Court File No. 231/17

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

ALLIANCE TO PROTECT PRINCE EDWARD COUNTY

Applicant

and

THE INDEPENDENT ELECTRICITY SYSTEM OPERATOR and WPD WHITE PINES WIND INCORPORATED

Respondents

FACTUM OF THE ALLIANCE TO PROTECT PRINCE EDWARD COUNTY

December 21, 2017

ERIC K. GILLESPIE PROFESSIONAL CORPORATION
Suite 600, 10 King Street East
Toronto, Ontario
M5C 1C3

Eric K. Gillespie
LSUC # 37815P
Tel: 416-703-6362
Fax: 416-703-9111
Email: egillespie@gillespielaw.ca

Lawyers for Alliance to Protect
Prince Edward County

TO: **GOODMANS LLP**
Bay Adelaide Centre
333 Bay Street, Suite 3400
Toronto, ON M5H 2S7

Alan H. Mark
Tel: 416.597.4264
Fax: 416.979.1234
Email: amark@goodmans.ca

Lawyers for the Independent Electricity System Operator

AND TO: **STIKEMAN ELLIOTT**
5300 Commerce Court West
199 Bay Street
Toronto, ON M5L 1B9

Patrick G. Duffy
Tel: 416.869.5257
Email: pduffy@stikeman.com

Lawyers for WPD White Pines Wind Incorporated

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PART I – OVERVIEW

1. In the spring of 2017 the Alliance to Protect Prince Edward County ("APPEC") succeeded in an appeal to the Environmental Review Tribunal ("ERT"). The ERT found that it was in the public interest to remove 18 of 27 industrial wind turbines from a proposed wind project (the "Project") in Prince Edward County ("PEC"), reducing the Project to only 9 turbines.

2. The Project was governed by a contract between the Independent Electricity System Operator ("IESO") and the supplier, WPD White Pines Wind Incorporated ("WPD"). That contract was made available to the public by the IESO. It contained specific terms regarding the process for terminating the contract. After the ERT decision, WPD was unable to meet its obligations under the contract. APPEC fully expected the Project to be terminated. However, WPD has recently announced the Project will still proceed.

3. APPEC relied on the IESO's representations. More specifically, because the Project could not have continued under the publicized contract, APPEC had no reason to appeal the 2017 ERT decision. Therefore, it did not appeal.

4. The IESO now claims that there were major amendments to the contract, that were not available to the public, and is allowing the Project to proceed. The time for APPEC to appeal the Project has passed and, as a result of its reliance on the IESO's representations, APPEC has lost an essential procedural right. By failing to follow the contractual process it publicly disclosed, the doctrine of legitimate expectations has been violated. By publishing misleading and inaccurate information, the IESO has also made negligent misrepresentations. The IESO should be held to its word and the Project should be terminated.

PART II – FACTS

5. The Alliance to Protect Prince Edward County ("APPEC") is a provincially incorporated association in the province of Ontario, dedicated to energy conservation and the development of responsible alternative forms of energy in Prince Edward County ("PEC"). APPEC promotes awareness of the impacts of industrial wind energy on PEC's environment, economy, and quality of life.[1]

6. APPEC was the Appellant in an Environmental Review Tribunal ("ERT") process, related to the White Pines Wind Project (the "Project") in PEC.[2]

7. The Respondent, wpd White Pines Wind Incorporated ("WPD"), is a provincially incorporated company in the province of Ontario. WPD is the Project developer in PEC.[3]

8. The Respondent, the Independent Electricity System Operator (the "IESO"), is a not-for-profit corporate entity responsible for real-time operations of the electricity grid and long-term planning, procurement, and conservation efforts in Ontario. The IESO is a provincial government entity governed by an independent Board with a Chair and Directors appointed by the Government of Ontario. All fees and licences to operate are set by the Ontario Energy Board (the "OEB"), and the IESO operates independently of all other participants in the electricity market. In or around January 2015, the IESO and the Ontario Power Authority (the "OPA"), the original party to the agreement with WPD, merged and began operating as one organization.[4]

9. On June 15, 2010, WPD entered into a Feed-In-Tariff contract (the "FIT Contract") with the OPA/IESO for the Project.[5]

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[1] Affidavit of Orville Walsh, Sworn November 8, 2017 at para 1 [the "November Walsh Affidavit"].
[2] November Walsh Affidavit at para 2.
[3] November Walsh Affidavit at para 3.
[4] November Walsh Affidavit at para 4.
[5] November Walsh Affidavit at para 5, Exhibit "A" – IESO Active Contracted Generation List excerpt dated as of June 30, 2017; Exhibit "B" – Copy of unsigned IESO Contract version 1.3.0 excerpts.

10. On July 16, 2015, Mohsen Keyvani, Director of the Ministry of the Environment and Climate Change ("MOECC"), issued Renewable Energy Approval No. 2344-9R6RWR (the "REA") to WPD, authorizing the Project, which included: the construction, installation, operation, use and retirement of a Class 4 wind facility, consisting of 27 wind turbines, two transformer stations, underground electrical cabling, distribution lines and associated infrastructure, to be located in PEC. The Project is located near the south shore of PEC in an area bounded by Brummel Road and Bond Road to the north, Lighthall Road to the west, Gravelly Bay Road to the east, and Lake Ontario to the south.[6]

11. On February 26, 2016, the ERT found that, pursuant to s. 145.2.1(2) of the *Environmental Protection Act* (the "*EPA*"), engaging in the Project in accordance with the REA would cause serious and irreversible harm to plant life, animal life, or the natural environment. At that time, the ERT adjourned the proceeding under s. 59(2)1.ii of Ontario Regulation ("O. Reg") 359/09 on Renewable Energy Approvals. The proceeding was again adjourned on March 21, 2016, and July 27, 2016.[7]

12. On November 14, 2016, the ERT considered the issue of whether to revoke the decision of the Director, to direct the Director to take such action as the ERT considered the Director should take in accordance with the EPA and its regulations, or to alter the decision of the Director.[8]

13. On April 26, 2017, the ERT found it was in the public interest to alter the Director's decision by amending the REA by, in part, removing eighteen turbines from the Project.[9]

> In light of all of the circumstances, based on the evidence provided and taking into account the purposes of the *EPA* in support of environmental protection

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[6] November Walsh Affidavit at para 6.
[7] November Walsh Affidavit at para 7.
[8] November Walsh Affidavit at para 8.
[9] November Walsh Affidavit at para 9.

and renewable energy, the Tribunal finds that it is in the public interest to alter the Director's decision by amending the REA in part. The Tribunal finds that it is in the public interest to add the Approval Holder's proposed Condition L2 to the REA, but to alter that condition by removing Tables 3-1 to 3-3, in the NRSI Plan. <u>The Tribunal further finds that it is in the public interest to remove from the REA the turbines proposed to be accessed by the proposed upgraded secondary and tertiary municipal road segments and by the intersections in Blanding's turtle habitat, specifically Turbines 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28 and 29.</u> [emphasis added] *Hirsch v Ontario (Environment and Climate Change)*, 15-068 (26 April 2017) at para 163, Applicant's Authorities, Tab 1.

14. By email dated October 12, 2017, Terry Young, IESO Vice President, Conservation & Corporate Services, wrote to Steven Ferguson, councillor for South Marysburgh ward in PEC, stating that the IESO had entered into an amended contract with WPD.[10]

> As you are aware, the size of the [Project] was reduced to 18.45 MW by the [ERT] decision earlier this year. <u>The IESO subsequently consented to a contractual amendment to reflect the reduction</u> [emphasis added].

15. In or around 2010, APPEC obtained a copy of Version 1.3.0 of the FIT Contract dated March 9, 2010, from the then OPA Website (the "IESO Contract"). The IESO Contract, at Article 2, section 2.1(c), states:[11] (Exhibit "B" – IESO Contract excerpt, s. 2.1(c))

> Notwithstanding Section 2.1(b), prior to the Supplier delivering its NTP Request pursuant to Section 2.4, <u>the Supplier may</u>, on a single occasion, <u>elect to reduce the Contract Capacity to a lower amount by giving notice to the OPA, provided that such lower amount is no less than 75% of the original Contract Capacity</u>. If the Supplier provides such notice, the Contract Capacity shall be reduced to the lower amount. The OPA shall have no obligation to consent to a request to alter the Contract Capacity other than as set out in this Section 2.1(c). Any such reduction in Contract Capacity shall only affect the amount of Completion and Performance Security that is required to be provided to the OPA after the date of the request for such reduction (the "Capacity Clause") [emphasis added].

16. The Project's original Contract Capacity was approximately 60 megawatts (MW). Following the ERT decision on April 26, 2017, the Project was reduced from 27 wind turbines to

[10] November Walsh Affidavit at para 10, Exhibit "C" – E-mail from Young to Ferguson dated October 12, 2017.
[11] November Walsh Affidavit at para 11, Exhibit "B" – IESO Contract excerpt, s. 2.1(c).

9 wind turbines, which can only produce an approximate total capacity of 18.45MW (each wind turbine has a maximum capacity of 2.05MW).[12]

17. With only 9 wind turbines, WPD cannot possibly satisfy the Capacity Clause, as the total capacity of 9 wind turbines is 18.45 MW and far less than the required amount (75% of the original Contract Capacity). As a result, the only option available after the ERT decision for the OPA/IESO was to cancel the IESO Contract.[13]

18. However, as of September 21, 2017, WPD publicly announced that it was continuing to develop the Project.[14]

19. As well, in or around October 15, 2013, WPD published the "White Pines Wind Project Heritage Assessment Report" (the "Stantec Report"), which was prepared by Stantec Consulting Ltd.[15]

20. The Stantec Report stated that removing three turbines from the Project, that were causing negative visual impacts on cultural heritage, was not possible because the full complement of 29 turbines was needed for the Project to be economically viable:[16]

> In order to mitigate any visual impacts, Turbine locations T07, T09, and T11 would have to be avoided. Turbine locations T07, T09, and T11 have been decided based on considerations of availability of land, and natural environment, noise, and property line setbacks, as defined in Ontario Regulation 359/09. <u>Moving the turbines is not possible, due to these constraints, and avoidance/removal of the turbines will impact the economic viability of the [Project]</u>. Moving Project turbines to other locations in [PEC] is also not possible, due to potential interference with Department of National Defence (DND) radar systems, as identified through consultations with DND [emphasis added].

