

CANADA / JUDGMENT

Harrison Hydro Project Inc. v. Environmental Appeal Board

2017 BCSC 320

COURT

Supreme Court of British Columbia

DECIDED

27 February 2017

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2017 BCSC 320 Harrison Hydro Project Inc. v. Environmental Appeal Board

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Harrison Hydro Project Inc. v. Environmental Appeal Board,

2017 BCSC 320

Date: 20170227

Docket: S160831

Registry: Vancouver

Between:

Harrison Hydro Project Inc., Fire Creek Project Limited Partnership,

Lamont Creek Project Limited Partnership, Stokke Creek Project Limited Partnership, Tipella
Creek Project Limited Partnership, and

Upper Stave Project Limited Partnership

Petitioners

And:

Environmental Appeal Board, Deputy Comptroller of Water Rights

for the Province of British Columbia

Respondents

On judicial review from a decision of the Environmental Appeal Board issued

December 8, 2015, Decision Nos. 2014-WAT-002(a) to 2014-WAT-007(a).

Before: The Honourable Mr. Justice B.D. MacKenzie

Reasons for Judgment

Counsel for the Petitioners:

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Deputy Comptroller of Water Rights for

the Province of British Columbia

D. Cowie

Place and Date of Hearing:

Vancouver, B.C.

November 28-30, 2016

and December 1, 2016

Place and Date of Judgment:

Vancouver, B.C.

February 27, 2017

Introduction

- [1] The petitioners have filed a petition for judicial review of a decision by the Environmental Appeal Board ("EAB"), issued 8 December 2015 (Decision Nos. 2014-WAT-002(a) to 2014-WAT-007(a)) ("EAB Decision"). The Deputy Comptroller for Water Rights for the Province of British Columbia (the "Comptroller") made the initial decision which the petitioners appealed to the EAB.
- [2] Harrison Hydro Project Inc. ("Harrison Hydro") is the general partner of the other five petitioners, which are limited partnerships that own five separate "run of river" hydro projects near Harrison Lake, British Columbia. Each hydro project has a water licence issued under the Water Act, R.S.B.C. 1996, c. 483, authorizing the use of water for power production purposes. The issue giving rise to this proceeding is whether each limited partnership should hold the water licence associated with its hydro project, or whether Harrison Hydro is the proper licensee for each of the five licences. This is significant because if Harrison Hydro holds all five licences, then the water rental rate for each of the

five projects, if charged on the aggregate, is much higher than what it would be if each limited partnership was the licensee and was charged on a stand-alone basis, which was the billing practice from 2009 to 2012. While the Water Sustainability Act, S.B.C. 2014, c. 15, has replaced the Water Act, the water licensing scheme remains functionally the same.

- [3] For reasons that follow, I find that the EAB Decision was reasonable and I dismiss the petitioners' application.

Facts

- [4] The Fire Creek, Lamont Creek, Stokke Creek, Tipella Creek and Upper Stave projects are run-of-river hydroelectric sites located on separate streams near Harrison Lake. A limited partnership independently owns each project and is its namesake. The five limited partnerships have an identical ownership structure. Harrison Hydro is the general partner of each of the limited partnerships. A sixth project, Douglas Creek, also has an ownership structure identical to the other five projects but is not a petitioner in this proceeding. Four entities, Cloudworks Energy Inc., Mkw'alts Energy Limited Partnership, Kwalsa Energy Limited Partnership, and Upper Stave Limited Partnership (collectively the "Former Owners"), initially developed these five projects. Between 2004 and 2006 the Former Owners applied for and obtained water licences and licences of occupation from the provincial government under the Water Act and Land Act, R.S.B.C. 1996, c. 245. Each water licence was appurtenant to the land for which the Former Owners held a licence of occupation. The powerhouse for each project would also be located on these lands. In late August 2006 B.C. Hydro executed electricity purchase agreements with the Former Owners for the five projects.
- [5] In late February 2007 the five limited partnerships were formed under s. 51 of the Partnership Act, R.S.B.C. 1996, c. 348, with Harrison Hydro named as the general partner of each. At the same time each limited partner entered into a limited partnership agreement with Harrison Hydro that states, *inter alia*, that Harrison Hydro, as general partner:
- (a) is entitled to receive 0.01% of the net income of the limited partnership, up to a maximum of \$500, with the 99.99% (or higher depending on whether the \$500 maximum to Harrison Hydro cap is reached) balance of the next income to be distributed to the limited partners;
 - (b) has the power and authority to operate the business of the particular limited partnership for and on behalf of and in the name of the limited partnership;
 - (c) has the power and authority to acquire and hold any property, both real and personal, for, on behalf of, and in the name of the limited partnership;
 - (d) where appropriate, will hold legal title to partnership property for the benefit of the limited partnership or may cause such property to be held by one or more persons as nominees, agents and bare trustees for the limited partnership;

