IN THE MATTER OF the *Ontario Energy Board Act, 1998* S.O. 1998, c. 15 (Schedule B) (the "**OEB Act**");

AND IN THE MATTER OF a Notice of Intention to Make an Order for Compliance against Toronto Hydro-Electric System Limited

MATERIALS FOR MOTION FOR ADEQUACY OF DISCLOSURE

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EB-2009-0308

IN THE MATTER OF the *Ontario Energy Board Act, 1998* S.O. 1998, c. 15 (Schedule B) (the "**OEB Act**");

AND IN THE MATTER OF a Notice of Intention to Make an Order for Compliance against Toronto Hydro-Electric System Limited

NOTICE OF MOTION

The Moving Party, Toronto Hydro Electric System Limited ("**THESL**") will bring a motion to the Board at a time and place to be determined by the Board Panel for orders respecting the disclosure and production of documents in accordance with the Board's Amended Decision and Order, dated October 23, 2009 (the "Disclosure Decision").

Specifically, THESL requests the following orders:

(1) That compliance counsel produce the complaint or complaints filed against THESL by the Smart Metering Work Group (the "Working Group Complaints") that were apparently filed with the Board and/or with the Market Surveillance Panel in December, 2008 and which culminated in the Board issuing a Notice of Intention to Make an Order for against THESL as well as all other materials related to this complaint that were prepared, sent, received, or reviewed by or exchanged with any employee of the Board who was involved in the review and/or investigation of THESL in relation to THESL's smart metering of condominium units (the "Working Group Information.");

(2) That the Board Panel review the documents for which production is resisted on the basis of solicitor client privilege to determine whether the claim for privilege is appropriate and to order production of all documents that the Board Panel determines are not properly subject to solicitor-client privilege; and

(3) Setting dates for Compliance Counsel to file pre-filed evidence and respond to Interrogatories.

The Grounds for this order are as follows:

I. Generally

(1) On October 26, 2009, Compliance Counsel provided THESL with a bound copy of documents that it was prepared to disclosure (the "Disclosed Documents") and a list of documents for which solicitor-client privilege was claimed (the "Privilege Claim").

> *Letter from Compliance Counsel to Counsel for THESL dated October 26, 2009, including enclosures.*

(2) On October 30, 2009, counsel for THESL requested Compliance Counsel to produce additional relevant materials, including materials related to the Working Group Complaints.

> *Letter from Counsel for THESL Compliance Counsel to dated October 30, 2009*

(3) On November 3, 2009, this request was refused.

> *Letter from Compliance Counsel to Counsel for THESL dated November 3, 2009*

II. With respect to the production of the Working Group Information:

(1) The Disclosure Decision directed the Compliance Team to:

> "produce all information that *may relate to* suite metering or smart metering practices of Toronto *in relation to* Metrogate or Avonshire, prepared, sent, received or reviewed by or exchanged with any employee of the Board who was involved in the review and/or investigation of Toronto in relation to Toronto's smart metering of condominium units."
>
> *OEB Disclosure Decision, October 23, 2009*, p.12.

(2) The dictionary definition of the term "in relation to" has been interpreted by a number of courts as having "some material association with, connection with, or linkage with."

> *Majestic Contractors Ltd. v. N.C.L. Contracting Ltd,* [1994] S.J. No. 278 (Sask. Q.B.), paragraph 21.
>
> *Zheng v. Canada (Minister of Citizenship and Immigration)* (Fed. Ct. T.D.), paragraphs 26-29.

(3) From a purposive perspective, in the context of production of information for use in both judicial and administrative proceedings, the definition of the term "in relation to" is aimed at a broad disclosure requirement. As the B.C. Supreme Court observed:

> What is the meaning of that definition? What are the documents which are documents relating to any mater in question in the action? In *Jones v. Monte Video Gas Co.* (1) the Court stated its desire to make the rule as to the affidavit of documents as elastic as was possible. And I think that that is the view of the Court both as to the sources from which the information can be derived, and as to the nature of the documents. We desire to make the rule as large as we can with due regard to propriety; *and therefore I desire to give as large an interpretation as I can to the words of the rule, "a document relating to any matter in question in the action." I think it obvious from the use of these terms that the documents to be produced are not confined to those, which would be evidence either to prove or to disprove any matter in question in the action*; and the practice with regard to insurance cases shows that the Court never thought that the person making the affidavit would satisfy the duty imposed upon him by merely setting out such documents, as would be evidence to support or defeat any issue in the cause. The doctrine seems to me to go farther than that and to go as far as the principle which I am about to lay down. *It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may -- not which must -- either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary .* (Emphasis added by B.C.S.C.)
>
> *Lougheed v. Filgate* (1995), 5 B.C.L.R. (3d) 101 at paragraphs 32-33 (B.C.S.C.)
>
> See also: *Kotonopoulos v. Becker Milk Company*, [1974] O.L.R.B. Rep. 732 at pp. 737-739.

(4) As a result, the disclosure obligation on the Compliance Team here is not just to disclose materials that specifically identify alleged activities of THESL at Avonshire or Metrogate, but all materials that are linked to, or logically connected with the allegations made against THESL at Avonshire and Metrogate. To apply the language quoted in the previous paragraph, the Compliance team must disclose "every document [that] relates to the matters in question in the action [i.e., the allegations against THESL respecting Avonshire and Metrogate], which not only would be evidence upon any issue, but also which, it is

reasonable to suppose, contains information which may -- not which must -- either directly or indirectly enable the party requiring the affidavit [i.e., THESL] either to advance his own case or to damage the case of his adversary [i.e., the Compliance Team]."

(5) From the material that Compliance Counsel has disclosed, it is clear that the Working Group Materials are related to the allegations made against THESL respecting Metrogate and Avonshire. Specifically:

- The Correspondence produced from Avonshire and Metrogate indicate that THESL provided Avonshire and Metrogate the offer to connect that they requested. The allegations that THESL refused to connect Avonshire and Metrogate, and the impact of that refusal, came from the Working Group. These allegations are not supported by – and in fact contradict - the Correspondence produced from Avonshire and Metrogate.

  Compliance Counsel Documents, Tabs 1 and 9.

- The Compliance Team May 1, 2009 and July 15 Briefing Notes which recommended an enforcement proceeding against THESL, specifically identified the Working Group Complaint as supporting the allegations made against THESL in this proceeding. Again, these allegations were made by the Working Group in its complaint, not by Avonshire and Metrogate. These allegations are repeated as fact by Compliance Staff in its Briefing Notes in support of issuing the Notice of Compliance herein against THESL's activities at Avonshire and Metrogate.

  Compliance Counsel Documents, Tabs 11 and 18.

- The materials respecting Avonshire and Metrogate that are relied upon by Compliance Team in these proceedings and in its briefing notes are taken from a Brief of Materials provided by counsel for the Working Group to the Compliance Team entitled, "In the Matter of a Complaint and Request to undertake an investigation made by members of the Smart Sub-metering Working Group to the Market Surveillance Panel, under Subsection 4.3.1 of the *Ontario Energy Board Act*...";

  Compliance Counsel Documents, Tab 9.

- In the cover letter providing these materials, counsel for the Working Group made specific allegations tying the allegations of THESL's conduct relating to both Metrogate and Avonshire to the Working Group complaint.

Compliance Counsel Documents, Tab 9, 11 and 18.

(6) In light of the foregoing, there is clearly a relationship between the Working Group Information and the allegations made against THESL respecting Avonshire and Metrogate. In fact, it appears that this prosecution was based on the allegations in the Working Group Complaint, and not by Avonshire and Metrogate. Access to the Working Group Information may be relevant in allowing THESL to at least determine whether it may challenge the credibility of the allegations made against it, as well as the Compliance Team's investigation and recommendations based on those allegations.

II. With respect to the Request that the Panel review Documents for which Privilege is Claimed.

The grounds for this request are as follows:

(1) the Board's Disclosure Decision stated that "any claim for privilege must reference specific documents. We are not prepared to accept blanket claims of privilege."

Disclosure Decision, at paragraph 27.

(2) THESL acknowledges that the OEB Compliance Team is entitled to claim privilege for the legal advice that is provided to it. However, as the Supreme Court of Canada stated in *R. v. Campbell*, "It is, of course, not everything done by a government (or other lawyer) that attracts solicitor-client privilege:

> "While some of what government lawyers do is indistinguishable from the work of private practitioners, they may and frequently do have multiple responsibilities including, for example, participation in various operating committees of their respective departments. Government lawyers who have spent years with a particular client department may be called upon to offer policy advice that has nothing to do with their legal training or expertise, but draws on departmental know-how. Advice given by lawyers on matters outside the solicitor-client relationship is not protected."
>
> *R. v. Campbell*, [1999] 1 S.C.R. 565, at para. 50.

(3) It is obviously not possible for THESL to make informed submissions on the specific documents for which privilege is claimed here. However, even a cursory review of the list of documents for which privilege is claimed suggests that the claim is being made very broadly.

(4) First, the list of documents includes materials that were apparently prepared by Board staff employees who are not lawyers.

> *The "Privilege Claim" in letter from Compliance Counsel to Counsel for THESL dated October 26, 2009.* Nos. 8.01, 9.03, 15.01, 16.02, 16.06, 17.02, 18.01, 20.2, and 23.01).

(5) Second, the sheer quantity of documents for which privilege is claimed is startling. There are 71 documents in the Privilege Claim. Seventy of these documents are dated between April 21, 2009 and July 29, 2005. There are also 70 working days in that period. This suggests that, on average, written legal advice was communicated on every single working day in that period.

(6) Also, the Compliance Team has only produced 19 documents. If all of these allegedly privileged documents contained legal advice, then that would mean that close to four documents of legal advice are prepared for every one document of non-privileged communications (including casual emails and working notes).

(7) Finally, from a review of the materials that have been provided, it is clear that Board Counsel acted as a member of the Compliance Team, involved in attempting to secure a prosecution, not as a disinterested provider of legal services;

(8) It is particularly noteworthy in this regard that the list of allegedly privileged documents contains attachments to Briefing Notes dated May 1 and July 15, 2009. It is clear that the

role of compliance counsel in those meetings was not to provide objective legal advice to decision makers, but to advocate for a specific outcome. As a result, legal positions put forward by Staff in respect of these documents (and any other documents surrounding the Briefing Notes) are more in the form of legal submissions than legal advice. As a result, solicitor client privilege does not apply.

Compliance Counsel Documents, Tab 9, 11 and 18.

(9) THESL suggests that the only appropriate solution to address whether all the documents for which solicitor client privilege is claimed is entitled to that privilege is for the panel to review the documents in the absence of counsel to determine whether they provide legal advice (in which case the privilege attaches), or whether the provide policy or other non-legal advice, in which case the privilege does not attach.

III. Date for Compliance Team's Pre-Filed Evidence.

(1) Since the commencement of this proceeding in August, 2009, THESL has requested the Compliance Team to commit to dates by which it will file pre-filed evidence and respond to written interrogatories. The Compliance Team has continually failed or refused to commit to these dates. THESL therefore requests that the Board impose such dates through a Procedural Order.

Letter from counsel for THESL to Compliance Counsel, August 28, 2009.

OEB Rules of Practice and Procedure, Rules 13, 28 and 29.

All of Which is Respectfully Submitted

Date: November 5, 2009

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TO:

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Materials for Motion for Adequacy of Disclosure

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Ontario Energy Board

Commission de l'énergie de l'Ontario

EB-2009-0308

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

AND IN THE MATTER OF a Notice of Intention to Make an Order for Compliance against Toronto Hydro-Electric System Limited.

BEFORE: Gordon Kaiser
Vice-Chair and Presiding Member

Cynthia Chaplin
Member

AMENDED DECISION AND ORDER

[1] This Decision addresses a motion brought by Toronto Hydro-Electric System Limited ("Toronto") for the production and disclosure of certain documents from: the Board; certain complainants, Metrogate Inc. ("Metrogate"), Residences of Avonshire Inc. ("Avonshire"), Deltera Inc. ("Deltera") and Enbridge Electric Connections Inc. ("Enbridge"); and the members of the Smart Sub-Metering Working Group (the "Working Group") [1].

[2] This is a compliance proceeding in which Compliance Counsel is seeking an Order under section 112.3 of the OEB Act. That section states:

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[1] The Smart Sub-metering Working Group is made up of the following members:

Carma Industries Inc.
Enbridge Electric Connections Inc.
Hydro Connection Inc.
Intellimeter Canada Inc.
Provident Energy Management Inc.
Stratacon Inc.
Wyse Meter Solutions

112.3 (1) If the Board is satisfied that a person has contravened or is likely to contravene an enforceable provision, the Board may make an order requiring the person to comply with the enforceable provision and to take such action as the Board may specify to,

(a) remedy a contravention that has occurred; or

(b) prevent a contravention or further contravention of the enforceable provision.

[3] In the Notice of Intention to Make an Order For Compliance dated August 4, 2009, the Board identified the enforceable provisions as: section 28 of the *Electricity Act, 1998* (the *"Electricity Act"*); section 53.17 of the Electricity Act; section 2.4.6 of the Distribution System Code (the "DSC"); section 3.1.1 of the DSC; and section 5.1.9 of the DSC.

[4] The foregoing provisions create a scheme under which condominium developers or corporations may opt to: (i) have a distributor smart-meter individual condominium units, in which case each unit owner becomes a customer of the distributor; or (ii) have a Board-licensed smart sub-meter provider smart sub-meter individual units, in which case the condominium corporation (through a bulk meter) continues to be the customer of the distributor and the smart sub-metering provider allocates the bulk bill to the individual unit owners.

[5] At issue in this proceeding is Toronto's practice of refusing to connect new condominium projects within its service area unless all units in the condominium are individually smart-metered by Toronto. This practice, it is alleged, effectively precludes condominium corporations or developers from the option of using services of licensed smart sub-meter providers.

[6] In this proceeding, the Board alleges that Toronto's practice violates the above-noted provisions of the *Electricity Act* and the DSC. The particulars of non-compliance are set out in the Compliance Notice:

1. Toronto's Conditions of Service, specifically section 2.3.7.1.1, states that Toronto "will provide electronic or conventional smart suite metering for each unit of a new Multi-unit site, or a condominium." By way of letters dated April 22, 2009, Toronto informed Metrogate Inc. ("Metrogate") and Avonshire Inc.

("Avonshire") that despite Metrogate and Avonshire's request that Toronto prepare a revised Offer to Connect for condominiums based on a bulk meter / sub-metering configuration, Toronto would not offer that connection for new condominiums and would not prepare a revised Offer to Connect on that basis.

2. Toronto's refusal to connect on that basis is contrary to the requirement of a distributor to connect to a building, to its distribution system as per section 28 of the Electricity Act and is contrary to section 3.1.1 of the DSC.

3. Toronto's practice is also contrary to section 5.1.9 of the DSC which states that distributors must install smart meters when requested to do so by the board of directors of a condominium corporation or by the developer of a building, in any stage of construction, on land for which a declaration and description is proposed or intended to be registered pursuant to section 2 of the *Condominium Act, 1998.*

4. Toronto's practice is also contrary to section 53.17 of the Electricity Act (and Ontario Regulation 442/07 – *Installation of Smart Meters and Smart Sub-Metering Systems in Condominiums* (made under the Electricity Act)) which contemplates a choice between smart metering and smart sub-metering.

5. Toronto's Conditions of Service are therefore contrary to section 2.4.6 of the DSC which states that Conditions of Service must be consistent with the provisions of the DSC and all other applicable codes and legislation.

[7] On August 21, 2009 Toronto wrote to Compliance Counsel requesting "disclosure and production of all information that may relate to suite metering or smart metering practices of THESL or third parties".

[8] On September 1, 2009 Compliance Counsel responded and provided counsel for Toronto with a package of documents[2] containing:

(a) Stakeholder complaints made to the Board;
(b) Compliance office communications with Toronto; and
(c) Extracts from Toronto's Conditions of Service, the Distribution System Code, and the Smart Sub-Metering Code.

[2] Affidavit of Patrick G. Duffy sworn September 22, 2009. Exhibit KM1.1.

[9] On August 28, 2009 Toronto wrote to the Working Group and requested disclosure of "all contracts made with, condominium developers with respect to the installation and operation of sub-meters for condominiums in the City of Toronto" from each member of the Working Group.

[10] On August 31, 2009, the Working Group informed Toronto by letter that it would not be providing the materials requested.

[11] In this motion, Toronto is seeking the production of:

(a) all information that may relate to suite metering or smart metering practices of Toronto or third parties, prepared, sent, received, or reviewed by or exchanged with any employee of the Board who was involved in the review and/or investigation of Toronto in relation to Toronto's smart-metering of condominium units (referred to by Toronto as "Compliance Information");

(b) all communications among the "Complainants" (Metrogate, Avonshire, Deltera, and Enbridge) and sub-meterers or condominiums developers addressing the terms on which sub-meters offer to provide sub-metering to condominium developers in the City of Toronto (referred to by Toronto as "Complainant Information"); and

(c) materials from the members of the Working Group, specifically all proposals made to, and all contracts made with, condominium developers with respect to the installation and operation of sub-meters for condominiums in the City of Toronto (the "Working Group Materials").

Disclosure By Compliance Counsel

[12] Toronto is seeking extensive disclosure and production of documents based upon the Supreme Court decision in *Stinchcombe*[3]. The *Stinchcombe* standard was summarized by Supreme Court of Canada in *Taillefer*[4].

> "The Crown must disclose all relevant information to the accused, whether inculpatory or exculpatory, subject to the exercise of the Crown's discretion to refuse to disclose information that is privileged or plainly

[3] *R. v. Stinchcombe*, [1991] 3 S.C.R. 326.

[4] *R. v. Tailleter*, [2003] 3 S.C.R. 307.

> irrelevant. Relevance must be assessed in relation both to the charge itself and to the reasonably possible defences. The relevant information must be disclosed whether or not the Crown intends to introduce it in evidence, before election or plea (p. 343). Moreover, all statements obtained from person who have provided relevant information to the authorities should be produced notwithstanding that they are not proposed as Crown witnesses...
>
> As the courts have defined it, the concept of relevance favours the disclosure of evidence. Little information will exempt from the duty that is imposed on the prosecution to disclose evidence.
>
> The Crown's duty to disclose is therefore triggered whenever there is a reasonable possibility of the information being useful to the accused in making full answer and defence."

[13] The *Stinchcombe* standard was established in the context of an indictable criminal offense and the disclosure requirements of a prosecutor. Mr. Justice Sopinka, the author of that opinion questioned at the time whether it would even extend to summary conviction offenses. *Stinchcombe* has however been applied to civil proceedings by administrative tribunals but that extension has largely been restricted to cases where an individual's livelihood is at stake.

[14] In *Re Berry*[5] the Ontario Securities Commission (the "Commission") decided that *Stinchcombe* required that documents reflecting settlement agreements between other parties should be produced. In *Re Biovail*[6] the Commission also recognized that the staff must provide disclosure similar to this *Stinchcombe* standard following the Supreme Court of Canada in *Deloitte and Touche LLP*[7]. Toronto also relies on the *Markandey*[8]decision, a disciplinary proceeding against an ophthalmologist. At paragraph 43 the Court stated

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[5] (2008), 31 O.S.C.B. 5441.

[6] (2008), 31 O.S.C.B. 7161.

