# COURT OF APPEAL FOR ONTARIO

CITATION: West Whitby Landowners Group Inc. v. Elexicon Energy Inc., 2025 ONCA 821
DATE: 20251201
DOCKET: COA-24-CV-0965 & COA-25-CV-0172



Hourigan, Sossin and Pomerance JJ.A.

BETWEEN

West Whitby Landowners Group Inc.

Applicant (Appellant)

and

Elexicon Energy Inc. and Ontario Energy Board

Respondents (Respondents)

Christopher Lee and Kiren Purba, for the appellant

Laura M. Wagner, Teagan Markin and Brianne Taylor, for the respondent Elexicon Energy Inc.

M. Philip Tunley and Flora Yu, for the respondent Ontario Energy Board

Heard: October 6, 2025

On appeal from the order of the Divisional Court (Associate Chief Justice Faye E. McWatt, Justices Kendra D. Coats and Lise G. Favreau), dated February 24, 2022, with reasons reported at 2022 ONSC 1035, dismissing an application for judicial review from the Ontario Energy Board (COA-25-CV-0172)

On appeal from the order of Justice Suzan Fraser of the Superior Court of Justice, dated October 16, 2024, with reasons reported at 2024 ONSC 4338 (COA-24-CV-0965).

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**Sossin J.A.:**

## A. OVERVIEW

[1] This appeal concerns what kinds of decisions give rise to judicial review. Specifically, the issue on appeal is whether an intervention by the Ontario Energy Board (the "OEB" or the "Board") in a cost-sharing dispute between a group of real estate developers in Whitby, Ontario, and the licensed monopoly distributor of

electricity in that region, is judicially reviewable. The Divisional Court concluded it had no jurisdiction to conduct such a review, on the grounds that the OEB had not exercised a statutory power of decision on the substantive dispute at issue, and the appellant had no standing to challenge the OEB's decision not to hold a hearing on its complaint.

[2] For the reasons that follow, I would allow the appeal. In short, the OEB made a binding decision, interpreting legal instruments within its exclusive jurisdiction, that prescribed the parties' legal rights. Such a decision is "public" in nature and gives rise to judicial review.

## B. BACKGROUND

[3] The appellant, West Whitby Landowners Group Inc. ("WWLG") is a cost-sharing trustee corporation for 11 real estate developers in Whitby. The respondent, Elexicon Energy Inc. ("Elexicon"), is the licensed monopolist that distributes electricity in Whitby in accordance with the Distribution System Code (the "Code") set out by the OEB pursuant to s. 70.1 of the *Ontario Energy Board Act*, *1998*, S.O. 1998, c. 15, Sched. B (the "Act" or the "*OEB Act*").

[4] At the time of the dispute giving rise to these proceedings, the appellant was developing residential subdivisions in Whitby. These subdivisions required electricity. Consequently, in December 2018, the appellant and Elexicon negotiated an Offer to Connect (the "Connection Agreement"), whereby they

agreed that Elexicon would provide electricity to the new subdivisions through a municipal substation that the parties refer to as “MS16” and two new transformers.

[5] Under the Code, new works like MS16 can be classified as either an expansion or an enhancement of the existing grid. If MS16 is an expansion, Elexicon must charge the appellant a capital contribution towards its construction costs. If it is merely an enhancement to the existing grid, costs must be borne by Elexicon: Code, ss. 1.2, 3.2.3, 3.2.4.

[6] The parties could not agree as to whether MS16 was an expansion or an enhancement. As such, they included a provision in the Connection Agreement that referred this determination, and who was to bear the associated costs, to the OEB and agreed to be bound by the result. Accordingly, on February 15, 2019, the appellant wrote to the OEB’s Industry Relations office, requesting an “interpretation under the Code” that would “address in a final and binding manner” four questions:

(1) Was MS16 an expansion or an enhancement?

(2) What portion of the capital costs associated with MS16 were WWLG’s responsibility?

(3) Could Elexicon require a capital contribution of $775,000 from WWLG for future relocation of hydro infrastructure? And,

(4) What was the appropriate connection horizon to be used by the parties?

I refer to this correspondence as the "February 2019 letter". WWLG specifically requested that if the OEB's Industry Relations Office were unable to provide a final determination, "as if it were rendered as a decision of the Board itself", to confirm this and refer the matter for a full hearing.

[7] On August 16, 2019, the OEB wrote back that it was its staff's "views and conclusions" that "Elexicon [had] applied the regulatory provisions of the [Code] correctly to the WWLG expansion" and had thus "appropriately calculated the capital costs for the project that should be paid by WWLG" (the "August 2019 letter") (emphasis added). By letter dated November 18, 2019, WWLG expressed its position that the August 2019 letter did not address its four questions, and merely provided an "opinion" on its submissions (the "November 2019 letter"). Accordingly, it requested a reconsideration of the August 2019 letter and elevated the matter to a "formal complaint", in which the OEB would investigate Elexicon for contravening the Code. In doing so, the appellant provided detailed submissions in support of its position. In response, the OEB elicited submissions from Elexicon, which were not provided to the appellant.

[8] On July 6, 2020, the appellant requested that a "full hearing" be convened to determine the dispute (the "July 2020 letter"). In a letter dated December 18,

2020, the Board provided the “results … of staff’s review of [WWLG’s] complaint” and its “conclusions regarding the issues raised” (the “December 2020 letter”). This letter confirmed its earlier analysis and conclusion that MS16 was an expansion, but revised its conclusion on the division of the costs of the expansion, allocating $710,109 of those costs to Elexicon. Thus, the Board’s view was that the appellant was responsible for approximately $4.2 million in capital costs. The letter stated that this concluded OEB staff’s review of the complaint, but did not expressly address the appellant’s request for a full hearing.



## C. DECISIONS BELOW

### 1. Divisional Court (2022 ONSC 1035)

[9] Following the December 2020 letter, the appellant brought an application for judicial review before the Divisional Court. It argued that it was denied procedural fairness because the OEB failed to hold a hearing to address the dispute and failed to provide it with Elexicon’s submissions. It also argued that the OEB’s decision, contained in the August 2019 and December 2020 letters, was substantively unreasonable.

[10] The Divisional Court dismissed the application without engaging with any of these issues, concluding that it lacked jurisdiction. This was for two reasons. First, because the appellant had no standing to compel the OEB to hold a hearing. Second, because the OEB did not exercise a statutory power of decision giving

rise to judicial review within the meaning of s. 2 of the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1 ("*JRPA*").

[11] In determining reviewability, the court reasoned that it had to situate the interactions at issue within the *OEB Act* because the Connection Agreement could not compel the OEB to do anything that is not provided for by statute or regulation. The court reasoned that, in the August 2019 letter, the OEB provided its opinion on the dispute between the parties, and in the December 2020 letter, provided its response to the appellant's complaint, indicating that it would take no further steps. Thus, the starting point for the Divisional Court's analysis was whether it had the jurisdiction to review a decision by the OEB under s. 105 of the Act not to take any further steps in response to a complaint.

[12] Accordingly, on the first issue, the Divisional Court concluded that the appellant lacked standing to compel the OEB to hold a hearing because this decision was entirely within its discretion. Drawing on Part VII.1 of the *OEB Act*, the court reasoned that the right to request a hearing belongs to a regulated entity against which the OEB issues a compliance order under ss. 112.3-112.5. Pursuant to s. 112.2(1), such an order can only be made on the OEB's "own motion" and cannot be compelled by a person making a complaint under s. 105.