- (e) will execute one or more declarations of trust in respect of such property held for and [on] behalf of the limited partnership;
 - (f) will, upon resignation or removal as a general partner, transfer title to the property to a new or remaining general partner; and
 - (g) may at any time be removed as a general partner of the limited partnership by a special resolution (75% of votes) of the limited partners or by ordinary resolution (50% of votes) of the limited partners if the general partner is in breach of its obligations under the Limited Partnership Agreement.
- [6] In March 2007 Harrison Hydro entered into bare trust agreements for each of the projects, in which it agreed to hold legal title to the property of each limited partnership as bare trustee, "for the sole use, benefit and advantage" of the particular limited partnership. Each agreement defined "property" to include all licences beneficially owned by the particular limited partnership. More specifically, under each agreement Harrison Hydro:
- (a) holds title to the Partnership's property as bare trustee for the sole use, benefit and advantage of the Partnership;
 - (b) has no beneficial interest in the Partnership's property;
 - (c) has no authority to transfer or otherwise deal with the property except as directed by the Partnership;
 - (d) is obligated to deal with the property of the Partnership (the "Partnership Property") as directed by the Partnership; and
 - (e) acknowledges that in all of Harrison Hydro's dealings with the Partnership Property, Harrison Hydro will be merely fulfilling its obligations as a bare trustee and will only be acting as agent for the Partnership.
- [7] In May 2007 the Province authorized the Former Owners to assign the licences of occupation for the lands to the respective limited partnerships. The Province accepted each of the limited partnerships as the party that had assumed all of the obligations under the respective licence of occupation. The water licences appurtenant to the lands transferred to the limited partnerships under s. 16 of the Water Act, which the Province duly recorded.
- [8] In June 2007 the certificate of each limited partner was amended to limits its business to "developing, constructing, owning and operating" its particular project.
- [9] In late 2008, apparently in order to obtain financing, the petitioners advised the Province that they wanted a more secure form of land tenure for the projects. As a result, the Province raised a title for each of the project lands, and as each project was completed, each limited partnership obtained a Crown lease to replace the licence of occupation. Harrison Hydro executed the lease for each project in accordance with its statutory and contractual obligations to the limited partnerships. Harrison Hydro is also identified as the transferee of

each lease. Each limited partnership then applied to register its Crown lease at the Land Title Office ("LTO"). However, the LTO has a policy that does not allow a limited partnership to register an interest in land in its own name. In British Columbia, the solution is to register the property in the general partner's name as a bare trustee for and on behalf of the limited partnership. Accordingly, the LTO records Harrison Hydro as the registered owner for each of the Crown leases registered against each of the properties in question, even though each limited partnership owns a 100% beneficial interest in the particular Crown lease applicable to its project.