[7] *Deloitte & Touche LLP v. Ontario (Securities Commission)*, [2003] 2 S.C.R. 713.

[8] *Markandey v. Ontario (Board of Ophthalmic Dispensers)* [1994] O.J. No. 484. See also *Re Suman* 32 O.S.C.B. 592 at para 38.

> "The importance of full disclosure to the fairness of the disciplinary proceedings before the Board cannot be overstated. Although the standards of pre-trial disclosure in criminal matters would generally be *higher than in administrative matters* (See Biscotti et al. v. Ontario Securities Commission, supra), tribunals should disclose all information relevant to the conduct of the case, whether it be damaging to or supportive of a respondent's position, in a timely manner unless it is privileged as a matter of law. Minimally, this should include copies of all witness statements and notes of the investigators. The disclosure should be made by counsel to the Board after a diligent review of the course of the investigation. Where information is withheld on the basis of its irrelevance or a claim of legal privilege, counsel should facilitate of review of these decisions, if necessary."

[15] Compliance Counsel responds that the *Stinchcombe* level of disclosure is limited to criminal or disciplinary proceedings where the accused faces a severe sanction. He relies on the recent Supreme Court of Canada decision in *May v. Ferndale*[9] at paragraph 91:

> "It is important to bear in mind that the *Stinchcombe* principles were enunciated in the particular context of criminal proceedings where the innocence of the accused was at stake. Given the severity of the potential consequences the appropriate level of disclosure was quite high. In these cases, the impugned decisions are purely administrative. These cases do not involve a criminal trial and innocence is not at stake. The *Stinchcombe* principles do not apply in the administrative context."

[16] Compliance Counsel also relies on the Federal Court decision in *CIBA-Geigy*[10] which concerned the disclosure standards to be used by the Patented Medicine Prices Review Board. CIBA-Geigy was accused of excessive pricing and the company faced substantial fines relating to any excess profits. CIBA-Geigy requested all documents relating to all matters at issue that were or had been in the possession or control of the Board. The request was for all relevant documents whether favorable or prejudicial to the Respondent's position whether or not Board staff plan to rely upon those documents

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[9] *May v. Ferndale Institution*, [2005] 3 S.C.R. 809.

[10] *CIBA-Geigy Canada Ltd.*, (1994) 83 F.T.R. 2.

as part of its case. In that sense the claim by CIBA-Geigy for disclosure was similar to the claim by Toronto before this Board.

[17] In the trial decision Mr. Justice McKeown refused the requested disclosure stating at paragraph 32:

> "In summary, when the statutory scheme of this Board is looked at, the Board is a regulatory Board or tribunal. There is no point in the legislature creating a regulatory tribunal if the tribunal is treated as a criminal court. The obligations concerning disclosure imposed by the doctrine of fairness and natural justice are met if the subject of the inquiry is advised of the case it has to meet and is provided with all the documents that will be relied on."

[18] The Federal Court of Appeal upheld the trial decision[11] stating at paragraph 8:

> "This is where any criminal analogy to the proceedings in the case at bar breaks down. There are admittedly extremely serious economic consequences for an unsuccessful patentee at a s. 83 hearing, and a possible effect on a corporation's reputation in the market place. But as McKeown J. found, the administrative tribunal here has economic regulatory functions and has no power to affect human rights in a way akin to criminal proceedings."

[19] To require a Board to disclose all possibly relevant information gathered in the course of its regulatory activities could easily impede its work from an administrative standpoint. As Macaulay and Sprague note "there must be a reason the functions have been mandated to an administrative agency and not to a court "[12]. There is also a significant difference between disciplinary proceedings where an individual may lose his livelihood and a situation where a corporation faces a sanction by way of fine or administrative penalty. An economic regulator, such as this Board, has little ability to affect human rights in the manner of a criminal or disciplinary proceeding. No individual is at risk in this case. Counsel for Toronto suggested that there may be an analogy in that Toronto could lose its license and ability to operate. Compliance Counsel responded that he is not seeking such a remedy.

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[11] *CIBA-Geigy Canada Ltd.*, (1994) 3 F.C. 425 (CA).

[12] *Macaulay and Sprague*, Hearings Before Administrative Tribunals (Carswell 2009) at 9-1 to 9-2.

[20] Toronto argued that the Board often requires extensive disclosure from utilities it regulates and it would be wrong if the Board were to impose a broad disclosure requirement on a utility as an Applicant and not provide similar rights when the utility is a Respondent facing charges that it failed to comply with the Act or its licence. In *West Coast Energy*[13] the Board set out the standard of disclosure required of a utility and sanctioned the utility with a cost penalty for failure to comply:

> "A public utility in Ontario with a monopoly franchise is not a garden variety corporation. It has special responsibilities which form part of what the courts have described as the "regulatory compact". One aspect of that regulatory compact is an obligation to disclose material facts on a timely basis...
>
> Failure to disclose has at least two unfortunate consequences. First, it can only result in less than optimum Board decisions. Second, it adds to the time and cost of proceedings. Neither of these are in the public interest.
>
> A publicly regulated corporation is under a general duty to disclose all relevant information relating to Board proceedings it is engaged in unless the information is privileged or not under its control. In doing so, a utility should err on the side of inclusion. Furthermore, the utility bears the burden of establishing that there is no reasonable possibility that withholding the information would impair a fair outcome in the proceeding. This onus would not apply where the non-disclosure is justified by the law of privilege but no privilege is claimed here."

[21] There is no question that the Board takes a broad view of disclosure for regulated utilities but that obligation flows from the unique status of a public utility with a monopoly franchise. As indicated in *West Coast Energy* that responsibility flows from the "regulatory compact" long recognized by the courts. That is not the situation here. The law respecting disclosure is well developed. The question before us is whether Stinchcombe extends to this type of regulatory proceeding where no individual rights are at issue. We take the view that it does not.

[22] Compliance Counsel responds that he is only required to produce documents he intends to rely on. Toronto claims that it should have access to all documents

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[13] *Re West Coast Energy Inc. and Union Gas Limited* EB-2008-0304, November 19, 2008 at p.11.

necessary to meet those charges and frame its defence. In this regard Toronto sets out a very specific defence. Toronto intends to argue that it has a statutory defence which allows them to refuse to connect if there is a violation of law. Toronto argues that it is illegal for unlicensed distributors to profit from distribution activities.

[23] Accordingly, Toronto seeks information on the financial arrangements between condominium developers and sub-meterers to determine whether either or both of these are seeking to profit from distribution activities. Toronto argues that this information is relevant to its defense under section 3.1.1 of the Distribution System Code[14]. That section authorizes a refusal to connect where the customer contravenes the laws of Ontario.

[24] Fairness is always a matter of balancing different interests. As indicated, we do not accept that *Stinchcombe* applies to the disclosure requirements in this case. On the other hand, we believe Toronto is entitled to frame its defence as it sees fit and to obtain documents necessary to argue that defence. Whether they will be successful in that legal argument remains to be seen. But as a matter of fairness they are entitled to have documents required to advance a defence particularly where, as here, they have identified a specific arguable defence. Accordingly, we will order Compliance Counsel to produce all documents relating to smart metering activities at Metrogate and Avonshire.

[25] This is narrower disclosure than Toronto seeks. Toronto is seeking "all information that may relate to suite metering or smart metering practices of Toronto or third parties, prepared, sent, received, or reviewed by or exchanged with any employee of the Board who was involved in the review and/or investigation of Toronto in relation to Toronto's smart-metering of condominium units".

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[14] DSC section 3.1.1 states that: In establishing its connection policy as specified in its Conditions of Service, and determining how to comply with its obligations under section 28 of the *Electricity Act*, a distributor may consider the following reasons to refuse to connect, or continue to connect, a customer:

(a) contravention of the laws of Canada or the Province of Ontario including the Ontario Electrical Safety Code;
(b) violation of conditions in a distributor's licence;
(c) materially adverse effect on the reliability or safety of the distribution system;
(d) imposition of an unsafe worker situation beyond normal risks inherent in the operation of the distribution system;
(e) a material decrease in the efficiency of the distributor's distribution system;
(f) a materially adverse effect on the quality of distribution services received by an existing connection; and
(g) if the person requesting the connection owes the distributor money for distribution services, or for non-payment of a security deposit. The distributor shall give the person a reasonable opportunity to provide the security deposit consistent with section 2.4.20.

[26] The Notice of Intention to Make an Order issued by the Board on August 4 limits the questionable conduct to actions of Toronto with respect to Metrogate and Avonshire. No allegations are made with respect to other condominiums. Accordingly, any production of documents should be limited to documents in the possession of Compliance Counsel that relate to Metrogate and Avonshire.

[27] These documents should be produced within ten days unless there is a claim of privilege. There is no question that this Board is required to recognize claims of privilege where appropriate[15], but any claim of privilege must reference specific documents. We are not prepared to accept blanket claims of privilege.

Disclosure of Third-Party Documents

[28] Toronto is also seeking broad disclosure from third parties. Specifically they request "all communications among the "Complianants" (Metrogate, Avonshire, Deltera, and Enbridge) and sub-meterers or condominium developers addressing the terms on which sub-meters offer to provide sub-metering to condominium developers in the City of Toronto". They also request that all members of the Working Group produce *all* proposals and *all* contracts made with condominium developers relating to the installation and operation of sub-meters for condominiums in the City of Toronto. Seven companies form the Working Group.

[29] There is no question that the Board has jurisdiction to order third parties to produce documents[16] but this is an unusual step to be taken only when the documents identified are clearly relevant and no prejudice or undue burden on the third parties results from the disclosure. We do not believe that Toronto has met the burden in this case.

[30] As the Ontario Municipal Board cautioned in *Hammersmith Canada*[17] the Board "must be mindful of the possible abuse of the discovery process. We should be vigilant against any attempt to transform the right to discovery into a license to procure information from the world at large". Toronto has not identified specific documents. Rather, they request *all* seven members of the Working Group and each of the

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[15] *Blood Tribe Department of Health v. Canada (Privacy Commission)*, [2008] 2 S.C.R. 574.

[16] See s. 21(1) of the *Ontario Energy Board Act, 1998*, and ss. 5.4 and 12 of the *Statutory Powers Procedure Act.*

[17] *Hammerson Canada Inc. v. Guelph (City)*, [1999] O.M.B.D. No. 1174 at para. 7.

"complainants" to produce *all* proposals and *all* contracts with *all* condominium developers in the City of Toronto.

[31] Concern with a fishing expedition is particularly relevant here where the members of the Working Group all compete with Toronto in the supply of smart meters to condominium units. Moreover, this is not a Stinchcombe case and Toronto's conduct is being questioned regarding only two condominium units, Metrogate and Avonshire, not *all* condominium units in Toronto.

[32] We also noted that the Board has appointed an independent lawyer to act as Compliance Counsel in this case largely in response to Toronto's concerns that the Board should not be acting as both an investigator and prosecutor. Toronto originally sought an order from the board concerning the separation of those activities. That matter has been resolved by the Board appointing independent counsel and the agreement by counsel to certain joint undertakings set out in Appendix A to this decision.

[33] It is important in considering this aspect of the motion to note that paragraph 37 of the factum filed by Compliance Counsel states that "the complainant information and Working Group materials [requested by Toronto directly from the third parties] have not been shared with Board compliance staff and will not be relied upon by compliance counsel in this proceeding". We would also note that of the production ordered with respect to Metrogate and Avonshire goes beyond the bare minimum that Compliance Counsel offered, namely that he produce only those documents that he intended to rely upon.

[34] In the circumstances we believe that the production ordered with respect to Metrogate and Avonshire materials held by Compliance Counsel meets any fairness concerns. Accordingly, no production will be ordered against third parties.

Role of Prosecution Staff

[35] In addition to orders for the production of various documents, Toronto also sought certain orders from the Board relating to procedural matters. The purpose of these requests was to ensure that sufficient separation was maintained between the members of Board staff (along with their external counsel) that were and had been working on the file from a compliance perspective to bring the case against Toronto

("Compliance Staff") and the members of Board staff that were and had been assisting the Board panel in this matter ("Board Staff").

[36] Prior to the commencement of the oral hearing on the motion, the parties reached an agreement on an appropriate procedural protocol, which was approved by the Board. A copy of this protocol, which has been signed by the counsel which are bound by it, is attached as Appendix A to this decision.

IT IS THEREFORE ORDERED THAT:

1. Compliance Counsel will within ten days produce all information that may relate to suite metering or smart metering practices of Toronto in relation to Metrogate or Avonshire, or Metrogate or Avonshire, prepared, sent, received, or reviewed by or exchanged with any employee of the Board who was involved in the review and/or investigation of Toronto in relation to Toronto's smart-metering of condominium units.

DATED at Toronto, October 23, 2009.

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary

Appendix A

Procedural Protocol

By Notice of Motion dated September 4, 2009, the Defendant Toronto Hydro Electric System Limited ("THESL") requested an order from the Board establishing a process for this proceeding, and in particular, governing how the Board will ensure that the Board Staff Team (consisting of individuals listed below) and the Panel hearing this proceeding (the "Panel") will govern their interactions with the Compliance Team (consisting of individuals listed below).

The Board Staff Team consists of persons who are assisting the Panel in this matter, specifically Michael Millar, Lenore Dougan and Adrian Pye.

The Compliance Team consists of persons who have been engaged in the investigation, compliance or prosecution of this application, specifically: Maureen Helt, MaryAnne Aldred, Joanna Rosset, Martine Band, Mark Garner, Brian Hewson, Jill Bada, (no longer an employee of the OEB) Fiona O'Connell, Lee Harmer, and Paul Gasparatto.

The Board Staff Team agrees to support the following protocol for the Panel's endorsement:

1. Members from each Team will have no contact with each other about matters relevant to this proceeding, except through the public hearing process or through correspondence copied to all other parties. Members of the Compliance team will have no contact with Board members on matters relevant to this proceeding, except through the public hearing process.

2. No member of either Team will place any files relevant to this proceeding that are not on the public record (computer or otherwise) in a place that can be accessed by the other team or anyone not on their Team.

3. The Team lists will be circulated to everyone at the Board, with instructions that no person at the Board that is not on one of the Teams may communicate with any member of either Team about this case except as specifically authorized in writing from the Board. If it is discovered that a person at the Board has either assisted the panel in this matter or engaged in the investigation and prosecution

of this matter throughout the course of this proceeding, or if, during the course of this proceeding, any additional persons either assist the panel in this matter or engage in the investigation and prosecution of this matter, then the Board Staff Team will immediately inform THESL and such person will be added to the appropriate list of persons.

4. The Board Staff Team will only provide advice to the Panel on questions of facts, law, policy or some combination thereof on the public record so that all other parties can respond. This restriction applies to substantive procedural matters. However, it does not apply to administrative procedural issues, such as advice on where items are addressed in the Board's Rules of Practice and Procedure or other matters that are similarly not contestable.

5. Point 4 (above) applies to advice on questions of facts, law policy or some combination thereof in communications between the Board Staff Team and the Panel after the hearing has concluded (including in discussing or reviewing a draft decision) so that the Board Staff Team will not provide any such advice unless the hearing is re-opened and all parties have an opportunity to hear staff's submissions and make their own submissions.

I undertake to abide by the protocol described above, to the extent that it applies:

Original signed by
Michael Millar

Original signed by
Maureen Helt

Original signed by
Glenn Zacher

Original signed by
Patrick Duffy

STIKEMAN ELLIOTT

Stikeman Elliott LLP Barristers & Solicitors
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Tel: (416) 869-5500 Fax: (416) 947-0866 www.stikeman.com

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E-mail: gzacher@stikeman.com

BY COURIER

October 26, 2009
File No. 100519.1011

Mr. George Vegh
McCarthy Tétrault LLP
Barristers and Solicitors
Suite 5300, TD Bank Tower
Toronto Dominion Centre
Toronto ON M5K 1E6

Dear Mr. Vegh:

Re: Notice of Intention to Make an Order for Compliance under Section 112.3 of the *OEB Act*, 1998
Board File No: EB 2009-0308

We enclose documents in the possession of Compliance Counsel which are we are producing under the terms of the Board's Order dated October 14, 2009. We are also attaching a list of documents over which privilege is asserted.

Yours truly,

Glenn Zacher

/mas
enclosures
cc: Patrick Duffy
Maureen Helt

PRIVILEGED DOCUMENTS

No.	Doc Type	Date	Description	Privilege
1.	E-mail	April 21, 2009	From Maureen Helt to Jill Bada, Paul Gasparatto	Solicitor - client
2.	E-mail	April 27, 2009	From Paul Gasparatto to Jill Bada and Maureen Helt.	Solicitor – client
3.	E-mail	April 27, 2009	From Paul Gasparatto to Jill Bada and Maureen Helt.	Solicitor – client
3.01	Embedded e-mail	April 27, 2009	From Maureen Helt to Paul Gasparatto and Jill Bada	Solicitor – client
3.02	Embedded e-mail	April 27, 2009	From Paul Gasparatto to Jill Bada and Maureen Helt	Solicitor – client
3.03	Attachment – Briefing Note	May 1, 2009	Electricity Distribution Committee Request for Guidance:	Solicitor – client
4.	E-mail.	April 27, 2009	From Paul Gasparatto to Jill Bada and Maureen Helt.	Solicitor – client
4.01	Embedded e-mail	April 27, 2009	From Jill Bada to Paul Gasparatto and Maureen Helt	Solicitor – client
5.	E-mail	April 27, 2009	From Paul Gasparatto to Maureen Helt and Jill Bada.	Solicitor – client
5.01	Attachment – Briefing Note	May 1, 2009	Electricity Distribution Committee Request for Guidance:	Solicitor – client
6.	E-mail	April 28, 2009	From Maureen Helt to Paul Gasparatto.	Solicitor – client
7.	Notes	April 28, 2009	Written by Maureen Helt.	Solicitor – client
8.	E-mail	April 28, 2009	From Paul Gasparatto to Jill Bada and Maureen Helt.	Solicitor – client
8.01	Embedded e-mail	April 28, 2009	From Mark Garner to Paul Gasparatto and Adele Margis	Solicitor – client
8.02	Embedded e-mail	April 28, 2009	From Paul Gasparatto to Adele Margis, Mark Garner, Jill Bada and Maureen Helt	Solicitor – client
9.	E-mail	April 28, 2009	From Paul Gasparatto to Maureen Helt and	Solicitor – client