[13] With respect to the second issue, the court first concluded that the OEB's "opinion" on whether MS16 was an expansion or an enhancement was not

judicially reviewable because it did not give rise to a remedy in the nature of *certiorari* pursuant to s. 2(1)1 of the *JRPA*. The court relied on the factors articulated in *Air Canada v. Toronto Port Authority*, 2011 FCA 347, [2013] 3 F.C.R. 605, at para. 34, which collectively assess whether a particular decision is amenable to public law remedies like *certiorari*. The court focused its analysis of these factors on "the character of the matter for which review is sought", concluding that the parties sought an opinion from the OEB for the purpose of resolving their private dispute. Thus, the fact that they agreed to be bound by this opinion did not turn it into a decision of a public character.

[14] In the court's view, the only decision the OEB made was its decision not to take further steps in handling the appellant's complaint. It thus concluded that its jurisdictional analysis would lead to the same result if the appellant had sought declaratory relief to control the exercise of a statutory power of decision within the meaning of s. 2(1)2 of the *JRPA*, instead of a remedy in the nature of *certiorari*. This is because the decision not to take further steps on the appellant's complaint did not affect its legal rights, as is required by that section.

## 2. Superior Court of Justice (2024 ONSC 4338)

[15] After the Divisional Court dismissed its application for judicial review, the appellant brought an application to the Superior Court of Justice, asking it to resolve the parties' dispute by interpreting the Connection Agreement and the

Code. The appellant argued that the effect of the Divisional Court's decision was to say that the OEB did not decide the issue, leaving it open to the court to do so. Elexicon brought a motion to dismiss the application as an abuse of process pursuant to r. 21.01(3) of the *Rules of Civil Procedure,* R.R.O. 1990, Reg. 194.

[16] The motion judge granted Elexicon's motion, concluding that, despite the OEB not exercising a statutory power of decision, it had decided the dispute between the parties pursuant to their agreement. Accordingly, the appellant's application was an attempt to relitigate the matter and should be dismissed as an abuse of process. The motion judge also found that the subject matter of the dispute, being the interpretation of the Code, was within the exclusive jurisdiction of the OEB, pursuant to s. 19(6) of the Act.

## D. RELEVANT LEGISLATION

[17] The following provisions of the *JRPA* and *OEB Act* are relevant to the scope of judicial review in this context.

[18] Under the *JRPA,* judicial review is available in two circumstances. First, s. 2(1)1 states that judicial review is available in "[p]roceedings by way of application for an order in the nature of mandamus, prohibition or certiorari." Second, pursuant to s. 2(1)2, judicial review is available in:

> Proceedings by way of an action for a declaration or for an injunction, or both, in relation to the exercise, refusal to exercise or proposed or purported exercise of a statutory power. [Emphasis added.]

[19] The term “statutory power” is defined in s. 1 of the *JRPA* to include the “exercise of a statutory power of decision”. A statutory power of decision is defined as follows:

> “statutory power of decision” means a power or right conferred by or under a statute to make a decision deciding or prescribing,
>
> (a) the legal rights, powers, privileges, immunities, duties or liabilities of any person or party, or
>
> (b) the eligibility of any person or party to receive, or to the continuation of, a benefit or licence, whether the person or party is legally entitled thereto or not, and includes the powers of an inferior court.

[20] Section 2(4) of the *JRPA* states that where an applicant is successful under s. 2(1)2, a reviewing court may set aside a decision made in excess of a statutory power of decision instead of issuing a declaration.

[21] Section 19 of the *OEB Act* prescribes the OEB’s jurisdiction:

> **19** (1) The Board has in all matters within its jurisdiction authority to hear and determine all questions of law and of fact. 1998, c. 15, Sched. B, s. 19 (1)
>
> …
>
> (6) The Board has exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it by this or any other Act. 1998, c. 15, Sched. B, s. 19 (6).

[22] Section 105 of the *OEB Act* empowers the OEB to deal with complaints from the public:

> **105** The Board may,

> (a) receive complaints concerning conduct that may be in contravention of an enforceable provision whether the conduct constitutes an offence or not; and
>
> (b) make inquiries, gather information and attempt to mediate or resolve complaints, as appropriate, concerning any matter that comes to its attention that may be in contravention of an enforceable provision whether the matter constitutes an offence or not. 2010, c. 8, s. 38 (22). [Emphasis added.]

[23] The Board is empowered under the *OEB Act* to enforce Elexicon's compliance with any "enforceable provision", which includes the terms of its distribution licence: s. 3(1). Compliance with the Code is a condition of Elexicon's licence and thus the Code constitutes an "enforceable provision". To this end, Part VII.1, ss. 112.3-112.5, empowers the OEB to make a compliance order against Elexicon, suspend or revoke its licence, or impose an administrative monetary penalty if Elexicon fails to comply with the Code. Section 112.2(1) provides that such orders "may only be made on the Board's own motion", and the person against whom the order is made may request a hearing: *OEB Act,* s. 112.2(6).

## E. ISSUES ON APPEAL

[24] With respect to its appeal of the Divisional Court decision, the appellant raises two main issues:

(1) Did the Divisional Court err in finding that it lacked jurisdiction to consider the application for judicial review because:

(a) the OEB did not exercise a statutory power of decision?

(b) the OEB's decision did not affect the legal rights, powers, or liabilities of the appellant?

(2) Did the Divisional Court err in finding that an order in the nature of *certiorari* was not available?

[25] With respect to its appeal of the Superior Court decision, which only becomes relevant, in the appellant's submission, if this court dismisses its appeal of the Divisional Court decision, the appellant raises two main issues:

(1) Did the Superior Court err in finding that the application was an abuse of process because it was relitigating the dispute which was determined by the OEB?

(2) Did the Superior Court err in finding that the relief sought on the application was a matter within the exclusive jurisdiction of the OEB?

## F. ANALYSIS

[26] As I would allow the appeal of the Divisional Court decision, the analysis below is focused on that appeal. Accordingly, I do not address the appeal from the Superior Court decision in any detail.

[27] The appeal from the Divisional Court's decision is unlike the appeal of a judicial review generally, where this court steps into the shoes of the Divisional Court to consider whether it determined the correct standard of review and applied

it correctly: *Agraira v. Canada (Public Safety and Emergency Preparedness),* 2013 SCC 36, [2013] 2 S.C.R. 559. Rather, this appeal concerns a Divisional Court decision on its own jurisdiction and whether judicial review is available in light of the matter in dispute. The question of whether judicial review is available is a question of law subject to a standard of review of correctness: see *Khorsand v. Toronto Police Services Board*, 2024 ONCA 597, 499 D.L.R. (4th) 717, at para. 62, leave to appeal refused, [2024] S.C.C.A. No. 399.

[28] The analysis unfolds as follows. First, I consider the statutory requirements of the *JRPA* and the scope of the Divisional Court's judicial review jurisdiction under that legislation. Second, I consider whether the OEB's decision, contained within the August 2019 and December 2020 letters (collectively, the "OEB Letters"), was of a sufficiently public character to give rise to judicial review. As part of addressing that issue, I consider two questions. First, whether the OEB's decision gives rise to a public law remedy in the nature of *certiorari*, pursuant to s. 2(1)1 of the *JRPA*. Second, whether the OEB exercised a statutory power of decision affecting the legal rights, duties, or liabilities of the parties, within the meaning of ss.1 and 2(1)2 of the *JRPA*. I would answer "yes" to both of these questions. I then clarify the Divisional Court's decision that the appellant had no standing to challenge the OEB's decision not to hold a hearing in this matter. I conclude that the appellant does not have standing to compel the OEB to hold a

hearing, but it does have standing to seek judicial review of the OEB's refusal to take further steps on its complaint. Finally, I address the relevance of the Superior Court's subsequent decision on the appellant's application, concluding that it is largely consistent with the analysis on the above issues.