- [10] The Douglas Creek project did not suffer the same fate as the other projects, simply because the powerhouse for the Douglas Creek project is situated on a federally-administered Indian Reserve, making it unnecessary to register a lease at the LTO. The Douglas Creek Limited Partnership ("Douglas Creek LP") executed the sublease for the project in its own name and the sublease is registered in the Indian Land Registry System, which does not have a policy like that of the LTO. As a result, I am not persuaded that anything turns on the fact that the water licence for the Douglas Creek project continues to be in the Douglas Creek LP's own name. The question of who should hold that water licence was not before the EAB, so there is no inconsistency in terms of the EAB's decision-making. The reason Douglas Creek LP continues to hold the water licence for its project is simply because the location of the Douglas Creek water plant allows the registration of title to be in a federal land registry, permitting a limited partnership to be on title. As a result, for the Douglas Creek project, the land and water records were already consistent, as opposed to the other five limited partnerships.
- [11] Given this circumstance, the Comptroller says the fact that the water licence remains in the name of Douglas Creek LP is irrelevant to the present application. I agree with this conclusion.
- [12] Returning to the five other projects, between 2009 and 2012 Harrison Hydro was listed as the registered owner for each of the Crown leases. However, internal records of the Ministry of Forests, Lands, and Natural Resource Operations (the "Ministry") continued to show the limited partnerships as holding the water licences appurtenant to the Crown leases. During this period the Ministry billed the limited partnerships separately for the water rental fees associated with each project. In March 2012 Ministry staff began an internal review to harmonize the information contained in the Ministry's water licensing records and in its land tenure database. This review revealed the discrepancies concerning the projects' water licences and Crown leases, in that for each project the same entity did not hold the respective water licence and Crown lease. Accordingly, between December 2012 and August 2013 the Ministry gradually amended its records to show Harrison Hydro as the licensee for all of the water licences connected with the projects.
- [13] What is important is that these amendments affected how the Ministry billed the water rental fees associated with the projects. In March 2013 the Ministry invoiced Harrison Hydro an amount based on the combined power output of the Lamont Creek and Upper Stave

projects. At that point the Ministry had only amended the records for these two projects to show Harrison Hydro as the water licence holder. In August 2013 the Ministry invoiced Harrison Hydro an amount based on the combined power output of all five projects, as by that time the Ministry's records showed Harrison Hydro as holding all five water licences. Because the Ministry invoiced Harrison Hydro for water rentals based on the total aggregate output of all the projects for which Harrison Hydro was the licensee, for each project the new water rental fee is 4.7 times higher than it was before, when all five limited partnerships were billed separately.

- [14] Given the significant increase in the rental rate, in both March and August of 2013 the petitioners wrote to the Ministry to express their concerns about the Ministry's new position on licensing. In October 2013 the petitioners also made lengthy submissions to the Comptroller, who is statutorily responsible for water rental determinations, submitting that each individual limited partnership should hold the water licences and thus the Ministry should not bill Harrison Hydro for water rentals on an aggregate basis.
- [15] In December 2013 the Comptroller responded in writing, with two conclusions:
- (1) billing Harrison Hydro as a single licensee for the five projects is in accordance with the Water Act and the Water Regulation, B.C. Reg. 204/88; and
 - (2) he concurred with the Ministry's decision to transfer the water licences for the five projects to Harrison Hydro based on the recorded land tenures. The Comptroller closed by stating that his "decision constitutes an order of the comptroller and is subject to appeal" under s. 92 of the Water Act.
- [16] The petitioners appealed to the EAB in January 2014. The petitioners identified a number of grounds of appeal, but only three are relevant to this judicial review. They are that the Comptroller erred and/or exceeded his jurisdiction by:
3. erroneously interpreting the term "owner" under the Water Act by reference to the term "owner" under the Land Title Act;
 4. changing the licensee on the five Licences owned by the Limited Partnerships to the name of the general partner for each of the Limited Partnerships, Harrison Hydro Project Inc.;
 5. in the alternative, by refusing to rectify the Licences back to the names of the Limited Partnerships that owned the five hydro projects
- [17] However, the EAB Decision reframed the primary questions as:
1. Is the Comptroller's concurrence with the regional office's "transfer" of the water licences to Harrison Hydro an appealable "order", and if so, was the order appealed within the 30-day appeal period required by section 92 of the Water Act?
 2. If so, based on the relevant provisions in the Water Act and the facts in this case, should the water licences for the five hydroelectric projects be in the name of Harrison Hydro?

- [18] On the first question the EAB concluded that the Comptroller's "concurrence" was not an appealable order. Despite this, "out of an abundance of caution and for greater certainty," the EAB went on to determine that all five water licences should be and were properly in the name of Harrison Hydro.
- [19] The parties had initially disagreed on whether the Ministry had charged Harrison Hydro the proper water rental rate for the five projects. However, during submissions on the judicial review, all parties agreed that if Harrison Hydro is the proper holder of the water licences, then the higher rate imposed is in fact the correct rate.

