

ONTARIO ENERGY BOARD

IN THE MATTER OF the *Ontario Energy Board Act 1998*, Schedule B to the *Energy Competition Act*, 1998, S.O. 1998, c.15;

AND IN THE MATTER OF an Application by Toronto Hydro-System Electric Limited for an Order or Orders approving or fixing just and reasonable rates and other service charges for the distribution of electricity as of May 1, 2015.

AND IN THE MATTER OF Rule 27 of the Board's *Rules of Practice and Procedure*.

NOTICE OF CONSTITUTIONAL QUESTION

The Intervenor, Canadian Electricity Association ("CEA"), intends to question the constitutional validity of the Ontario Energy Board (the "Board") compelling disclosure, and therefore reproduction, of documents owned by a third party pursuant to provincial legislation, namely section 21(1) of the *Ontario Energy Board Act, 1998*, S.O. 1998, Chapter 15, Schedule B (the "OEB Act") and sections 5.4 and 12(1) of the *Statutory Powers Procedure Act*, R.S.O. 1990, Chapter S. 22 (the "SPPA"), where the third party copyright owner of the documents has not granted consent, in accordance with section 3(1) of the federal *Copyright Act*, R.S.C. 1985, c. C-42 (the "*Copyright Act*").

The question is to be argued on a date and time to be fixed by the Board at 2300 Yonge Street, Toronto, Ontario.

The following are the material facts giving rise to the constitutional question:

1. The Board issued a Notice of Proceeding on an application by Toronto Hydro-System Electric Limited ("Toronto Hydro") pursuant to section 78 of the *Ontario Energy Board Act, 1998* for an order or orders approving just and reasonable payment amounts for prescribed generating facilities commencing May 1, 2015.
2. The School Energy Coalition ("SEC") is an intervenor in this proceeding and pursuant to Procedural Order No. 1, delivered written interrogatories to Toronto Hydro. On November 5, 2014, Toronto Hydro filed responses to interrogatories.
3. On December 19, 2014, the SEC filed a Notice of Motion with the Board, seeking the following relief pursuant to Rule 27.03 of the Board's *Rules of Practice and Procedure* (the "*Rules*"):
 - (a) An order requiring Toronto Hydro to provide a full and adequate response to interrogatory 1B-SEC-8, specifically to produce benchmarking documents with respect to which Toronto Hydro has participated through the CEA.

- (b) Such further and other relief as the SEC may request and the Board may grant.
4. On January 10, 2015, the CEA requested intervenor status so that it could make submissions in respect of the SEC Motion, given that CEA is the exclusive owner of copyright of the benchmarking reports and data models (collectively, the “CEA Property”) that could be disclosed and therefore, reproduced without CEA’s consent, if the Board were to grant the SEC Motion.
 5. On January 10, 2015 the Board granted the CEA intervenor status for the purpose of responding to the SEC Motion.

The following is the legal basis for the constitutional question:

6. Pursuant to section 5(1) of the *Copyright Act*, copyright subsists in every unpublished original literary, dramatic, musical and artistic work authored in Canada. The term “literary work” is defined in section 2 to include “tables, computer programs, and compilations of literary works.” “Compilation” is defined, in part, as “a work resulting from the selection or arrangement of data.”
7. The CEA is the copyright owner of the CEA Property.
8. Pursuant to section 3(1) of the *Copyright Act*, CEA, as the copyright owner of the CEA Property, has “[t]he sole right to produce or reproduce” the CEA Property “or any substantial part thereof in any material form whatever ... and to authorize any such acts.”
9. Section 27(1) of the *Copyright Act* further provides that “[i]t is an infringement of copyright for any person to do, without the consent of the owner of the copyright, anything that by this Act only the owner of copyright has the right to do.”
10. The *Copyright Act* provides for defences to claims of infringement of copyright in certain circumstances. No such circumstances exist in this case.
11. The rights and remedies provided by the *Copyright Act* are exhaustive.
12. As an agent of the provincial Crown, the Board is bound by the *Copyright Act* (*Manitoba v. Canadian Copyright Licensing Agency (Access Copyright)*, 2013 FCA 91, at para. 48). Therefore, in accordance with the *Copyright Act*, consent from the CEA is required prior to issuing an Order to compel the disclosure of copyrighted material owned by the CEA.
13. The Board does not have the power to override the *Copyright Act*. The Board’s authority to compel disclosure of documents is derived from the following provisions under provincial legislation:
 - (a) Section 21(1) of the OEB Act provides that the Board “may at any time on its motion and without a hearing give directions or require the preparation of evidence incidental to the exercise of the powers conferred upon the Board by this or any other Act.”

- (b) Section 5.4(1) of the SPPA provides that “[if] the tribunal’s rules made under section 25.1 deal with disclosure, the tribunal may, at any stage of the proceeding before all hearings are complete, make orders for, (a) the exchange of documents” or “(e) any other form of disclosure.”
- (c) Section 12(1) of the SPPA provides that “[a] tribunal may require any person, including a party, by summons ... (b) to produce in evidence at an oral or electronic hearing documents and things specified by the tribunal.”

- 14. The Board has adopted Rule 14.01 in its *Rules*, which provides that “[a] party who intends to rely on or refer to any document that has not already been filed in a proceeding shall file and serve the document 24 hours before using it in the proceeding, unless the Board directs otherwise.”
- 15. The Board’s authority to make orders for the disclosure of documents is explicitly limited by the terms of its enabling legislation. Section 5.4(1.1) of the SPPA provides that “[t]he tribunal’s power to make orders for disclosure is subject to any other Act or regulation that applies to the proceeding.”
- 16. Furthermore, the doctrine of federal paramountcy dictates that where there is an inconsistency, a conflict or an incompatible operational effect between validly enacted but overlapping provincial and federal legislation, the provincial legislation is inoperative to the extent of any inconsistency.
- 17. Pursuant to section 3(1) of the *Copyright Act*, CEA must consent to the reproduction, and hence disclosure (on a confidential or public basis), of the CEA Property. Therefore, in accordance with the doctrine of federal paramountcy, an order of the Board under section 21(1) of the OEB Act, and sections 5.4 and 12(1) of the SPPA to compel disclosure of the CEA Property without CEA’s consent would result in an incompatible operational effect with section 3(1) of the *Copyright Act* and would be constitutionally invalid.

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EB-2014-0116

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