No.	Doc Type	Date	Description	Privilege
			Jill Bada.	
9.01	Embedded e-mail	April 28, 2009	From Maureen Helt to Paul Gasparatto and Jull Bada.	Solicitor – client
9.02	Embedded e-mail	April 28, 2009	From Paul Gasparatto to Jull Bada and Maureen Helt.	Solicitor – client
9.03	Embedded e-mail	April 28, 2009	From Mark Garner to Paul Gasparatto, and Adele Margis.	Solicitor – client
9.04	Embedded e-mail	April 28, 2009	From Paul Gasparatto to Adele Margis, Mark Garner, Jill Bada and Maureen Helt.	Solicitor – client
10.	E-mail	April 29, 2009	From Paul Gasparatto to Jill Bada and Maureen Helt.	Solicitor – client
11.	E-mail	May 1, 2009	From Maureen Helt to Paul Gasparatto.	Solicitor – client
12.	E-mail	May 1, 2009	From Maureen Helt to Paul Gasparatto.	Solicitor – client
12.01	Embedded e-mail	May 1, 2009	From Paul Gasparatto to Maureen Helt.	Solicitor – client
12.02	Embedded e-mail	May 1, 2009	From Maureen Helt to Paul Gasparatto.	Solicitor – client
13.	E-mail	May 1, 2009	From Paul Gasparatto to Maureen Helt.	Solicitor – client
13.01	Embedded e-mail	May 1, 2009	From Maureen Helt to Paul Gasparatto.	Solicitor – client
14.	E-mail	May 4. 2009	From Maureen Helt to Paul Gasparatto.	Solicitor – client
14.01	Embedded e-mail	May 4, 2009	From Paul Gasparatto to Maureen Helt and Jill Bada.	Solicitor – client
14.02	Embedded e-mail	May 4, 2009	From Paul Gasparatto to Maureen Helt and Jill Bada.	Solicitor – client
14.03	Embedded e-mail	May 4, 2009	From Maureen Helt to Paul Gasparatto and Jill Bada.	Solicitor – client
14.04	Embedded e-mail	May 4, 2009	From Paul Gasparatto to Jill Bada and Maureen Helt.	Solicitor – client
14.05	Embedded e-	May 4, 2009	From Jill Bada to Paul Gasparatto and	Solicitor – client

No.	Doc Type	Date	Description	Privilege
	mail		Maureen Helt.	
15.	E-mail	May 7, 2009	From Paul Gasparatto to Maureen Helt and Jill Bada.	Solicitor – client
15.01	Attachment – Letter	None.	Draft Letter.	Solicitor – client
16.	E-mail	May 7 2009	From Maureen Helt to Jill Bada and Paul Gasparatto.	Solicitor – client
16.01	Embedded e-mail	May 7 2009	From Jill Bada to Paul Gasparatto and Maureen Helt.	Solicitor – client
16.02	Embedded e-mail	May 7 2009	From Paul Gasparatto to Jill Bada.	Solicitor – client
16.03	Embedded e-mail	May 4, 2009	From Maureen Helt to Paul Gasparatto and Jill Bada.	Solicitor – client
16.04	Embedded e-mail	May 4, 2009	From Paul Gasparatto to Jill Bada and Maureen Helt.	Solicitor – client
16.05	Embedded e-mail	May 4, 2009	From Jill Bada to Paul Gasparatto and Maureen Helt.	Solicitor – client
16.06	Attachment – Letter	None.	Draft Letter.	Solicitor – client
17.	E-mail	May 7, 2009	From Maureen Helt to Jill Bada and Paul Gasparatto.	Solicitor – client
17.01	Embedded e-mail	May 7, 2009	From Jill Bada to Paul Gasparatto and Maureen Helt	Solicitor – client
17.02	Embedded e-mail	May 7 2009	From Paul Gasparatto to Jill Bada.	Solicitor – client
17.03	Embedded e-mail	May 4, 2009	From Maureen Helt to Paul Gasparatto and Jill Bada.	Solicitor – client
17.04	Embedded e-mail	May 4, 2009	From Jill Bada to Paul Gasparatto and Maureen Helt.	Solicitor – client
18.	E-mail	May 8, 2009	From Paul Gasparatto to Maureen Helt and Jill Bada.	Solicitor – client

No.	Doc Type	Date	Description	Privilege
18.01	Attachment – Letter	May 9, 2009	Draft Letter.	Solicitor – client
19.	E-mail	May 8, 2009	From Maureen Helt to Paul Gasparatto and Jill Bada.	Solicitor – client
19.01	Embedded e-mail	May 8, 2009	From Paul Gasparatto to Maureen Helt and Jill Bada.	Solicitor – client
20.	E-mail	May 8, 2009	From Maureen Helt to Paul Gasparatto and Jill Bada.	Solicitor – client
20.01	Embedded e-mail	May 8, 2009	From Paul Gasparatto to Maureen Helt and Jill Bada	Solicitor – client
20.02	Attachment – Letter	May 9, 2009	Draft Letter.	Solicitor – client
21.	E-mail	May 21, 2009	From Paul Gasparatto to Maureen Helt and Jill Bada.	Solicitor – client
22.	E-mail	May 21, 2009	From Paul Gasparatto to Maureen Helt and Jill Bada.	Solicitor – client
23.	E-mail	May 25, 2009	From Paul Gasparatto to Jill Bada and Maureen Helt.	Solicitor – client
23.01	Attachment – Briefing Note	None.	Compliance Case Briefing Note.	Solicitor – client
24.	E-mail	July 15, 2009	From Maureen Helt to Paul Gasparatto.	Solicitor – client
24.01	Embedded e-mail	July 15, 2009	From Paul Gasparatto to Maureen Helt	Solicitor – client
24.02	Embedded e-mail	July 15, 2009	From Maureen Helt to Paul Gasparatto	Solicitor – client
24.03	Embedded e-mail	July 15, 2009	From Paul Gasparatto to Maureen Helt.	Solicitor – client
25.	E-mail	July 15, 2009	From Maureen Helt to Paul Gasparatto.	Solicitor – client
25.01	Embedded e-mail	July 15, 2009	From Paul Gasparatto to Maureen Helt.	Solicitor – client
26.	E-mail	July 15, 2009	From Paul Gasparatto to Maureen Helt.	Solicitor – client

No.	Doc Type	Date	Description	Privilege
26.01	Embedded e-mail	July 15, 2009	From Maureen Helt to Paul Gasparatto	Solicitor – client
26.02	Embedded e-mail	July 15, 2009	From Paul Gasparatto to Maureen Helt.	Solicitor – client
26.03	Embedded e-mail	July 15, 2009	From Maureen Helt to Paul Gasparatto	Solicitor – client
27.	E-mail	July 29, 2009	From Mark Garner to Joanna Rosset and Paul Gasparatto.	Solicitor – client
27.01	Embedded e-mail	July 29, 2009	From Joanna Rosset to Mark Garner, Paul Gasparatto and Brian Hewson	Solicitor – client
28.	E-mail.	August 25, 2009	From Paul Gasparatto to Maureen Helt.	Solicitor – client

EB-2009-0308

ONTARIO ENERGY BOARD

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

AND IN THE MATTER OF a Notice of Intention to Make an Order for Compliance against Toronto Hydro-Electric System Limited.

COMPLIANCE COUNSEL DOCUMENTS

October 26, 2009

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Email: gvegh@mccarthy.ca

Counsel for Toronto Hydro-Electric System Limited

PRODUCIBLE DOCUMENTS

No.	Doc Type	Date	Description
1.	E-mail	April 24, 2009	From Dennis O'Leary to Maureen Helt
1.01	Attachment - Letter	April 22, 2009	From Colin McLorg to Giuseppi Bello
1.02	Attachment - Letter	April 22, 2009	From Colin McLorg to Lou Tersigni
2.	E-mail	April 24, 2009	From Maureen Helt to Mark Garner and Jill Bada
2.01	Attachment - Letter	April 22, 2009	From Colin McLorg to Giuseppi Bello
2.02	Attachment - Letter	April 22, 2009	From Colin McLorg to Lou Tersigni
3.	E-mail	April 27, 2009	From Jill Bada to Paul Gasparatto
3.01	Embedded e-mail	April 24, 2009	From Maureen Helt to Paul Gasparatto.
3.02	Embedded e-mail	April 24, 2009	From Dennis O'Leary to Maureen Helt
3.03	Attachment - Letter	April 22, 2009	From Colin McLorg to Giuseppi Bello
3.04	Attachment - Letter	April 22, 2009	From Colin McLorg to Lou Tersigni
4.	E-mail	April 28, 2009	From Jill Bada to Paul Gasparatto
4.01	Embedded e-mail	April 28, 2009	From Maureen Helt to Dennis O'Leary and Jill Bada
5.	E-mail	April 28, 2009	From Maureen Helt to Dennis O'Leary and Jill Bada
6.	Letter	April 29, 2009	From Dennis O'Leary to Maureen Helt and Jill Bada
7.	E-mail	April 29, 2009	From Jill Bada to Ken Quesnelle, Paul Sommerville, Pamela Nowina, David Balsillie, Lee Harmer, Paul Gasparatto, Maureen Helt, Mark Garner.
7.01	Attachment – Briefing Note	May 1, 2009	Electricity Distribution Committee Request for Guidance
8.	E-mail	April 30, 2009	From Carol Thomas (Dennis O'Leary) to Maureen Helt and Jill Bada
9.	E-mail	April 30, 2009	From Jill Bada to Paul Gasparatto.
9.01	Embedded e-mail	April 30, 2009	From Carol Thomas on behalf of Denis O'Leary to Maureen Helt and Jill Bada

No.	Doc Type	Date	Description
9.02	Attachment – Letter	April 29, 2009	From Dennis O'Leary to Maureen Helt and Jill Bada.
9.03	Attachment Contact Numbers	April 29, 2009	Contact numbers from the SSMWG.
9.04	Attachment – Letter	January 26, 2009	From Toronto Hydro-Electric System to Avonshire Inc.
	Attachment – Letter	March 6, 2009	From Avonshire to Toronto Hydro-Electric System
	Attachment – Letter	April 22, 2009	From Colin McLorg to Giuseppi Bello
	Attachment – Letter	February 2, 2009	From Toronto Hydro-Electric System to Metrogate Inc.
	Attachment – Letter	March 10, 2009	From Metrogate to Toronto Hydro-Electric System
	Attachment - Letter	April 22, 2009	From Colin McLorg to Lou Tersigni
10.	Minutes	May 1, 2009	Electricity Distribution Committee Action Minutes
11.	Briefing Note	May 1, 2009	Electricity Distribution Committee Request for Guidance: Toronto Hydro Metering Policies & Restricting Smart Sub-metering
12.	E-mail	May 4, 2009	From Jill Bada to Paul Gasparatto and Maureen Helt.
13.	E-mail	May 8, 2009	From Jill Bada to Mark Garner, Maureen Helt and Paul Gasparatto.
14.	Email	May 20, 2009	From Colin McLorg to Paul Gasparatto and George Vegh.
14.01	Attachment - Letter	May 20, 2009	From Colin McLorg to Paul Gasparatto
14.02	Attachment – Letter	April 22, 2009	From Colin McLorg to Giuseppi Bello
14.03	Attachment - Letter	April 22, 2009	From Colin McLorg to Lou Tersigni
15.	E-mail	May 20, 2009	From Colin McLorg to Paul Gasparatto.
15.01	Attachment – Letter	May 20, 2009	From Anthony Haines to Howard Wetston
16.	E-mail	May 21, 2009	From Paul Gasparatto to Colin McLorg
16.01	Embedded e-mail	May 20, 2009	From Colin McLorg to Paul Gasparatto and George Vegh
16.02	Attachment – Letter	May 20, 2009	From Anthony Haines to Howard Wetston

No.	Doc Type	Date	Description
17.	Notes	May 2009	Written by Jill Bada.
18.	Briefing Note	July 15, 2009	Compliance Case Briefing Note: Toronto Hydro Metering Policies & Restricting Smart Sub-metering
19.	E-mail	August 21, 2009	From Maureen Helt to Colin McLorg

From: Dennis O'Leary [doleary@airdberlis.com]
Sent: April 24, 2009 3:36 PM
To: Maureen Helt
Subject: RE: SSMWG Complaint, Toronto Hydro Letters

Attachments: Reply to Avonshire Apr 2009.pdf; Reply to Metrogate Apr 2009.pdf
Maureen,

I am forwarding two letters which were sent to two projects which are being built by the Tridell Group of Companies. I will try and forward to your attention on Monday copies of the offers to connect and the requests by both Metrogate and the Avonshire specifically requesting that an offer to connect that contemplates a bulk meter and the sub-metering of the buildings by a competitive smart sub-meterer. The requests were made because the only offer to connect that Toronto Hydro provided contemplated it individually suite metering the buildings. The attached letter clearly states Toronto Hydro's position which is that it will not provide a bulk meter and that "it has no obligation to do otherwise".

Suffice to say that it is the view of the SSMWG that Toronto Hydro is clearly wrong. If this position continues and is sustained, it will eliminate the competitive Smart sub-metering industry in Ontario.

Aside from the broader implications of this position, these two projects are at the point where the developers wish to get their shovels in the ground and they immediately need sufficient power for construction purposes. These developers remain desirous of engaging a smart sub-metering company but are faced with the situation where they need power and it appears that Toronto Hydro will not make the necessary connections until they capitulate to its demand that Toronto Hydro be allowed to meter the buildings.

Can we please discuss the immediate steps that can be taken to insure that these projects are provided with sufficient power to allow construction to proceed. To my understanding, the needs of these projects and the jobs that they will provide cannot await the conclusion of an enforcement proceeding. I welcome your thoughts on this.

Regards

Dennis M. O'Leary
Aird & Berlis LLP
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Brookfield Place, Suite 1800
Box 754, 181 Bay Street
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Telephone: 416-542-2513
Facsimile: 416-542-2776
cmclorg@torontohydro.com

toronto hydro electric system

2009 April 22

Mr. Giuseppi Bello
Project Manager
Residences of Avonshire Inc
4800 Dufferin Street
Toronto, ON M3H 5S9
via email

Dear Mr. Bello:

RE: Metering and Offers to Connect for 'Avonshire' Projects

Thank you for your letter of March 10, 2009 to our Mr. Trgachef. Unfortunately, conflicting address information in your letter resulted in delays in its delivery. Your letter, received by me April 20, has been referred to me for reply.

Your letter generally concerns Toronto Hydro's policy and practice regarding offers to connect and smart metering for new condominiums, particularly those mentioned in the subject line of your letter. Your letter goes on to request that Toronto Hydro prepare a revised Offer to Connect for those condominiums based on a bulk meter / sub-metering configuration. As explained below, Toronto Hydro does not offer that connection configuration for new condominiums and therefore will not prepare a revised Offer to Connect on that basis.

The Ontario Energy Board ('OEB') regulates Toronto Hydro rates and service offerings. The OEB has defined the term 'smart metering' as follows: "The Board uses the term "smart metering" to describe the situation in which a licensed distributor individually meters every condominium unit (and the condominium's common areas) with a smart meter. In this scenario, each unit will become a residential customer of the licensed distributor and each unit and the common areas must have a separate account with the licensed distributor.")[1]

As set out in Toronto Hydro's Conditions of Service, for condominium projects commenced with Toronto Hydro on and after February 28, 2008 ('new condominiums'), Toronto Hydro will provide smart metering as defined by the OEB (i.e., individual unit or suite metering

[1] [EB-2007-0772 Notice of Proposal etc. issued January 8, 2008]

compliant with smart metering regulations) for all separate units and for common areas ('individually metered units') at no charge to the developer. Upon registration and creation of the condominium corporation, the holders of the individually metered units become the direct customers of Toronto Hydro.

Toronto Hydro (along with other licensed distributors) has been specifically authorized to conduct smart metering as part of its standard, licensed distribution activities. The OEB has stated as follows:

> "The Board has previously determined in rates proceedings related to smart metering activities of certain distributors that smart metering is a part of the distribution activity that is already covered by distributors' distribution licences. As there is no distinction between smart metering condominiums and other residences, the Board has determined that only licensed distributors can smart meter condominiums. In the Board's view, this is in keeping with the current regulatory framework in the electricity sector.
>
> The Board is also of the view that Regulation 442 allows all licensed distributors to smart meter in condominiums."[2]
>
> "As set out in the January Notice, the Board remains of the view that smart metering is a distribution activity, and that the Electricity Act and Regulation 442 taken together allow all licensed distributors to undertake smart metering in condominiums. The distributor would do so as a distribution activity within its licensed service area."[3]

Toronto Hydro therefore asserts that it is authorized to connect new condominiums in the manner described in its Conditions of Service and that it has no obligation to do otherwise.

The statement of Toronto Hydro's position in this matter is not entirely correct in your letter. Specifically, you state your understanding that Toronto Hydro advised you that "Toronto Hydro was the only entity that had the right to own and supply meters for any of our projects and that no other options for metering were available."

While it is the case that ultimately Toronto Hydro will own the metering infrastructure and will attach the individually metered units as direct customers, Toronto Hydro's Conditions of Service provide for alternative bids for the installation of meters and do not preclude the installation of an additional sub-metering system, should the developer or condominium wish to install one, provided it does not interfere with Toronto Hydro's equipment.

Your request for a further Offer to Connect assuming bulk metering is based on an incorrect interpretation of Section 53.17 of the *Electricity Act,* which you state contradicts Toronto Hydro's advice referred to above. In fact, that Section provides as follows:

> "Despite the Condominium Act, 1998 and any other Act, a distributor and any other person licensed by the Board to do so shall, in the circumstances prescribed by regulation, install a smart meter, metering equipment, systems and technology and associated equipment, systems and technologies or smart sub-metering systems, equipment and technology and any associated equipment, systems and technologies of a type prescribed by regulation."

Section 53.17 of the *Electricity Act* does not contradict Toronto Hydro's position and is irrelevant to this issue, since with respect to new condominiums, it does not prohibit a

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[2] [EB-2007-0772 Notice of Proposal etc, January 8, 2008, pages 2-3]

[3] [EB-2007-0772 Notice of Proposal etc, June 10, 2008, pages 4]

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In summary, nothing with respect to new condominiums in Toronto Hydro's metering or connection practice or in its Conditions of Service is out of compliance with Code, regulation, or legislation. The OEB has expressly concluded that smart metering of condominiums is a distribution activity authorized by the existing licenses of distributors, and has not established any obligation on distributors to provide for sub-metering configurations in new condominiums.

For these reasons Toronto Hydro does not accept the request set out in your letter. Please contact me if you have concerns or questions around any of these matters.

Yours truly,

(Original signed by)

Colin McLorg

Manager, Regulatory Policy and Relations

416-542-2513

cmclorg@torontohydro.com

Colin J. McLorg
14 Carlton St.
Toronto, Ontario
M5B 1K5

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cmclorg@torontohydro.com

toronto hydro electric system

2009 April 22

Mr. Lou Tersigni
Project Manager
Metrogate Inc
4800 Dufferin Street
Toronto, ON M3H 5S9
via email

Dear Mr. Tersigni:

RE: Metering and Offers to Connect for 'Metrogate' Projects

Thank you for your letter of March 10, 2009 to our Mr. Trgachef. Unfortunately, conflicting address information in your letter resulted in delays in its delivery. Your letter, received by me April 20, has been referred to me for reply.

Your letter generally concerns Toronto Hydro's policy and practice regarding offers to connect and smart metering for new condominiums, particularly those mentioned in the subject line of your letter. Your letter goes on to request that Toronto Hydro prepare a revised Offer to Connect for those condominiums based on a bulk meter / sub-metering configuration. As explained below, Toronto Hydro does not offer that connection configuration for new condominiums and therefore will not prepare a revised Offer to Connect on that basis.

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As set out in Toronto Hydro's Conditions of Service, for condominium projects commenced with Toronto Hydro on and after February 28, 2008 ('new condominiums'), Toronto Hydro will provide smart metering as defined by the OEB (i.e., individual unit or suite metering

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compliant with smart metering regulations) for all separate units and for common areas ('individually metered units') at no charge to the developer. Upon registration and creation of the condominium corporation, the holders of the individually metered units become the direct customers of Toronto Hydro.