Relief Sought

- [20] The petitioners ask this Court to set aside the EAB Decision and remit the matter back to the EAB with directions that:
- (a) each of the five limited partnership Petitioners is the licensee under the Water Act in respect of the water licences issued in respect of the particular hydroelectric project owned by each of the limited partnership Petitioners; and
 - (b) each of the five hydroelectric projects owned separately by each of the limited partnership Petitioners be assessed water rental rates under the Water Regulation, B.C. Reg. 204/88 at rates based on the separate output from the hydroelectric project owned by the particular limited partnership Petitioners, and not based on the rates applicable to the combined aggregate output from all five hydroelectric projects.
- [21] In the alternative, the petitioners ask this Court to set aside the EAB Decision and remit the matter back to the Board with a direction that it reconsider the matter in accordance with this court's reasons.

The Standard of Review

- [22] The Supreme Court of Canada overhauled and refined the analysis regarding what standard of review a court should apply to an administrative tribunal's decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, and *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61. The reasonableness standard of review presumptively applies to a decision where an administrative tribunal has interpreted or applied "its own statute or statutes closely connected to its function, with which it will have particular familiarity": *Alberta Teachers' Association*, at paras. 34, 39. As the EAB says, this presumption of reasonableness will only be displaced in "very limited circumstances". Therefore, the correctness standard of review will apply when the tribunal's interpretation of its home statute falls into one of the following four categories: (1) constitutional questions; (2) "questions of law that are of central importance to the legal system as a whole and that are outside the adjudicator's expertise"; (3) questions about "the jurisdictional lines between two or more competing specialized tribunals"; and (4) "true questions of jurisdiction or vires": *Alberta Teachers'*

Association, at para. 30, *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53 [Mowat] at para. 18.

- [23] The petitioners submit that the question the EAB addressed attracts the correctness standard of review, even though the EAB had to interpret the Water Act, which the petitioners concede "may be considered one of the [EAB's] 'home statutes'", and which would normally call for deference. However, the petitioners say the issues the EAB had to address "required consideration of the impact of the law (both common law and statutory) applicable to partnerships and agency generally." The petitioners say such issues "raise general legal questions" that are far from the core of the EAB's expertise. In addition, the petitioners characterize the EAB's "reference and reliance on definitions from other statutes," such as the Land Act, as evidence that the EAB went beyond the scope of its expertise. Accordingly, the petitioners submit that the question falls into the second exception identified in *Alberta Teachers' Association*.
- [24] At the same time, the petitioners acknowledge the reasonableness standard of review would apply "if the issues before the court raise questions of mixed fact and law or are clearly within the scope of the [EAB's] (or the Ministry's) specialized expertise."
- [25] The Comptroller submits that the reasonableness standard of review does apply because the EAB was interpreting its home statute, and as such "deference is owed to the statutory interpretations" made by the EAB. Further, the Comptroller contends that "[t]he issues raise questions of mixed fact and law engaging the specialised expertise of the EAB (or Ministry officials acting under the authority of the Regional Water Manager)."
- [26] The EAB also submits that the court should apply the reasonableness standard of review. The EAB points to existing jurisprudence which suggests that this standard applies in circumstances where the EAB must interpret and/or apply its home statute or a closely-related statute: *Gagne v. Sharpe*, 2014 BCSC 2077; *Unifor Local 2301 v. British Columbia (Environmental Appeal Board)*, 2015 BCSC 1592. Those cases concerned the EAB's interpretation of certain provisions in the Environmental Management Act, S.B.C. 2003, c. 53, one of its home statutes. The EAB also submits that the legislature has entrusted it with de novo jurisdiction to hear matters under statutes such as the Water Act and that the EAB has expertise on such matters. In contrast, the court on judicial review plays a supervisory role and should not usurp the role of the EAB.
- [27] The EAB further submits that however one characterizes the questions before the court (as ones of law, or mixed fact and law), a presumption of reasonableness applies and it is not rebutted in the circumstances. Finally, the EAB points to its expertise as the post-Dunsmuir jurisprudence understands that concept. As the Court in *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, observed at para. 33:

the resolution of unclear language in an administrative decision maker's home statute is usually best left to the decision maker. That is so because the choice between multiple reasonable interpretations will often involve policy considerations that we presume the legislature desired the administrative decision maker - not the courts - to make. Indeed, the exercise of that interpretative discretion is part of an administrative decision maker's "expertise".

