the rate of inflation when it introduced the Wattage Based fee.

[39] To the extent that they are findings of fact alone this Court has no jurisdiction (*Valovic*, at paras. 33 and 36).

[40] To the extent that the findings require some interpretation of Schedule F (for example the meaning of "appropriate notice" and "Fee Review"), I conclude that the Review Panel's decision is reasonable, and based on its knowledge of the regulated industry. For the following reasons it falls within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir v. New Brunswick*, at para. 47.

(i) Was the Wattage Based fee improperly implemented on an *ad hoc* basis?

[41] Deltro argues that the ESA had no authority to implement the Wattage Based fee on an ad hoc basis. The Review Panel accepted the position that the introduction of the Wattage Based fee was the making of a new or revised fee and was therefore subject to Board approval as well as other requirements set out in Schedule F. As indicated above, the Review Panel found that while the ESA did not comply with certain of the provisions of Schedule F when it first enacted the Wattage Based fee in 2010, these procedural defects, including Board approval, were cured in subsequent proceedings, and all the applicable requirements of Schedule F were met by the time the Wattage Based fee was applied to Deltro's solar farm projects in 2013. In other words, the Review Panel determined that the issue was not whether the ESA initially used an *ad hoc* process or an annual fee setting process, but whether the various components of Schedule F were met.

[42] For the reasons set out in para. 34 above, I conclude that the Review Panel's decision that the ESA could meet the various requirements of Schedule F by subsequent compliance was reasonable. The next question is whether the Review Panel's decision that the ESA did comply with the various elements of Schedule F was reasonable. I turn to that now.

(ii) Did the ESA have a financial system that allowed it to identify the costs attributable to each service?

[43] Deltro argued that the ESA failed to implement a financial system which allowed for the identification of direct or indirect costs attributable to each service for which a fee was established because it did not undertake a cost analysis of the Wattage Based fee nor engage in the exercise of allocating direct or indirect costs to the Wattage Based fee.

[44] The Review Board interpreted the first paragraph of Schedule F as relating to the tracking of costs and benchmarking for services in respect of which fees are to be charged. Based on the evidence provided at the hearing, the Review Panel found that the ESA implemented a financial system, known as the SAP computer-based system, which allowed for the identification of direct and indirect costs attributable to each service for which a fee is intended to be established and that the ESA used bench marking to ensure that services are cost effective. Accordingly, the SAP system complied with the requirements of Schedule F and the fact that these requirements were not carried out in relation to the Wattage Based fee specifically was not a breach of Schedule F.

[45] To the extent that this finding required an interpretation of Schedule F, the Review Panel's decision was reasonable and based on the evidence before it.

(iii) Did the ESA fail to conduct stakeholder consultations?

[46] The Review Panel noted that Schedule F does not define the meaning of "Fee Review". The Review Panel concluded that "Fee Review" requires the ESA to engage in a process that includes "requesting and giving due consideration to comments from the appropriate Industry Associations, as well as other stakeholders as identified by ESA" whenever the ESA proposes to change an existing fee. The Review Panel rejected the Appellant's position that consultation required consultation with individual contractors. That interpretation is reasonable.

[47] While the Review Panel found that the ESA failed to meet the consultation requirement when it first proposed to change from the Device Based fee to the Wattage based fee, the Review Panel found that the ESA undertook its normal consultation process in 2012 and thereby satisfied its consultation obligations prior to the application of this fee to Deltro in 2013. The Review Panel concluded (at para. 163): "The fee that is challenged in these appeals is a fee that had ultimately gone through the process of public stakeholder consultations. On the facts of this case, therefore, the ESA satisfied its consultation obligation in respect of the fees associated with the orders that are under appeal". To the extent that this finding required the ESA to interpret the meaning of "stakeholder consultation", this too was a reasonable interpretation of Schedule F.

(iv) Did the Wattage Based fee have Board approval?

[48] The Review Panel decided that Board approval was a pre-condition for the implementation of the Wattage Based fee. The Review Panel then found, based on Board minutes of March 25, 2010 and the Audit Committee minutes of March 4, 2010, that the Wattage Based fee was approved by the Board in March 2010, as part of the annual fee setting process. Since Board approval was given prior to the application of the Wattage Based fee to Deltro in 2013, the Wattage Based fee was validly applied to Deltro.

[49] Since there was no requirement to obtain Board approval prior to March 2010, the Review Panel's decision in this regard was reasonable and based on the evidence that it heard.

(v) Did the ESA fail to give appropriate notice or provide a business case to the Minister?

[50] The Review Panel noted that Schedule F does not set out the type of notice that is appropriate. The Review Panel's finding that publication of the fees in the ESA Fee Guide, available on the ESA's website to the general public, constitutes "appropriate notice" under Schedule F is a reasonable interpretation of that requirement based on its expertise in relation to the operation of the industry. The Review Panel also found that Deltro had notice of the Wattage Based fee at the time it submitted the applications for the solar farms, and had paid the Wattage Based fees on projects dating back to 2012.