Toronto Hydro (along with other licensed distributors) has been specifically authorized to conduct smart metering as part of its standard, licensed distribution activities. The OEB has stated as follows:

> "The Board has previously determined in rates proceedings related to smart metering activities of certain distributors that smart metering is a part of the distribution activity that is already covered by distributors' distribution licences. As there is no distinction between smart metering condominiums and other residences, the Board has determined that only licensed distributors can smart meter condominiums. In the Board's view, this is in keeping with the current regulatory framework in the electricity sector.
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> The Board is also of the view that Regulation 442 allows all licensed distributors to smart meter in condominiums."[2]
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> "As set out in the January Notice, the Board remains of the view that smart metering is a distribution activity, and that the Electricity Act and Regulation 442 taken together allow all licensed distributors to undertake smart metering in condominiums. The distributor would do so as a distribution activity within its licensed service area."[3]

Toronto Hydro therefore asserts that it is authorized to connect new condominiums in the manner described in its Conditions of Service and that it has no obligation to do otherwise.

The statement of Toronto Hydro's position in this matter is not entirely correct in your letter. Specifically, you state your understanding that Toronto Hydro advised you that "Toronto Hydro was the only entity that had the right to own and supply meters for any of our projects and that no other options for metering were available."

While it is the case that ultimately Toronto Hydro will own the metering infrastructure and will attach the individually metered units as direct customers, Toronto Hydro's Conditions of Service provide for alternative bids for the installation of meters and do not preclude the installation of an additional sub-metering system, should the developer or condominium wish to install one, provided it does not interfere with Toronto Hydro's equipment.

Your request for a further Offer to Connect assuming bulk metering is based on an incorrect interpretation of Section 53.17 of the *Electricity Act*, which you state contradicts Toronto Hydro's advice referred to above. In fact, that Section provides as follows:

> "Despite the Condominium Act, 1998 and any other Act, a distributor and any other person licensed by the Board to do so shall, in the circumstances prescribed by regulation, install a smart meter, metering equipment, systems and technology and associated equipment, systems and technologies or smart sub-metering systems, equipment and technology and any associated equipment, systems and technologies of a type prescribed by regulation."

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Yours truly,

(Original signed by)

Colin McLorg

Manager, Regulatory Policy and Relations

416-542-2513

cmclorg@torontohydro.com

From: Maureen Helt
Sent: April 24, 2009 3:49 PM
To: Mark Garner; Jill Bada
Subject: FW: SSMWG Complaint, Toronto Hydro Letters

Attachments: Reply to Avonshire Apr 2009.pdf; Reply to Metrogate Apr 2009.pdf
Please see message below and attachments. Perhaps we can discuss early next week ?

From: Dennis O'Leary [mailto:doleary@airdberlis.com]
Sent: April 24, 2009 3:36 PM
To: Maureen Helt
Subject: RE: SSMWG Complaint, Toronto Hydro Letters

Maureen,

I am forwarding two letters which were sent to two projects which are being built by the Tridell Group of Companies. I will try and forward to your attention on Monday copies of the offers to connect and the requests by both Metrogate and the Avonshire specifically requesting that an offer to connect that contemplates a bulk meter and the sub-metering of the buildings by a competitive smart sub-meterer. The requests were made because the only offer to connect that Toronto Hydro provided contemplated it individually suite metering the buildings. The attached letter clearly states Toronto Hydro's position which is that it will not provide a bulk meter and that "it has no obligation to do otherwise".

Suffice to say that it is the view of the SSMWG that Toronto Hydro is clearly wrong. If this position continues and is sustained, it will eliminate the competitive Smart sub-metering industry in Ontario.

Aside from the broader implications of this position, these two projects are at the point where the developers wish to get their shovels in the ground and they immediately need sufficient power for construction purposes. These developers remain desirous of engaging a smart sub-metering company but are faced with the situation where they need power and it appears that Toronto Hydro will not make the necessary connections until they capitulate to its demand that Toronto Hydro be allowed to meter the buildings.

Can we please discuss the immediate steps that can be taken to insure that these projects are provided with sufficient power to allow construction to proceed. To my understanding, the needs of these projects and the jobs that they will provide cannot await the conclusion of an enforcement proceeding. I welcome your thoughts on this.

Regards

Dennis M. O'Leary
Aird & Berlis LLP
Barristers and Solicitors
Brookfield Place, Suite 1800
Box 754, 181 Bay Street
Toronto, ON M5J 2T9

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toronto hydro electric system

2009 April 22

Mr. Giuseppi Bello
Project Manager
Residences of Avonshire Inc
4800 Dufferin Street
Toronto, ON M3H 5S9
via email

Dear Mr. Bello:

RE: Metering and Offers to Connect for 'Avonshire' Projects

Thank you for your letter of March 10, 2009 to our Mr. Trgachef. Unfortunately, conflicting address information in your letter resulted in delays in its delivery. Your letter, received by me April 20, has been referred to me for reply.

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toronto hydro
electric system

2009 April 22

Mr. Lou Tersigni
Project Manager
Metrogate Inc
4800 Dufferin Street
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via email

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0049

Paul Gasparatto

From: Jill Bada
Sent: April 27, 2009 9:29 AM
To: Paul Gasparatto
Subject: Fw: SSMWG Complaint, Toronto Hydro Letters
Attachments: Reply to Avonshire Apr 2009.pdf; Reply to Metrogate Apr 2009.pdf

Fyi

From: Maureen Helt
To: Mark Garner; Jill Bada
Sent: Fri Apr 24 15:49:08 2009
Subject: FW: SSMWG Complaint, Toronto Hydro Letters

Please see message below and attachments. Perhaps we can discuss early next week ?

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compliant with smart metering regulations) for all separate units and for common areas ('individually metered units') at no charge to the developer. Upon registration and creation of the condominium corporation, the holders of the individually metered units become the direct customers of Toronto Hydro.

Toronto Hydro (along with other licensed distributors) has been specifically authorized to conduct smart metering as part of its standard, licensed distribution activities. The OEB has stated as follows:

> "The Board has previously determined in rates proceedings related to smart metering activities of certain distributors that smart metering is a part of the distribution activity that is already covered by distributors' distribution licences. As there is no distinction between smart metering condominiums and other residences, the Board has determined that only licensed distributors can smart meter condominiums. In the Board's view, this is in keeping with the current regulatory framework in the electricity sector.
>
> The Board is also of the view that Regulation 442 allows all licensed distributors to smart meter in condominiums."[2]
>
> "As set out in the January Notice, the Board remains of the view that smart metering is a distribution activity, and that the Electricity Act and Regulation 442 taken together allow all licensed distributors to undertake smart metering in condominiums. The distributor would do so as a distribution activity within its licensed service area."[3]

Toronto Hydro therefore asserts that it is authorized to connect new condominiums in the manner described in its Conditions of Service and that it has no obligation to do otherwise.

The statement of Toronto Hydro's position in this matter is not entirely correct in your letter. Specifically, you state your understanding that Toronto Hydro advised you that "Toronto Hydro was the only entity that had the right to own and supply meters for any of our projects and that no other options for metering were available."

While it is the case that ultimately Toronto Hydro will own the metering infrastructure and will attach the individually metered units as direct customers, Toronto Hydro's Conditions of Service provide for alternative bids for the installation of meters and do not preclude the installation of an additional sub-metering system, should the developer or condominium wish to install one, provided it does not interfere with Toronto Hydro's equipment.

Your request for a further Offer to Connect assuming bulk metering is based on an incorrect interpretation of Section 53.17 of the *Electricity Act,* which you state contradicts Toronto Hydro's advice referred to above. In fact, that Section provides as follows:

> "Despite the Condominium Act, 1998 and any other Act, a distributor and any other person licensed by the Board to do so shall, in the circumstances prescribed by regulation, install a smart meter, metering equipment, systems and technology and associated equipment, systems and technologies or smart sub-metering systems, equipment and technology and any associated equipment, systems and technologies of a type prescribed by regulation."

Section 53.17 of the *Electricity Act* does not contradict Toronto Hydro's position and is irrelevant to this issue, since with respect to new condominiums, it does not prohibit a

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[2] [EB-2007-0772 Notice of Proposal etc, January 8, 2008, pages 2-3]

[3] [EB-2007-0772 Notice of Proposal etc, June 10, 2008, pages 4]

distributor from installing smart metering, nor require a non-distributor to provide sub-metering, but rather goes to the requirement that whatever equipment is installed be of a type required by regulation. Furthermore, it clearly does not establish a right on the part of any person to install sub-metering equipment. Sub-metering is referred to because such configurations are allowed, but not required, in the case of existing condominiums already fitted with bulk meters.

In summary, nothing with respect to new condominiums in Toronto Hydro's metering or connection practice or in its Conditions of Service is out of compliance with Code, regulation, or legislation. The OEB has expressly concluded that smart metering of condominiums is a distribution activity authorized by the existing licenses of distributors, and has not established any obligation on distributors to provide for sub-metering configurations in new condominiums.

For these reasons Toronto Hydro does not accept the request set out in your letter. Please contact me if you have concerns or questions around any of these matters.

Yours truly,

(Original signed by)

Colin McLorg

Manager, Regulatory Policy and Relations

416-542-2513

cmclorg@torontohydro.com

0057

Paul Gasparatto

From: Jill Bada
Sent: April 28, 2009 12:22 PM
To: Paul Gasparatto
Cc: Maureen Helt
Subject: FW: SSMWG Complaint

Here is Maureen's letter to Dennis. She is awaiting contact information for the complainants in the SSMWG complaint. Then you can proceed to contact them.
Thanks
Jill

Jill Bada

Manager, Compliance
ONTARIO ENERGY BOARD
2300 Yonge Street, Suite 2700
Toronto, Ontario
M4P 1E4

Tel: 416-440-7641
Fax: 416-440-8100
Email: jill.bada@oeb.gov.on.ca

For general enquiries please contact the Market participant Hotline at: Market.Operations@oeb.gov.on.ca

---

From: Maureen Helt
Sent: April 28, 2009 11:10 AM
To: 'doleary@airdberlis.com'
Cc: Jill Bada
Subject: SSMWG Complaint

Dennis

Thank you for your letter dated April 23, 2009 authorizing Board staff to contact the witnesses referred to in SSWMG complaint which was filed with the Board on a confidential basis. I also confirm that, with respect to Monarch, all inquiries will be made to counsel, Mr William Liske (Email:williaml@monarchgroup.net; Tel:416 495-3590). I have forwarded a copy of your letter to the Compliance Office.

With respect to the information you provided to me by email on Friday April 24, 2009 concerning Tridell, as it is a new complaint please direct all inquiries and correspondence to Jill Bada, Manager of Compliance. This does not mean that if you have any questions you can't contact me but as it is a compliance matter Ms. Bada and the compliance staff are the best people to assist you. Ms. Bada's contact information is as follows:

Manager, Compliance
ONTARIO ENERGY BOARD
2300 Yonge Street, Suite 2700
Toronto, Ontario

M4P 1E4

Tel: 416-440-7641
Fax: 416-440-8100
Email: jill.bada@oeb.gov.on.ca

Maureen A. Helt
Legal Counsel
Ontario Energy Board
P.O. Box 2319
2300 Yonge St., 27th Floor
Toronto, Ont
M4P 1E4
Tel: 416 440 7672
Email: maureen.helt@oeb.gov.on.ca

0059

From: Maureen Helt
Sent: April 28, 2009 11:10 AM
To: 'doleary@airdberlis.com'
Cc: Jill Bada
Subject: SSMWG Complaint
Dennis

Thank you for your letter dated April 23, 2009 authorizing Board staff to contact the witnesses referred to in SSWMG complaint which was filed with the Board on a confidential basis. I also confirm that, with respect to Monarch, all inquiries will be made to counsel, Mr William Liske (Email:williaml@monarchgroup.net; Tel:416 495-3590). I have forwarded a copy of your letter to the Compliance Office.

With respect to the information you provided to me by email on Friday April 24, 2009 concerning Tridell, as it is a new complaint please direct all inquiries and correspondence to Jill Bada, Manager of Compliance. This does not mean that if you have any questions you can't contact me but as it is a compliance matter Ms. Bada and the compliance staff are the best people to assist you. Ms. Bada's contact information is as follows:

Manager, Compliance
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AIRD & BERLIS LLP

Barristers and Solicitors

Dennis M. O'Leary
Direct: 416.865.4711
E-mail: doleary@airdberlis.com

April 29, 2009

Via email and Courier

Ms. Maureen Helt
Legal Counsel
Ontario Energy Board
2300 Yonge Street
27th Floor
Toronto, ON M4P 1E4

Jill Bada
Manager of Compliance
Ontario Energy Board
2300 Yonge Street
27th Floor
Toronto, ON M4P 1E4

Dear Ms. Helt and Ms. Bada:

Re: Complaint by the Smart Sub-metering Working Group ("SSMWG")

We are counsel to the SSMWG. Further to the Complaint filed by the SSMWG late last year, and in response to your request for contact numbers, I provide a list of the contact numbers received to date.

In addition we attach both electronically and three hard copies of the documentation related to the recent letters from Toronto Hydro to Metrogate and Avonshire refusing to permit the planned projects to be metered by a licensed smart sub-metering company. The attached booklet contains the original offers to connect from Toronto Hydro, the response of Metrogate and Avonshire specifically noting their desire to utilize a licensed smart sub-metering provider and requesting a compatible offer to connect. Toronto Hydro's response is set out in their letters dated April 22, 2009.

Should you have any questions, please do not hesitate to call.

Yours very truly,

AIRD & BERLIS LLP

Original Signed by,

Dennis M. O'Leary
DMO/ct
Enclosures
5198446.1

0061

Paul Gasparatto

From: Jill Bada
Sent: April 29, 2009 12:28 PM
To: Ken Quesnelle; Paul Sommerville; Pamela Nowina; David Balsillie; Lee Harmer
Cc: Paul Gasparatto; Maureen Helt; Mark Garner
Subject: Dx committee meeting material - May 1/09
Attachments: BN_THESL Sub Metering_Dx Note_20090428_rev 3 (2).doc

Please find the attached briefing note related to a compliance case that is scheduled for discussion at the Dx committee this week. Given that this case may result in an enforcement proceeding we would ask that it be treated as confidential.
Many thanks,
Jill

Jill Bada

Manager, Compliance
ONTARIO ENERGY BOARD
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Tel: 416-440-7641
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For general enquiries please contact the Market participant Hotline at: Market.Operations@oeb.gov.on.ca

Ontario

BRIEFING NOTE

ELECTRICITY DISTRIBUTION COMMITTEE
REQUEST FOR GUIDANCE

Toronto Hydro Metering Policies &
Restricting Smart Sub-metering

May 1, 2009

REQUEST FOR GUIDANCE

Staff request the Electricity Distribution Committee's views on the following two questions and subsequently, which of the outlined options would be the recommended course of action.

QUESTIONS

1. Does a new condominium owner have the right to install, either themselves or through a smart sub-meter provider, a smart sub-metering system for each unit, (serviced by a distributor bulk meter), rather than be required to have distributor smart metering be installed for each unit?

2. If so, are the legal and regulatory requirements set out in legislation or regulations and/or Code sufficiently clear?

BRIEF BACKGROUND

In July 2008, the Compliance Office received complaints from sub-meter providers about Toronto Hydro's ("THESL") policy regarding the metering of new condominiums. The Compliance Office began an investigation which resulted in a series of correspondence between THESL and Compliance staff. Details of this communication are outlined later in this note under the section "Detailed Background."

This correspondence determined that THESL has implemented a policy that requires individual units in all new condominiums to be directly metered by THESL. A developer or Condominium Board may install its own additional sub-metering system provided that there is no interference with THESL's smart metering system. However, it is THESL's policy that ultimately each residential and commercial unit in a new condominium must be a direct customer of THESL. THESL has based this policy on its belief that there are no regulatory provisions which prohibit its policy and/or require that a distributor install smart metering only at the request of the condominium.

The OEB Compliance Office expressed its that view that to the extent that THESL's policies require smart metering of new condominiums and that each unit must be a direct customer of THESL, such policies are inconsistent with the Board's smart sub-metering licensing regime.

It is also the concern of the Compliance Office, that if a customer were to refuse to accept individual unit metering by Toronto Hydro, it appears that THESL would refuse to connect the customer. This concern has become real with the filing of a new compliant with the Board. On April 25, 2009, the Compliance Office was provided with two letters from THESL to developers informing the developers that THESL will not prepare an Offer to Connect that provides for the installation of a bulk meter/sub-metering configuration. It is the view of the Compliance Office that such actions are non-compliant with a distributor's obligation to connect as set out in section 28 of the *Electricity Act, 1998* and the obligation to install an interval meter when requested to do so as set out in section 5.1.5 of the Distribution System Code.

The question of whether a distributor can require that customers be directly metered by the distributor will have an impact on more than just THESL's policies. The Compliance Office has received complaints from the smart sub-metering industry regarding the metering activities of other distributors. Compliance staff is also aware that other distributors are closely following the discussions between THESL and Compliance staff, including one distributor who has stated its refusal to discuss their metering activities with staff until the Board has taken a position on THESL's policies.

The most recent activity in this dispute was a meeting between Board and THESL staff. In this meeting THESL reaffirmed its commitment to its policy and requested a Board hearing on the matter. OEB staff stated that we would request guidance from the Board as to its intention in regards to sub-metering activities and then determine next steps.

RELEVANT REGULATORY & LEGAL REFERENCES

Distribution System Code

> *5.1.5 A distributor shall provide an interval meter within a reasonable period of time to any customer who submits to it a written request for such meter installation, either directly, or*

through an authorized party, in accordance with the Retail Settlement Code …

5.1.9 When requested by either:

(a) the board of directors of a condominium corporation; or
(b) the developer of a building, in any stage of construction, on land for which a declaration and description is proposed or intended to be registered pursuant to section 2 of the Condominium Act, 1998,

a distributor shall install smart metering that meets the functional specification of Ontario Regulation 425/06 – Criteria and Requirements for Meters and Metering Equipment, Systems and Technology (made under the Electricity Act).

Electricity Act, 1998

28. A distributor shall connect a building to its distribution system if,

(a) the building lies along any of the lines of the distributor's distribution system; and
(b) the owner, occupant or other person in charge of the building requests the connection in writing.

53.17 (1) Despite the Condominium Act, 1998 *and any other Act, a distributor and any other person licensed by the Board to do so shall, in the circumstances prescribed by regulation, install a smart meter, metering equipment, systems and technology and associated equipment, systems and technologies or smart sub-metering systems, equipment and technology and any associated equipment, systems and technologies of a type prescribed by regulation, in a property or class of properties prescribed by regulation at a location prescribed by regulation and for consumers or classes of consumers prescribed by regulation at or within the time prescribed by regulation.*

Ontario Regulation 442/07

2. For the purposes of subsection 53.17 (1) of the Act, the following are prescribed classes of property:

1. A building on land for which a declaration and description have been registered pursuant to section 2 of the Condominium Act, 1998.

2. *A building on land for which a declaration and description have been registered creating a condominium corporation that was continued pursuant to section 178 of the* Condominium Act, 1998.
3. *A building, in any stage of construction, on land for which a declaration and description is proposed or intended to be registered pursuant to section 2 of the* Condominium Act, 1998.