- [28] In this analysis, I am satisfied that when it comes to reviewing decisions made by the EAB, where it is interpreting its home statutes, "the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded": *Dunsmuir*, at para. 62. In this case, the standard of reasonableness applies.
- [29] Furthermore, in light of the principles enunciated in *Dunsmuir*, *Smith*, *Alberta Teachers' Association* and *McLean*, combined with the specific issues and questions raised by the petitioners in this case, I am also satisfied that under the second part of the *Dunsmuir* test the reasonableness standard of review applies to the EAB Decision. While the EAB considered principles of agency and partnership law, I am not satisfied that these are questions that are centrally important to the legal system as a whole and outside the EAB's expertise. As the Court noted in *McLean*:
- [27] The logic underlying the "general question" exception is simple. As *Bastarache* and *LeBel JJ.* explained in *Dunsmuir*, "[b]ecause of their impact on the administration of justice as a whole, such questions require uniform and consistent answers" (para. 60). Or, as *LeBel* and *Cromwell JJ.* put it in *Mowat*, correctness review for such questions "safeguard[s] a basic consistency in the fundamental legal order of our country" (para. 22).
- [30] When it comes to questions of law that are centrally important to the legal system as a whole, the Court in *McLean* drew an important distinction between the question's conceptual importance and its application in the specific circumstances before a tribunal (at para. 28). For example, while the concept of a limitation period has broad importance to the legal system, a tribunal's interpretation of a particular limitation period in a particular statute is something different and would warrant deference by a reviewing court (*McLean*, at para. 28). Similarly, in *Mowat* a human rights tribunal's decision to award legal costs to the victim of a discriminatory practice attracted deference (at para. 25). Likewise, in *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59, the Court deferred to a labour arbitrator who imposed an estoppel as part of an award. Such decisions reinforce my view that the EAB's consideration of partnership and agency law does not fit into the "general question" exception.

Issues

- [31] The petitioners identified three "primary" issues for determination on this judicial review:

- (a) Did the [EAB] err in determining that the Comptroller did not make a decision or order that is appealable under the Water Act with respect to the Water Licences being transferred to Harrison Hydro?
 - (b) Did the [EAB] fail to correctly interpret and apply the relevant law such that it erroneously determined that Harrison Hydro, and not the Partnerships, should be the licensee under each of the Water Licences?
 - (c) In the alternative, if the [EAB] is correct that the Comptroller did not make a decision or order that is appealable under the Water Act with respect to the Water Licences being transferred to Harrison Hydro, was the Ministry's Decision to change the licensee in each water licence correct or reasonable?
- [32] During oral submissions all parties agreed that the Comptroller's decision was an appealable order under s. 92 of the Water Act. Accordingly, it is unnecessary to address issues (a) and (c) above, despite the petitioners' position that portions of its submissions on issue (a) inform the analysis on issue (b). Put simply, I do not agree that the EAB's reference to the definition of "disposition" in the Land Act when interpreting the terms "conveyance or other disposition" in s. 16(1) of the Water Act, or the EAB's conclusion that the Comptroller's concurrence with the Ministry's decision was a "matter of record keeping", is relevant to the questions I must address under issue (b), which the Comptroller termed the "ownership question". As the petitioners have stated in written submissions, the first question was "to support the proposition that the Comptroller's purported 'concurrence' was not an appealable order", and the Comptroller has conceded that the EAB's determination that it was not an appealable order was unreasonable.
- [33] Nor do I find it necessary to determine whether or not the licences were transferred to Harrison Hydro "by operation of law" under s. 16(1) of the Water Act. This issue was also only relevant with respect to the question of whether or not the Comptroller's order was "an appealable order, decision or direction under the Water Act with respect to the naming of Harrison as the licensee in the subject licences" (EAB Decision, at para. 111). I am unable to agree with the petitioners when they submit that if there was no disposition or conveyance of the land, then it follows there would be no "passing of the licence" and "ultimately" the limited partnerships should be the licensees, eliminating the necessity for any further analysis. When I consider the EAB Decision as a whole, I am satisfied the EAB went on to properly consider the issue of "ownership". The EAB considered the relevant definitions in the Water Act and the particular circumstances in this case in determining whether Harrison Hydro was the proper licensee of each water licence, even if there was no transfer "by operation of law".