[51] The Review Panel then interpreted Schedule F as requiring the ESA to give the Minster advance notice of a fee change, and forward to the Minister a business case, only "where ESA intends to make a fee increase which is significantly above the current rate of inflation" (emphasis added). While not the only possible interpretation, this is certainly a reasonable

interpretation of the language of Schedule F. Schedule F clearly makes the ESA's intention the key factor triggering this requirement.

[52] The Review Panel then concluded, based on the evidence, that the ESA's intention in adopting the Wattage Based fee was to decrease the fee charged for PV panels relative to what was being paid under the Device Based fee. Since the ESA did not intend to make a fee increase that was significantly above the rate of inflation, it was not required to give the Minister advance notice or submit a business case under Schedule F.

[53] Initially the adoption of the Wattage Based fee operated as intended, and the inspection fees for a large majority of solar farms decreased. From 2011, however, the effect of the Wattage Based fee was to increase the fee payable for most solar farms. The Review Panel concluded, quite reasonably, that the requirement to provide the Minister with advance information or a business case cannot be triggered by the benefit of hindsight.

Conclusion

[54] Accordingly, the Review Panel considered each of the alleged procedural irregularities and concluded that at the time Deltro submitted an application for inspection in 2013, the ESA had fulfilled all of the applicable requirements of Schedule F, and the fee was validly applied. To the extent that this decision involved the interpretation of Schedule F, we conclude that it was reasonable.

b) Did the Review Panel err in finding that Orillia 1 and Orillia 2 were not exempt from the Ontario *Electrical Safety Code*?

[55] The Appellant argues that prior to August 6, 2013, the OESC did not apply to two of Deltro's projects – Orillia 1 and Orillia 2 – which were therefore exempt from the OESC and not required to pay inspection fees to the ESA.

[56] Until August 6, 2013, Rule 2-000 of the OESC provided that the Code did not apply to:

> (a) Electrical equipment and electrical installations used exclusively in the generation, transmission, or distribution of electrical power or energy intended for sale or distribution to the public, where…(iii) the generator is licensed to own or operate the generation system…

[57] There is no dispute that Orillia 1 and Orillia 2 fell within that exemption.

[58] On August 6, 2013, Rule 2-000 of the OESC was amended to exempt licensed generators from the OESC "except where the Ontario Energy Board require an authorization to connect from the inspection department in accordance with Part V of the *Ontario Energy Board Act* (*OEBA*)."

[59] Deltro argues that since Orillia 1 and Orillia 2 received generating licences from the Ontario Energy Board on November 29, 2012, and the applications with respect to those two projects were submitted prior to the August 6, 2013 amendment of Rule 2-000, Orillia 1 and 2

were exempt from the OESC. Accordingly, Deltro argues that the ESA did not have the authority to issue Notices of Deficiency to Deltro for failure to obtain Connection Authorization.

[60] The Review Panel rejected this argument, finding that the Ontario Energy Board's Distribution System Code (DSC) applied to Orillia 1 and 2. Various provisions in the DSC required installations such as Orillia 1 and 2 to submit to ESA inspections and obtain ESA Connection Authorizations. The Review Panel found that, in light of the legislative regime applicable to Orillia 1 and 2 under the *Ontario Energy Board Act* and the DSC, Deltro was legally obliged to obtain a Connection Authorization from the ESA in respect of Orillia 1 and 2 before connection to a distribution system. Since Deltro required a Connection Authorization by the DSC, it was required to submit an application in accordance with the OESC. In other words, notwithstanding the exemption in Rule 2-000 of the OESC, Deltro was obliged to submit to the ESA by virtue of the provisions in the DSC, which also required approval of the connection in accordance with the OESC.

[61] The Review Panel concluded that the application of the OESC to Orillia 1 and 2 is in line with the broader scheme envisaged in the OESC and the legislative scheme that "plainly treats generation of electricity as an activity that ought to conform to certain safety standards." In this regard, it is significant that an ESA inspection would be required in order to obtain any Connection Authorization required by a generator under the DSC and it would therefore be reasonable to expect to pay fees relating to such inspections. The Review Panel rejected any interpretation of the OESC that would "permit any of the Solar Farms to enter into service without having been found to be safe".

[62] In this regard, the amendment of the OESC in August 2013 can be viewed as a clarification of the regulatory scheme already in place rather than an actual change. This conclusion is consistent with s. 56(2) of the *Legislation Act, 2006*, S.O. 2006, c.21, Sched. F, which provides that "The amendment of an Act or regulation does not imply that the previous state of the law was different".

[63] This decision by the Review Panel dealt with the very sort of technical issues that engaged the expertise of that tribunal and required sorting through the complex web of interrelated regulatory requirements applicable to participants in this highly regulated industry. In our view the Review Panel's interpretation of the relationship between the DSC and the OESC and its decision in this regard are reasonable.

c) Did the Review Panel err in finding that the use of MC4 connectors with respect to the solar farms constituted work on an "electrical installation" pursuant to the *Ontario Electrical Safety Code*?