3. For the purposes of subsection 53.17 (1) of the Act, the following are prescribed circumstances:

1. *The approval by the board of directors to install smart meters or smart sub-metering systems, in the case of a building that falls into a prescribed class of property described in paragraph 1 or 2 of section 2.*
2. *The installation of smart meters or smart sub-metering systems, in the case of a building that falls into a prescribed class of property described in paragraph 3 of section 2.*

4. (1) For a class of property prescribed under section 2 and in the circumstances prescribed under section 3, a licensed distributor, or any other person licensed by the Board to do so, shall install smart meters or smart sub-metering systems of a type, class or kind,

(a) that are authorized by an order of the Board or by a code issued by the Board; or

(b) that meet any criteria or requirements that may be set by an order of the Board or by a code issued by the

Smart Sub-Metering Code

2.2.1 A smart sub-metering provider shall ensure that either:

(c) the board of directors of a condominium corporation; or

(d) the developer of a building, in any stage of construction, on land for which a declaration and description is proposed or intended to be registered pursuant to section 2 of the Condominium Act, 1998,

has requested, and a distributor has installed, a master meter that is an interval meter before beginning to provide smart sub-metering services.

Notice of Proposal to Amend a Code and Notice of Proposal to issue a New Code, dated January 8, 2008, page #2.

> *The Board uses the term "smart metering" to describe the situation in which a licensed distributor individually meters every condominium unit (and the condominium's common areas) with a smart meter. In this scenario, each unit will become a residential customer of the licensed distributor and each unit and the common areas must have a separate account with the licensed distributor.*
>
> *The Board uses the term "smart sub-metering" to describe the situation in which a licensed distributor provides service to the condominium's bulk (master) meter and then a separate person (the smart sub-meter provider on behalf of the condominium corporation) allocates that bill to the individual units and the common areas through the smart sub-metering system. In this scenario, the condominium continues to be the customer of the licensed distributor and will receive a single bill based on the measurement of the bulk (master) meter.*

OPTIONS

The following options are based on the answer to Question #1 being that new condominiums do have the right to install, either themselves or with a smart sub-meter provider, a smart sub-metering system rather than be required to have distributor smart metering be installed for each unit

If the answer to Question #1 is that distributors have the right to impose smart metering on customers, then staff suggests that the only action necessary is to inform the smart sub-metering industry of that position.

Option A - The legal and regulatory requirements are sufficiently clear, no further clarification by the Board is necessary.

Option B - The legal and regulatory requirements could benefit from further clarification from the Board. This clarification should take the form of a letter to distributors explaining the Board's expectations.

Option C - The legal and regulatory requirements are not clear and a code amendment to clarify the position is necessary.

DETAILED BACKGROUND

CUSTOMER CONTACT

In July 2008, Carma Industries and Intellimeter have complained to the Compliance Office regarding what they see as unfair business practices by Toronto Hydro.

In December 2008, a group of private sub-meter providers known as the Smart Sub-Metering Work Group also submitted a compliant that electricity distributors are abusing their market power and as a result hindering the growth of the smart sub-metering industry in the province. The complaint specifically identifies the following utilities:

- Toronto Hydro, Enersource, Oakville Hydro, PowerStream

The alleged activity includes the following:

- Building owners/developers are told that only the LDC may install meters and provide individual suite metering.
- Where a building owner/developer has expressed an interest in smart sub-metering, the LDC refuses to provide an Offer to Connect, refuses to install a bulk meter or advises that such a choice would result in other causes of delay. The LDC's inform the developers that none of these events would occur if the LDC is permitted to do the metering.
- Certain Offers to Connect are being provided without the LDC undertaking an economic evaluation and as a result either inadequate or no financial contributions are being requested.

REVIEW OF COMPLIANCE OFFICE ACTIVITY

On July 16, 2008 and July 25, 2008, the Compliance Office received complaints from Carma Industries and Intellimeter.

On July 24, 2008, Compliance staff requested Toronto Hydro provide a response to questions relating to the distributor's policies regarding metering of multi-unit properties.

On July 29, 2008, Toronto Hydro responded to staff questions and provided the following positions.

- THESL requires distributor smart meters be installed in new facilities. However, it does allow customers to install these meters through alternative bid and then be transferred to the distributor.

- THESL's position is that unit holders and common areas (either residential or commercial) in new condominiums are individual residential or general service customers of THESL, the same as new customers in single detached homes.

- THESL believes that the Board supports this view since it has stated in its June 10th Notice for the Sub-Metering initiative that Smart Metering is a distribution activity and that only licensed distributors are allowed to undertake smart metering in condominiums.

On October 22, 2008, the Chief Compliance Officer issued a determination to Toronto Hydro stating that its policy is inconsistent with its regulatory obligations. The CCO stated the following views:

- THESL's policies are inappropriate in light of the legal and regulatory framework applicable to the metering of new condominiums as set out in section 53.17 (1) of the Electricity Act, 1998 which states

  "a distributor and any other person licensed by the Board to do so shall, ... , install a smart meter, metering equipment, systems and technology and associated equipment, systems and technologies or smart sub-metering systems, equipment and technology and any associated equipment, systems and technologies of a type prescribed by regulation." (emphasis added)

- The availability of the smart sub-metering option is clear from the materials issued by the Board when it amended the Distribution System Code (the "DSC") and created the Smart Sub-Metering Code. Section 5.1.9 of the DSC itself also clarifies that a distributor must install smart metering only when requested to do so by the condominium corporation or the developer.

- Under section 28 of the *Electricity Act, 1998*, a distributor must connect a building on request. The DSC sets out a list of the reasons that may justify a refusal to connect. However, the desire of a customer to install smart sub-metering is not one of those reasons.

On November 12, 2008, Toronto Hydro responded to the CCO's letter. THESL stated that it does not accept the opinions that were set out in the letter and would not change its metering policies. THESL presented the views that:

- It is incorrect to conclude that their policies preclude the installation of a sub-metering system; should a customer wish to install an additional sub-metering system, they are at liberty to do so provided there is no interference with THESL's smart metering system. In any case, each distinct residential or commercial unit (including common areas) would remain as a direct customer of THESL.

- Section 53.17 of the *Electricity Act* is irrelevant to this issue, since it does not require a non-distributor to provide sub-metering, nor prohibit a distributor from installing smart metering, but goes to the requirement that equipment be of a type required by regulation. Furthermore, it clearly does not establish a right on the part of any person to install sub-metering equipment.

- The thrust of Section 5.1.9 is clearly to require that the metering installed meet the functional specification of Ontario Regulation 425/06.

On January 29, 2009, the CCO sent a follow up letter to Toronto Hydro stating that after considering THESL's arguments, he remains of the view that their policies are inappropriate. The CCO stated the following views:

- Cannot agree with THESL's characterization of section 53.17 of the *Electricity Act, 1998* as being either irrelevant to this issue, or as speaking only to the nature of the equipment to be installed.

- Cannot agree with THESL's characterization of section 5.1.9 of the Distribution System Code as having, as its thrust, to require that the metering installed meet the specifications in regulation. Section 5.1.9 also makes it clear that the person responsible for a new condominium has the ability to choose between having a licensed distributor install smart meters or having a licensed smart sub-metering provider install smart sub-meters.

- THESL's position that each individual unit must be become a direct customer of THESL is incompatible with the Board's approach to smart sub-metering. As described by the Board, smart sub-metering clearly involves (a) a licensed distributor that bills its customer – the condominium corporation – based on the measurement of a bulk meter; and (b) a separate person – the licensed smart sub-metering provider – that bills the individual units and common areas based on the measurement of a smart sub-metering system.

- The provisions of the Board's Smart Sub-Metering Code make it clear that smart sub-metering as a competitive licensed activity goes beyond merely the installation of the meters.

- There are no regulatory provisions that provide licensed distributors with the authority to implement a requirement that each unit and common area in a new condominium must become a direct customer of the distributor.

On February 9, 2009, Toronto Hydro responded to the CCO's letter and restated its view that the CCO's interpretations are incorrect. THESL presented the views that:

- Section 5.1.9 of the DSC does not mention smart sub-metering, nor contain any statement that expressly 'makes it clear' that a distributor may only install smart

metering upon the request of a person in charge of a condominium. The unstated premise of your argument appears to be that the Section begins with the word 'Only', which it does not.

- In THESL's view that there are no regulatory provisions which prohibit its smart metering policy.

- Furthermore, the DSC states at Section 5.1.6:

> *"A distributor shall identify in its Conditions of Service the type of meters that are available to a customer, the process by which a customer may obtain such meters and the types of charges that would be levied on a customer for each meter type."*

This statement is not conditioned by any further obligation on the part of distributors concerning smart sub-metering in new condominiums.

On February 27, 2009, Compliance staff sent information request letters to Enersource, Powerstream and Oakville Hydro enquiring about their policies in regards to metering individual units in condominiums. Response to these enquiries has indicated that in the case of Enersource and Powersteam, they do not implement policies that require all customers in new condominiums be directly metered by the distributor. Oakville Hydro has stated that it will no longer communicate with staff on this issue until the Board settles the dispute with Toronto Hydro.

On April 17, 2009 OEB staff and THESL staff meet to discuss the dispute. THESL reaffirmed its previous position that individual customers in new condominiums should be customers of the distributor. They also acknowledged their policy is to not install a bulk meter even when requested by the customer and submitted that they have no regulatory obligation to do so. THESL expressed its willingness to participate in an enforcement proceeding in order for this matter to have a hearing before the Board. OEB staff informed THESL that they would request guidance from the Board regarding interpretation of the legal requirements. Among the results of this guidance could be a Board statement on the interpretation, an enforcement proceeding and/or a code amendment.

On April 24, 2009, the Sub-metering Working Group provided copies of letters from THESL to two property managers in which THESL states that they do not offer a connection configuration based on a bulk meter/sub-metering configuration. As a result THESL would not prepare an Offer to Connect on that basis.

STAFF ASSESMENT

Through the issuance of Smart Sub-Meter Provider licenses and the Smart Sub-Metering code, it is staff's view that the Board anticipated that all customers would have the option of hiring private contractors to install and operate smart sub-metering systems.

To accept Toronto Hydro's view and policies on this matter would, in staff's view, be a reversal of the intention of the Board when it established its smart sub-metering licensing regime. Despite Toronto Hydro's suggestion that a Condominium could chose to install both smart metering and smart sub-metering, THESL's policy will almost certainly eliminate the practical business opportunities of licensed smart sub-meter providers.

In addition to Toronto Hydro's specific actions, there is also the concern that many distributors around the province may be implementing similar policies that restrict the ability of licensed smart sub-meter providers to operate.

RELEVANT COMPLIANCE LEGAL REFERENCES

Section 112.3(1) of the OEB Act, 1998 states:

> *If the Board is satisfied that a person has contravened or is likely to contravene an enforceable provision, the Board may make an order requiring the person to comply with the enforceable provision and to take such action as the Board may specify to,*
>
> *(a) remedy a contravention that has occurred; or*
>
> *(b) prevent a contravention or further contravention of the enforceable provision.*

Section 112.4 of the OEB Act, 1998 states:

> *(1) If the Board is satisfied that a person who holds a licence under Part IV or V has contravened an enforceable provision, the Board may make an order suspending or revoking the licence.*
> *(2) This section applies to contraventions that occur before or after this section comes into force.*

Section 112.5 of the OEB Act, 1998 states:

(1) If the Board is satisfied that a person has contravened an enforceable provision, the Board may, subject to the regulations under subsection (5), make an order requiring a person to pay an administrative penalty in the amount set out in the order for each day or part of a day on which the contravention occurred or continues.

Prepared by: Paul Gasparatto

0073

Maureen Helt

From: Carol Thomas [cthomas@airdberlis.com] on behalf of Dennis O'Leary [doleary@airdberlis.com]

Sent: April 30, 2009 11:22 AM

To: Maureen Helt

Cc: Jill Bada

Subject: SSMWG Complaint

Attachments: Cover letter to M Helt and J Bada_electronic verson.PDF; Contact #s re SSMWG_sent to M Helt and J Bada_OEB.PDF; Booklet sent to OEB re Toronto Hydro OTCs re Metrogate and Avonshire.PDF

<<Cover letter to M Helt and J Bada_electronic verson.PDF>> <<Contact #s re SSMWG_sent to M Helt and J Bada_OEB.PDF>> <<Booklet sent to OEB re Toronto Hydro OTCs re Metrogate and Avonshire.PDF>>

Dear Ms. Helt and Ms. Bada,

Please see the above letter and enclosures. Hard copies of same are being delivered to the Board Office this afternoon.

Regards,

Carol Thomas
Assistant to Dennis M. O'Leary and Scott Stoll

Aird & Berlis LLP
Barristers and Solicitors
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Box 754, 181 Bay Street
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0074

Paul Gasparatto

From: Jill Bada
Sent: April 30, 2009 11:32 AM
To: Paul Gasparatto
Subject: FW: SSMWG Complaint
Attachments: Cover letter to M Helt and J Bada_electronic verson.PDF; Contact #s re SSMWG_sent to M Helt and J Bada_OEB.PDF; Booklet sent to OEB re Toronto Hydro OTCs re Metrogate and Avonshire.PDF

The info we have been waiting for. Please review and let's discuss it.
Thanks
Jill

Jill Bada

Manager, Compliance
ONTARIO ENERGY BOARD
2300 Yonge Street, Suite 2700
Toronto, Ontario
M4P 1E4

Tel: 416-440-7641
Fax: 416-440-8100
Email: jill.bada@oeb.gov.on.ca

For general enquiries please contact the Market participant Hotline at: Market.Operations@oeb.gov.on.ca

---

From: Carol Thomas [mailto:cthomas@airdberlis.com] **On Behalf Of** Dennis O'Leary
Sent: April 30, 2009 11:22 AM
To: Maureen Helt
Cc: Jill Bada
Subject: SSMWG Complaint

<<Cover letter to M Helt and J Bada_electronic verson.PDF>> <<Contact #s re SSMWG_sent to M Helt and J Bada_OEB.PDF>> <<Booklet sent to OEB re Toronto Hydro OTCs re Metrogate and Avonshire.PDF>>

Dear Ms. Helt and Ms. Bada,

Please see the above letter and enclosures. Hard copies of same are being delivered to the Board Office this afternoon.

Regards,

Carol Thomas
Assistant to Dennis M. O'Leary and Scott Stoll

Aird & Berlis LLP
Barristers and Solicitors
Brookfield Place, Suite 1800
Box 754, 181 Bay Street
Toronto, ON M5J 2T9

Tel. 416-863-1500, Ext. 4503

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AIRD & BERLIS LLP

Barristers and Solicitors

Dennis M. O'Leary
Direct: 416.865.4711
E-mail: doleary@airdberlis.com

April 29, 2009

Via email and Courier

Ms. Maureen Helt
Legal Counsel
Ontario Energy Board
2300 Yonge Street
27th Floor
Toronto, ON M4P 1E4

Jill Bada
Manager of Compliance
Ontario Energy Board
2300 Yonge Street
27th Floor
Toronto, ON M4P 1E4

Dear Ms. Helt and Ms. Bada:

Re: Complaint by the Smart Sub-metering Working Group ("SSMWG")

We are counsel to the SSMWG. Further to the Complaint filed by the SSMWG late last year, and in response to your request for contact numbers, I provide a list of the contact numbers received to date.

In addition we attach both electronically and three hard copies of the documentation related to the recent letters from Toronto Hydro to Metrogate and Avonshire refusing to permit the planned projects to be metered by a licensed smart sub-metering company. The attached booklet contains the original offers to connect from Toronto Hydro, the response of Metrogate and Avonshire specifically noting their desire to utilize a licensed smart sub-metering provider and requesting a compatible offer to connect. Toronto Hydro's response is set out in their letters dated April 22, 2009.

Should you have any questions, please do not hesitate to call.

Yours very truly,

AIRD & BERLIS LLP

Original Signed by,

Dennis M. O'Leary
DMO/ct
Enclosures
5198446.1

CONTACT NAMES AND NUMBERS FOR SSMWG MEMBERS

REMOVED/REDACTED

ONTARIO ENERGY BOARD

IN THE MATTER OF a Complaint and Request to undertake an Investigation made by the members of the Smart Sub-metering Working Group to the Market Surveillance Panel, under Subsection 4.3.1 of the *Ontario Energy Board Act, 1998, S.O. 1998, c. 15 (Schedule B)*

INDEX

January 29, 2009

toronto hydro electric system

Residences of Avonshire Inc. and
K & G Oakburn Apartments I Ltd.
299 Rochampton Avenue
Toronto, Ontario M4P 1S2

Attention: Mark Gallow

Dear Sir:

Re: Residences of Avonshire Inc. development of 100, & 115 Harrison Garden Boulevard
and 5, 7 & 9 Oakburn Crescent
as legally described in PIN Nos. 10104-1613 (LT), 10104-1614 (LT), 10104-1622 (LT) and 10104-1624 (LT) ("Property")
K & G Oakburn Apartments I Ltd. development of 105 Harrison Garden Boulevard
as legally described in PIN Nos. 10104-1623 (LT) and 10104-1625 (LT) ("Property")
748 high-rise residential units (748 Toronto Hydro suite meters)
41 townhouses
792 connections
Toronto Hydro Customer Class 4
Toronto Hydro Project No. P0016652 Work Order No. 158422 ("Project")

Toronto Hydro-Electric System Limited ("Toronto Hydro") acknowledges receipt of Residences of Avonshire Inc.'s and K & G Oakburn Apartments I Ltd. ("Customer") written request for connection of the Project to the Toronto Hydro main distribution system.

The Customer has represented to Toronto Hydro that 789 residential units will be constructed and connected to the Toronto Hydro main distribution system and the estimated increased demand load attributable to the Project will be 1,900 kW ("Estimated Incremental Demand").

In order to connect the Project, an expansion to the Toronto Hydro main distribution system will be needed.

Based on the plans dated January 22, 2008 ("Plans") this document, including all Schedules attached, is Toronto Hydro's firm Offer to Connect ("Offer to Connect") as required by the Distribution System Code ("Distribution System Code") established by the Ontario Energy Board ("OEB").

In addition to the obligations set forth in this Offer to Connect, the Customer shall be bound by and required to comply with all provisions of the Conditions of Service filed by Toronto Hydro with the OEB. A copy of the Conditions of Service can be obtained at www.torontohydro.com.

Terms used in this Offer to Connect shall have the meaning ascribed thereto in the Distribution System Code and the Conditions of Service unless otherwise defined herein.

The following Schedules attached hereto form a part of this Offer to Connect:

Schedule A – Connection Work and Fees;
Schedule B – Expansion Work and Fees;
Schedule C – Capital Contribution Requirements and Economic Evaluation;
Schedule D – Expansion Deposit;
Schedule E – Alternative Bid Process and Contestable Work;
Schedule F – General Terms and Conditions.

A Capital Contribution, as described in Schedule C, will be required from the Customer.

An Expansion Deposit, as described in Schedule D, will be required from the Customer.

This Offer to Connect includes Contestable Work for which the Customer may obtain an alternative bid as described in Schedule E.

Based on the Plans and information provided to Toronto Hydro, as of the date of this Offer to Connect, an easement will be required to connect the Project. General easement requirements are set out under the heading "Easements" in Schedule F, General Terms and Conditions.