## 1. The *JRPA* and the scope of judicial review

[29] The central question on this appeal is whether the Divisional Court erred in concluding it had no jurisdiction to judicially review the actions of the OEB, namely those contained in the OEB Letters. Before turning to that question, it is necessary to consider the statutory framework for judicial review under the *JRPA* and the relevant case law on when a decision is sufficiently public to give rise to a right of judicial review.

[30] The *JRPA* is engaged in two different ways in this case. First, the Divisional Court concluded that the appellant was not entitled to an order in the nature of *certiorari,* pursuant to s. 2(1)1. Second, the Divisional Court concluded that it was not entitled to declaratory or injunctive relief under s. 2(1)2 because the Board had not exercised a statutory power of decision in issuing the OEB Letters. The appellant challenges both these conclusions.

### a. When is a remedy in the nature of *certiorari* available under the *JRPA*?

[31] In its application to the Divisional Court, the appellant sought an order in the nature of *certiorari* under s. 2(1)1.

[32] In *Martineau v. Matsqui Institution,* [1980] 1 S.C.R. 602, Dickson J. (as he then was, concurring in the result) explained, at p. 628, that the remedy of *certiorari* is available to supervise "the machinery of government decision-making" by quashing unlawful state action. It is available against "any public body with the power to decide any matter affecting the rights, interests, property, privileges or liberty of any person." However, the *JRPA* does not elaborate on when an order in the nature of *certiorari* is available.

[33] This court, in *Ontario Place Protectors v. Ontario*, 2025 ONCA 183, 175 O.R. (3d) 561, interpreted s. 2 as encompassing two alternative forms of relief, stating, at para. 34, that the *JRPA*:

> [P]ermits a single application to be brought for relief in the nature of the prerogative writs – *mandamus,* prohibition, and *certiorari*, the forms of relief historically available to control the exercise of public authority. In addition, declarations and injunctions may be granted on an application for judicial review where the exercise of a "statutory power of decision" is concerned.

[34] The availability of *certiorari* is not linked directly to the question of whether the impugned decision constituted an exercise of a statutory power of decision

within the meaning of ss. 1 and 2(1)2 of the *JRPA*. As this court explained in *Setia v. Appleby College*, 2013 ONCA 753, 118 O.R. (3d) 481, at para. 30:

> [W]hile early judicial interpretations of the *JRPA* linked the availability of relief in the nature of the prerogative writs under s. 2(1)1 to the requirement of a statutory power of decision under s. 2(1)2, that approach was not sustainable, and has since been clearly rejected.



[35] The Divisional Court reiterated this point in *Biztech v. Accreditation Canada*, 2025 ONSC 2689 (Div. Ct.), concluding, at para. 61, that "[j]urisdiction to issue an order in the nature of *certiorari* under s. 2(1)1 of the *JRPA* is not limited to statutory powers of decision, and not all statutory powers of decision are subject to judicial review."

[36] Rather, in each case, determining the availability of an order in the nature of *certiorari* depends on whether the impugned decision is of a sufficiently public character to warrant a public law remedy: *Khorsand*, at paras. 63-76.

[37] Broadly speaking, as this court affirmed in *Khorsand*, "[t]he purpose of judicial review is to ensure the legality of state decision making": at para. 63, citing *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26, [2018] 1 S.C.R. 750, at para. 13.

[38] In *Wall*, the Supreme Court confirmed that judicial review is available only where there is an "exercise of state authority" that is of a "sufficiently public

character”: at para. 14. In setting out these requirements, Rowe J. underscored that public bodies may make decisions that are private in nature and that, accordingly, are not subject to judicial review: at para. 14.

[39] Given the absence of statutorily-prescribed factors determining the availability of an order in the nature of *certiorari*, courts have often turned to the common law, and specifically the *Air Canada* factors: see e.g., *The Conservative Party of Canada v. Trost*, 2018 ONSC 2230 (Div. Ct.), leave to appeal to Ont. C.A. refused, M49223 (September 21, 2018). While these factors were developed to assist the Federal Courts in navigating the public/private distinction in their particular statutory context – a limitation emphasized by Rowe J. in *Wall*, at para. 21 – they have been adopted as a guide more broadly to assist courts in determining whether a decision is of sufficiently public character to be amenable to judicial review, and thus the remedy of *certiorari*: see *Khorsand*, at para. 73; and *Strauss v. North Fraser Pretrial Centre (Deputy Warden of Operations)*, 2019 BCCA 207, 435 D.L.R. (4th) 111, at para. 42.

[40] The *Air Canada* factors may be stated as follows:

- The character of the matter for which review is sought;
- The nature of the decision maker and its responsibilities;
- The extent to which a decision is founded in and shaped by law as opposed to private discretion;

- The decision-making body's relationship to other statutory schemes or other parts of government;
- The extent to which a decision maker is an agent of government or is directed, controlled or significantly influenced by a public entity;
- The suitability of public law remedies; and
- Whether the decision belongs to an "exceptional" category of cases where the conduct has attained a serious public dimension: at para. 60.



[41] The reliance on the *Air Canada* factors after *Wall* is subject to an important caveat. They cannot be used to transform a private decision into a public one on the basis that the decision impacts a significant interest or a broad segment of the public: *Khorsand*, at para. 75. Indeed, in *Wall,* Rowe J. criticized the cases that relied on *Setia* for suggesting that where a decision has a broad public impact, it may be reviewable: *Wall,* at para. 20, citing *Graff v. New Democratic Party*, 2017 ONSC 3578, 28 Admin. L.R. (6th) 294 (Div. Ct.), at para. 18; *West Toronto United Football Club v. Ontario Soccer Association*, 2014 ONSC 5881, 327 O.A.C. 29 (Div. Ct.), at para. 24. As Rowe J. emphasized in *Wall*, these cases failed to distinguish between "public" in a generic sense and "public" in a public law sense. The fact that a decision engages the public's interest does not transform it from a private to a public case for the purposes of the availability of *certiorari*.

[42] In *Khorsand*, Fairburn A.C.J.O. held, at para. 75, that "a decision will be considered to be public where it involves questions about the rule of law and the

limits of an administrative decision maker's exercise of power": citing *Wall,* at para. 20. She went on to say that a decision is not public simply because it "impacts or is of significant interest to a broad segment of the public": at para. 75. In order for a decision to be public "in the administrative law sense", it must engage "the legality of state decision making": *Khorsand*, at para. 75, citing *Wall,* at para. 20. The *Air Canada* factors thus may be relevant to the extent they shed light on the ultimate question of whether a state actor's decision is of sufficiently public character to attract public law remedies such as *certiorari*: *Khorsand*, at para. 73. However, they are not a "strict test or checklist": *Khorsand*, at para. 74.

[43] In summary, three principles can be derived from the *JRPA* and the cases of *Wall*, *Khorsand,* and *Air Canada*. First, because judicial review is about supervising the legality of state decision making, the ultimate question in determining its availability is whether a state actor has exercised a public power. Second, this question can be answered in one of two ways under the *JRPA*. One, by asking whether a remedy in the nature of *certiorari* is available under s. 2(1)1. Two, by asking whether a decision maker exercised a statutory power of decision pursuant to s. 2(1)2. Third, in determining whether a remedy in the nature of *certiorari* is available, courts may be guided by the *Air Canada* factors.