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[12] November Walsh Affidavit at para 12.
[13] November Walsh Affidavit at para 13.
[14] November Walsh Affidavit at para 14, Exhibit "D" – Notice in Picton Gazette dated September 21, 2017.
[15] November Walsh Affidavit at para 15.
[16] November Walsh Affidavit at para 16, Exhibit "E" – Stantec Report excerpt, section 8.2.

21. During the REA application technical review, WPD also discussed the economic viability of the Project, in light of public concerns regarding cultural impacts of the Project:[17]

> The Project has been developed and assessed for 29 turbines…All economics of the project…have been based on the project proposal accepted by the OPA…As per the economic viability, although developers are not required to publicize the economics of a project, the following may shed light on the subject. The FIT program established the compensation/kw generated on an expected 8-12 year Return on Investment (ROI)…It stands to reason that also losing turbines within a projected project would have a strong negative effect on the ROI."

22. In WPD's Notice of Appeal to the ERT dated July 31, 2015, WPD submitted that:[18]

> Removing the turbines [T07 and T11] would materially adversely impact…[the [P]roject's] contractual and economic foundations, with negative consequences for…[WPD]."

23. Section 2.2(a) of the IESO Contract also states:[19]

> [WPD] agrees that the Facility shall be located in the Province of Ontario. [WPD] agrees that the Facility shall have a Connection Point as set out in the Application and shall affect supply or demand on the IESO-Controlled Grid, a Distribution System or a Host Facility, as applicable.

24. The most current drawings of the Project appear to show a different Connection Point than the Connection Point authorized in the IESO Contract. The original Connection Point is indicated by a star marked as "Substation" (northern section of the map) on County Rd 5 in Exhibit "D" of the Affidavit of Orville Walsh, sworn on November 8, 2017. The most current drawings of the Project indicate a substation connection point on County Rd 1.[20]

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[17] November Walsh Affidavit at para 17, Exhibit "F" – Environmental Registry Comments dated June 12, 2015 excerpt at page 38.
[18] November Walsh Affidavit at para 18, Exhibit "G" – WPD Notice of Appeal excerpt at para 14.
[19] November Walsh Affidavit at para 19, Exhibit "B" – IESO Contract excerpt, s 2.2(a).
[20] November Walsh Affidavit at para 20, Exhibit "D", Exhibit "H" – Current Project Drawings indicating Connection Point.

25. Moreover, on March 30, 2017, the OEB issued a decision and Order that granted WPD leave to construct certain transmission facilities in PEC. The Order extended the construction commencement deadline to September 29, 2017.[21]

26. By letter dated October 31, 2017, WPD wrote to the OEB, indicating that no construction had commenced on the Project transmission line facilities. To date, WPD has not commenced transmission line construction for the Project.[22]

27. Section 2.4(a) of the IESO Contract also states that the IESO may terminate the FIT Contract prior to the OPA/IESO providing WPD with a Notice to Proceed ("NTP") for the Project:[23]

> Until the OPA issues Notice to Proceed to [WPD], and [WPD] has provided to the OPA the Incremental NTP Security in accordance with Section 2.4(g), the OPA may terminate this Agreement in its sole and absolute discretion by notice to [WPD] and all Completion and Performance Security shall be returned or refunded (as applicable) to [WPD] within 20 Business Days following receipt of a written request for such return or refund (as applicable) from [WPD]. Until the OPA issues Notice to Proceed to [WPD], [WPD] may terminate this Agreement in its sole and absolute discretion by notice to the OPA.

28. To date, the IESO has not issued WPD with a NTP for the Project.[24]

29. Section 2.5 of the IESO Contract also addresses timing and milestone dates, and states:[25]

> The Supplier acknowledges that time is of the essence to the OPA with respect to attaining <u>Commercial Operation of the Contract Facility by the Milestone Date for Commercial Operations as set out in Exhibit A. The Parties agree that Commercial Operation shall be achieved in a timely manner and by the Milestone Date for Commercial Operation.</u> [WPD] acknowledges that even if the Contract Facility has not achieved Commercial Operation by the Milestone Date for Commercial Operation, the Term shall nevertheless expire on the day before the twentieth or fortieth anniversary (as applicable) of the Milestone Date for Commercial Operation, pursuant to Section 8.1 [emphasis added].

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[21] November Walsh Affidavit at para 21, Exhibit "I" – OEB Decision dated March 30, 2017.
[22] November Walsh Affidavit at para 22, Exhibit "J" – Letter dated October 31, 2017 from WPD to OEB.
[23] November Walsh Affidavit at para 23, Exhibit "B" – IESO Contract excerpt, s. 2.4(a).
[24] November Walsh Affidavit at para 24.
[25] November Walsh Affidavit at para 25, Exhibit "B" – IESO Contract excerpt, s. 2.5.

30. The IESO Active Contracted Generation List at Exhibit "A" indicates the Milestone Commercial Operation Date for the Project is January 6, 2015 (the "MCOD Date"). WPD did not achieve Commercial Operation by the MCOD Date. To date, WPD has not achieved Commercial Operation for the Project.[26]

31. Section 9.1 of the IESO Contract also addresses termination and default provisions:[27]

> Each of the following will constitute an Event of Default by the Supplier (each, a Supplier Event of Default"): (j) The Commercial Operation Date has not occurred on or before the date which is 18 months after the Milestone Date for Commercial Operation, or otherwise as may be set out in Exhibit A [emphasis added].

32. WPD did not satisfy the Project Commercial Operation Date on or before July 6, 2016, which is 18 months after the MCOD Date. WPD is in default of the IESO Contract pursuant to section 9.1.[28]

33. For each of the foregoing reasons, APPEC fully expected that the Project would not proceed.[29]

34. On September 21, 2017, WPD publicly announced that it was intending to proceed with a 9 turbine White Pines project.[30]

35. On September 29, 2017, APPEC issued its Notice of Application in this proceeding.[31]

36. On October 18, 2017, turbine manufacturer Senvion announced that an agreement had been signed to provide turbines for the White Pines project. This press release made it clear that the turbines were only ordered after APPEC's application was commenced. It also makes it clear that delivery of the turbines would not take place until the summer of 2018.[32]

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[26] November Walsh Affidavit at para 26.
[27] November Walsh Affidavit at para 27, Exhibit "B" – IESO Contract excerpt, s 9.1(j).
[28] November Walsh Affidavit at para 28.
[29] November Walsh Affidavit at para 29.
[30] Affidavit of Orville Walsh, Sworn December 15, 2017, at para 3 [the "December Walsh Affidavit"].
[31] December Walsh Affidavit at para 4.
[32] December Walsh Affidavit at para 5, Exhibit "A" – Senvion Press Release dated October 18, 2017.

37. WPD has also publicly indicated that turbine bases would not be installed until the spring of 2018. Given weather conditions in Prince Edward County and general building practices, the earliest this construction could reasonably take place is April 2018.[33]

38. WPD still has no road use agreements, and haul routes have not been established pursuant to the REA and its conditions.[34]

39. WPD has conducted a limited amount of preliminary site preparation. However, this work is similar to work done on turbine sites which the Environmental Review Tribunal removed in its decision of April 26, 2017. The photos at Exhibit "D" of the Affidavit of Orville Walsh, sworn on December 15, 2017, were taken in the spring of 2016 from a drone at the request of APPEC. They depict the scope of work conducted at one of the proposed turbine sites for this Project. Notwithstanding this amount of work, the ERT did not hesitate to remove this and 17 other proposed turbines from the REA.[35]

40. Based on this type of information, APPEC believed that the schedule, established with counsel for the IESO and WPD, leading to a March 2, 2018 hearing (the previous return date for this application) would allow the court to hear and rule on the issues raised in APPEC's application before any material and/or substantial work on the Project would occur.[36]

41. On November 24, 2017, counsel for APPEC received a copy of correspondence, dated November 15, 2017. It was not received by the recipient Ms. Paula Peel (an APPEC Director) until earlier that week. It appears to indicate that construction will be taking place much earlier.

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[33] December Walsh Affidavit at para 6, Exhibit "B" – wpd White Pines project website excerpt.
[34] December Walsh Affidavit at para 7, Exhibit "C" – County Roads Update re REA.
[35] December Walsh Affidavit at para 8, Exhibit "D" – Photos of Proposed Turbine Site.
[36] December Walsh Affidavit at para 9.

This raised serious concerns for APPEC regarding the schedule and the March 2, 2018 hearing date.[37]

42. On December 8, 2017, counsel for APPEC, without waiving any of their client's other rights, agreed with the IESO's position set out in an email of November 29, 2017 that all of the risk of proceeding with construction while this application is before the court lies solely with WPD and that APPEC would be advising the court accordingly.[38]

43. Regarding the location for a hearing, counsel for APPEC investigated the possibility of a transfer to Toronto. In order to do so, the file must be traversed between jurisdictions. This would add time and cost to the application, and may or may not be accepted by the court. APPEC was also advised that it may not be possible to obtain dates any earlier, and in fact, they may be later than those that are likely to become available in Picton/Belleville. Consequently, APPEC has continued to work with the Trial Coordinator's office in the court where the matter is currently active.[39]

44. Regarding the affidavit of Perry Cecchini, dated November 30, 2017, APPEC relied upon the representations in the FIT contract between the IESO and Proponent. These include (but are not limited to) the fact that the Contract Capacity clearly cannot be reduced below 75 percent i.e. section 2.1(c). As well, APPEC relied upon the termination provisions, including (but not limited to) section 2.4. From Mr. Cecchini's affidavit, it now appears that these were misrepresentations.[40]

45. As a result of that reliance, APPEC has suffered irreparable damage. APPEC did not appeal the decision of the ERT, dated April 26, 2017, that allowed 9 of the 27 turbines, as it was

[37] December Walsh Affidavit at para 10, Exhibit "E" – Letter MOECC to P. Peel – Nov. 15, 2017.
[38] December Walsh Affidavit at para 11.
[39] December Walsh Affidavit at para 12.
[40] December Walsh Affidavit at para 13.

clear from the information available to APPEC at that time, that the Project could no longer proceed. The time to appeal expired long before APPEC became aware of the relevant information in Mr. Cecchini's affidavit. This includes (but is not limited to) the Ministerial Directive dated August 2, 2011 (Cecchini Affidavit, Exhibit "G"), which was unknown to APPEC until reading Mr. Cecchini's Affidavit.[41]