If the terms and conditions of this Offer to Connect are acceptable to the Customer, a duly authorized officer of the Customer shall sign the duplicate copy and return it to Toronto Hydro within 60 days of the date set forth above. If a signed copy is not returned to Toronto Hydro within that time period, Toronto Hydro reserves the right to revoke this Offer to Connect without further notice to the Customer. The Customer is advised that Toronto Hydro requires a minimum of 24 weeks, if not more ("lead time") to complete the Project, after receiving the signed Offer to Connect from the Customer, and, if necessary the Customer should make arrangements to return the signed Offer to Connect earlier, to accommodate the required lead time.

If the expansion work for this Project has not commenced within one (1) year from the date set forth above, Toronto Hydro has the right to terminate this Offer to Connect in accordance with its rights of termination as set out herein.

Any notice, communication, inquiry and payment regarding this Offer to Connect shall be directed as follows:

To: Toronto Hydro-Electric System Limited
Asset Management – 3rd Floor, 500 Commissioners Street
Toronto, Ontario M4M 3N7
Attention: Jim Trgachef, Supervisor
Standards and Policy Planning
Telephone (416) 542-2514, Facsimile: (416) 542-2731

To: The Customer at the address set forth below:
Residences of Avonshire Inc. and
K & G Oakburn Apartments I Ltd.
299 Roehampton Avenue
Toronto, Ontario M4P 1S2
Attention: Mark Gallow
Telephone: (416) 487-2844, Facsimile: (416) 487-7550

All payments and security as may be required hereunder shall be due and payable, or deliverable, upon acceptance of this Offer to Connect by the Customer.

Each of Residences of Avonshire Inc. and K & G Oakburn Apartments I Ltd. shall be jointly and severally liable for all the obligations in this Offer to Connect.

Please sign in the appropriate place below and return one signed copy, and all payments and security as may be required, to the address indicated above.

Yours truly,

Toronto Hydro-Electric System Limited

Per: _____
Name: Anthony Haines,
Title: President
I have authority to bind the Corporation.

Residences of Avonshire Inc. and K & G Oakburn Apartments I Ltd. each acknowledges its understanding of, accepts, agrees jointly and severally to comply with, and be bound by, all of the terms and conditions of this Offer to Connect, which include the provisions set forth above and all of the Schedules attached. Each acknowledges that by accepting this Offer to Connect a binding agreement is created and, upon signing, this Offer to Connect constitutes a legally valid and binding obligation, enforceable in accordance with its terms.

Residences of Avonshire Inc. and K & G Oakburn Apartments I Ltd. each confirms that it will not be obtaining alternative bids for the Contestable Work described in Schedule E.

Residences of Avonshire Inc.

Per:_____ Date:_____
Name:
Title:
I have authority to bind the Corporation.

K & G Oakburn Apartments I Ltd.

Per:_____ Date:_____
Name:
Title:
I have authority to bind the Corporation.

OR

Residences of Avonshire Inc. and K & G Oakburn Apartments I Ltd. each confirms it is not accepting Toronto Hydro's Offer to Connect and it will be proceeding by way of an alternative bid process for the Contestable Work, as described in Schedule E.

Residences of Avonshire Inc.

Per:_____ Date:_____
Name:
Title:
I have authority to bind the Corporation.

K & G Oakburn Apartments I Ltd.

Per:_____ Date:_____
Name:
Title:
I have authority to bind the Corporation.

SCHEDULE A
CONNECTION WORK and FEES

1. Connection Assets are the assets between the point of connection to the Toronto Hydro main distribution system and the ownership demarcation point as defined in Table 1.3 of Toronto Hydro's Conditions of Service.

2. The Connection Work and Connection Fees to supply and install the Connection Assets for the Project are described below.

3. Toronto Hydro shall recover costs associated with the installation of Connection Assets through:
   (a) Basic Connection Fees which are part of the Economic Evaluation; and
   (b) Variable Connection Fees collected directly from the Customer. The variable Connection Fees arise from the Variable Connection Work and are in addition to the Basic Connection Fees.

4. The Variable Connection Fees are payable by the Customer to Toronto Hydro pursuant to this Offer to Connect upon acceptance of this Offer to Connect by the Customer, or, if the Customer pursues an alternative bid process described in Schedule E, to the Customer's qualified contractor.

Connection Work shall mean the following:

- All necessary engineering design and inspections;
- Supply & Install:
  - U/G road crossing and primary cable.
- Supply:
  - The necessary switching and isolations required to connect the Customer to the Toronto Hydro distribution system;
  - Primary connections and terminations in transformer vault and to the Toronto Hydro distribution system;
  - All transformation, switchgear and termination as required.

NOTE:

- Customer is responsible for:
  - Trenching, supplying and installing a 2Wx2H concrete encased duct structure on private property from street line to transformer building vaults.

Connection Fees:

a) Basic Connection Fees of $1,310.00 per meter connection and $850.00 per meter connection have been included in Toronto Hydro's Economic Evaluation.

b) Variable Connection Fees

Variable Connection Fees	$193,930.60
GST 5%	$ 9,696.53
TOTAL CONNECTION FEES, GST	**$203,627.13**
Less Deposit and GST received	**- $ 0**
BALANCE OUTSTANDING	**$203,627.13**

The Connection Fees are based on the Connection Work being done during non-winter conditions. If the Customer requires the Connection Work to be done during winter conditions that would result in additional costs, Toronto Hydro will advise the Customer of the estimated additional costs and if the Customer provides a written request to Toronto Hydro to proceed, a Project Invoice will be issued and payment must be received by Toronto Hydro prior to the commencement of any of the applicable work.

SCHEDULE B
EXPANSION WORK AND FEES

1. The Uncontestable Expansion Work and Contestable Expansion Work that must be performed to connect the Project to the Toronto Hydro main distribution system, and corresponding Fees and Total Expansion Fees ("Total Expansion Fees") are described below.

2. The Customer will also be responsible for the payment of the operating, maintenance and administration costs ("OM&A Costs") of the Project, including applicable taxes. The OM&A Costs are included in the Economic Evaluation.

3. The Expansion Fees and OM&A Costs are recovered by Toronto Hydro by way of Capital Contribution if applicable, as described in Schedule C and the increased distribution revenues attributable to the Project, which are received by Toronto Hydro ("Incremental Revenues").

Uncontestable Expansion Work shall mean the following:

- All necessary engineering design and inspections;
- Supply & install:
  - Primary terminations and connections to the existing Toronto Hydro distribution system;
  - The necessary switching and outage arrangements to allow connections to existing distribution system.

Uncontestable Expansion Fees:

Enhancement Costs (1,900 x $260 per kW)	$ 494,000.00
Materials	$ 24,500.00
Labour (engineering design, inspections)	$ 32,500.00
Equipment	$ 1,500.00
Basic Connection Charge (3 x $1,310.00 and 41 x $850.00, per meter connection)	$ 38,780.00
Overhead (including administration)	$ 63,326.08
TOTAL UNCONTESTABLE EXPANSION FEES	**$ 654,606.08**

Contestable Expansion Work shall mean the following:

- Supply & install:
  - All necessary duct structures, cable chambers, tap boxes, splice vaults, submersible transformer vaults, switchgear foundations on Harrison Garden extension and Oakburn Crescent to Avondale Avenue cable riser poles.

Contestable Expansion Fees:

Materials	$ 358,759.09
Labour (construction)	$ 198,380.43
Equipment	$ 26,793.96
Overhead (including administration)	$ 62,539.28
TOTAL CONTESTABLE EXPANSION FEES	**$ 646,472.76**
TOTAL UNCONTESTABLE EXPANSION FEES	**$ 654,606.08**
TOTAL EXPANSION FEES (CONTESTABLE AND UNCONTESTABLE)	**$1,301,078.84**
GST (5%)	**$ 65,053.94**
TOTAL EXPANSION FEES, GST	**$1,366,132.78**

The Expansion Fees are based on the Expansion Work being done during non-winter conditions. If the Customer requires the Expansion Work to be done during winter conditions that would result in additional costs, Toronto Hydro will advised the Customer of the estimated additional costs and if the Customer provides a written request to Toronto Hydro to proceed, a Project Invoice will be issued and payment must be received by Toronto Hydro prior to the commencement of any applicable work.

SCHEDULE C
CAPITAL CONTRIBUTION REQUIREMENTS and ECONOMIC EVALUATION

1. The Customer acknowledges that it has represented to Toronto Hydro that the estimated increased demand load attributable to the Project will be 1,900 kW ("Estimated Incremental Demand") and that 789 residential units will be connected to the Toronto Hydro main distribution system.

2. To determine the amount of Capital Contribution that is required from the Customer for this Project, Toronto Hydro has performed, as described in Appendix B of the Distribution System Code, an economic evaluation ("Initial Economic Evaluation"). A copy of the Initial Economic Evaluation, including the calculation used to determine the amount of the Capital Contribution to be paid by the Customer, including all of the assumptions and inputs used to produce the Initial Economic Evaluation, is included with this Offer to Connect.

3. As a result of Toronto Hydro's Initial Economic Evaluation of the Project, the Customer shall pay to Toronto Hydro, upon acceptance of this Offer to Connect, a Capital Contribution in the amount set forth below:

Capital Contribution	**$92,981.00**
GST (5%)	**$ 4,649.05**
Capital Contribution and GST	**$97,630.05**

SCHEDULE D
EXPANSION DEPOSIT

1. An Expansion Deposit is intended to ensure that Toronto Hydro is held harmless in respect of the Expansion Fees and OM&A Costs by securing payment of the Total Expansion Fees in the event the Estimated Incremental Demand does not materialize. The Expansion Deposit shall be in the form of cash, or an irrevocable commercial letter of credit issued by a Schedule 1 bank as defined in the Bank Act, or a surety bond. The form of security must expressly provide for its use to cover the events for which it is held as a deposit. Any portion of the Expansion Deposit held as cash, which is returned to the Customer, shall include interest on the returned amount from the date of receipt of the full amount of the Expansion Deposit, at the Prime Business Rate set by the Bank of Canada less two (2) percent.

2. The Customer is required to post an Expansion Deposit, upon acceptance of this Offer to Connect, for the difference between the actual Expansion Fees and GST and the amount of the Capital Contribution and GST paid by the Customer, in accordance with Toronto Hydro's Initial Economic Evaluation of the Project.

3. This Expansion Deposit is in addition to any other charges that may be payable to Toronto Hydro under this Offer to Connect, or the Conditions of Service, or otherwise.

4. The amount of the Expansion Deposit is set out below.

5. After the facilities are energized, the Expansion Deposit shall be reduced, at the end of each 365-day period, by an amount calculated by multiplying the original Expansion Deposit by a percentage derived by dividing the actual connections completed or materialized in that 365-day period, by the total number of connections contemplated in this Offer to Connect. For information about reduction in the amount of the Expansion Deposit after each 365 day period, please contact Carrie Matthew at (416) 542-3100 ext. 32076.

6. If after five (5) years from the energization date of the facilities, the total number of connections contemplated by the original Offer to Connect have not materialized, Toronto Hydro shall retain any cash held as an Expansion Deposit, or to be entitled to realize on any letter of credit or bond held as an Expansion Deposit and retain any cash resulting therefrom, with no obligation to return any portion of such monies to the Customer at any time.

EXPANSION DEPOSIT:

TOTAL EXPANSION FEES AND GST	**$1,366,132.78**
LESS CAPITAL CONTRIBUTION AND GST	**-$ 97,630.05**
EXPANSION DEPOSIT	**$1,268,502.73**

SCHEDULE E
ALTERNATIVE BID PROCESS AND CONTESTABLE WORK

1. Toronto Hydro advises the Customer that part of the work that will be required for the expansion and connection to the existing distribution facilities includes work for which the Customer may obtain an alternative bid i.e. work that would not involve work with existing Toronto Hydro assets. The work for which the Customer may obtain alternative bid, "Contestable Work" is described below.

2. The Customer must use a contractor for the Contestable Work qualified by Toronto Hydro in accordance with its Conditions of Service. To qualify, contractors shall submit a "Contractor Qualification Application" and meet the requirements posted at: http://www.torontohydro.com/electricsystem/customer_care/cond_of_services/index.cfm at least 30 business days prior to their selection by the Customer to undertake Contestable Work. The Customer shall not be entitled to start performance of the Contestable Work until the contractor has completed its qualification by Toronto Hydro and has been qualified for no less than 30 business days.

3. Toronto Hydro does not make any representation or warranty regarding any contractor selected by the Customer to do any work regardless of whether the contractor has been qualified by Toronto Hydro or not and shall have no liability to the Customer in respect of such work.

4. If the Customer decides to hire a qualified contractor to perform the Contestable Work, the Customer will be required to select, hire and pay the contractor's costs for such work and to assume full responsibility for the construction of all of the Contestable Work.

5. The Customer shall ensure that the Contestable Work is done in accordance with Toronto Hydro's design and technical standards and specifications.

6. The Customer and his qualified contractor shall only use materials that meet the same specifications as Toronto Hydro approved materials (i.e. same manufacturers and same part numbers). Once the Customer has hired a qualified contractor, the Customer may request and obtain from Toronto Hydro the listing of approved materials that may be required for the Contestable Work.

7. The Customer will be required to pay for administering the contract with the qualified contractor, or if agreed by Toronto Hydro, pay Toronto Hydro a fee for performing this activity on its behalf. Upon request if Toronto Hydro is agreeable to performing such activity, Toronto Hydro will advise the Customer of the amount of the fee. Administering the contract includes, among other things, acquiring all permissions, permits and easements.

8. Toronto Hydro shall have the right to inspect and approve all aspects of the facilities constructed by the qualified contractor as part of its system commissioning activities, prior to connecting the expanded facilities to the Toronto Hydro main distribution system. If all of Toronto Hydro's requirements for the Contestable Work, including but not limited to, those set out in Sections 5, 6, and 7 above, have not been completed satisfactorily to Toronto Hydro, acting reasonably, the Project will not be energized, until the Contestable Work is in compliance with all of Toronto Hydro's requirements.

9. If the Customer decides to pursue an alternative bid for the Contestable Work, Toronto Hydro may charge the Customer costs, including, but not limited to, the following, for:
   (a) additional design, engineering or installation of facilities required to complete the Project that are required in addition to the original Offer to Connect; and,
   (b) inspection or approval of the work performed by the contractor hired by the Customer; and
   (c) making the final connection of the new facilities to the Toronto Hydro distribution system.
   ("Additional Costs for Alternative Bid Work").

10. If the Customer decides to hire a qualified contractor to perform the Contestable Work, the Customer must:
    1. Sign an Alternative Bid Agreement;
    2. Hire a qualified contractor;
    3. Pay to Toronto Hydro, the firm amount of Toronto Hydro's Additional Costs for Alternative Bid Work, as set out below;
    4. Provide the Alternative Bid Expansion Deposit as set out below.

11. After the Customer has performed the Contestable Work and Toronto Hydro has inspected and approved the constructed facilities, the Customer shall transfer the expansion facilities that were constructed under the alternative bid option to Toronto Hydro and Toronto Hydro shall pay to the Customer, a transfer price, ("Transfer Price") to be determined, as hereinafter set out.

12. The Transfer Price for the Contestable Work shall be the lower of the Customer's Costs or the amount set out in this Offer to Connect of the Contestable Work. The Customer's Costs shall mean:
    (a) the costs the Customer paid to have the Contestable Work performed, excluding the Variable Connection Work, as provided by evidence satisfactory to Toronto Hydro;
    (b) the Additional Costs for Alternative Bid Work charged by Toronto Hydro.
    Toronto Hydro shall be satisfied that all Customer's Costs shall have been properly incurred.

13. If the Customer does not provide the calculation setting out the Customer's Costs to Toronto Hydro within 30 days of all new facilities being energized, then the amount of the Transfer Price shall be the amount set out in this Offer to Connect for the Contestable Work.

14. Toronto Hydro shall carry out a final economic evaluation after the facilities are energized ("Final Economic Evaluation"). The Final Economic Evaluation shall be based on the amounts used in this Offer to Connect for costs and forecasted revenues, and the amount of the Transfer Price to be paid by Toronto Hydro to the Customer for the Contestable Work, where applicable. A copy of the Final Economic Evaluation shall be provided to the Customer.

15. Any amount payable by the Customer to Toronto Hydro, may be deducted from the Transfer Price owing to the Customer by Toronto Hydro.

16. If the Customer pursues an Alternative Bid, the Customer shall post an Alternative Bid Expansion Deposit in the amount of 10% of the Expansion Deposit as set out in Schedule D.

17. Toronto Hydro will retain the Alternative Bid Expansion Deposit for a warranty period of up to two years. The warranty begins at the end of the Realization Period, defined below.

18. The Realization Period for a Project ends, upon the first to occur of:
    (i) the materialization of the last forecasted connection in the expansion project, or
    (ii) Five (5) years after energization of the new facilities.

19. Toronto Hydro shall be entitled to retain and use the Alternative Bid Expansion Deposit to complete, repairing or bring up to standard the facilities constructed by the Customer, including Toronto Hydro's costs to ensure that the expansion is completed to the proper design, technical standards and specifications, using approved materials and that the facilities operate properly when energized.

20. Toronto Hydro shall return to the Customer the unapplied portion of the Alternative Bid Expansion Deposit, if any, at the end of the two-year warranty period.

21. Upon receipt of notice from the Customer that it intends to hire an alternative bid contractor, Toronto Hydro will provide an Alternative Bid Agreement.

Contestable Work shall mean the following:

Note:

- All Customer-supplied materials must be submitted to Toronto Hydro for approval prior to installation and meet Toronto Hydro Distribution Construction Standards;
- All equipment and underground plant installed must be inspected and approved prior to connection to the Toronto Hydro distribution system;
- Customer is responsible for applying for and obtaining any necessary City road cut permits.

Description of Work to Be Completed by the Customer:

- Supply & install:
  - All necessary duct structures, cable chambers, tap boxes, splice vaults, submersible transformer vaults, switchgear foundations on Harrison Garden extension and Oakburn Crescent to Avondale Avenue cable riser poles;
  - All primary cables complete with terminations thereof, except final connection to the Toronto Hydro distribution system;
  - All secondary cables complete with terminations thereof, except final connection to the Toronto Hydro distribution system;
  - All switchgears, submersible transformers;
  - All cable risers completed to the installation of the first section of U-Guard on the termination poles.

Description of Work to Be Completed by Toronto Hydro:

- All necessary engineering design and inspections and material approvals;
- Primary cable termination connections to the existing Toronto Hydro distribution system on Harrison Garden Blvd;
- The necessary switching and outage arrangements to allow connection to existing distribution system.

Toronto Hydro's Additional Costs for Alternative Bid Work	**$ 9,800.00**
GST (5%)	**$ 490.00**
TOTAL ADDITIONAL COSTS FOR ALTERNATIVE BID WORK, GST	**$ 10,290.00**
ALTERNATIVE BID EXPANSION DEPOSIT	**$126,850.27**

SCHEDULE F
GENERAL TERMS AND CONDITIONS
of OFFER TO CONNECT

1. ASSIGNMENT

1.1 Neither party may assign this Offer to Connect without the prior written consent of the other party, such consent not to be unreasonably withheld.

2. DEMARCATION POINTS

2.1 The ownership and operational demarcation points of the Project shall be identified as such by Toronto Hydro on the as-constructed drawings.