Discussion

The Reasonableness Standard of Review

- [34] The court in *Dunsmuir* explained how a court on judicial review should apply the standard of reasonableness:
- [47] Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.
- [35] The Court in *McLean* also discussed these principles, specifically in the context of competing interpretations of an administrative tribunal's home statute:
- [32] In plain terms, because legislatures do not always speak clearly and because the tools of statutory interpretation do not always guarantee a single clear answer, legislative provisions will on occasion be susceptible to multiple reasonable interpretations. The question that arises, then, is who gets to decide among these competing reasonable interpretations?
- [33] The answer, as this Court has repeatedly indicated since *Dunsmuir*, is that the resolution of unclear language in an administrative decision maker's home statute is usually best left to the decision maker. That is so because the choice between multiple reasonable interpretations will often involve policy considerations that we presume the legislature desired the administrative decision maker -- not the courts -- to make. Indeed, the exercise of that interpretative discretion is part of an administrative decision maker's "expertise".

[Emphasis in original.]

- [36] Accordingly, under reasonableness review an applicant has the onus "not only to show that [its] competing interpretation is reasonable, but also that the [tribunal's] interpretation is unreasonable" (*McLean*, at para. 41, emphasis in original). Similarly, as our Court of Appeal noted in *British Columbia v. Canadian National Railway*, 2014 BCCA 171 at para. 14:

... the issue is not only whether the interpretation propounded by the Province is reasonable, which it undoubtedly is, or even whether it is more reasonable than the [Forest Appeals] Commission's, but whether the Commission's interpretation is not reasonable. That is a high hurdle for the Province to meet as that question engages the highest deference.

[Emphasis in original.]

The EAB Decision

- [37] Turning to the EAB Decision, the EAB framed the second issue this way: "based on the relevant provisions in the Water Act and the facts in this case, should the water licences for the five hydroelectric projects be in the name of Harrison Hydro?" After reviewing the parties' submissions, the EAB began its analysis by observing that under s. 7(a) of the Water Act, only an "owner" of land as defined under the statute can acquire and hold a water licence, so the "key issue" was whether the limited partnerships met the definition of "owner" (at para. 139). The EAB then quite properly noted that the definition of "owner" in the Water Act was broader than the definition in the Land Title Act, R.S.B.C. 1996, c. 250, and concluded that the Water Act definition clearly applied "for the purposes of interpreting and applying the Water Act" (at para. 140). For ease of reference, the relevant portion of the Water Act definition states that an owner means "a person entitled to possession of any land ... in British Columbia, and includes a person who has a substantial interest in the land ...".
- [38] The EAB then concluded that while holding title to land, that is, registration in the LTO, can satisfy the Water Act definition of "owner", the definition also "includes persons who are in possession of, or occupy, land" (at para. 142, citing the EAB decision in *Chief Kathi Dickie v. Assistant Regional Water Manager* (Decision No. 2012-WAT-013(a), issued November 6, 2012)).
- [39] The EAB next observed that the Water Act definition of "owner" only includes "persons", which the statute in turn defined as including "a firm, association or syndicate", and that various dictionaries suggested that the definition of "firm" included a limited partnership (at paras. 143-146). The EAB continued:
- [147] For these reasons, the Panel finds that a limited partnership is not barred from acquiring a water licence if, on the facts, it can qualify as a licensee under the Water Act by being an owner entitled to possession of the appurtenant land. The question of whether the Limited Partnerships may hold the water licences, based on the facts in this case, is further examined below. Based on all of these considerations, the key question at this stage of the analysis is whether a limited partnership is capable of being entitled to possession of the lands appurtenant to a water licence.
- [148] Before turning to that question, the Panel also has considered the plain meaning of the phrase "and includes a person who has a substantial interest in the land" in the Water Act's definition of "owner". This is relevant because the Appellants assert that the Limited Partnerships hold the beneficial interest in the Crown lands where the powerhouses are located and the water is used, and Harrison holds no beneficial interest in the property of the Limited Partnerships. They assert that Harrison, as the general partner, only holds the Crown leases as a bare trustee, nominee, and agent for the Limited Partnerships. The Panel notes that the phrase "substantial interest in the land" is preceded by the phrase "and includes", which means that a "substantial interest in the land" is an interest that entitles the

person to possession of the land. Thus, entitlement to possession of the land that is appurtenant to a water licence is essential to the ability to hold a water licence. The Panel notes that the Board reached a similar conclusion in *Chief Kathi Dickie* at para. 86, where the Board stated as follows:

the definition of "owner" is qualified by the requirement of possession. Specifically, the Panel finds that the phrase "substantial interest in the land" means a substantial interest in "the land" to which the person is entitled to possession.