PART III – ISSUES AND LAW

ISSUE 1 – DOCTRINE OF LEGITIMATE EXPECTATIONS

46. The Supreme Court of Canada ("SCC") in *Old St Boniface Residents Assn Inc v Winnipeg (City)* ("*St. Boniface*")[42], defined the doctrine of legitimate expectations as an extension of the rules of natural justice and procedural fairness. The Court explains:

> The principle [of legitimate expectation]…is simply an extension of the rules of natural justice and procedural fairness. It affords a party affected by the decision of a public official an opportunity to make representations in circumstances in which there otherwise would be no such opportunity. The court supplies the omission where, based on the conduct of the public official, a party has been led to believe that his or her rights would not be affected without consultation.[43]

47. The doctrine was revisited by the SCC in *Canada (Attorney General) v Mavi*[44] ("*Mavi*"),

> Where a government official makes representations within the scope of his or her authority to an individual about an administrative process that the government will follow, and the representations said to give rise to the legitimate expectations are clear, unambiguous and unqualified, the government may be held to its word, provided the representations are procedural in nature and do not conflict with the decision maker's statutory duty. Proof of reliance is not a requisite.[45]

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[41] December Walsh Affidavit at para 14.
[42] *Old St Boniface Residents Assn Inc v Winnipeg (City)*, [1990] 3 SCR 1170 ["*St Boniface*"], Applicant's Authorities, Tab 2.
[43] *St Boniface*, *supra* note 42 at para 74.
[44] *Canada (Attorney General) v Mavi*, [2011] 2 SCR 504 ["*Mavi*"], Applicant's Authorities, Tab 3.
[45] *Mavi*, *supra* note 44 at para 68.

> …Generally speaking, government representations will be considered sufficiently precise for purposes of the doctrine of legitimate expectations if, had they been made in the context of a private law contract, they would be sufficiently certain to be capable of enforcement.[46]

48. Here, there can be no doubt that APPEC had a legitimate expectation of the IESO's process related to their contract with WPD, and more specifically, the Project's Contract Capacity and termination clauses. By publishing the IESO Contract on its website, the IESO made clears representation to the public, and particularly to those members of local communities impacted by the FIT Program.

49. The IESO Contract certainly related to an administrative process. It laid out, in fact, the very rules for terminating a contract with a supplier. The terms were clear, unambiguous, and unqualified.

50. In addition, the representation cannot possibly conflict with the IESO's mandate or statutory duties, as the IESO Contract actually reflected their responsibilities under the FIT Program. The case law even contemplates that representations will be upheld under the doctrine of legitimate expectations if they were enforceable in a contractual context. Here, the representation was actually part of a contract that APPEC fully expected to be enforced.

51. Notably, proof of reliance is not required to meet the test for legitimate expectations.

52. For the foregoing reasons, the IESO ought "to be held to its word."[47] The IESO Contract, made available to the public, should be enforced and the Project should be terminated.

53. The IESO may attempt to argue that the doctrine does not apply to it. However, the law is clear. The doctrine of legitimate expectations governs the conduct of "public officials", and the IESO is clearly comprised of "public officials".

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[46] *Mavi*, *supra* note 44 at para 69.
[47] *Mavi*, *supra* note 44 at para 68.

54. This term has been defined by the SCC in *R. v Boulanger*[48] ("*Boulanger*"). There, the Court looked to the *Criminal Code*[49] to determine who represents an "official" and what constitutes an "office":

> An "official" is defined in s. 118 as a person who "holds an office" or "is appointed to discharge a public duty". The term "office" is defined broadly as including "an office or appointment under the government", "a civil or military commission" and "a position or an employment in a public department" [emphasis added].[50]

55. Similarly, the New Brunswick Court of Queen's Bench considered the definition of a "public officer" in *Béliveau v Sackville (Town)*[51] ("*Béliveau*"), later affirmed by the New Brunswick Court of Appeal in 2017. There, the Court relied on the Federal Court of Canada's treatment of the term, "public officers", in *Houle v Minister of Employment of Employment and Immigration* ("*Houle*").

56. Specifically, the Court in *Béliveau* addresses the following passage from *Houle*: [52]

> I note as well that the definition of "public officer" in the Interpretation Act is an inclusive one, similar to the definition of a public officer contained in s. 2 of the Interpretation Ordinance, RONWT 1974, c I-3, and thus extends, but does not exclude, the common law meaning of the term whereby: …every one who is appointed to discharge a public duty, and receives a compensation in whatever shape, whether from the crown or otherwise, is constituted a public office.

57. Ultimately, the Court in *Béliveau* agreed that the term "public officer" was inclusive, and broader even than the Court found in *Houle*. Compensation was not a prerequisite to being a

[48] *R v Boulanger*, [2006] 2 SCR 49 ["*Boulanger*"], Applicant's Authorities, Tab 4.
[49] *Criminal Code*, RSC 1985, c C-46.
[50] *Boulanger*, *supra* note 48 at para 5.
[51] *Béliveau v Sackville (Town)*, [2016] NBJ No 197 (NBQB), aff'd [2017] NBJ No 133 (NBCA) ["*Béliveau*"], Applicant's Authorities, Tabs 5 and 6.
[52] *Béliveau*, *supra* note 51 at para 28, citing *Houle v Canada (Minister of Labour and Immigration)*, [1987] 2 FC 493 at para [19].

public officer.[53] Instead, the Court found that *any* person appointed to a public authority or board, with the broad responsibilities found in *Béliveau*, is a public officer.

58. The IESO is governed by the *Electricity Act,* and must "exercise the powers and perform the duties assigned to it under this Act, the regulations, directions, the market rules and its licence."[54] Its mandate is broad and was summarized in Mr. Cecchini's affidavit: it is "to ensure that Ontario's electricity needs were met both now and in the future."[55] That mandate includes many examples of responsibilities that directly impact the public, and includes more specifically "the development and administration of the FIT Program."[56]

59. In *Béliveau*, "the responsibilities and areas of impact" of a local Heritage Board were considered sufficiently "far-reaching and public in nature," that the Board's members were found to be public officers.[57] With respect, it would seem legally absurd to suggest that the IESO, a province-wide organization composed of government appointees,[58] responsible for power system planning and the procurement of new generation,[59] holds less responsibility and is less far-reaching than a small town's Heritage Board. Clearly, the IESO is an organization of public officials, who can rightly be held accountable under the doctrine of legitimate expectations.

60. As a final note, to fully appreciate the weight of the doctrine of legitimate expectations, one must look to the doctrine of procedural fairness, as one undoubtedly informs the other. In *Mavi*, the SCC expressed the historic importance of procedural fairness:

> The doctrine of procedural fairness has been a fundamental component of Canadian administrative law since *Nicholson v Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 SCR 311, where Chief Justice Laskin for the majority adopted the proposition that "in the administrative or

[53] *Béliveau*, *supra* note 51 at para 47.
[54] *Electricity Act*, 1998, S.O. 1998, c. 15, Sched. A, at s.6(1).
[55] Affidavit of Perry Cecchini, sworn November 30, 2017 [the "Cecchini Affidavit"], at para. 8.
[56] Cecchini Affidavit, at para. 10.
[57] *Béliveau*, *supra* note 51 at para 46.
[58] *Electricity Act*, 1998, S.O. 1998, c. 15, Sched. A, at s.5(3).
[59] Cecchini Affidavit, at para. 6.

> executive field there is a general duty of fairness" (p. 324). Six years later this principle was affirmed by a unanimous Court, per Le Dain J: "…there is, as a general common law principle, a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual": Cardinal v Director of Kent Institution, [1985] 2 SCR 643, at p 653. The question in every case is "what the duty of procedural fairness may reasonably require of an authority in the way of specific procedural rights in a particular legislative and administrative context" (Cardinal, at p 654)…"[t]he observance of fair procedures is central to the notion of the "just" exercise of "power."[60]

61. The SCC also particularized the doctrine, as having two key elements: (1) the general duty of fairness in the administrative context; and (2) the content of the duty of procedural fairness. The general duty of fairness provides that administrative officials cannot be free to deal unfairly with people.[61] The substantive content of the duty of fairness is a context-dependent analysis, that "varies with circumstances and the legislative and administrative context."[62]

62. The content of procedural fairness must be weighed on a balance. In *Mavi*, the SCC stated,

> In determining the content of procedural fairness a balance must be struck. Administering a "fair" process inevitably slows matters down and costs the taxpayer money. On the other hand, the public also suffers a cost if government is perceived to act unfairly, or administrative action is based on "**erroneous, incomplete or ill-considered findings of fact, conclusions of law, or exercises of discretion.**"[63] [emphasis added]

63. Furthermore, the SCC addressed what contextual elements should be considered to determine the content of procedural fairness:

> A number of factors help to determine the content of procedural fairness in a particular legislative and administrative content…The duty of fairness is not a "one-size-fits-all" doctrine. Some of the elements to be considered were set out…in a non-exhaustive list in *Baker* to include [:]

[60] *Mavi*, *supra* note 44 at para 38.
[61] *Mavi*, *supra* note 44 at para 39.
[62] *Mavi*, *supra* note 44 at para 39.
[63] *Mavi*, *supra* note 44 at para 40.

> (i) "the nature of the decision being made and the process followed in making it" (para 23);
> (ii) "the nature of the statutory scheme and the 'terms of the statute pursuant to which the body operates" (para 24);
> (iii) "the importance of the decision to the individual or individuals affected" (para 25);
> (iv) "the legitimate expectations of the person challenging the decision" (para 26); and
> (iv) "the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances" (para 27).
>
> Other cases helpfully provide additional elements for courts to consider but the obvious point is that the requirements of the duty in particular cases are driven by their particular circumstances. <u>The simple overarching requirement is fairness</u>, and this "central" notion of the "just exercise of power" should not be diluted or obscured by jurisprudential lists developed to be helpful but *not* exhaustive. [emphasis + spacing added][64]

64. Ultimately, government entities such the IESO "cannot be free to deal unfairly with people."[65] Fair dealings are context-specific and judged by particular circumstances. That simple principle must be considered in the test for legitimate expectations. In this case, the conduct of the IESO clearly falls below this standard.