[64] The Appellant also argued that plugging in the PV panels using MC4 connectors requires no professional training or knowledge and that such work does not have to be performed by an electrician. Since the MC4 connection is not required to be performed by an electrician, Deltro argues that MC4 connectors are not electrical connections and are not subject to inspection under the OESC.

[65] In this regard Deltro relies on the decision of the Ontario Labour Relations Board (OLRB) in *IBEW Local 530 v. Gil & Sons Limited*, 2012 CanLII 17123 (ON LRB), where the OLRB held that the specialized skill of an electrician is not required to perform the MC4 connection safely for the purposes of the *Construction Projects* regulations (Ont. Reg. 213/91) under the *Occupational Health and Safety Act*, R.S.O. 1990, c.O.1. The Labour Board found:

> [T]he MC4 Connector consists of a uniquely designed MC4 plug which can only fit into the uniquely designed MC4 receptacle. No special expertise is required in order to effect the connection. It is in fact safer than plugging a plug into a standard receptacle in that: both the MC4 plug and the MC4 receptacle are finger safe; a worker is alerted to whether the connection has been effected by the presence or absence of an audible clicking noise; once the connection is effected it is locked; once the connection is effected it may be immersed in water; and the MC4 Connector bears a printed warning that it should not be disconnected while under load.

[66] The Review Panel declined to follow *IBEW Local 530*, noting that the OLRB was concerned with the level of training required to complete a particular task, not with the application of the OESC. The application of the OESC is not based on who performs the work in question, but the nature of the work or installation itself. Section 4(1) of the *Licensing of Electrical Contractors and Master Electricians*, O. Reg. 570/05, under the *Electricity Act* ("*Contractors Regulation*") obliges contractors to carry out "electrical work" in accordance with the OESC. "Electrical work" is defined in s. 1(1) of the *Contractors Regulation* as including "connecting or disconnecting any electrical installation or electrical equipment".

[67] Moreover, the Review Panel held (at para. 107) that "the application of the OESC to work and the obligation to include that work on an Application hinge on whether that work is on an electrical installation, which is defined in the OESC as "the installation of any wiring…from the point[s] where electric power or energy can be supplied from any source, to the point[s] where such power or energy can be used…by any electrical equipment and includes the connection of any such wiring with any of the said equipment and any part of that wiring…". The Review Panel found that the PV panels and combiner boxes are electrical equipment, and connecting them to each other through MC4 connectors consists of connecting pieces of electrical equipment to each other, which makes it "work on an electrical installation" for the purposes of the Rule 2-004 of the OESC. Accordingly, such connection must be included in an Application.

[68] The Review Panel found that safety is an issue on solar installations, including the DC component of such installations where PV panels and MC4 connectors are located. In particular, the Review Panel found that there were a number of potential hazards that could be present on a solar installation. For example, if too many PV panels are connected to one another, or if PV panels with incorrect ratings are used, this could result in fire or a serious electric shock. This factual finding is not subject to an appeal. It supports the need for ESA inspections of this work. It therefore also supports the reasonableness of the Review Panel's decision that the connection of PV panels using MC4 connectors with respect to solar farms should be included in the inspection process.

[69] In our view the Review Panel's analysis of this issue was reasonable. As this Court stated in *Mayburry*, at paras. 27-28:

> [G]iven that the Code is designed to ensure the safe installation and operation of electrical equipment and the larger power system, it could hardly be said that the majority's broad interpretation was inconsistent with the objectives of the Code or unreasonable. I therefore conclude that the decision of the majority most certainly fell within a range of possible, acceptable outcomes defensible in respect of the facts and law in the present case.
>
> Finally, I would observe that the highly technical nature of the interpretation dispute in this case illustrates the institutional limits of the Courts and the reason for a deferential standard of review in appropriate cases. Judges of this Court are not electrical safety experts. When faced with an interpretation by an expert tribunal which promotes the safe operation of the electrical system, the judicial standard of reasonableness necessarily drives a deferential result.

d. What remedies are available to Deltro if the Wattage Based fee is invalid?

[70] Given the Court's conclusion with respect to the previous question, it is not necessary to deal with this question.

Conclusion

[71] For these reasons, Deltro's appeal is dismissed.

[72] Deltro shall pay the respondent's (Director, Electrical Safety Code) its costs of this appeal fixed at $15,000.

CHARNEY J.

I agree

WILTON-SIEGEL J.

I agree

THORBURN J.

Released: APR 13 2018

CITATION: Deltro Electric Ltd. v. Director, Electrical Safety Code, 2018 ONSC 2286
DIVISIONAL COURT FILE NO.: DC-16-595-00
DATE: 20180413

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVSIONAL COURT

WILTON-SIEGEL, THORBURN and CHARNEY JJ.

BETWEEN:

DELTRO ELECTRIC LTD.
Appellant

- and -

DIRECTOR, ELECTRICAL SAFETY CODE
Respondent

– and –

THE ELECTRIC SAFETY AUTHORITY
REVIEW PANEL
Intervener

REASONS FOR DECISION

Charney J.

Released: April 13, 2018