[44] In this case, as set out above, the Divisional Court applied the *Air Canada* factors and concluded that the OEB's "opinion" did not qualify as a decision giving

rise to *certiorari*. Accordingly, the only decision the court acknowledged as having been made by the OEB was not to take further steps on the appellant's complaint pursuant to s. 105 of the *OEB Act*. The Divisional Court analogized this question to whether the appellant could obtain a declaration under s. 2(1)2 of the *JRPA* relating to the exercise of a statutory power of decision. The court held that the OEB did not exercise a statutory power of decision in failing to take further steps in relation to the appellant's complaint. This was because s. 105 of the *OEB Act* confers on the OEB a discretion on how to deal with complaints, and its exercise of that discretion had no effect on the "legal rights, powers, privileges, immunities, duties or liabilities" of the appellant as a complainant: *JRPA*, s. 1.

[45] I elaborate below why I disagree with these conclusions.

**2. The nature of the OEB Letters**

[46] Determining the true nature of the OEB Letters lies at the core of this appeal. If the OEB merely offered its opinion on questions submitted by the parties, and the parties contracted to treat that opinion as binding, as the respondents assert, then the actions of the OEB in assisting with the resolution of the dispute between the appellant and Elexicon did not give rise to a right of judicial review. If, on the other hand, the OEB issued a decision on a legal question within its exclusive jurisdiction, as the appellant contends, then the OEB exercised a statutory power of decision and made a decision giving rise to a remedy in the nature of *certiorari.*

In both cases, the OEB's decision is public for the purpose of judicial review within the meaning of the framework articulated in *Wall* and *Khorsand*.

[47] In my view, s. 105 of the *OEB Act* empowers the Board to resolve complaints by deciding parties' disputes, and that is precisely what occurred here.

[48] By the terms of the Connection Agreement, the parties agreed to refer to the OEB the issue of whether MS16 was an "enhancement" or an "expansion", and accordingly, who was required to pay for it under the Code. The referral to the OEB was set out under the "Arbitration" provision within that agreement. It provided that: "the parties agree that the Dispute will be finally settled by the OEB. The decision of the OEB on the Dispute shall be final and binding upon all the parties to the Dispute and there shall be no appeal therefrom."

[49] The appellant's referral of the parties' dispute to the OEB in its February 2019 letter triggered the Board's broad discretionary authority to receive, investigate and resolve complaints under s. 105 of the Act. I reproduce this section below:

> **105** The Board may,
>
> (a) receive complaints concerning conduct that may be in contravention of an enforceable provision whether the conduct constitutes an offence or not; and
>
> (b) make inquiries, gather information and attempt to mediate or resolve complaints, as appropriate, concerning any matter that comes to its attention that may be in contravention

> of an enforceable provision whether the matter constitutes an offence or not.

[50] In my view, the February 2019 letter constituted a “complaint” under s. 105, despite the appellant not using that specific language. First, it was submitted by the appellant, a consumer who is directly impacted by any contravention of the Code, to the OEB’s Industry Relations office, the body responsible for handling complaints.

[51] Second, it asks the OEB to decide whether MS16 is an expansion or an enhancement. In its February 2019 letter, the appellant took issue with Elexicon characterizing MS16 as an expansion and submitted to the Board that “the Code requires that the … construction of MS16 … be defined as an enhancement.” It further argued that classifying MS16 as an enhancement and requiring Elexicon to pay for it was the only interpretation that was “consistent with the Code”, and that requiring the appellant to make capital contributions was “not appropriate.” The appellant specifically notes that “the requirement for WWLG to fund … MS16 without full recoveries has never before been encountered and is contrary to the Code.” In other words, the appellant’s contention was that Elexicon’s treatment of MS16 as an expansion was not consistent with the Code. Thus, it was bringing to the Board’s attention “conduct that may be in contravention of an enforceable provision” for resolution: *OEB Act*, s. 105(a). In other words, it was making a complaint.

[52] The question thus becomes whether the OEB is entitled to decide disputes under s. 105. This requires a statutory interpretation of that provision.



**a. Can the OEB "decide" a dispute pursuant to s. 105?**

[53] The modern principle of statutory interpretation makes clear that courts should consider the words used in legislation in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act, and the intention of the legislature: see *Piekut v. Canada (National Revenue),* 2025 SCC 13, 502 D.L.R. (4th) 1, at paras. 42-50; *Telus Communications Inc. v. Federation of Canadian Municipalities,* 2025 SCC 15, 502 D.L.R. (4th) 59, at paras. 30-36. While this approach to statutory interpretation considers the text, context and purpose of that provision, the text of the legislative provision at issue must always be the "anchor" of the interpretive exercise: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, at paras. 120-21; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Directrice de la protection de la jeunesse du CISSS A*, 2024 SCC 43, 498 D.L.R. (4th) 316, at para. 24.

[54] In this case, the text of s. 105 is clear. Section 105 empowers the OEB to attempt to "resolve" complaints. Nothing in the text suggests that the Board is limited under s. 105 in how it may do this. Furthermore, the text distinguishes between the OEB's power to "mediate" and its power to "resolve". The former

denotes exclusively non-binding authority, while the latter includes the exercise of binding authority: see e.g., Richard H. McLaren, *Innovative Dispute Resolution: The Alternative* (Carswell: Scarborough, 1994) (loose-leaf updated March 2025, release 1), at § 5:4; *O.P.S.E.U. v. Seneca College of Applied Arts & Technology* (2006), 80 O.R. (3d) 1 (C.A.), at para. 39, leave to appeal refused, [2006] S.C.C.A. No. 281.

[55] When one considers the text of this provision in light of the relevant context and the purposes of the *OEB Act*, it becomes clear that s. 105 empowers the OEB to issue binding interpretations of the Code in order to resolve complaints. It is to this context I now turn.

[56] Perhaps the most important contextual signal that s. 105 empowers the OEB to resolve complaints through binding legal determinations is s. 19(1). As noted above, this section empowers the Board to "determine all questions of fact and law" arising in matters over which it has jurisdiction (emphasis added). Per s. 19(6), this jurisdiction is exclusive. Section 105 assigns the OEB the jurisdiction to investigate and resolve complaints. It follows that, as part of this jurisdiction, it has the authority to determine questions of law.

[57] Elexicon contends that s. 19 only applies to the OEB's jurisdiction to issue orders. I disagree. Nowhere in s. 19(1) is the word "order" mentioned. It is only in "proceedings", such as those under Part VII.1 of the Act, where the Board must

make its determinations by order: s. 19(2). Indeed, restricting the Board's s. 19 jurisdiction to the issuance of orders is out of sync with the scheme of the *OEB Act*, which allows the Board to regulate many aspects of Ontario's energy sector without issuing orders. For example, the Board does not grant licences in the electricity sector by way of order: *OEB Act,* s. 60(1). However, in order to determine whether a licence should be granted, the Board has to interpret and apply other sections of the *OEB Act*, including ss. 57 (regarding whether the activity is one for which a licence is required) and 66 (regarding whether the Board can issue licences for electricity generated outside of Ontario). This would not be possible if it was not empowered to exercise its jurisdiction to determine questions of law pursuant to s. 19(1). In my view, issuing orders is only one way in which the Board exercises its s. 19 jurisdiction.

[58] The notion that s. 105 empowers the OEB to make legal determinations for the purposes of deciding a dispute between parties to a complaint is also supported by the jurisprudence interpreting this section since its enactment in 2010: *Energy Consumer Protection Act*, *2010*, S.O. 2010, c. 8, s. 38(22).

[59] For example, in *Bennet v. Hydro One Inc.*, 2017 ONSC 7065, 140 O.R. (3d) 264, at para. 130, aff'd 2018 ONSC 7741 (Div. Ct.), leave to appeal to Ont. C.A. refused, M50022 (March 26, 2019), the court cited the extensive powers of the Board to address complaints as one reason why a class action was not a

preferable procedure for dealing with allegations that an electricity distributor overcharged its consumers.

