



**DECISION**

**IN THE MATTER OF the Penobsquis Water System**

**December 15, 2009**

**New Brunswick Energy and Utilities Board**

**APPLICANT:**

Citizens of Penobsquis .....

**REPRESENTED BY:**

**Solicitor:**  
Mr. Michel DesNeiges

**REGISTERED PARTIES:**

City of Moncton .....

Mr. Christopher Stewart  
Mr. Ensor Nicholson

City of Saint John .....

Mr. Scott Brittain

Department of Local Government .....

Ms. Michelle Brun-Coughlan  
Mr. Stephen Battah

Potash Corporation of Saskatchewan Inc. ....

Mr. Peter Zed, Q.C.  
Mr. Blair Borgerson

Village of Sussex Corner .....

Mr. Howard Spalding, Q.C.  
Mr. Don Smith  
Mr. Arie Rultenberg

**NEW BRUNSWICK ENERGY AND UTILITIES BOARD:**

**Counsel:** Ms. Ellen Desmond  
**Staff:** Mr. Doug Goss  
Mr. David Keenan  
Mr. David Young

**Panel:**

**Chairman:** Mr. Ray Gorman, Q.C.  
**Vice-Chairman** Mr. Cyril Johnston  
**Members:** Mr. Roger McKenzie  
Mr. Steve Toner

**Board Secretary** Ms. Lorraine Légère

## **Penobsquis Water Hearing**

### **Introduction**

This is a decision of the New Brunswick Energy and Utilities Board (“Board”) in the matter of an application by the Concerned Citizens of Penobsquis and 28 Residential Homeowners of Penobsquis (the “Applicant”) in the Local Service District of Cardwell (“Cardwell”) as it relates to provision of water by the municipality of Sussex Corner in the Province of New Brunswick. Cardwell is outside the municipal limits of the municipality of Sussex Corner.

The Applicant filed its application with the Board on August 31, 2009 wherein it submits that the Energy and Utilities Board Act (the *EUB Act*) applies to the provision of water by the Village of Sussex Corner to residents of Cardwell. On October 19, 2009, the Department of Local Government, Province of New Brunswick, filed a motion contesting the Board’s jurisdiction in this matter.

A pre-hearing conference was held on October 27, 2009 and a number of intervenors registered as interested parties. A hearing was held on November 12, 2009 at which time the sole issue before the Board was whether the Province of New Brunswick or the Village of Sussex Corner is a “public utility” as defined in Section 53 of the *EUB Act* and as it relates to the provision of water to residents in Cardwell.

### **Facts**

During the pre-hearing conference, the parties developed an Agreed Statement of Facts, as it relates to the sole issue before the Board. This Statement of Facts provides in part, as follows:

- The Province of New Brunswick is the current owner of the Penobsquis Water System (“PWS”) that serves residents and commercial users in the greater area of Penobsquis;

- The PWS is administered and operated by the Village of Sussex Corner pursuant to an agreement between the Province of New Brunswick and the Village of Sussex Corner dated April 27, 2009;
- The PWS provides water exclusively to users who are outside the Village of Sussex Corner, including users who reside in the Local Service District of Cardwell;
- There are users who have executed an agreement with the Village of Sussex Corner and they are paying a fee for the provision of water.

### **Legislation**

Section 53 of the *EUB Act* defines the term “public utility” for interpretive purposes. It states:

“public utility” means

(a) a person that owns, operates, manages or controls any plant or equipment for the transmission, delivery or furnishing of water or natural gas, or that provides such other service as may be prescribed by regulation, either directly or indirectly, to or for the public,

(b) when specified by regulation, any municipality or rural community that owns, operates, manages or controls any plant or equipment for the transmission delivery or furnishing of water or natural gas, either directly or indirectly, to any person outside its own limits, and

(c) when specified by regulation, a municipal distribution utility as defined in the *Electricity Act* that generates or distributes electricity.