[40] The EAB went on to consider dictionary definitions for the words "interest" and "substantial" and suggested it was "unclear whether the Limited Partnerships' beneficial interest in the land covered by the Crown leases qualifies as a 'substantial interest in the land'" (at paras. 149-151). Despite this, the EAB repeated its finding that an owner must be entitled to possess the land appurtenant to the water licence so a "substantial interest" must be one "in land to which the person is 'entitled to possession'" (at para. 151). The EAB also applied modern statutory interpretation principles to interpret the phrase, "includes a person who has a substantial interest in the land," by considering "other provisions of the Water Act that relate to licensing" (at para. 151). After reviewing other sections of the legislation, the EAB noted that certain "rights and obligations of a licensee can only be carried out by a person entitled to physical possession, occupancy and control of the appurtenant land" (at para. 152). The EAB then considered some of the agreements in place between Harrison Hydro and the limited partners, and concluded at para. 154:

it is clear that only the general partner is entitled to physical possession, occupancy and control of the appurtenant land, and only the general partner is capable of carrying out the rights and obligations of a licensee described in the Water Act sections discussed above. Based on that language in the Limited Partnership Agreement, the Panel finds that only Harrison, as the general partner, could exercise the above-noted rights of a licensee and undertake the obligations of a licensee.

[41] The EAB also expressly concluded that the limited partnerships failed to meet the definition of "owner" in the Water Act:

[158] While the Limited Partnerships hold a beneficial interest in the appurtenant land, and that beneficial interest is a substantial interest in a financial context, the Panel finds that it is insufficient to constitute a "substantial interest" in the context of the definition of "owner" in the Water Act. In the context of the Water Act, "substantial interest" means one that involves possession, occupancy and control of the land. In the present case, only the general partner (i.e., Harrison) has a substantial interest (as the lease holder, and based on the terms of the Limited Partnership Agreement) in the lands to which the water licences are appurtenant, such that it has possession, occupancy and control of those lands.

Positions of the Parties

[42] In regards to the EAB Decision, the petitioners make two main arguments:

- (1) the EAB failed to grasp the powers and capacities of the limited partnerships; and
- (2) the EAB improperly interpreted the term "owner" under the Water Act.

[43] With their first argument, the petitioners submit the EAB "failed to either consider or correctly apply the law of partnership and agency in relation to its interpretation of the Water Act" even though such legal principles are well-established. The petitioners submit the EAB erred because when it considered the respective powers and capacities of Harrison Hydro as a general partner and the five limited partnerships, the EAB:

failed to appreciate that Harrison Hydro was only entitled to manage or control the businesses of the Partnerships on behalf of and as agent for the Partnerships, and that the Partnerships could have revoked this entitlement at any time. The underlying control of the Partnerships' businesses and properties were therefor [sic] always with the Partnerships themselves. Harrison Hydro did not have or purport to have a stand-alone right to the businesses or the properties of the Partnerships.

[Emphasis in original.]

[44] The petitioners also point to the fact that Douglas Creek LP continues to hold its water licence in its own name, and that the only difference between the Douglas Creek project and the other five projects "is the registry in which the interests in the land have been registered." The petitioners submit that this fact also demonstrates the EAB's flawed reasoning. I have already stated that I do not find this is a relevant consideration.

[45] With their second argument, the petitioners contend that the EAB's conclusion that the limited partnerships are not "owners" under the Water Act is erroneous, whether the standard of review is correctness or reasonableness. Here the petitioners submit that the EAB:

- (1) was wrong to interpret the phrase "entitled to possession" as requiring physical possession, as opposed to mere "entitlement";
- (2) failed to appreciate that Harrison Hydro could only carry out the rights and obligations of a water licence holder on behalf of and on the direction of the limited partnerships; and
- (3) failed to appreciate that the law of agency and contractual arrangements made the limited partnerships both entitled to possession and in actual possession of the lands appurtenant to their respective water licences, as the "underlying control of the Partnerships' businesses and properties were therefor [sic] always with the Partnerships themselves".