[60] Similarly, in *Vista Waterloo Hotel Inc. v. 1426398 Ontario Inc., & Ontario Energy Board*, 2021 ONSC 2724, the court recognized the OEB's broad powers to address complaints under s. 105. In particular, it held that the question of whether a hotel was entitled to certain rebates under the *OEB Act* and other statutes fell within the Board's exclusive jurisdiction under ss. 19(1) and 19(6): at paras. 17-18, 22-23. This was the legal question the OEB answered in rejecting the applicant's complaint. Indeed, the court noted, at para. 9 that:

> The courts have recognized that the OEB must be allowed to make its own decision at first instance. In the present case, that has happened. The Applicant complained to the OEB and its complaint was rejected.

Accordingly, while the court did not address this point expressly, it accepted that one of the ways in which the OEB may address a complaint is through a legal determination within its exclusive authority.

[61] Cases addressing the OEB complaints process prior to the enactment of s. 105 may also shed light on its scope. For example, in *Graywood Investments Ltd. v. Ontario Energy Board* (2005), 194 O.A.C. 241 (Div. Ct.), rev'd on other grounds (2006), 80 O.R. (3d) 492 (C.A.), the Divisional Court held that in resolving a complaint, the OEB has discretion to hold a hearing as part of its power to control

its own process: at para. 22. In an earlier, related case, this court concluded that the OEB's "decision" on a fundamental issue raised in a complaint "may be a matter of judicial review", given the OEB's exclusive jurisdiction: *Graywood Investments Ltd. v. Toronto Hydro-Electric Energy System Ltd*. (2004), 181 O.A.C. 265 (C.A.), at para. 7

[62] In my view, this context suggests that while s. 105 codified the OEB's broad discretion to control its process with respect to its handling of complaints, decisions arising from the OEB's disposition of complaints will generally be reviewable. I should add that there is no indication in the language of s. 105, nor in the Act generally, that decisions reached as part of the OEB's attempt to resolve a dispute would be immune from review.

[63] Turning to the purpose of s. 105, the breadth of the powers conferred on the Board suggests an intent to investigate and address complaints through a wide range of dispute resolution mechanisms. Indeed, pursuant to the Act, the OEB is granted exclusive jurisdiction over regulating Ontario's electricity and gas sectors, with the express purpose of protecting consumers' interests: ss. 1(1)1, 2(1)2. In service of this, the Board is granted extraordinary powers relating to licensure, pricing, and compliance, including powers of search and seizure: see *OEB Act,* ss. 57-60, 78, 107,112.0.1-112.0.6, 112.2-112.6. It would be consistent with such a purpose that the Board could exercise its s. 19 exclusive authority to interpret

and apply the Code as part of the suite of options at its disposal to resolve complaints. By contrast, precluding such an option from being available to the Board would be inconsistent with this purpose.

[64] Therefore, considering its text, context, and purpose, s. 105 of the Act suggests the OEB had the statutory discretion to accept the referral from the parties, and to attempt to resolve the dispute between them through an interpretation and application of the Code, over which the OEB has exclusive jurisdiction. Further, there is nothing in the text, context, or purpose of s. 105 to suggest that the OEB is immune from judicial review in exercising this discretionary authority.

[65] I now turn to the question of whether the OEB in fact exercised this power through its letters to the appellant.

### b. Did the OEB reach a final decision in this case, or merely express an opinion?

[66] In my view, while the referral to the OEB was triggered by the Connection Agreement between the parties, and specifically the carve-out to the arbitration arrangements, the OEB was not playing the role of a private arbitrator in this dispute (subject, for example, to arbitral rules or the provisions of the *Arbitration Act, 1991*, S.O. 1991, c. 17), Rather, the referral was for the OEB to

exercise its exclusive authority to interpret and apply the Code, as set out in s. 19 of the Act.

[67] It is clear that the Divisional Court viewed the “character of the matter” as a significant basis for its conclusion that the OEB’s actions in accepting the referral from the parties was not subject to judicial review. The Divisional Court characterized the appellant’s initial correspondence as follows: “[i]n its first letter, WWLG stated that it was seeking the OEB’s opinion” (emphasis added): at para. 28. The Divisional Court did not explain the basis for this characterization, but its continued reference to the OEB providing an opinion rather than a decision coloured its analysis of whether judicial review was available.

[68] A review of the record before the Divisional Court, however, leads me to conclude the OEB issued a decision rather than an opinion in response to the appellant’s complaint. The arbitration provisions in the Connection Agreement, in my view, make clear that the parties were not seeking an opinion from the OEB, but rather a decision. The more important question, however, is how the OEB understood this referral and its actions pursuant to it.

[69] The appellant’s February 2019 letter expressly states that a “final and binding” interpretation of the Code by the OEB was required. The appellant specifically asked the Industry Relations office of the OEB to “please review same and confirm whether or not a determination by your office would result in a final

and binding decision as if it were rendered as a decision of the Board itself." In that letter, the appellant added that, if the Industry Relations office was "unable to provide that final determination," then the appellant requested that a hearing of the OEB be scheduled to resolve the matter, "given the significance of the issue and its application to the interpretation of the Code".

[70] The appellant then provided the following, specific set of questions to be determined relating to "an interpretation under the Code":

> The parties have requested an interpretation under the Code that will address the following inquiry:
>
> Pursuant to the Code, is the inclusion of MS16, as described in the OTC [the Connection Agreement] from WHEC [now Elexicon] dated December 20th, 2018, an "expansion" or an "enhancement" to the WHEC [now Elexicon] distribution system?
>
> If MS16 is determined to be an expansion what portion of the capital costs required to construct same are properly recovered from WWLG through the OTC [the Connection agreement]? If MS16 is determined to be an enhancement, a confirmation that the capital costs required to construct same are not recoverable from WWLG?
>
> Can WHEC [now Elexicon] require a capital contribution of $775,000.00 plus HST, from WWLG for the future relocation of hydro infrastructure require by the future grade separation at Des Newman Boulevard and CP Rail?

> What is the appropriate connection horizon to be used by the parties in the OTC given the timing and framework for the development of the lands?

[71] In the August 2019 letter, accepting the referral, the OEB's Vice President for Consumer Protection and Industry Performance provided what was referred to as the OEB staff's "views and conclusions." The letter does not respond directly to the appellant's request that a "final and binding" decision be issued, but it is reasonable to infer that if the OEB did not intend its staff's views and conclusions to constitute a final and binding decision, it would have so stated in its response letter. This is especially true because the appellant specifically requested that the Industry Relations office confirm whether it could issue a binding determination.

[72] After setting out its substantive analysis on the questions referred to it, the conclusion that Elexicon was in compliance with the Code, and that Elexicon correctly treated the new substation as an "expansion" rather than an "enhancement" of the Elexicon system, the August 2019 letter summarized its conclusion on the interpretation and application of the Code as follows:

> In summary, based on the available information, it is OEB staff's conclusion that Elexicon has applied the regulatory provisions of the DSC correctly to the WWLG expansion. I trust this addresses the issues that gave rise to the dispute with Elexicon.

[73] In the November 2019 letter, the appellant responded:

> Thank you for your correspondence dated August 16th, 2019 in which you provide the opinion of [*sic*] in response to our submission package of February 15th, 2019. While we appreciate your effort at addressing the issues that have been raised as concerns by our clients, we would note that your response does not address the specific questions raised …. [Emphasis added.]