Subsection 54 of the *EUB Act* explicitly gives the Board supervisory powers over public utilities.

In part, this section states:

**54(1)** The Board has supervision of the activities of public utilities and other persons subject to this Part and has full jurisdiction to inquire into, hear and determine any matter

(a) where it appears to the Board that any person has failed to do any act, matter or thing required to be done by this Part or by any regulation, rule, order or direction made by the Board, or that any person has done or is doing any act, matter or thing contrary to or in contravention of this Part or regulation, rule, order or direction, or

(b) where it appears to the Board that the circumstances may require it, in the public interest, to make any order or give any direction, leave or approval that by law it is authorized to make or give, or concerning any matter, act or thing that by this Part or any regulation, rule, order or direction is prohibited or required to be done.

## **Issues**

In light of the *EUB Act* and the Agreed Statement of Facts, the Board finds as follows with respect to the jurisdictional issue:

*The Province of New Brunswick:*

While the Province of New Brunswick is the owner of the Penobsquis water system, reference must be made to section 32 of the *Interpretation Act* which states:

**32** No Act or regulation impairs or adversely affects the rights of the Crown unless it is expressly stated therein that the Crown is bound thereby.

The *EUB Act* does not state, expressly or otherwise, that the Crown is bound by it. In this case, a finding that the Province of New Brunswick is a “public utility” would adversely affect the rights of the Crown. In light of the *Interpretation Act*, the Board finds that the Province of New Brunswick cannot be considered a public utility in this matter.

### *The Village of Sussex Corner*

The Applicant argued that the Village of Sussex Corner, as the administrator and the operator of the Penobscis water system, is a “public utility” according to the *EUB Act* and is therefore subject to the jurisdiction of the Board.

Careful consideration must be made of section 53(b) *EUB Act* which explicitly states that a “municipality” or “rural community” that operates equipment for the transmission of water outside its own limits is only considered a “public utility” when specified by regulation.

The *EUB Act* does not define “municipality” or “rural community”, however, section 1 of the *Municipalities Act* defines a municipality to mean a “city, town or village”. As such, the Village of Sussex Corner is, in fact, a municipality.

A municipality which operates a water system for the transmission of water outside its own limits is only considered a “public utility” when specified by regulation. In this case, there is no such regulation.

The Board is a creature of statute and must adhere to the confines of its statutory authority. While the Applicant invited the Board to expand the limits of section 53(b), this section must be read in its grammatical and ordinary sense.

In the absence of any such regulation and in light of the Agreed Statement of Facts, the Board finds that the Village of Sussex Corner cannot be considered a “public utility” for the services it provides to the Applicant.

### **Conclusion**

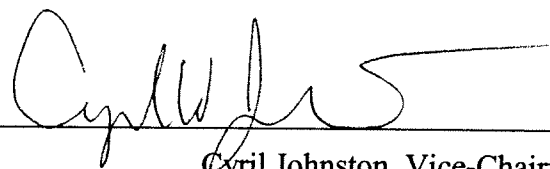
The Board finds that neither the Province of New Brunswick nor the Village of Sussex Corner are a “public utility” in relation to the provision of water to residents of the Local Service District of Cardwell and as such, the Board does not have jurisdiction in this matter. Accordingly, the motion is granted and the Application is dismissed.

Dated at the City of Saint John, New Brunswick this 15<sup>th</sup> day of December, 2009.



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Raymond Gorman, Q.C., Chairman



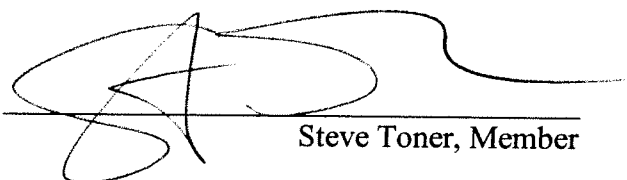
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Cyril Johnston, Vice-Chairman



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Roger McKenzie, Member



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Steve Toner, Member