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Ontario Court of Appeal Confirms Limits on the Freedom of Publicly Regulated Companies

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The Court of Appeal for Ontario, in a decision in the case of *Toronto Hydro-Electric System Limited and the Ontario Energy Board*, released on April 20, 2010, has restated the important distinction between private corporations and publicly regulated corporations. It has also confirmed that there are important limits on the freedom of these corporations.

At issue was whether the regulator had the power to impose, as a condition of approving rates, a duty to obtain the approval of a majority of the independent directors before declaring a dividend payable to the utility's affiliates. The utility argued that, as a matter of corporate law, the regulator could not put constraints on the power of directors to declare dividends.

In upholding the decision of the regulator, the Court of Appeal pointed to the distinction between private corporations and publicly regulated corporations. The court held that publicly regulated corporations must balance the interests of investors and consumers. To accomplish that balance, restraints may be placed on the board of directors, because those directors have an obligation not only to the corporation but to the public.

The Court of Appeal restated the principle that, while the directors and officers of unregulated companies have a fiduciary duty to act in the best interests of a company, a regulated utility must operate in a manner which "balances the interests of the utility shareholders against those of its ratepayers". The Court of Appeal concluded that, if the utility fails to operate in a way which balances those interests, the regulator must intervene, strike the balance, and protect the interests of ratepayers.

For a link to the decision, visit:
http://www.ontariocourts.on.ca/decisions/2010/april/2010ONCA0284.pdf