[74] Notably, this is the first reference in the record to the August 2019 letter from the OEB setting out its conclusions as constituting an "opinion."

[75] The appellant subsequently explained that, as it did not believe the response of the OEB decided the matters in dispute, nor clarified the application of the Code, it wished to "elevate" its inquiry to a formal complaint under the Act and requested an investigation into the matter.

[76] In its July 2020 letter, the appellant stated its position that, given the correspondence with the OEB to date, only a full hearing with respect to the application of the Code could resolve the dispute.

[77] In its final letter, the December 2020 letter, the OEB restated what it characterized as the "conclusions" resulting from staff's analysis, which I reproduce below:

> - Elexicon Energy complied with the applicable regulatory requirements and the new station (MS16) that will be used to supply the new WWLG developments should be considered an "expansion" (not an "enhancement") under the provisions of the [Code];

- WWLG should also be responsible for the relocation charges that were questioned; and
- The appropriate connection horizon is five years as set out in the [Code].

[78] On the issue of whether MS16 was an expansion versus an enhancement, based on new information received, the Board also addressed the implications of its determination, and made a downward adjustment in the capital contribution to be required from the appellant, from approximately $5 million to $4.2 million. The OEB explained:

> In summary, based on the information we obtained, it remains OEB staff's conclusion that Elexicon Energy has applied the regulatory requirements of the DSC correctly to the WWLG expansion (including relocation costs and the five-year connection horizon). However, OEB staff has also taken into account the unique circumstances in this case (i.e., not a pure expansion project) and, in doing so, also concluded that there should be a reduction in costs attributed to WWLG, as described above.

[79] In my view, the December 2020 letter is properly characterized as the final decision of the Board in this matter, and the decision from which judicial review was sought: see Donald J.M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada* (Toronto: Thomson Reuters, 1998) (loose-leaf updated June 2025, release 2), at Part II, § 1:10. At that point, the appellant also had clarified that its objection to Elexicon's position constituted a complaint before the Board. Indeed, this letter from the Board concluded as follows: "[i]n my view, this concludes OEB staff's review of this complaint."

[80] Further, in this final decision letter, the Board characterized its overall determination as flowing from its earlier conclusions on the proper interpretation of the Code, which it incorporated by reference. The Vice President responsible for the Industry Relations Office stated that "after considering all of the submissions from WWLG and the information from Elexicon, the underlying conclusions set out in my August 16th letter remain unchanged."

[81] For these reasons, I would not accept the Divisional Court's characterization of the OEB's response to the parties as an "opinion." I conclude the two letters from the OEB, the latter incorporating the analysis of the former, together constitute the decision and reasons of the Board, interpreting and applying the Code to resolve the complaint.

### 3. Was the OEB's decision sufficiently "public" in nature so as to trigger the availability of *certiorari*?

[82] To summarize, the OEB used its power to determine legal questions under s. 19(1) of the Act to interpret the Code and decide that MS16 was an expansion, thus resolving the parties' dispute pursuant to s. 105. The question remains whether such a decision can give rise to an order in the nature of *certiorari*. As discussed above, I am guided in this analysis by the *Air Canada* factors, which I reproduce again below for convenience:

- The character of the matter for which review is sought;

- The nature of the decision maker and its responsibilities;
- The extent to which a decision is founded in and shaped by law as opposed to private discretion;
- The decision-making body's relationship to other statutory schemes or other parts of government;
- The extent to which a decision maker is an agent of government or is directed, controlled or significantly influenced by a public entity;
- The suitability of public law remedies; and
- Whether the decision belongs to an "exceptional" category of cases where the conduct has attained a serious public dimension: at para. 60.

[83] While not all these factors favour the judicial review of the OEB's decision, most do. Accordingly, I would conclude that an order in the nature of *certiorari* was available under s. 2(1)1 of the *JRPA* to review the OEB's decision that MS16 was an expansion. The Divisional Court erred in finding otherwise.

[84] With respect to the first factor, as discussed above, the character of the matter in dispute was a decision by the OEB on a legal question involving the interpretation and application of the Code. This factor leans heavily towards the availability of judicial review.

[85] With respect to the second factor, the OEB has exclusive jurisdiction over the Act's enforceable provisions, including the Code. Accordingly, it has exclusive jurisdiction to resolve complaints regarding the interpretation and application of the Code. This is a fundamentally public function.

[86] With respect to the third factor, the OEB may only act to resolve complaints and disputes as provided by its governing legislation, specifically s. 105 of the Act. The only “private” dimension of its actions in this case was the fact the referral of the dispute/complaint to be decided was triggered by an agreement between private developers and the regulated authority providing electricity to the subject development. Given the clear statutory basis for its decision, the fact that the OEB’s interpretation and application of the Code was triggered by an agreement between private parties does not alter the public character of the OEB’s actions or the appropriateness of public law remedies.

[87] The factor which appears not to be met in this case is the presence of a compulsory power. The Board’s final decision that the appellant was responsible for paying for the electricity infrastructure at issue – and its determination of the exact amount the appellant had to pay – did not come in the form of an order. However, in the context of the dispute, it was understood by the parties and by the OEB that its determination would have binding effect. In these circumstances, the absence of a formal compulsory power does not alter the public nature of the decision at issue, whether or not the power exercised by the OEB could be said to be compulsory. I note on this point that the *Air Canada* factors are merely analytical aids to be used in answering *Wall’s* ultimate question of whether the exercise of

state authority is of a sufficiently public character, not a strict checklist: *Wall,* at para. 14; *Khorsand*, at paras. 73-74.

[88] The fact that the question before the OEB arose from a contract between the parties, in other words, does not transform the OEB's interpretation and application of the Code from a public into a private act.

[89] I note that for an order in the nature of *certiorari* to be available, a person's "rights, interests, property, privileges or liberty" must be at stake: *Martineau*, at p. 628. I deal with this issue in my analysis of whether the OEB exercised a statutory power of decision, as it is an express requirement of s. 2(1)2 of the *JRPA*.

[90] I now turn to the question of whether judicial review was available under s. 2(1)2 of the *JRPA* because the OEB Letters constituted the exercise of a statutory power of decision.

**4. Did the OEB exercise a statutory power of decision?**

[91] The parties disagree as to whether the OEB Letters constituted the exercise of a statutory power of decision for the purposes of the *JRPA*, thereby giving rise to judicial review under s. 2(1)2. This question may be seen as another indicator of whether the OEB's decision was of a sufficiently public character to fall within the scope of judicial review on the *Wall* test.

[92] The question of whether a party is entitled to a remedy in judicial review under s. 2(1)2 of the *JRPA* is twofold. This stems from the fact that a statutory power of decision under s. 1 contains two criteria. In this case, the appellant must first demonstrate that it was subject to "a power or right conferred by or under a statute to make a decision". Second, this decision must decide or prescribe the "legal rights, powers, privileges, immunities, duties or liabilities of any person or party". I now turn to the first of these questions.



### a. Did the OEB make a decision pursuant to its enabling statute?

[93] The crux of the Divisional Court's decision on this issue is that in the OEB Letters, the Board merely expressed its opinion regarding the classification of MS16, and then later decided not to pursue the complaint further. The Divisional Court summarized its conclusion, at para. 45, as follows:

> Accordingly, in my view, the OEB's opinion on whether the MS16 is an enhancement or an expansion is not subject to judicial review. This was not the exercise of a statutory power. The OEB provided this opinion to the parties because they requested that it do so as part of their dispute resolution process. [Emphasis in original.]

[94] In the Divisional Court's view, the parties could not transform the OEB's opinion into a decision made pursuant to statute merely because they agreed to be bound by said opinion.