2.2 In accordance with Toronto Hydro's Conditions of Service, the Customer is responsible for maintaining, repairing and replacing, in a safe condition satisfactory to Toronto Hydro, all the Customer's civil infrastructure on private property that is deemed required by Toronto Hydro to house Toronto Hydro's Connection Assets, including but not limited to poles, underground conduits, cable chambers, cable pull rooms, transformer rooms, transformer vaults and transformer pads.

3. DISPUTE RESOLUTION

3.1 Any controversy between the parties arising under this Offer to Connect not resolved by discussions between the parties shall be determined by an arbitration tribunal convened pursuant to a notice of submission given either by Toronto Hydro or the Customer.

3.2 The notice shall name one arbitrator.

3.3 The party receiving the notice shall, within 10 days of *notice to the other, name the second arbitrator or*, if it fails to do so, the party giving the notice of submission shall name the second arbitrator.

3.4 The two arbitrators appointed shall name the third arbitrator within 10 days, or if they fail to do so within that time period, either party may make application to the applicable court for appointment of the third arbitrator.

3.5 Any arbitrator selected to act under this Offer to Connect shall be *qualified by education, training and experience* to pass on the particular question in dispute and shall have no connection to either of the parties other than acting in previous arbitrations.

3.6 The arbitration shall be conducted in accordance with the provisions of *The Arbitration Act, 1991* S.O. c-17, as amended.

3.7 The decisions of the arbitration tribunal shall be made in writing and shall be final and binding on the parties as to the questions submitted and the parties shall have no right of appeal therefrom.

4. EASEMENTS

4.1 Upon request by Toronto Hydro, the Customer shall, at its own expense, execute, register and provide a solicitor's opinion on title in a form acceptable to Toronto Hydro, within the time period specified by Toronto Hydro, and subject only to those encumbrances permitted in writing by Toronto Hydro, such easement agreements as Toronto Hydro may require for the installation and continued existence of any electrical or telecommunication plants or access to same for the life of such plant or as otherwise required to perform its responsibility as a distribution company.

4.2 The customer acknowledges that in order for an easement to be registered, it shall be required, at its expense, to arrange for and register any necessary documentation required by the appropriate Land Registry Office, including a Reference Plan, prepared by an Ontario Land Surveyor, describing the extent of the lands required for the easement.

5. FORCE MAJEURE

5.1 Force Majeure means any act, event, cause or condition that is beyond Toronto Hydro's reasonable control, including wind, ice, lightning or other storms, earthquakes, landslides, floods, washouts, fires, explosions, contamination, breakage of equipment or machinery, delays in transportation, strikes, lockouts or other labour disturbances, civil disobedience or disturbances, war, acts of sabotage, blockades, insurrections, vandals, riots, epidemics, loss of any relevant license or a declaration of force majeure by Hydro One Networks Inc., or any successor, under any agreement which Hydro One Networks Inc., or any successor, has with Toronto Hydro in connection with any work to be performed by Toronto Hydro under this Offer to Connect.

5.2 If by reason of Force Majeure, Toronto Hydro is unable, wholly or partially, to perform or comply with any or all of its obligations under, this Offer to Connect, it shall be relieved of such obligations, and any liability (including liability for any injury, damage or loss to the Customer caused by such event of Force Majeure) for failing to perform or comply with such obligations, during the continuance of Force Majeure.

6. LIMITATION OF LIABILITY

6.1 Toronto Hydro shall not be responsible for the acts or omissions of the Customer or its employees, contractors, subcontractors or agent.

6.2 Neither Toronto Hydro nor any of its employees, agents, officers, directors or other representatives ("*Representatives*") shall be liable for any loss, injury or damage to persons or property caused in whole or in part by negligence or fault of the Customer, or any of the Customer's Representatives, contractors or subcontractors.

6.3 Notwithstanding any other provision in this Offer to Connect, or any applicable statutory provision Toronto Hydro and its Representatives shall only be liable for any *damages which arise directly out of the wilful* misconduct or negligence of Toronto Hydro or its Representatives.

6.4 Neither Toronto Hydro nor any of its Representatives shall be liable under any circumstances whatsoever for any loss of profits or revenues, business interruption losses, loss of contract or loss of goodwill, or for any indirect, consequential, incidental or special damages, including but not limited to punitive or exemplary damages, arising from any breach of this Offer to Connect, fundamental or otherwise, or from any tortious acts, including the negligence or willful misconduct of it or its Representatives, however arising.

6.5 No action arising out of this Offer to Connect, regardless of the form thereof, may be brought by either party more than two (2) years following the date the cause of action arose, provided however that, subject to any applicable law, Toronto Hydro may bring an action for non-payment of amounts, or non-delivery of Expansion Deposits, required to be paid or delivered by the Customer under this Offer to Connect at any time.

6.6 The Customer shall indemnify and save harmless Toronto Hydro and its Representatives from any action, claim, penalty, damages, losses, judgements, settlements, costs and expenses or other remedy brought by any party or governmental authority, arising out of or resulting from any negligent act or failure to act or any willful misconduct by the Customer or any of its Representatives.

6.7 All of the provisions of Sections 6.1, 6.2, 6.3, 6.4, 6.5 and 6.6 shall survive the termination of this Offer to Connect.

7. NOTICE

7.1 Any notice to be given under this Offer to Connect shall be in writing and delivered by prepaid registered mail, hand, courier or facsimile to the contact for the parties as set forth in the Offer to Connect.

7.2 Delivery by facsimile shall be deemed received on the day following transmittal provided the facsimile is received as confirmed by the issuance of a confirmation receipt at the point of transmission.

7.3 Delivery by hand or courier shall be deemed received on the date delivered.

7.4 Delivery by prepaid registered mail shall be deemed received on the 5th business day after mailing.

7.5 Either party may change its address for notice by providing written notice of that change to the other party.

8. REVISED PLANS

8.1 If the Customer submits revised plans or requires additional design work, Toronto Hydro may provide, at cost, a new offer based on the revised plans or the additional design work.

8.2 If the Plans are revised at any time, after acceptance of this Offer to Connect shall be withdrawn or terminated immediately, despite any acceptance by the Customer. A new Offer to Connect will only be provided to the Customer upon payment in the amount of $3,500.00 that must be paid prior to the new Offer to Connect being provided to the Customer.

9. SECURITY INTEREST

9.1 As security for its obligation under this Offer to Connect, the Customer grants to Toronto Hydro a present and continuing security interest in, and lien on (and right of set-off against), and assignment of all money, cash collateral and cash equivalent collateral and any and all proceeds resulting therefrom or the liquidation thereof, delivered as an Expansion Deposit or otherwise pursuant to the terms of this Offer to Connect, or for the benefit of Toronto Hydro.

9.2 The Customer agrees to take such action as Toronto Hydro reasonably requires in order to perfect Toronto Hydro's first-priority security interest in, and lien on (and right of set-off against), such collateral and any and all proceeds resulting therefrom or from the liquidation thereof.

9.3 Toronto Hydro shall apply the proceeds of the collateral realized upon the exercise of any such rights or remedies to reduce Customer's obligations under this Offer to Connect (Customer remaining liable for any amounts owing to Toronto Hydro after such application), subject to Toronto Hydro's obligation to return any surplus proceeds remaining after such obligations are satisfied in full.

10. TAXES

10.1 Unless specified, none of the amounts payable or deliverable under the Offer to Connect include goods and services taxes or any other taxes that may be payable.

10.2 The Customer shall pay all such taxes in accordance with applicable laws.

11. TERMINATION

11.1 Each of the following shall constitute an event of default ("Event of Default"):

(i) the Customer fails to make any payment at the time specified for payment in this Offer to Connect and such failure has not been remedied within 4 days notice of such failure;

(ii) the Customer fails to deliver any Expansion Deposit, including a renewal, or additional Expansion Deposit within the time period specified for delivery in this Offer to Connect;

(iii) the Customer fails to execute and deliver any agreement, or deliver any other document, within the time period specified for execution and/or delivery;

(iv) the Customer fails to commence the Expansion Work within 1 year from the date of this Offer to Connect;

(v) the Customer cancels the Project for any reason;

(vi) the Customer fails to comply with any other covenant or obligation in this Offer to Connect and such failure has not been remedied (where it is possible to remedy such failure) within 15 days of the initial failure to perform;

(vii) a resolution has passed, or documents filed at an office of public record, for the merger, amalgamation, dissolution, termination of existence, liquidation or winding-up of the Customer, unless the prior consent of Toronto Hydro has been obtained;

(viii) a receiver, manager, receiver-manager, liquidator, monitor or trustee in bankruptcy of the Customer or any of its property is appointed by any government authority, and such receiver, manager, receiver-manager, liquidator, monitor or trustee is not discharged within 30 days of appointment; or, if by decree of any government authority, the Customer is adjudicated bankrupt or insolvent, or any substantial part of its property is taken, and such decree is not discharged within 30 days after the entry thereof; or, if a petition to declare bankruptcy or to reorganize such party pursuant to any applicable law is filed against the Customer and is not dismissed within 30 days of such filing;

(ix) the Customer files, or consents to the filing of, a petition in bankruptcy or seeks, or consents to, an order or other protection under any provision of any legislation relating to insolvency or bankruptcy ("Insolvency Legislation"); or files, or consents to the filing of, a petition, application,

answer or consent seeking relief or assistance in respect of itself under provision of any Insolvency Legislation; or files, consents to the filing of, an answer admitting the material allegations of a petition filed against it in any proceeding described herein; or makes an assignment for the benefit of its creditors; or admits in writing its inability to pay its debts generally as they become due; or consents to the appointment of a receiver, trustee, or liquidator over any, or all, of its property.

11.2 Upon the occurrence of an Event of Default, Toronto Hydro may, at its sole option, do any one or more of the following:

(i) exercise any of the rights and remedies of a secured party including any such rights and remedies under law then in effect;

(ii) exercise its rights of set-off against any and all property of the Customer in the possession of Toronto Hydro;

(iii) declare the full amounts of the Expansion Fees and OM&A Costs that are unpaid and unrecovered as due and owing ("Accelerated Amounts");

(iv) draw on any cash, or draw under any letter of credit, then held by or for the benefit of Toronto Hydro as an Expansion Deposit or Capital Contribution or otherwise, free from any claim or right of any nature whatsoever of the Customer, including any equity or right of purchase or redemption by the Customer, to cover all costs incurred on, or prior to, the date of termination, including costs for materials ordered for the expansion, storage costs and facilities removal costs and any amounts owing under this Offer to Connect, including the Accelerated Amounts; and/or

(v) terminate this Offer to Connect, provided that, any termination shall not affect any obligations incurred prior to the effective date of termination or any other rights that Toronto Hydro may have arising out of any rights or obligations that are expressed to survive termination of this Offer to Connect.

12. TITLE AND RISK OF LOSS

12.1 Notwithstanding that Toronto Hydro may install equipment and materials under this Offer to Connect to which title is intended to pass to the Customer, title to such equipment or materials shall be transferred to the Customer, and risk of loss shall be assumed by the Customer, upon delivery to the Property.

12.2 Toronto Hydro shall be entitled to receive reasonable compensation for storing any materials or equipment not delivered to the Customer due to a delay caused by the Customer and such equipment or materials shall be held at the Customer's risk.

13. WARRANTIES

13.1 Toronto Hydro warrants that the services it provides are in accordance with Good Utility Practice.

13.2 Except as expressly set forth in this Offer to Connect, Toronto Hydro provides no warranties, for fitness for purpose or otherwise, and whether statutory or otherwise, to the Customer.

14. MISCELLANEOUS

14.1 This Offer to Connect, including the Schedules attached, shall constitute the entire agreement between the parties, and there are no other agreements or understandings, either written or oral, to conflict with, alter or enlarge this Offer to Connect unless agreed to in writing between the parties subsequent to the effective date of this Offer to Connect.

14.2 Failure or delay by Toronto Hydro in enforcing any right under, or provision of this Offer to Connect shall not be deemed a waiver of such provision or right with respect to the instant, or any previous, or subsequent, breach.

14.3 This Offer to Connect shall be governed by the laws of the Province of Ontario and the laws of Canada as applicable.

14.4 Toronto Hydro shall be entitled to access at all reasonable times to any of the Customer's properties to perform the services in this Offer to Connect.

14.5 Interest on unpaid amounts shall bear interest at the rate of 1.5 percent calculated and compounded monthly (19.56 percent per annum) at and from the due date up to and including the date of payment in full of such amount, together with all interest accrued to the date of payment.

14.6 Toronto Hydro and the Customer agree to execute and deliver such further documents as may be required for either party to fulfill its obligations and enforce its rights under this Offer to Connect.

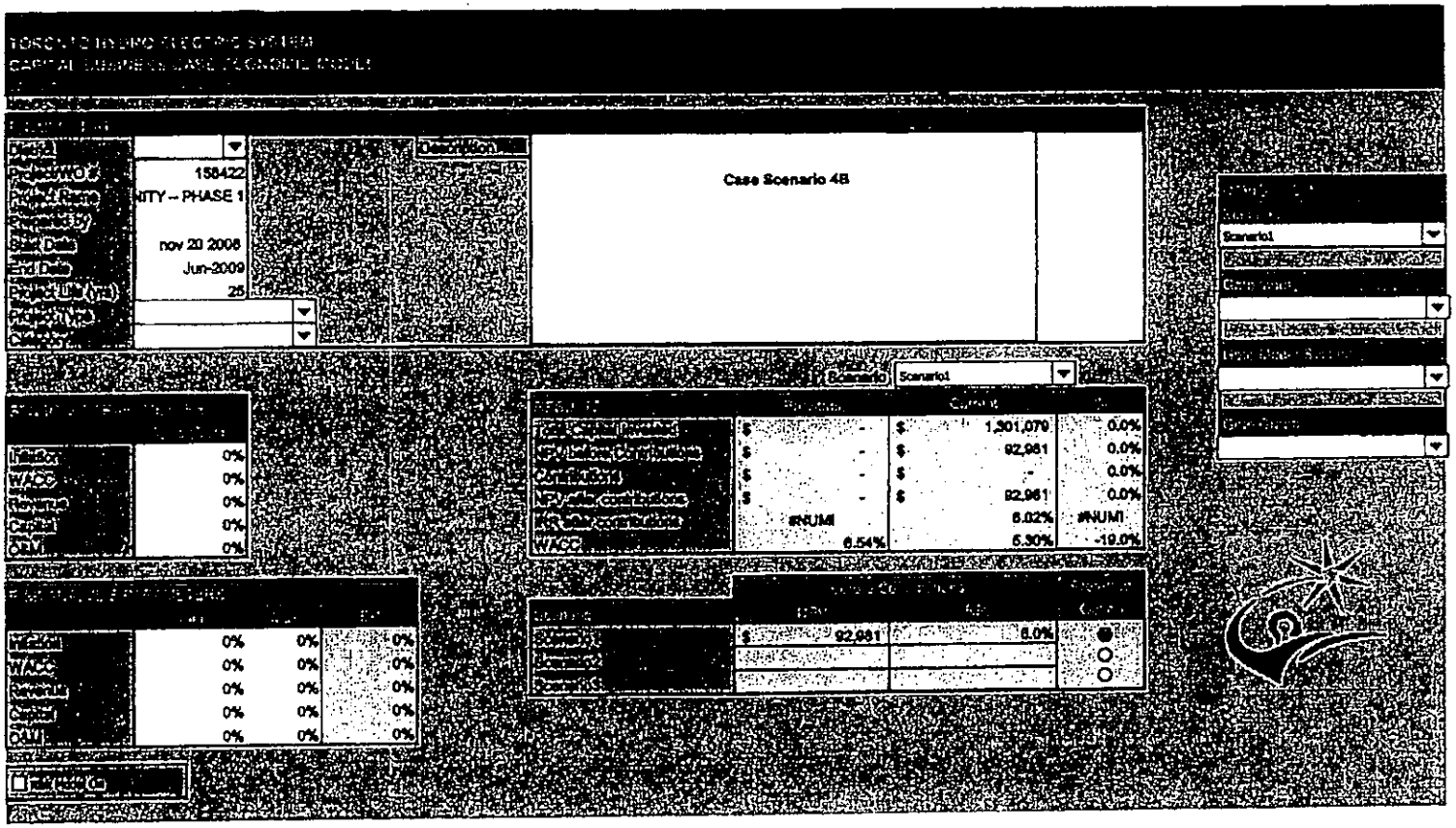
14.7 If any provision of this Offer to Connect is declared illegal, invalid or unenforceable for any reason whatsoever, to the extent permitted by law, such illegality, invalidity or unenforceability shall not affect the legality, validity or enforceability of any of the other provisions.

14.8 This Offer to Connect and the obligations of the parties under it are subject to all applicable present and future laws, rules, regulations and orders of any regulatory or legislative body or other duly constituted authority having jurisdiction over Toronto Hydro or the Customer.

14.9 Time shall be of the essence.

14.10 If there is a conflict between this Offer to Connect and Toronto Hydro's Conditions of Service, this Offer to Connect shall govern.