<u>ISSUE 2 – NEGLIGENT MISREPRESENTATION</u>

65. The SCC in *Queen v Cognos Inc*[66] ("*Queen*") defined the (5) five elements of the tort of negligent misrepresentation:[67]

> The required elements for a successful *Hedley Byrne* [tort of negligent misrepresentation] claim have been stated in many authorities, sometimes in varying forms. The decisions of this Court cited above suggest five general requirements: (1) there must be a duty of care based on a "special relationship" between the representor and the representee; (2) the representation in question must be untrue, inaccurate, or misleading; (3) the representor must have acted

[64] *Mavi*, *supra* note 44 at para 42.
[65] *Mavi*, *supra* note 44 at para 39.
[66] *Queen v Cognos Inc*, [1993] 1 SCR 87 ["*Queen*"], Applicant's Authorities, Tab 7.
[67] *Queen*, *supra* note 66 at para 33; *Orr v Metropolitan Toronto Condominium Corp. No. 1056*, [2014] OJ No. 5752 (ONCA) ["*Orr*"] at para. 42, Applicant's Authorities, Tab 8.

negligently in making said misrepresentation; (4) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and (5) the reliance must have been detrimental to the representee in the sense that damages resulted.

66. Each of these five elements have also occurred in this case. Assessing each element, there is, first of all, certainly a duty of care present between the IESO and APPEC.

67. In *Queen*, the SCC points out that,

> There is some debate in academic circles, fuelled by various judicial pronouncements, about the proper test that should be applied to determine when a "special relationship" exists between the representor and the representee which will give rise to a duty of care. Some have suggested that "foreseeable and reasonable reliance" on the representations is the key element to the analysis, while others speak of "voluntary assumption of responsibility" on the part of the representor [emphasis added].[68]

68. Here, the IESO voluntarily published a copy of the IESO Contract on its website, "in order to maintain the standard, open and fair nature of the FIT Program."[69] There was a choice, and a "voluntary assumption of responsibility," in making that contract publicly available. The IESO must have known, and intended, that the public would see it and rely upon it. More particularly, it must have had in mind the class of people living in the communities affected by FIT projects. They have a very direct and unique interest in such matters. They are clearly in a limited class, in a special position.

69. The IESO may seek to argue that there is not sufficient proximity between the parties to establish a duty of care. However, a representation need not be made directly to the wronged party for there to be a claim for negligent misrepresentation.

70. In *Corporation of the Village of Lakefield v Black,* the Ontario Court of Appeal found a "*prima facie* duty of care" between a municipality and resident, even though the negligent misrepresentation there was made to the public at large. The Court held,

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[68] *Queen*, *supra* note 66 at para 45.
[69] Cecchini Affidavit, at para. 24.

> Lakefield [the municipality] ought reasonably to have foreseen that Black [a local resident] would rely on its representation. Lakefield made the representation based on its special knowledge of the circumstances and as a formal response to permit evaluation of a request for approval of a plan to subdivide this property. It ought to have foreseen that its representation would be relied on by someone seeking to effect that very subdivision, particularly where its representation was reflected in the draft plan approval which resulted from the representation.[70]

71. Here, the IESO also ought to have reasonably foreseen that local residents, impacted by FIT contracts in their community, would rely on the IESO's public representations regarding those contracts. Moreover, APPEC, was also involved in a legal dispute at the ERT with the contracting supplier, WPD. The IESO knew or ought to have known that APPEC had a unique interest in the matter, beyond that of any other members of the public. For the foregoing reasons there is then in these circumstance a duty of care between the IESO and APPEC.

72. Second, the IESO's representations to the public were, by their own admission, inaccurate and misleading. The IESO published a contract that laid out very specific terms regarding Contract Capacity and termination. There was no evidence that the IESO contract, available to the public, was incomplete and/or subject to such wholesale extraordinary amendments so as to completely change the terms known to the public.

73. Mr. Cecchini suggests that, "while copies of the standard FIT Contracts, FIT Rules and Prescribed Forms are made publicly available on the IESO's website, the specific details of a particular supplier's FIT Contract and requests are considered confidential and are not to be disclosed to anyone except as permitted by the terms of the FIT Contract."[71] However, the process is intended to be "standardized."[72] APPEC had no reason to believe that there were additional terms and amendments to the IESO Contract that were hidden from public view. It

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[70] *Corporation of the Village of Lakefield v Black*, 41 OR (3d) 741 (ONCA) ["*Lakefield*"], Applicant's Authorities, Tab 9.
[71] Cecchini Affidavit, at para. 26.
[72] Cecchini Affidavit, at para. 13.

was the IESO's responsibility, in making a voluntary representation to the public, to ensure that the representation was accurate and not misleading. This clearly did not occur as the actual agreement between the company and the IESO was radically different than the contract the IESO held out to the public.

74. The IESO Contract *only* allows for reductions to the Contract Capacity if the "lower amount is no less than 75% of the original Contract Capacity."[73] Moreover, the IESO Contract contemplates that "it shall not be unreasonable for the [IESO] to withhold its consent to any modification, variation or amendment which would, or would be likely to, materially adversely affect the ability of the Supplier to comply with its obligations under this Agreement." Clearly, a reduction of the size allowed here would materially adversely affect WPD's ability to comply with its obligations, as evidenced by both the Stantec Report and WPD's own submissions at the ERT. Even if the IESO could allow a reduction of this size, which it could not, it was not reasonable to do so.

75. Just as importantly, the approval process described in paragraphs 31-34 of Mr. Cecchini's Affidavit was also completely unknown to the public or APPEC.

76. As well, the termination clauses of the IESO Contract were very clear. Until issuing a Notice to Proceed, the IESO could terminate their agreement with WPD.[74] Additionally, "the Parties agree that Commercial Operation shall be achieved in a timely manner and by the Milestone Date for Commercial Operation."[75] The supplier, WPD, would default if they did not achieve commercial operation by the Commercial Operation Date (18 months after the MDCO).[76]

[73] November Walsh Affidavit at para 11, Exhibit "B" – IESO Contract excerpt, s. 2.1(c).
[74] November Walsh Affidavit at para 23, Exhibit "B" – IESO Contract excerpt, s. 2.4(a).
[75] November Walsh Affidavit at para 25, Exhibit "B" – IESO Contract excerpt, s. 2.5.
[76] November Walsh Affidavit at para 27, Exhibit "B" – IESO Contract excerpt, s 9.1(j).

77. The Ministerial Directive, dated August 2, 2011, allows for waiver of the IESO's termination rights,[77] but there is no evidence that the public was notified of this significant change to the IESO Contract. Similarly, there is no evidence showing that the IESO offered WPD any extension to the Project timeline. Furthermore, the "public notification" referred to in Mr. Cecchini's Affidavit is merely a proposal, and not notice of any actual amendment to the process outlined in the IESO Contract. The document expressly states, "the OPA is proposing to adjust a Supplier's Milestone Date for Commercial Operation for a period equal to the appeal period."[78]

78. On the evidence now presented for the first time by the IESO in November 2017 in response to this legal claim, it is obvious that there have been major changes to the IESO's process that have taken place behind closed doors. The IESO Contract that was represented to the public is, simply put, not true and, therefore, is a misrepresentation meeting the requirements of *Queen*.

79. Third, the IESO did indeed act negligently by making the misrepresentation. In *Orr v Metropolitan Toronto Condominium Corp. No. 1056*, the Ontario Court of Appeal reiterated the five elements of negligent misrepresentation, and went further in defining the standard of care applicable to the tort:

> The standard of care applicable to negligent misstatement is that of an ordinary, reasonable and prudent person in the position of the representor, in the circumstances…In other words, the representor must exercise such reasonable care as the circumstances require to ensure that the representation is accurate and not misleading... What is reasonable must be determined on an objective basis with consideration for the context of the particular case, such as the likelihood of a foreseeable harm, the gravity of the harm, and the cost of avoiding the harm…The court may consider "external indicators" of what is

[77] Cecchini Affidavit, Exhibit "G" – Ministerial Directive, dated August 2, 2011.
[78] Cecchini Affidavit, Exhibit "H" – IESO Article, dated February 14, 2014.

> reasonable, such as custom, trade practice, and statutory or regulatory standards… [emphasis added].[79]

80. The IESO did not take reasonable care to ensure that the IESO Contract was accurate and not misleading. It was reasonably foreseeable that entities such as APPEC would rely on the information the IESO publicly promoted. The gravity of harm by not providing accurate information is self-evident, as these are very large projects affecting entire communities. The consequences of providing misinformation will obviously be serious.

81. However, it gave no indication that the IESO Contract was incomplete, outdated, or otherwise unreliable. Indeed, the IESO Contract states: "This Agreement constitutes the entire agreement between the Parties pertaining to the subject matter of this Agreement."[80] It would have taken virtually no extra effort to alert the public that there was more to the Agreement. It would have taken virtually no effort to advise that the process outlined in the IESO Contract had changed. The IESO clearly failed to meet the requisite standard of care.

82. Fourth, APPEC has reasonably relied on the IESO's misrepresentation. After the ERT's decision on April 26, 2017, WPD was incapable of meeting its obligations under the IESO Contract. WPD would not be able to meet the requisite 75% of the original Contract Capacity, with only 9 turbines. Likewise, WPD had missed deadlines, and, therefore, was in default. As a result, APPEC fully, and reasonably, believed that the Project would not proceed.

83. Finally, fifth, APPEC has clearly suffered a loss, as a direct result of that reliance. APPEC did not appeal the final ERT decision because it was, seemingly, clear that the Project could not continue and would be terminated. As previously stated, the time to appeal expired long before APPEC became aware of the relevant information in Mr. Cecchini's Affidavit.

[79] *Orr, supra* note 67 at para. 54.
[80] Cecchini Affidavit, Exhibit "C" – IESO Contract at s.1.9.

Because of the IESO's misrepresentation, APPEC did not appeal. They have lost an essential procedural right and stand to suffer resulting harms to their community.

PART IV – RELIEF SOUGHT

84. The Applicant, APPEC, respectfully requests:

a. A declaration that the original contract, and any amendments to the original agreement and any subsequent agreements between the Respondents, the IESO and WPD, or such other entity named in any Agreement(s), is null and void;

b. An injunction restraining any further work by WPD, associated with the Project in PEC, if necessary;

c. The costs of this application on a full indemnity basis; and

d. Such further and other relief as counsel may advise and this Honourable Court may permit.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 21st DAY OF DECEMBER, 2017.