[95] While I agree parties cannot take a non-binding opinion and reconstitute it as a statutory decision simply because they agree to be bound by it, I do not agree that this is what happened here, based on my review of the OEB Letters set out above.

[96] As noted above, the OEB used its s. 105 jurisdiction to decide the legal questions giving rise to the parties' dispute. This is, by definition, the exercise of a power conferred by statute to make a decision pursuant to s. 1 of the *JRPA*.

[97] The Divisional Court also drew support for its conclusion that the Board had not exercised a statutory power of decision from the fact that the statutory power at issue was discretionary. As set out above, s. 105 states that the OEB "may … receive complaints" and "may … make inquiries, gather information and attempt to mediate or resolve complaints" (emphasis added). Section 105 does not compel the OEB to do anything.

[98] The OEB, in support of this position, asserts in its factum that, "OEB staff simply have no 'statutory power' under s. 105 to 'decide' or 'prescribe' or 'determine' anything," though I note the OEB provides no support in case law or other authority for this proposition. On the contrary, as discussed above, courts have recognized the Board's broad authority to deal with complaints, including by deciding legal issues.

[99] I would reject this submission. In my view, as mentioned above in my analysis of the text, context and purpose of s. 105, it confers on the OEB the authority to resolve complaints. It does not preclude the OEB from "deciding", "prescribing", or "determining" issues in the course of doing so.

[100] The OEB's decision to accept the referral to resolve the dispute was unquestionably discretionary. However, once it undertook to provide a final determination on the interpretation and application of the Code under its exclusive authority conferred by s. 19 of the Act, the usual public law principles of reviewability applied to that determination: *Dow Chemical Canada ULC v. Canada*, 2024 SCC 23, 493 D.L.R. (4th) 1, at para. 8.

[101] As for the fact the analysis in this case came from staff, and not the OEB Commissioners, this again requires some attention to s. 105 of the Act. The OEB submits that the Act confers "the primary mandate" on panels of OEB Commissioners to "hear and determine" matters of fact and law: see *OEB Act*, s. 4.3(8). These powers of the Commissioners, moreover, are required by the statute to be exercised by order, generally after a hearing, with a statutory appeal then lying to the Divisional Court: see ss. 6(2), 19(2), 33(1), 112.2-112.5. While the Act prescribes that the decisions of Commissioners in proceedings will be in the form of orders, s. 19, however, does not refer to the exclusive authority of "the Commissioners," but rather to the exclusive authority of "the Board".

[102] The OEB does not take the position on this appeal that the Board cannot issue a decision, making a legal or factual determination, based on its staff's analysis. The reliance of the OEB on its own staff's analysis in determining the issue, cannot be determinative of the question of whether judicial review is available.

[103] It was open to the Board under the broad authority of s. 105 to choose how best to discharge the role it had agreed to play in this case. Again, significantly in my view, the correspondence to the parties came from the Board, and nowhere did the Board indicate that the conclusions contained in that correspondence were subject to review, revision or further consideration by Commissioners, or anyone else at the Board, before those conclusions could constitute a decision of the Board.

[104] Administrative decision makers, especially regulatory bodies, may issue decisions in many forms. The fact that a decision may be conveyed in a letter rather than an order is no bar to judicial review: see e.g., the decisions found to be judicially reviewable in *Endicott v. Ontario (Independent Police Review Office),* 2014 ONCA 363, 373 D.L.R. (4th) 149 (contained in a letter from staff representing the Independent Police Review Office screening out a complaint); and, *Graywood Div. Ct.* (contained in a letter from the OEB dismissing a complaint).

[105] The scope of a reviewable regulatory decision was considered by the Federal Court of Appeal in *Telus Communications Inc. v. Federation of Canadian Municipalities*, 2023 FCA 79, [2023] 3 F.C.R. 3, aff'd 2025 SCC 15, 502 D.L.R. (4th) 59. In that case, the court noted the broad decision-making authority of the Canadian Radio-television and Telecommunications Commission ("CRTC"), and highlighted the distinction between policy statements and decisions in specific disputes: at paras. 55, 62-63. The court paid particular attention to the language used by the CRTC in addressing the dispute in that case, and concluded that the language used was not preliminary or tentative, but reflected a determination by the CRTC of the matter before it, interpreting the legislative provision at issue:

> On the basis of that language, I fail to see how the CRTC could later entertain an application by a carrier for an order to access a municipal structure for the purposes of constructing, operating and maintaining mobile wireless apparatus. There is nothing tentative in the wording of its decision, and there is no further step involved before the decision becomes effective as was the case in the earlier policy decisions which this Court determined not to be "decisions" for the purposes of section 64 of the Act. Moreover, the Decision is based on the CRTC's interpretation of the Act, not on the assessment of facts or the existence of a particular technology that could change or evolve in the future. In other words, the Decision is clearly definitive and is meant to be a definitive finding.[Emphasis added.]

[106] In my view, a similar analysis applies in this case. The language used by the OEB in the correspondence was neither preliminary, nor tentative, but rather was, and was intended to be, a definitive interpretation and application of the Code.

[107] The decision of the Board determined the legal issue in dispute by interpreting the Code, and further, allocated the costs of MS16 between Elexicon and the appellant based on its determination.

[108] To use the wording of the Federal Court of Appeal in *Telus*, based on the Board's framing of its response to the parties' dispute, I fail to see how the Board could have later entertained an application by the appellant in relation to the expansion or enhancement issue and come to a different conclusion.

[109] This context may be contrasted with settings where the OEB expressly issues opinions that it intends to be non-binding. For example, the OEB, in its factum, refers to the Divisional Court's decision in *Powerline Plus Ltd. v. Ontario (Energy Board)*, 2013 ONSC 6720, 315 O.A.C. 315 (Div. Ct.), in which the propriety of the Board relying on certain OEB staff "compliance bulletins" issued to the public was at issue. In that context, the Divisional Court noted that the Board had acknowledged that it was not bound in any way by the compliance bulletins but that, equally, it was not required to ignore them: at para. 57. The Board stated in its decision that it regarded the submissions of Board staff to be no more authoritative than any others: at para. 57.

[110] This context is entirely different from the case on appeal, where the Board presented the staff conclusions as determinative of the issue in dispute, and did so in a context where it was understood by all parties, including the Board, that its conclusions would be binding on Elexicon and the appellant.

[111] In sum, I would find that the decision contained in the OEB Letters was exercised pursuant to the Board's statutory authority under s. 105 of the Act, and is thus a decision made under a power conferred by statute. I now turn to considering whether this decision decided or prescribed the "legal rights, powers, privileges, immunities, duties or liabilities of any person or party": *JRPA*, s. 1.

### b. Did the OEB's decision decide or prescribe the parties' "legal rights"?

[112] The Divisional Court, in determining that the Board had not exercised a statutory power of decision pursuant to s. 1 of the *JRPA*, concluded that the OEB's handling of the parties' dispute, which it characterized as a decision to take no further steps on the appellant's complaint, did not affect the appellant's legal rights. In my view, this was in error.

[113] I would conclude the OEB's decision did affect the legal rights and duties of the parties. As Brown and Evans note, the phrase "legal rights, powers, privileges, immunities, duties or liabilities" has been interpreted broadly: at Part II, § 2:11. The OEB's decision in this case was initiated under the Board's authority to resolve

disputes pursuant to s. 105 of the Act. As I have noted above, the Board's decision was based on its exclusive authority to interpret and apply the Code under s. 19 of the Act. Further, in interpreting and applying the Code, the Board's decision prescribed the legal rights of Elexicon. In turn, this interpretation of the Code determined the contractual relationship between the parties, through which the appellant's duties were set out. As a result of the OEB's interpretation and application of the Code, the appellant is required to pay for MS16 because the OEB has determined that Elexicon is allowed to charge this amount under the Code.