[46] In response, the Comptroller submits that the EAB considered all of the submissions made by the limited partnerships and Harrison Hydro before reaching its decision. Further, the Comptroller submits that in light of the principles enunciated in *Dunsmuir*, the EAB Decision as a whole demonstrates that the EAB's conclusion that Harrison Hydro is the licensee of the various water licences is a reasonable outcome. The Comptroller submits that the EAB's finding that Harrison Hydro "was the only person capable of exercising the

rights and performing the obligations associated with being a licensee accords with fundamental principles of partnership law." Such principles, stemming from cases such as *Kucor Construction & Developments & Associates v. Canada Life Assurance Co.*, 1998 CanLII 4236 (ONCA); *Edenvale Restoration Specialists Ltd. v. British Columbia (Finance)*, 2013 BCCA 85; and *Hudson's Bay Co. v. OMERS*, 2015 ONSC 4671, *aff'd* 2016 ONCA 113, include:

- (i) A limited partnership is not a legal entity;
 - (ii) The general partner has sole authority and control over the property and business of the limited partnership;
 - (iii) Any property in which a limited partnership may have an interest can only be held by the general partner;
 - (iv) A limited partnership, not being a legal entity, is incapable of acquiring or conveying title to real property;
 - (v) There can be no assignment of a lease into the name of a limited partnership;
 - (vi) An attempt to convey title to a limited partnership is to be regarded as a transfer of title to the general partner.
- [47] The Comptroller also submits that the EAB did not conclude that a limited partnership could never hold a water licence. Rather, the EAB framed the question as whether "on the facts" in the present case a limited partnership could hold a water licence by being an owner "entitled to possession" of the appurtenant land.
- [48] On the judicial review the EAB quite properly only made submissions on what standard of review should apply, not on how the standard should apply to the impugned decision.

Applying the Standard

- [49] As indicated above, on a reasonableness standard of review the petitioners have the heavy onus not only of showing that their interpretation is reasonable, but also that the EAB Decision is unreasonable. This they have failed to do. Like the Court of Appeal in *Canadian National Railway*, I have no hesitation in saying that the petitioners' interpretation of whether they have a "substantial interest" in the land or are "entitled to possession" of the land is a reasonable interpretation. However, that is not the test. The "high hurdle" the petitioners must meet is that the EAB's interpretation is not reasonable.
- [50] While the petitioners have identified a number of purported errors in the EAB Decision concerning which entity should be the water licence holder, in my view the petitioners' submissions for the most part tacitly assume a correctness standard of review. As a result, I need not decide whether any of the purported errors would be fatal on a review for correctness. In any event, I am not persuaded that these purported errors would permit a finding that the EAB Decision falls outside of the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, at para. 47). On the

contrary, I accept that the EAB Decision accords with the above-noted statutory and common law principles concerning limited partnerships. In this regard, the words of our Court of Appeal in Edenvale Restoration Specialists Ltd. are apposite:

- [9] The purpose of limited partnerships is to allow persons to make equity investments in a limited partnership without becoming jointly and severally liable for all of the obligations of the limited partnership, as is the case for partners in a general partnership. Limited partnerships are comparable to corporations, which have limited liability and do not expose their shareholders to obligations incurred by the corporation. As the partners of a partnership are jointly and severally liable at common law, the protection of limited liability is given by legislation. In order to be afforded the protection, the legislation requires that limited partners must cede control of the business of the limited partnership to a general partner, which is liable for all of the obligations of the limited partnership and which has all the rights and power of a partner in a general partnership subject to certain limitations

Conclusion

- [51] In the end, I am unable to find that the EAB's Decision that Harrison Hydro was the proper licensee was unreasonable. Accordingly, I dismiss the petitioners' application.
- [52] While the EAB did not seek costs, both the petitioners and the Comptroller sought costs if they were successful. The Comptroller has been substantially successful and is entitled to Schedule B costs.

"The Honourable Mr. Justice B.D. MacKenzie"

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Prepared on 28 October 2026 · Esheria