Eric K. Gillespie
Of counsel for the Applicant

SCHEDULE A

Béliveau v Sackville (Town), [2016] NBJ No 197 (NBQB), aff'd [2017] NBJ No. 133 (NBCA)

Canada (Attorney General) v Mavi, [2011] 2 SCR 504

Corporation of the Village of Lakefield v. Black, 41 OR (3d) 741 (ONCA)

Hirsch v Ontario (Environment and Climate Change), 15-068 (26 April 2017)(Ontario Environmental Review Tribunal)

Old St Boniface Residents Assn Inc v Winnipeg (City), [1990] 3 SCR 1170

Orr v Metropolitan Toronto Condominium Corp. No. 1056, [2014] OJ No. 5752 (ONCA)

Queen v Cognos Inc, [1993] 1 SCR 87

R v Boulanger, [2006] 2 SCR 49

SCHEDULE B

Electricity Act, 1998, S.O. 1998, c. 15, Sched. A

Amalgamation of IESO and OPA

5 (1) The predecessor Independent Electricity System Operator and the Ontario Power Authority are amalgamated and shall continue as one corporation without share capital in accordance with this Part. 2014, c. 7, Sched. 7, s. 3 (1).

Name of corporation

(2) The name of the corporation formed under subsection (1) is the Independent Electricity System Operator in English and Société indépendante d'exploitation du réseau d'électricité in French. 2014, c. 7, Sched. 7, s. 3 (1).

Composition

(3) The IESO is composed of the members of its board of directors. 2014, c. 7, Sched. 7, s. 3 (1).

Separation of functions

(4) The board of directors shall take such steps as it considers advisable and appropriate to ensure that there is an effective separation of functions and activities of the IESO relating to,

(a) its market operations; and

(b) its procurement and contract management activities. 2014, c. 7, Sched. 7, s. 3 (1).

Prohibition

(5) The IESO shall not conduct the operations of the IESO-administered markets in any manner that,

(a) unjustly advantages or disadvantages any market participant or class of market participants; or

(b) is inconsistent with this Act. 2014, c. 7, Sched. 7, s. 3 (1).

Transmission-related information

(6) The IESO shall provide transmission-related information on an equal basis and in the same manner to all market participants. 2014, c. 7, Sched. 7, s. 3 (1).

Confidentiality

(7) The board of directors shall ensure that appropriate procedures are established and maintained so that confidential information that is in the possession or control of any officers or employees of the IESO, or any agent or third party working on its behalf, is not inappropriately communicated. 2014, c. 7, Sched. 7, s. 3 (1).

Section Amendments with date in force (d/m/y)

Objects

6 (1) The objects of the IESO are,

(a) to exercise the powers and perform the duties assigned to it under this Act, the regulations, directions, the market rules and its licence;

(b) to enter into agreements with transmitters to give it authority to direct the operation of their transmission systems;

(c) to direct the operation and maintain the reliability of the IESO-controlled grid to promote the purposes of this Act;

(d) to participate in the development by any standards authority of criteria and standards relating to the reliability of the integrated power system;

(e) to establish and enforce criteria and standards relating to the reliability of the integrated power system;

(f) to work with the responsible authorities outside of Ontario to co-ordinate the IESO's activities with the activities of those authorities;

(g) to operate the IESO-administered markets to promote the purposes of this Act;

(h) to engage in activities related to contracting for the procurement of electricity supply, electricity capacity, electricity storage, transmission systems or any part of such systems and conservation resources;

(i) to engage in activities related to settlements, payments under a contract entered into under the authority of this Act and payments provided for under this Act or the *Ontario Energy Board Act, 1998*;

(j) to engage in activities in support of the goal of ensuring adequate, reliable and secure electricity supply and resources in Ontario;

(k) to forecast electricity demand and the adequacy and reliability of electricity resources for Ontario for the short term, medium term and long term;

(l) to conduct independent planning for electricity generation, demand management, conservation and transmission;

(m) to engage in activities to facilitate the diversification of sources of electricity supply by promoting the use of cleaner energy sources and technologies, including alternative energy sources and renewable energy sources;

(n) to engage in activities in support of system-wide goals for the amount of electricity to be produced from different energy sources;

(o) to engage in activities that facilitate load management;

(p) to engage in activities that promote electricity conservation and the efficient use of electricity;

(q) to assist the Board by facilitating stability in rates for certain types of consumers;

(q.1) to exercise the powers and rights and to perform the duties and obligations assigned to it under the *Ontario Fair Hydro Plan Act, 2017* and to engage in activities to facilitate the implementation of the *Ontario Fair Hydro Plan Act, 2017*, including,

(i) entering into agreements or arrangements with any person for the purposes of the *Ontario Fair Hydro Plan Act, 2017*,

(ii) engaging in activities related to making payments to and receiving payments as contemplated under the *Ontario Fair Hydro Plan Act, 2017* and related settlement activities,

(iii) engaging in activities related to the transfer and administration of the regulatory asset created under the *Ontario Fair Hydro Plan Act, 2017*, which activities may include,

(A) incurring liabilities in relation to the regulatory asset,

(B) transferring the regulatory asset under section 26 of the *Ontario Fair Hydro Plan Act, 2017* for consideration, and

(C) acting as a recovery agent under the *Ontario Fair Hydro Plan Act, 2017*;

(r) to collect and make public information relating to the short term, medium term and long term electricity needs of Ontario and the adequacy and reliability of the integrated power system to meet those needs; and

(s) to engage in such other objects as may be prescribed by the regulations. 2014, c. 7, Sched. 7, s. 3 (1); 2016, c. 10, Sched. 2, s. 3; 2017, c. 16, Sched. 1, s. 43 (1).

Not for profit

(2) The business and affairs of the IESO shall be carried on without the purpose of gain and any profits shall be used by the IESO for the purpose of carrying out its objects. 2014, c. 7, Sched. 7, s. 3 (1).

Capacity

(3) The IESO has the capacity, rights, powers and privileges of a natural person for the purpose of carrying out its objects, except as otherwise limited by this Act. 2014, c. 7, Sched. 7, s. 3 (1).

Limitation on powers, financial

(4) The IESO's powers to borrow, to invest its funds and to manage its financial assets, liabilities and risks are subject to such rules and restrictions as may be prescribed by the regulations. 2014, c. 7, Sched. 7, s. 3 (1).

R.R.O. 1990, Reg. 194: RULES OF CIVIL PROCEDURE

RULE 14 ORIGINATING PROCESS

HOW PROCEEDINGS COMMENCED

By Issuing Originating Process

14.01 (1) A proceeding shall be commenced by the issuing of an originating process. O. Reg. 14/04, s. 11.

Exceptions

(2) A counterclaim that is only against persons who are already parties to the main action, and a crossclaim, shall be commenced by the delivery of the pleading containing the counterclaim or crossclaim, and the pleading need not be issued. O. Reg. 131/04, s. 4.

(2.1) An application for a certificate of appointment of estate trustee under Rule 74 need not be issued. O. Reg. 484/94, s. 4 (2).

Where Leave Required

(3) Where leave to commence a proceeding is required, it shall be obtained by motion. R.R.O. 1990, Reg. 194, r. 14.01 (3).

(4) A party may rely on a fact that occurs after the commencement of a proceeding, even though the fact gives rise to a new claim or defence, and, if necessary, may move to amend an originating process or pleading to allege the fact. R.R.O. 1990, Reg. 194, r. 14.01 (4).

14.01.1 Revoked: O. Reg. 457/01, s. 2.

PROCEEDINGS BY ACTION AS GENERAL RULE

14.02 Every proceeding in the court shall be by action, except where a statute or these rules provide otherwise. R.R.O. 1990, Reg. 194, r. 14.02.

ACTIONS — BY STATEMENT OF CLAIM OR NOTICE OF ACTION

Statement of Claim

14.03 (1) The originating process for the commencement of an action is a statement of claim (Form 14A (general) or 14B (mortgage actions)), except as provided by,

(a) subrule (2) (notice of action);

(b) REVOKED: O. Reg. 131/04, s. 5 (1).

(c) rule 27.03 (counterclaim against person not already a party);

(d) subrule 29.02 (1) (third party claim); and

(e) rule 29.11 (fourth and subsequent party claims). R.R.O. 1990, Reg. 194, r. 14.03 (1); O. Reg. 131/04, s. 5 (1).

Notice of Action

(2) Where there is insufficient time to prepare a statement of claim, an action may be commenced by the issuing of a notice of action (Form 14C) that contains a short statement of the nature of the claim. R.R.O. 1990, Reg. 194, r. 14.03 (2); O. Reg. 131/04, s. 5 (2).

(3) Where a notice of action is used, the plaintiff shall file a statement of claim (Form 14D) within thirty days after the notice of action is issued, and no statement of claim shall be filed thereafter except with the written consent of the defendant or with leave of the court obtained on notice to the defendant. R.R.O. 1990, Reg. 194, r. 14.03 (3).

(4) The notice of action shall not be served separately from the statement of claim. R.R.O. 1990, Reg. 194, r. 14.03 (4).

Information for Court Use

(4.1) Form 14F (Information for court use) shall be filed together with Form 14A, 14B or 14C, as the case may be subject to subrule 14.04 (3). O. Reg. 206/02, s. 2; O. Reg. 263/03, s. 2; O. Reg. 487/16, s. 5.

Statement of Claim may Alter or Extend Claim

(5) In an action commenced by the issuing of a notice of action, the statement of claim may alter or extend the claim stated in the notice of action. R.R.O. 1990, Reg. 194, r. 14.03 (5).

ORDINARY AND SIMPLIFIED PROCEDURE

14.03.1 The simplified procedure set out in Rule 76 shall be used in actions to which subrule 76.02 (1), (2) or (2.1) applies, and may be used in other actions in accordance with subrule 76.02 (3); otherwise, the ordinary procedure set out in these Rules shall be used in all proceedings. O. Reg. 652/00, s. 1; O. Reg. 284/01, s. 4; O. Reg. 132/04, s. 3.