### c. Conclusion on this ground of appeal

[114] Therefore, with both elements of the definition satisfied, I would conclude that the OEB Letters constituted the exercise of a statutory power of decision within the meaning of s. 1 of the *JRPA*. Accordingly, it was reviewable pursuant to s. 2(1)2.

## 5. Conclusions on whether the OEB's decision gives rise to a right of judicial review

[115] Based on the analysis set out above, three conclusions flow:

(1) The OEB made a final decision when it interpreted and applied the Code to resolve the dispute between the appellant and Elexicon.

(2) In doing so, the OEB exercised a statutory power of decision within the meaning of ss. 1 and 2(1)2 of the *JRPA*, and its decision gave rise to the availability of a public law remedy in the nature of *certiorari* pursuant to s. 2(1)1.

(3) Accordingly, the decision meets the threshold set out in *Wall* of being "of a sufficiently public character" to give rise to judicial review: at para. 14.



## 6. The OEB's decision not to hold a hearing

[116] In light of its conclusion that the OEB had not made a decision in relation to the substantive dispute between the appellant and Elexicon, the Divisional Court held that the only decision the OEB made was not to refer the appellant's complaint for a hearing. On this point, the court held that the appellant lacked standing to compel the Board to hold a hearing.

[117] While the appellant does not appear to be pursuing an appeal of the Divisional Court's conclusions on its lack of standing, a clarification on that aspect of the Divisional Court's decision may be helpful.

[118] The Divisional Court's reasoning may be summarized as follows. It was the court's view that "while WWLG can make a complaint, it has no standing to require that the Board hold a hearing if it is not satisfied with the manner in which the Board has handled the complaint": at para. 31. The court reasoned that a hearing is only

triggered if the Board makes an order under Part VII.1 and the party that is subject to the order requests a hearing pursuant to s. 112.2(4). These orders can only be made on the Board's "own motion", pursuant to s. 112.2(1). Thus, relying on *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52, [2001] 2 S.C.R. 781, at para. 22, the court reasoned there was clear statutory language ousting the principles of natural justice. This meant that only the OEB had the power to trigger the process giving rise to a hearing.

[119] As these subsections were not engaged in the dispute involving the appellant and Elexicon, the Divisional Court concluded that the appellant had no standing to compel the Board to hold a hearing.

[120] In the Divisional Court's view, the appellant was in the same position as any member of the public making a complaint, and thus had no standing to review the Board's decision not to take any further steps in dealing with said complaint. To support this conclusion, the court relied on several cases from the professional discipline context, which it reasoned stood for the proposition that complainants have no standing to judicially review the outcome of complaints.

[121] One such case was *Batacharya v. The College of Midwives of Ontario*, 2012 ONSC 1072 (Div. Ct.), where the Divisional Court held that the College of Midwives of Ontario was not exercising a statutory power of decision when

processing a complaint under the *Health Professions Procedural Code*, being Schedule 2 to the *Regulated Health Professions Act, 1991*, S.O. 1991, c. 18, because the College had the discretion not to investigate said complaint. The Divisional Court contrasted this situation with this court's decision in *Endicott.* In that case, this court held that the Independent Police Review Office was exercising a statutory power of decision because the relevant legislation required, through the use of the word "shall", the Office to process the complaint: at paras. 26-27.

[122] I do not find either *Endicott* or *Batacharya* to be relevant to the question of whether a right of judicial review was available to the appellant. In *Endicott*, there was no dispute that the decision not to investigate a complaint was subject to judicial review: at para. 7. The question of whether the decision was an exercise of a statutory power of decision related to the remedy sought of compelling the decision maker to produce a record of the decision under s. 10 of the *JRPA*: *Endicott,* at para. 12.

[123] The dispute in *Batacharya* similarly concerned whether a complainant whose complaint was not pursued could obtain a record of the decision under s. 10 of the *JRPA*. Whether the investigation into the complaint was discretionary or mandatory, and accordingly whether it was a statutory power of decision, was held to be determinative of the question of the application of s. 10 of the *JRPA*: at paras. 13-21.

[124] In this case, however, the issue is the jurisdiction of the Divisional Court to judicially review the actions of the Board, not whether the appellant can compel production of a record of the Board's decision under the *JRPA*. It is well established that an administrative decision maker's decision not to take enforcement steps in response to a complaint is subject to a limited right of judicial review on procedural fairness grounds: see e.g., *Fuchigami v. Ontario College of Teachers*, 2024 ONSC 106, 34 Admin. L.R. (7th) 149 (Div. Ct.), at para. 14; *Mitten v. College of Alberta Psychologists*, 2010 ABCA 159, 487 A.R. 198.

[125] Therefore, while the Divisional Court was correct in concluding that the appellant could not compel the OEB to hold a hearing under the Act, this is a different question than whether the court had jurisdiction to hear a judicial review of the exercise of the OEB's authority not to take further steps in the complaint.

## 7. The relevance of the Superior Court's decision

[126] As I would find the Divisional Court erred in concluding the OEB's actions did not give rise to a judicially reviewable decision, it is not necessary to consider the motion judge's decision to dismiss the appellant's subsequent Superior Court application. As noted above, the appellant made clear that it was only pursuing an appeal of that decision in the event its appeal of the Divisional Court decision failed.

[127] That said, some comments on the motion judge's decision are warranted to the extent her analysis touched on the issues addressed above.

[128] The motion judge, in characterizing what the Board had done, distinguished between the Board offering its "views and conclusions" and "deciding" the parties' dispute: at paras. 23-24. This is partially because the parties before her agreed on that characterization. The appellant sought to argue that because the Board had not decided the matter, the court should do so. The respondents, on the other hand, argued that the appellant had no right to compel the Board to decide the matter.

[129] Generally, my analysis set out above is consistent with the analysis of the motion judge. First, she concluded that the appellant's application sought to relitigate a dispute the Board already decided and was thus an abuse of process. Second, the motion judge dismissed the application on the alternative ground that the OEB had exclusive jurisdiction over its subject matter. She concluded, at para. 37: "I find that the heart of this proceeding is the interpretation of the *Distribution System Code* which falls squarely within the Board's jurisdiction under s. 19(6) and 112.3 of the Act."

[130] The view that the dispute between the parties already had been decided, and the view that the OEB is the body with the exclusive jurisdiction to provide a binding interpretation of the Code, are both findings that are consistent with the analysis and conclusions set out above.

[131] I recognize that the appellant has pursued mutually irreconcilable arguments. Before the Superior Court, the appellant argued that no decision was reached, while before the Divisional Court and this court, the appellant argued that a decision was reached and it gives rise to a right of judicial review. I view these positions as reflecting the appellant's pursuit of any available pathway to challenge the OEB's actions in relation to its dispute.

## G. DISPOSITION

[132] For the reasons set out above, I would allow the appeal from the decision of the Divisional Court, and accordingly, need not address the appeal from the decision of the Superior Court.

[133] The appellant is entitled to costs. As the parties reached no agreement with respect to the quantum of costs, they may make written submissions not exceeding three pages each. The submissions of WWLG shall be delivered within 15 days of the release of these reasons, while the submissions of Elexicon shall be delivered within ten days after receipt of those of WWLG.

[134] No costs are awarded against the OEB.

Released: December 1, 2025 "C.W.H."

"L. Sossin J.A."
"I agree, C.W. Hourigan J.A."
"I agree, R. Pomerance J.A."