ELECTRONIC FILING OF ORIGINATING PROCESS FOR ACTION

14.04 (1) A statement of claim (Form 14A (general) or 14B (mortgage actions - foreclosure)) or a notice of action (Form 14C) may be filed electronically, if the statement of claim or notice of action may, under rule 13.1.01, be filed in a court location for which the software authorized by the Ministry of the Attorney General for the purpose may be used, as indicated by the Ministry. O. Reg. 487/16, s. 6.

(2) Subrule (1) does not apply unless the plaintiff specifies an e-mail address at which he or she agrees to accept documents from the court electronically. O. Reg. 487/16, s. 6.

(3) Subrule 14.03 (4.1) does not apply if the statement of claim or notice of action is filed electronically. O. Reg. 487/16, s. 6.

Requirement to File in Paper Format

(4) A statement of claim or notice of action that has been filed and issued electronically shall be filed with the registrar by the plaintiff in paper format,

(a) on the filing by the plaintiff of any other document in the action in paper format, other than a document filed under subrule 19.01 (1) or (2); or

(b) on the request of the registrar. O. Reg. 487/16, s. 6.

APPLICATIONS — BY NOTICE OF APPLICATION

Notice of Application

14.05 (1) The originating process for the commencement of an application is a notice of application (Form 14E, 14E.1, 68A or 73A) or an application for a certificate of appointment of an estate trustee (Form 74.4, 74.5, 74.14, 74.15, 74.21, 74.24, 74.27 or 74.30). R.R.O. 1990, Reg. 194, r. 14.05 (1); O. Reg. 484/94, s. 5; O. Reg. 43/14, s. 5 (1).

Information for Court Use

(1.1) Form 14F (Information for court use) shall be filed together with a notice of application in Form 14E, 14E.1, 68A or 73A. O. Reg. 260/05, s. 2; O. Reg. 43/14, s. 5 (2).

Application under Statute

(2) A proceeding may be commenced by an application to the Superior Court of Justice or to a judge of that court, if a statute so authorizes. R.R.O. 1990, Reg. 194, r. 14.05 (2); O. Reg. 292/99, s. 1 (2).

Application under Rules

(3) A proceeding may be brought by application where these rules authorize the commencement of a proceeding by application or where the relief claimed is,

(a) the opinion, advice or direction of the court on a question affecting the rights of a person in respect of the administration of the estate of a deceased person or the execution of a trust;

(b) an order directing executors, administrators or trustees to do or abstain from doing any particular act in respect of an estate or trust for which they are responsible;

(c) the removal or replacement of one or more executors, administrators or trustees, or the fixing of their compensation;

(d) the determination of rights that depend on the interpretation of a deed, will, contract or other instrument, or on the interpretation of a statute, order in council, regulation or municipal by-law or resolution;

(e) the declaration of an interest in or charge on land, including the nature and extent of the interest or charge or the boundaries of the land, or the settling of the priority of interests or charges;

(f) the approval of an arrangement or compromise or the approval of a purchase, sale, mortgage, lease or variation of trust;

(g) an injunction, mandatory order or declaration or the appointment of a receiver or other consequential relief when ancillary to relief claimed in a proceeding properly commenced by a notice of application;

(g.1) for a remedy under the *Canadian Charter of Rights and Freedoms*; or

(h) in respect of any matter where it is unlikely that there will be any material facts in dispute. R.R.O. 1990, Reg. 194, r. 14.05 (3); O. Reg. 396/91, s. 3.

TITLE OF PROCEEDING

14.06 (1) Every originating process shall contain a title of the proceeding setting out the names of all the parties and the capacity in which they are made parties, if other than their personal capacity. R.R.O. 1990, Reg. 194, r. 14.06 (1).

(2) In an action, the title of the proceeding shall name the party commencing the action as the plaintiff and the opposite party as the defendant. R.R.O. 1990, Reg. 194, r. 14.06 (2); O. Reg. 131/04. s. 7.

(3) In an application, the title of the proceeding shall name the party commencing the application as the applicant and the opposite party, if any, as the respondent and the notice of application shall state the statutory provision or rule, if any, under which the application is made. R.R.O. 1990, Reg. 194, r. 14.06 (3).

Exception

(4) Subrules (1), (2) and (3) do not apply to proceedings under Rules 74 and 75. O. Reg. 484/94, s. 6.

HOW ORIGINATING PROCESS ISSUED

14.07 (1) An originating process is issued by the registrar's act of dating, signing and sealing it with the seal of the court and assigning to it a court file number. R.R.O. 1990, Reg. 194, r. 14.07 (1).

(2) A copy of the originating process shall be filed in the court file when it is issued. R.R.O. 1990, Reg. 194, r. 14.07 (2).

Electronic Issuance of Originating Process for Action

(3) A statement of claim (Form 14A (general) or 14B (mortgage actions - foreclosure)) or a notice of action (Form 14C) that was filed electronically may be issued electronically, in which case subrule (2) does not apply. O. Reg. 487/16, s. 7.

TIME FOR SERVICE IN ACTIONS

14.08 (1) Where an action is commenced by a statement of claim, the statement of claim shall be served within six months after it is issued. R.R.O. 1990, Reg. 194, r. 14.08 (1).

(2) Where an action is commenced by a notice of action, the notice of action and the statement of claim shall be served together within six months after the notice of action is issued. R.R.O. 1990, Reg. 194, r. 14.08 (2).

(3) REVOKED: O. Reg. 170/14, s. 2.

(4) REVOKED: R.R.O. 1990, Reg. 194, r. 14.08 (5).

(5) SPENT: O. Reg. 198/05, s. 1. (as amended by O. Reg. 438/08, s. 11 (2)).

STRIKING OUT OR AMENDING

14.09 An originating process that is not a pleading may be struck out or amended in the same manner as a pleading. R.R.O. 1990, Reg. 194, r. 14.09.

DISMISSAL OF ACTION WHERE DEFENDANT PAYS CLAIM

14.10 (1) Where the plaintiff's claim is for money only, a defendant, on paying within the time prescribed for delivery of a defence or at any time before being noted in default, the amount of the plaintiff's claim and the amount claimed for costs, may on motion have the court dismiss the action. R.R.O. 1990, Reg. 194, r. 14.10 (1).

(2) A defendant who considers the amount claimed for costs to be excessive may pay, within the time prescribed for delivery of a defence or at any time before being noted in default, the amount of the plaintiff's claim and the sum of $400 for costs, and the court on motion may dismiss the action and may fix and order payment of the plaintiff's costs or may order payment of the plaintiff's costs as assessed under Rule 58. R.R.O. 1990, Reg. 194, r. 14.10 (2); O. Reg. 653/00, s. 2.

RULE 38 APPLICATIONS — JURISDICTION AND PROCEDURE

APPLICATION OF THE RULE

38.01 (1) Rules 38.02 to 38.12 apply to all proceedings commenced by a notice of application under rule 14.05, subject to subrules (2) and (3). O. Reg. 43/14, s. 8 (1).

(2) Rules 38.02 and 38.09 do not apply to applications to the Divisional Court. R.R.O. 1990, Reg. 194, r. 38.01 (2).

(3) Rules 38.02 to 38.12 apply to an application made under subsection 140 (3) of the *Courts of Justice Act*, unless otherwise provided in rule 38.13 and subject to any modifications set out in that rule. O. Reg. 43/14, s. 8 (2).

APPLICATIONS — TO WHOM TO BE MADE

38.02 An application shall be made to a judge. R.R.O. 1990, Reg. 194, r. 38.02.

PLACE AND DATE OF HEARING

Place of Commencement

38.03 (1) The applicant shall, in the notice of application, name the place of commencement in accordance with rule 13.1.01. O. Reg. 438/08, s. 38.

Place of Hearing

(1.1) The application shall be heard in the county where the proceeding was commenced or to which it has been transferred under rule 13.1.02, unless the court orders otherwise. O. Reg. 438/08, s. 38.

Hearing date where no practice direction

(2) At any place where no practice direction concerning the scheduling of applications is in effect, an application may be set down for hearing on any day on which a judge is scheduled to hear applications. O. Reg. 770/92, s. 11.

Exception, lengthy hearing

(3) If a lawyer estimates that the hearing of the application will be more than two hours long, a hearing date shall be obtained from the registrar before the notice of application is served. O. Reg. 770/92, s. 11; O. Reg. 575/07, s. 3.

Urgent application

(3.1) An urgent application may be set down for hearing on any day on which a judge is scheduled to hear applications, even if a lawyer estimates that the hearing is likely to be more than two hours long. O. Reg. 770/92, s. 11; O. Reg. 575/07, s. 3.

Counter-Application

(4) If a notice of application has been served and the respondent wishes to make an application against the applicant, or against the applicant and another person, the respondent shall make the application at the same place and time to the same judge, unless the court orders otherwise. O. Reg. 14/04, s. 20 (3).

CONTENT OF NOTICE

38.04 Every notice of application (Form 14E, 14E.1, 68A, 73A, 74.44 or 75.5) shall state,

(a) the precise relief sought;

(b) the grounds to be argued, including a reference to any statutory provision or rule to be relied on; and

(c) the documentary evidence to be used at the hearing of the application. R.R.O. 1990, Reg. 194, r. 38.04; O. Reg. 484/94, s. 8; O. Reg. 43/14, s. 9.

ISSUING OF NOTICE

38.05 A notice of application shall be issued as provided by rule 14.07 before it is served. R.R.O. 1990, Reg. 194, r. 38.05.

SERVICE OF NOTICE

Generally

38.06 (1) The notice of application shall be served on all parties and, where there is uncertainty whether anyone else should be served, the applicant may make a motion without notice to a judge for an order for directions. R.R.O. 1990, Reg. 194, r. 38.06 (1).

Where Notice Ought to Have Been Served

(2) Where it appears to the judge hearing the application that the notice of application ought to have been served on a person who has not been served, the judge may,

(a) dismiss the application or dismiss it only against the person who was not served;

(b) adjourn the application and direct that the notice of application be served on the person; or

(c) direct that any judgment made on the application be served on the person. R.R.O. 1990, Reg. 194, r. 38.06 (2).

Minimum Notice Period

(3) The notice of application shall be served at least ten days before the date of the hearing of the application, except where the notice is served outside Ontario, in which case it shall be served at least twenty days before the hearing date. R.R.O. 1990, Reg. 194, r. 38.06 (3).

Filing Proof of Service

(4) The notice of application shall be filed with proof of service at least seven days before the hearing date in the court office where the application is to be heard. R.R.O. 1990, Reg. 194, r. 38.06 (4); O. Reg. 171/98, s. 15; O. Reg. 438/08, s. 39.

NOTICE OF APPEARANCE

38.07 (1) A respondent who has been served with a notice of application shall forthwith deliver a notice of appearance (Form 38A). R.R.O. 1990, Reg. 194, r. 38.07 (1).

(2) A respondent who has not delivered a notice of appearance is not entitled to,

(a) receive notice of any step in the application;

(b) receive any further document in the application, unless,

(i) the court orders otherwise, or

(ii) the document is an amended notice of application that changes the relief sought;

(c) file material, examine a witness or cross-examine on an affidavit on the application; or

(d) be heard at the hearing of the application, except with leave of the presiding judge. O. Reg. 351/94, s. 3.

(3) Despite subrule (2), a party who is served with a notice of application outside Ontario may make a motion under subrule 17.06 (1) before delivering a notice of appearance and is entitled to be served with material responding to the motion. O. Reg. 351/94, s. 3.

Exception, applications to pass accounts

(4) Subrules (1) and (2) do not apply to a notice of application to pass accounts under Rule 74. O. Reg. 484/94, s. 9.

38.07.1 Revoked: O. Reg. 457/01, s. 8.

ABANDONED APPLICATIONS

38.08 (1) The applicant may abandon an application by delivering a notice of abandonment. R.R.O. 1990, Reg. 194, r. 38.08 (1).

(2) An applicant who fails to appear at the hearing shall be deemed to have abandoned the application unless the court orders otherwise. R.R.O. 1990, Reg. 194, r. 38.08 (2).

(3) Where an application is abandoned or is deemed to have been abandoned, a respondent on whom the notice of application was served is entitled to the costs of the application, unless the court orders otherwise. R.R.O. 1990, Reg. 194, r. 38.08 (3).

(4) If a party to an application is under disability, the application may be abandoned by or against that party only with leave of a judge, on notice to the party's litigation guardian and, if the litigation guardian is not the Children's Lawyer or the Public Guardian and Trustee,

(a) to the Children's Lawyer, if the party is a minor; or

(b) to the Public Guardian and Trustee, in any other case. O. Reg. 193/15, s. 3.

MATERIAL FOR USE ON APPLICATION

Application Record and Factum

38.09 (1) The applicant shall,

(a) serve an application record, together with a factum consisting of a concise argument stating the facts and law relied on by the applicant, at least seven days before the hearing, on every respondent who has served a notice of appearance; and

(b) file the application record and factum, with proof of service, at least seven days before the hearing, in the court office where the application is to be heard. R.R.O. 1990, Reg. 194, r. 38.09 (1); O. Reg. 171/98, s. 17 (1); O. Reg. 206/02, s. 9 (1); O. Reg. 438/08, s. 40 (1, 2).

(2) The applicant's application record shall contain, in consecutively numbered pages arranged in the following order,

(a) a table of contents describing each document, including each exhibit, by its nature and date and, in the case of an exhibit, by exhibit number or letter;

(b) a copy of the notice of application;

(c) a copy of all affidavits and other material served by any party for use on the application;

(d) a list of all relevant transcripts of evidence in chronological order, but not necessarily the transcripts themselves; and

(e) a copy of any other material in the court file that is necessary for the hearing of the application. R.R.O. 1990, Reg. 194, r. 38.09 (2).

Respondent's Application Record and Factum

(3) The respondent shall serve on every other party, at least four days before the hearing, a factum consisting of a concise argument stating the facts and law relied on by the respondent. O. Reg. 171/98, s. 17 (2); O. Reg. 206/02, s. 9 (2); O. Reg. 14/04, s. 21; O. Reg. 438/08, s. 40 (3).

(3.1) If of the opinion that the application record is incomplete, the respondent may serve on every other party, at least four days before the hearing, a respondent's application record containing, in consecutively numbered pages arranged in the following order,

(a) a table of contents describing each document, including each exhibit, by its nature and date and, in the case of an exhibit, by exhibit number or letter; and

(b) a copy of any material to be used by the respondent on the application and not included in the applicant's application record. O. Reg. 171/98, s. 17 (2); O. Reg. 438/08, s. 40 (4).

(3.2) The respondent's factum, and the respondent's application record, if any, shall be filed with proof of service in the court office where the application is to be heard, at least four days before the hearing. O. Reg. 171/98, s. 17 (2); O. Reg. 438/08, s. 40 (5).

Dispensing with Record and Factum

(4) A judge, before or at the hearing of the application, may dispense with compliance with this rule in whole or in part. R.R.O. 1990, Reg. 194, r. 38.09 (4).

Material May be Filed as Part of Record

(5) Any material served by a party for use on an application may be filed, together with proof of service, as part of the party's application record and need not be filed separately if the record is filed within the time prescribed for filing the notice or other material. R.R.O. 1990, Reg. 194, r. 38.09 (5).

Transcript of Evidence

(6) A party who intends to refer to a transcript of evidence at the hearing of an application shall file a copy of the transcript as provided by rule 34.18. R.R.O. 1990, Reg. 194, r. 38.09 (6).

Exceptions, applications in estate matters

(7) Subrules (1) to (6) do not apply to applications under Rule 74. O. Reg. 484/94, s. 10.

(8) Subrules (1) to (6) apply to applications under Rule 75, but neither the applicant nor the respondent is required to serve a factum. O. Reg. 484/94, s. 10.

CONFIRMATION OF APPLICATION

Confirmation of Application

38.09.1 (1) A party who makes an application on notice to another party shall,

(a) confer or attempt to confer with the other party;

(b) not later than 2 p.m. three days before the hearing date, give the registrar a confirmation of application (Form 38B) by,

(i) sending it by fax, or by e-mail if available in the court office, or

(ii) leaving it at the court office; and

(c) send a copy of the confirmation of application to the other party by fax or e-mail. O. Reg. 14/04, s. 22; O. Reg. 438/08, s. 41.

Effect of Failure to Confirm

(2) If no confirmation is given, the application shall not be heard, except by order of the court. O. Reg. 14/04, s. 22.

Duty to Update

(3) A party who has given a confirmation of application and later determines that the confirmation is no longer correct shall immediately,

(a) give the registrar a corrected confirmation of application (Form 38B), by,

(i) sending it by fax, or by e-mail if available in the court office, or

(ii) leaving it at the court office; and

(b) send a copy of the corrected confirmation of application to the other party by fax or e-mail. O. Reg. 14/04, s. 22.

DISPOSITION OF APPLICATION

38.10 (1) On the hearing of an application the presiding judge may,

(a) grant the relief sought or dismiss or adjourn the application, in whole or in part and with or without terms; or

(b) order that the whole application or any issue proceed to trial and give such directions as are just. R.R.O. 1990, Reg. 194, r. 38.10 (1).

(2) Where a trial of the whole application is directed, the proceeding shall thereafter be treated as an action, subject to the directions in the order directing the trial. R.R.O. 1990, Reg. 194, r. 38.10 (2).

(3) Where a trial of an issue in the application is directed, the order directing the trial may provide that the proceeding be treated as an action in respect of the issue to be tried, subject to any directions in the order, and shall provide that the application be adjourned to be disposed of by the trial judge. R.R.O. 1990, Reg. 194, r. 38.10 (3).

Exception, applications in estate matters

(4) Clause (1) (b) and subrules (2) and (3) do not apply to applications under Rule 74, other than applications under rule 74.18, and Rule 75. O. Reg. 484/94, s. 11; O. Reg. 193/15, s. 4.

SETTING ASIDE JUDGMENT ON APPLICATION MADE WITHOUT NOTICE

38.11 (1) A party or other person who is affected by a judgment on an application made without notice or who fails to appear at the hearing of an application through accident, mistake or insufficient notice may move to set aside or vary the judgment, by a notice of motion that is served forthwith after the judgment comes to the person's attention and names the first available hearing date that is at least three days after service of the notice of motion. R.R.O. 1990, Reg. 194, r. 38.11 (1); O. Reg. 132/04, s. 10; O. Reg. 55/12, s. 3.

(2) A motion under subrule (1) may be made,

(a) at any place, to the judge who granted the judgment;

(b) at a place determined in accordance with rule 37.03 (place of hearing of motions), to any other judge;

(c) to the Divisional Court, in the case of a judgment of that court. R.R.O. 1990, Reg. 194, r. 38.11 (2).

(3) On a motion under subrule (1), the judgment may be set aside or varied on such terms as are just. R.R.O. 1990, Reg. 194, r. 38.11 (3).

STRIKING OUT A DOCUMENT

38.12 Rule 25.11 applies, with necessary modifications, with respect to any document filed on an application. O. Reg. 43/14, s. 10.

APPLICATIONS UNDER S. 140 (3), COURTS OF JUSTICE ACT

38.13 (1) This rule applies to applications made under subsection 140 (3) of the *Courts of Justice Act*. O. Reg. 43/14, s. 10.

Written Hearing

(2) An application made under subsection 140 (3) of the *Courts of Justice Act* shall be heard in writing without the attendance of the parties, unless the court orders otherwise. O. Reg. 43/14, s. 10.

Commencement

(3) The application shall be commenced by filing both a notice of application, in Form 14E.1, and the application record described in subrule 38.09 (2). O. Reg. 43/14, s. 10.

Factum not Required

(4) A factum described in clause 38.09 (1) (a) is not required to be filed, but any factum that is filed shall be filed together with the notice of application and the application record. O. Reg. 43/14, s. 10.

Interpretation of Service of Notice Rule

(5) Subrules 38.06 (1) and (2) shall be read as if the reference to the notice of application includes reference to the application record and, if applicable, the applicant's factum. O. Reg. 43/14, s. 10.

Service on Attorney General

(6) In addition to serving the notice of application, application record and, if applicable, factum, on all parties under subrule 38.06 (1), the applicant shall serve the documents on the Attorney General of Ontario in the manner described in clause 16.02 (1) (h). O. Reg. 43/14, s. 10.

Timing of Service

(7) The notice of application, application record and, if applicable, factum shall be served within 15 days after the documents were filed or, if the service is on a person outside Ontario, within 25 days after the documents were filed. O. Reg. 43/14, s. 10.

Proof of Service

(8) Proof of service of the notice of application, application record and, if applicable, factum shall be filed immediately after they are served. O. Reg. 43/14, s. 10.

Non-application of Rules

(9) Subrules 38.03 (2), (3) and (3.1), 38.06 (3) and (4), rule 38.07, subrules 38.09 (1), (3), (3.1) and (3.2) and rule 38.09.1 do not apply to applications made under subsection 140 (3) of the *Courts of Justice Act*, unless the court orders otherwise. O. Reg. 43/14, s. 10.

Opportunity to Respond Before Making Order

(10) Despite subrule (9), the court shall not make an order under subsection 140 (4) of the *Courts of Justice Act* granting leave to institute or continue a proceeding, or rescinding an order made under subsection 140 (1) of that Act, without giving the other parties and the Attorney General of

Ontario an opportunity to serve and file a respondent's application record and factum. O. Reg. 43/14, s. 10.

RULE 39 EVIDENCE ON MOTIONS AND APPLICATIONS

EVIDENCE BY AFFIDAVIT

Generally

39.01 (1) Evidence on a motion or application may be given by affidavit unless a statute or these rules provide otherwise. R.R.O. 1990, Reg. 194, r. 39.01 (1).

Service and Filing

(2) Where a motion or application is made on notice, the affidavits on which the motion or application is founded shall be served with the notice of motion or notice of application and shall be filed with proof of service in the court office where the motion or application is to be heard at least seven days before the hearing. R.R.O. 1990, Reg. 194, r. 39.01 (2); O. Reg. 171/98, s. 18 (1); O. Reg. 394/09, s. 17 (1).

(3) All affidavits to be used at the hearing in opposition to a motion or application or in reply shall be served and filed with proof of service in the court office where the motion or application is to be heard at least four days before the hearing. R.R.O. 1990, Reg. 194, r. 39.01 (3); O. Reg. 171/98, s. 18 (2); O. Reg. 394/09, s. 17 (2).

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(4) An affidavit for use on a motion may contain statements of the deponent's information and belief, if the source of the information and the fact of the belief are specified in the affidavit. R.R.O. 1990, Reg. 194, r. 39.01 (4).

Contents — Applications

(5) An affidavit for use on an application may contain statements of the deponent's information and belief with respect to facts that are not contentious, if the source of the information and the fact of the belief are specified in the affidavit. R.R.O. 1990, Reg. 194, r. 39.01 (5).

Full and Fair Disclosure on Motion or Application Without Notice

(6) Where a motion or application is made without notice, the moving party or applicant shall make full and fair disclosure of all material facts, and failure to do so is in itself sufficient ground for setting aside any order obtained on the motion or application. R.R.O. 1990, Reg. 194, r. 39.01 (6).

Expert Witness Evidence

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(7) Opinion evidence provided by an expert witness for the purposes of a motion or application shall include the information listed under subrule 53.03 (2.1). O. Reg. 259/14, s. 8.

EVIDENCE BY CROSS-EXAMINATION ON AFFIDAVIT

On a Motion or Application

39.02 (1) A party to a motion or application who has served every affidavit on which the party intends to rely and has completed all examinations under rule 39.03 may cross-examine the deponent of any affidavit served by a party who is adverse in interest on the motion or application. R.R.O. 1990, Reg. 194, r. 39.02 (1).

(1.1) Subrule (1) does not apply to an application made under subsection 140 (3) of the *Courts of Justice Act*. O. Reg. 43/14, s. 11.

(2) A party who has cross-examined on an affidavit delivered by an adverse party shall not subsequently deliver an affidavit for use at the hearing or conduct an examination under rule 39.03 without leave or consent, and the court shall grant leave, on such terms as are just, where it is satisfied that the party ought to be permitted to respond to any matter raised on the cross-examination with evidence in the form of an affidavit or a transcript of an examination conducted under rule 39.03. R.R.O. 1990, Reg. 194, r. 39.02 (2).

To be Exercised with Reasonable Diligence

(3) The right to cross-examine shall be exercised with reasonable diligence, and the court may refuse an adjournment of a motion or application for the purpose of cross-examination where the party seeking the adjournment has failed to act with reasonable diligence. R.R.O. 1990, Reg. 194, r. 39.02 (3).

Additional Provisions Applicable to Motions

(4) On a motion other than a motion for summary judgment or a contempt order, a party who cross-examines on an affidavit,

(a) shall, where the party orders a transcript of the examination, purchase and serve a copy on every adverse party on the motion, free of charge; and

(b) is liable for the partial indemnity costs of every adverse party on the motion in respect of the cross-examination, regardless of the outcome of the proceeding, unless the court orders otherwise. R.R.O. 1990, Reg. 194, r. 39.02 (4); O. Reg. 284/01, s. 10.

EVIDENCE BY EXAMINATION OF A WITNESS

Before the Hearing

39.03 (1) Subject to subrule 39.02 (2), a person may be examined as a witness before the hearing of a pending motion or application for the purpose of having a transcript of his or her evidence available for use at the hearing. R.R.O. 1990, Reg. 194, r. 39.03 (1).

(2) A witness examined under subrule (1) may be cross-examined by the examining party and any other party and may then be re-examined by the examining party on matters raised by other parties, and the re-examination may take the form of cross-examination. R.R.O. 1990, Reg. 194, r. 39.03 (2).

(2.1) Subrules (1) and (2) do not apply to an application made under subsection 140 (3) of the *Courts of Justice Act*. O. Reg. 43/14, s. 12.

To be Exercised with Reasonable Diligence

(3) The right to examine shall be exercised with reasonable diligence, and the court may refuse an adjournment of a motion or application for the purpose of an examination where the party seeking the adjournment has failed to act with reasonable diligence. R.R.O. 1990, Reg. 194, r. 39.03 (3).

At the Hearing

(4) With leave of the presiding judge or officer, a person may be examined at the hearing of a motion or application in the same manner as at a trial. R.R.O. 1990, Reg. 194, r. 39.03 (4).

Summons to Witness

(5) The attendance of a person to be examined under subrule (4) may be compelled in the same manner as provided in Rule 53 for a witness at a trial. R.R.O. 1990, Reg. 194, r. 39.03 (5).

EVIDENCE BY EXAMINATION FOR DISCOVERY

Adverse Party's Examination

39.04 (1) On the hearing of a motion, a party may use in evidence an adverse party's examination for discovery or the examination for discovery of any person examined on behalf or in place of, or in addition to, the adverse party, and rule 31.11 (use of discovery at trial) applies with necessary modifications. O. Reg. 534/95, s. 1.

Party's Examination

(2) On the hearing of a motion, a party may not use in evidence the party's own examination for discovery or the examination for discovery of any person examined on behalf or in place of, or in addition to, the party unless the other parties consent. O. Reg. 534/95, s. 1.

PRESERVATION OF RIGHTS IN PENDING LITIGATION

RULE 40 INTERLOCUTORY INJUNCTION OR MANDATORY ORDER

HOW OBTAINED

40.01 An interlocutory injunction or mandatory order under section 101 or 102 of the *Courts of Justice Act* may be obtained on motion to a judge by a party to a pending or intended proceeding. R.R.O. 1990, Reg. 194, r. 40.01.

WHERE MOTION MADE WITHOUT NOTICE

Maximum Duration

40.02 (1) An interlocutory injunction or mandatory order may be granted on motion without notice for a period not exceeding ten days. R.R.O. 1990, Reg. 194, r. 40.02 (1).

Extension

(2) Where an interlocutory injunction or mandatory order is granted on a motion without notice, a motion to extend the injunction or mandatory order may be made only on notice to every party affected by the order, unless the judge is satisfied that because a party has been evading service or because there are other exceptional circumstances, the injunction or mandatory order ought to be extended without notice to the party. R.R.O. 1990, Reg. 194, r. 40.02 (2).

(3) An extension may be granted on a motion without notice for a further period not exceeding ten days. R.R.O. 1990, Reg. 194, r. 40.02 (3).

Labour Injunctions Excepted

(4) Subrules (1) to (3) do not apply to a motion for an injunction in a labour dispute under section 102 of the *Courts of Justice Act*. R.R.O. 1990, Reg. 194, r. 40.02 (4).

UNDERTAKING

40.03 On a motion for an interlocutory injunction or mandatory order, the moving party shall, unless the court orders otherwise, undertake to abide by any order concerning damages that the court may make if it ultimately appears that the granting of the order has caused damage to the responding party for which the moving party ought to compensate the responding party. R.R.O. 1990, Reg. 194, r. 40.03.

FACTUMS REQUIRED

40.04 (1) On a motion under rule 40.01, each party shall serve on every other party to the motion a factum consisting of a concise argument stating the facts and law relied on by the party. O. Reg. 14/04, s. 23.

(2) The moving party's factum shall be served and filed with proof of service in the court office where the motion is to be heard at least seven days before the hearing. O. Reg. 394/09, s. 18.

(3) The responding party's factum shall be served and filed with proof of service in the court office where the motion is to be heard at least four days before the hearing. O. Reg. 394/09, s. 18.

(4) REVOKED: O. Reg. 394/09, s. 18.

Courts of Justice Act, R.S.O. 1990, c. C.43

INTERLOCUTORY ORDERS

Injunctions and receivers

101 (1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so. R.S.O. 1990, c. C.43, s. 101 (1); 1994, c. 12, s. 40; 1996, c. 25, s. 9 (17).

Terms

(2) An order under subsection (1) may include such terms as are considered just. R.S.O. 1990, c. C.43, s. 101 (2).

ALLIANCE TO PROTECT PRINCE EDWARD COUNTY Applicant	- and -	THE INDEPENDENT ELECTRICITY SYSTEM OPERATOR and WPD WHITE PINES INCORPORATED Respondents	Court File No. 231/17

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding Commenced at Picton

FACTUM OF ALLIANCE TO PROTECT PRINCE EDWARD COUNTY

ERIC K. GILLESPIE
PROFESSIONAL CORPORATION
Barristers & Solicitors
Suite 600, 10 King Street East
Toronto, Ontario
M5C 1C3

Eric K. Gillespie
LSUC # 37815P
Tel: (416) 703-6362
Fax: (416) 703-9111
Email: egillespie@gillespielaw.ca

Lawyers for the Alliance to Protect Prince Edward County