	A	B	C	D	E	F	G	H	I	J	K
1	REQUEST FOR ECONOMIC EVALUATION (NPV CALCULATION)										
2	January 23, 2007 Version										
3											
4	Important: Enter Data in Yellow Boxes only, including zero values										
5											
6											
7	Requested by:	DAN STANOEV						Date:		nov 20 2008	
8											
9	Tel. Ext	27818									
10											
11	Supervisor Approval:	Dave Graham									
12											
13	Project Information:										
14	Address	AVONSHIRE COMMUNITY - PHASE 1						WO Number		158422	
15											
16	Service Type (as applicable)	(say 'x',		Res		✔	Commercial				Industrial
17											
18					1,900	kW	Power Factor = 90%				
19											
20–21	Transformer Size	[illegible]	kVA		Incremental Load	2000.0	kVA		Total Load	2000.0	kVA
22											
23	Customer Class		4		Expected In-Service Date					Jun-09	
24											
25–26	Type of Account Meter	Monthly demand > 1000 kW and up to 5000 kW							No. of Meters Installed	792	
27											
28											
35											
36											
37	EXPANSION FEES - ENHANCEMENT COSTS										
38		KW				Avg Charges ($)					
39											
40	O/H and U/G	1,900			X	$260.00			=	$	494,000.00
41											
42											
43											
44	Enhancements Costs								=	$	494,000.00
45											
46	NETWORK VAULT COST SHARING								=	$	
47											
48	IMPARTED EXPANSION COST								=	$	494,000.00
49											
50	MATERIALS									$	383,256.09
51	LABOUR (DESIGN, ENG & CONSTRUCTION)									$	230,880.43
52	EQUIPMENT									$	28,293.96
53	BASIC CONNECTION FEE CONNECTION TRANSFORMATION COST									$	38,780.00
54	TRANSFER PRICE									$	
55	ADDITIONAL COST									$	
56	ADMIN/OVERHEAD COST								=	$	126,868.36
57	GRAND TOTAL									$	1,301,078.84
58										[illegible]	
59											
60											
61											
62											
63											
64											
65	Customer Connection Forecast - Number of Installed Meter										
66	Customer Class	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]			
67	Residential		41	746	0	0	0	[illegible]			
68	General Service (< 50 kW)		1	0	0	0	0	[illegible]			
69	General Service (50 - 999 kW)	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]			
70	General Service (1000 - 4999 kW)	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]			
71	Large User (5000+ kW)	[illegible]	0	0	0	0	0	[illegible]			
72											
73	Total Customer Monthly Peak Demand - kva - (Class 3, 4 and/or 5)										
74	Customer Class	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]		Contrib.	
75	Residential	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]		[illegible]	
76	General Service (< 50 kW)	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]		[illegible]	
77	General Service (50 - 999 kW)	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]		[illegible]	
78	General Service (1000 - 4999 kW)	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]		0.0	
79	Large User (5000+ kW)	[illegible]	0	0	0	0	0	0		0.0	
80											
81	Notes:										
82											


Case Scenario 4B
Scenario1
nov 20 2008
Jun-2009
25
$ 1,301,070
$ 92,981
$ 92,981
#NUM!
6.54%
6.30%
-19.0%
$ 92,981
6.0%

TORONTO HYDRO-ELECTRIC SYSTEM
CAPITAL BUSINESS CASE ECONOMIC MODEL

A. MODEL PARAMETBASE ASSUMPTIONS

Item	
Current Year	2005
Income Tax Rate	36.12%
LCT tax rate	0.13%
PCT tax rate	0.30%
Inflation	0.00%
WACC	6.30%

B. ASSET CLASSES

	Description		
1	Dist. System Assets (class1)	12.5	8%
2	Buildings (class 1)	50	4%
3	Computer Eqt. (class 10)	4	45%
4	Applications Software (class 12)	5	100%
6	Office Equipment (class 8)	10	20%

C. CUSTOMER CLASSES

	Description
1	Residential
2	General Service (< 50 kW)
3	General Service (50 - 999 kW)
4	General Service (1000 - 4999 kW)
5	Large User (5000+ kW)

D. CUSTOMER RATES

	Customer Class								
1	Residential	$	149.14	0.0164	$	48.8%	697,210	%	0%
2	General Service (< 50 kW)	$	206	0.0184	$	17.5%	66,606	%	0%
3	General Service (50 - 999 kW)	$	321	0.0068	$	20.1%		%	0%
4	General Service (1000 - 4999 kW)	$	6,693	0.0000	$	17.3%		%	0%
5	Large User (5000+ kW)	$	33,004	0.0060	$	6.3%		%	0%

E. AVERAGE CUSTOMER DEMAND

	Customer Class	
1	Residential	6,970
2	General Service (< 50 kW)	37,036
3	General Service (50 - 999 kW)	
4	General Service (1000 - 4999 kW)	
5	Large User (5000+ kW)	

G

% Engineering Admin Reclass	
Reclassed Item	
Engineering Admin	10.7%

AVONSHIRE

4800 DUFFERIN STREET
TORONTO, ONTARIO
M3H 5S9

March 6, 2009

Toronto Hydro-Electric System Limited
14 Carlton Street
Asset Management
3rd Floor, 500 Commissioner Street
Toronto, ON M4M 3N7

Attention: Jim Trgachef, Supervisor

Dear Sir:

Re: Residences of Avonshire Inc.
Address: 100, & 115 Harrison Garden Boulevard and 5,7 & 9 Oakburn Crescent

---

You will recall that you hosted a meeting last fall with representatives of Deltera Inc. at which time the discussion turned to the metering of the planned condominium projects which Deltera and related companies are and will be building in Toronto. At this meeting, you advised that effective February 28, 2008, Toronto Hydro was the only entity that had the right to own and supply meters for any of our projects and that no other options for metering were available. As a result of this, Residences of Avonshire Inc. request for an offer to connect in respect of the above noted building did not contemplate this building being suite metered by any entity other than Toronto Hydro and the offer to connect received contemplates Toronto Hydro installing individual suite meters.

It has come to our attention that contrary to the advice received, Residences of Avonshire Inc. does have the right under Subsection 53.17 of the *Electricity Act, 1998* to choose to have this project smart sub-metered by a licensed sub-metering company. Residences of Avonshire Inc. is desirous of considering the sub-metered option and would have requested an offer to connect which contemplated the above project being smart sub-metered but for the information provided at the meeting at your offices last fall.

We therefore require that Toronto Hydro provide a further offer to connect which contemplates the above project being smart sub-metered by a licensed sub-metering company This offer should specifically contemplate that Toronto Hydro will install a bulk meter and Residences of Avonshire Inc 's intention to smart sub-meter the units at the project downstream of the bulk meter.

I would appreciate confirmation that an appropriate Offer to Connect will be prepared and forwarded to Residences of Avonshire Inc. within the next two weeks. Given your familiarity already with the project, we trust that you will make every effort to meet this timeframe

Yours truly,
RESIDENCES OF AVONSHIRE INC.
Per:

Giuseppe Bello
Project Manager

Colin J. McLorg
14 Carlton St.
Toronto, Ontario
M5B 1K5

Telephone: 416-542-2513
Facsimile: 416-542-2776
cmclorg@torontohydro.com

toronto hydro
electric system

2009 April 22

Mr. Giuseppi Bello
Project Manager
Residences of Avonshire Inc
4800 Dufferin Street
Toronto, ON M3H 5S9
via email

Dear Mr. Bello:

RE: Metering and Offers to Connect for 'Avonshire' Projects

Thank you for your letter of March 10, 2009 to our Mr. Trgachef. Unfortunately, conflicting address information in your letter resulted in delays in its delivery. Your letter, received by me April 20, has been referred to me for reply.

Your letter generally concerns Toronto Hydro's policy and practice regarding offers to connect and smart metering for new condominiums, particularly those mentioned in the subject line of your letter. Your letter goes on to request that Toronto Hydro prepare a revised Offer to Connect for those condominiums based on a bulk meter / sub-metering configuration. As explained below, Toronto Hydro does not offer that connection configuration for new condominiums and therefore will not prepare a revised Offer to Connect on that basis.

The Ontario Energy Board ('OEB') regulates Toronto Hydro rates and service offerings. The OEB has defined the term 'smart metering' as follows: "The Board uses the term "smart metering" to describe the situation in which a licensed distributor individually meters every condominium unit (and the condominium's common areas) with a smart meter. In this scenario, each unit will become a residential customer of the licensed distributor and each unit and the common areas must have a separate account with the licensed distributor.")[1]

As set out in Toronto Hydro's Conditions of Service, for condominium projects commenced with Toronto Hydro on and after February 28, 2008 ('new condominiums'), Toronto Hydro will provide smart metering as defined by the OEB (i.e., individual unit or suite metering

[1] [EB-2007-0772 Notice of Proposal etc. issued January 8, 2008]

compliant with smart metering regulations) for all separate units and for common areas ('individually metered units') at no charge to the developer. Upon registration and creation of the condominium corporation, the holders of the individually metered units become the direct customers of Toronto Hydro.

Toronto Hydro (along with other licensed distributors) has been specifically authorized to conduct smart metering as part of its standard, licensed distribution activities. The OEB has stated as follows:

> "The Board has previously determined in rates proceedings related to smart metering activities of certain distributors that smart metering is a part of the distribution activity that is already covered by distributors' distribution licences. As there is no distinction between smart metering condominiums and other residences, the Board has determined that only licensed distributors can smart meter condominiums. In the Board's view, this is in keeping with the current regulatory framework in the electricity sector.
>
> The Board is also of the view that Regulation 442 allows all licensed distributors to smart meter in condominiums."[2]
>
> "As set out in the January Notice, the Board remains of the view that smart metering is a distribution activity, and that the Electricity Act and Regulation 442 taken together allow all licensed distributors to undertake smart metering in condominiums. The distributor would do so as a distribution activity within its licensed service area."[3]

Toronto Hydro therefore asserts that it is authorized to connect new condominiums in the manner described in its Conditions of Service and that it has no obligation to do otherwise.

The statement of Toronto Hydro's position in this matter is not entirely correct in your letter. Specifically, you state your understanding that Toronto Hydro advised you that "Toronto Hydro was the only entity that had the right to own and supply meters for any of our projects and that no other options for metering were available."

While it is the case that ultimately Toronto Hydro will own the metering infrastructure and will attach the individually metered units as direct customers, Toronto Hydro's Conditions of Service provide for alternative bids for the installation of meters and do not preclude the installation of an additional sub-metering system, should the developer or condominium wish to install one, provided it does not interfere with Toronto Hydro's equipment.

Your request for a further Offer to Connect assuming bulk metering is based on an incorrect interpretation of Section 53.17 of the *Electricity Act,* which you state contradicts Toronto Hydro's advice referred to above. In fact, that Section provides as follows:

> "Despite the Condominium Act, 1998 and any other Act, a distributor and any other person licensed by the Board to do so shall, in the circumstances prescribed by regulation, install a smart meter, metering equipment, systems and technology and associated equipment, systems and technologies or smart sub-metering systems, equipment and technology and any associated equipment, systems and technologies of a type prescribed by regulation."

Section 53.17 of the *Electricity Act* does not contradict Toronto Hydro's position and is irrelevant to this issue, since with respect to new condominiums, it does not prohibit a

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[2] [EB-2007-0772 Notice of Proposal etc, January 8, 2008, pages 2-3]

[3] [EB-2007-0772 Notice of Proposal etc, June 10, 2008, pages 4]

distributor from installing smart metering, nor require a non-distributor to provide sub-metering, but rather goes to the requirement that whatever equipment is installed be of a type required by regulation. Furthermore, it clearly does not establish a right on the part of any person to install sub-metering equipment. Sub-metering is referred to because such configurations are allowed, but not required, in the case of existing condominiums already fitted with bulk meters.

In summary, nothing with respect to new condominiums in Toronto Hydro's metering or connection practice or in its Conditions of Service is out of compliance with Code, regulation, or legislation. The OEB has expressly concluded that smart metering of condominiums is a distribution activity authorized by the existing licenses of distributors, and has not established any obligation on distributors to provide for sub-metering configurations in new condominiums.

For these reasons Toronto Hydro does not accept the request set out in your letter. Please contact me if you have concerns or questions around any of these matters.

Yours truly,

(Original signed by)

Colin McLorg

Manager, Regulatory Policy and Relations

416-542-2513

cmclorg@torontohydro.com

February 2, 2009

toronto hydro electric system

Metrogate Inc.
4800 Dufferin Street
Toronto, Ontario M3H 5S9

Attention: Lou Tersigni

Dear Sir:

Re: Metrogate Inc. development of Solaris at Metrogate, Phase I and II,
Ventus at Metrogate, Phases I and II, and
Metrogate Townhouses
as legally described in PIN's 06164-0466 (LT), 06164-0469 (LT), 06164-0470 (LT), 06164-0472 (LT),. and 06164-0473 (LT) ("Property")
1512 high-rise residential units (1512 Toronto Hydro suite meters)
74 townhouses
Toronto Hydro Customer Class 4
Toronto Hydro Project No. P0016652 Work Order No. 170242 ("Project")

Toronto Hydro-Electric System Limited ("Toronto Hydro") acknowledges receipt of Metrogate Inc.'s ("Customer") written request for connection of the Project to the Toronto Hydro main distribution system.

The Customer has represented to Toronto Hydro that 1586 residential units will be constructed and connected to the Toronto Hydro main distribution system and the estimated increased demand load attributable to the Project will be 3,100 kW ("Estimated Incremental Demand").

In order to connect the Project, an expansion to the Toronto Hydro main distribution system will be needed.

Based on the plans dated April 1, 2008 ("Plans") this document, including all Schedules attached, is Toronto Hydro's firm Offer to Connect ("Offer to Connect") as required by the Distribution System Code ("Distribution System Code") established by the Ontario Energy Board ("OEB").

In addition to the obligations set forth in this Offer to Connect, the Customer shall be bound by and required to comply with all provisions of the Conditions of Service filed by Toronto Hydro with the OEB. A copy of the Conditions of Service can be obtained at www.torontohydro.com.

Terms used in this Offer to Connect shall have the meaning ascribed thereto in the Distribution System Code and the Conditions of Service unless otherwise defined herein.

The following Schedules attached hereto form a part of this Offer to Connect:

Schedule A – Connection Work and Fees;
Schedule B – Expansion Work and Fees;
Schedule C – Capital Contribution Requirements and Economic Evaluation;
Schedule D – Expansion Deposit;
Schedule E – Alternative Bid Process and Contestable Work;
Schedule F – General Terms and Conditions.

A Capital Contribution, as described in Schedule C, will not be required from the Customer.

An Expansion Deposit, as described in Schedule D, will be required from the Customer.

This Offer to Connect includes Contestable Work for which the Customer may obtain an alternative bid as described in Schedule E.

Based on the Plans and information provided to Toronto Hydro, as of the date of this Offer to Connect, an easement will be required to connect the Project. General easement requirements are set out under the heading "Easements" in Schedule F, General Terms and Conditions.

If the terms and conditions of this Offer to Connect are acceptable to the Customer, a duly authorized officer of the Customer shall sign the duplicate copy and return it to Toronto Hydro within 60 days of the date set forth above. If a signed copy is not returned to Toronto Hydro within that time period, Toronto Hydro reserves the right to revoke this Offer to Connect without further notice to the Customer. The Customer is advised that Toronto Hydro requires a minimum of 24 weeks, if not more ("lead time") to complete the Project, after receiving the signed Offer to Connect from the Customer, and, if necessary the Customer should make arrangements to return the signed Offer to Connect earlier, to accommodate the required lead time.

If the expansion work for this Project has not commenced within one (1) year from the date set forth above, Toronto Hydro has the right to terminate this Offer to Connect in accordance with its rights of termination as set out herein.

Any notice, communication, inquiry and payment regarding this Offer to Connect shall be directed as follows:

To: Toronto Hydro-Electric System Limited
Asset Management – 3rd Floor, 500 Commissioners Street
Toronto, Ontario M4M 3N7
Attention: Jim Trgachef, Supervisor
Standards and Policy Planning
Telephone (416) 542-2514, Facsimile: (416) 542-2731

To: The Customer at the address set forth below:
Metrogate Inc.
4800 Dufferin Street
Toronto, Ontario M3H 5S9
Attention: Lou Tersigni
Telephone: (416) 736-2545, Facsimile: (416) 661-8923

All payments and security as may be required hereunder shall be due and payable, or deliverable, upon acceptance of this Offer to Connect by the Customer.

Please sign in the appropriate place below and return one signed copy, and all payments and security as may be required, to the address indicated above.

Yours truly,

Toronto Hydro-Electric System Limited

Per: _____
Name: Anthony Haines,
Title: President
I have authority to bind the Corporation.

Metrogate Inc. acknowledges its understanding of, accepts, agrees to comply with, and be bound by, all of the terms and conditions of this Offer to Connect, which include the provisions set forth above and all of the Schedules attached. The Customer acknowledges that by accepting this Offer to Connect a binding agreement is created and, upon signing, this Offer to Connect constitutes a legally valid and binding obligation of the Customer, enforceable in accordance with its terms.

The Customer confirms that it will not be obtaining alternative bids for the Contestable Work described in Schedule E.

Metrogate Inc.

Per:_____ Date:_____
Name:
Title:
I have authority to bind the Corporation.

OR

Metrogate Inc. confirms it is not accepting Toronto Hydro's Offer to Connect and it will be proceeding by way of an alternative bid process for the Contestable Work, as described in Schedule E.

Metrogate Inc.

Per:_____ Date:_____
Name:
Title:
I have authority to bind the Corporation.

SCHEDULE A
CONNECTION WORK and FEES

1. Connection Assets are the assets between the point of connection to the Toronto Hydro main distribution system and the ownership demarcation point as defined in Table 1.3 of Toronto Hydro's Conditions of Service.

2. The Connection Work and Connection Fees to supply and install the Connection Assets for the Project are described below.

3. Toronto Hydro shall recover costs associated with the installation of Connection Assets through:
   (a) Basic Connection Fees which are part of the Economic Evaluation; and
   (b) Variable Connection Fees collected directly from the Customer. The variable Connection Fees arise from the Variable Connection Work and are in addition to the Basic Connection Fees.

4. The Variable Connection Fees are payable by the Customer to Toronto Hydro pursuant to this Offer to Connect upon acceptance of this Offer to Connect by the Customer, or, if the Customer pursues an alternative bid process described in Schedule E, to the Customer's qualified contractor.

Connection Work shall mean the following:

- All necessary engineering design, drawings and inspections;
- Supply & install:
  - U/G road crossing and primary cable.
- Supply:
  - All switching and isolations;
  - All primary connections and terminations in transformer and to the underground primary distribution system;
  - All transformation, switchgear and termination as required.

NOTE: Customer is responsible for:

- Trenching, supplying and installing a 3Wx2H concrete encased duct structure on private Property from street line to transformer building vaults.

Connection Fees:

a) A Basic Connection Fee of $1,310.00 per commercial meter connection and $850.00 per residential meter connection has been included in Toronto Hydro's Economic Evaluation.

b) Variable Connection Fees

Variable Connection Fees	$76,154.01
GST 5%	$ 3,807.70
TOTAL CONNECTION FEES, GST	**$79,961.71**
Less Deposit and GST received	**- $ 0**
BALANCE OUTSTANDING	**$79,961.71**

The Connection Fees are based on the Connection Work being done during non-winter conditions. If the Customer requires the Connection Work to be done during winter conditions that would result in additional costs, Toronto Hydro will advise the Customer of the estimated additional costs and if the Customer provides a written request to Toronto Hydro to proceed, a Project Invoice will be issued and payment must be received by Toronto Hydro prior to the commencement of any of the applicable work.

SCHEDULE B
EXPANSION WORK AND FEES

1. The Uncontestable Expansion Work and Contestable Expansion Work that must be performed to connect the Project to the Toronto Hydro main distribution system, and corresponding Fees and Total Expansion Fees ("Total Expansion Fees") are described below.

2. The Customer will also be responsible for the payment of the operating, maintenance and administration costs ("OM&A Costs") of the Project, including applicable taxes. The OM&A Costs are included in the Economic Evaluation.

3. The Expansion Fees and OM&A Costs are recovered by Toronto Hydro by way of Capital Contribution if applicable, as described in Schedule C and the increased distribution revenues attributable to the Project, which are received by Toronto Hydro ("Incremental Revenues").

Uncontestable Expansion Work shall mean the following:

- All necessary engineering design, drawings and inspections;
- Supply & install:
  - Primary terminations and connections to the existing Toronto Hydro distribution system;
  - Reconfiguration of distribution and supply to the existing hotel;
  - The necessary switching and outage arrangements to allow connections to existing Toronto Hydro distribution system.

Uncontestable Expansion Fees:	
Enhancement Costs (3,100 x $260 per kW)	$ 806,000.00
Materials	$ 40,800.00
Labour (engineering design, inspections)	$ 43,800.00
Equipment	$ 3,800.00
Basic Connection Charge (74 x $850.00 and 11x $1,310.00 per meter connection)	$ 77,310.00
Overhead (including administration)	$ 104,070.14
TOTAL UNCONTESTABLE EXPANSION FEES	**$1,075,780.14**

Contestable Expansion Work shall mean the following:

- Supply & install:
  - All necessary duct structures, cable chambers, tap boxes, splice vaults, submersible transformer vaults, switchgear foundations on Village Green Square, Street 'A', Street 'B', Street 'C' and an extension to existing Toronto Hydro distribution system on Village Green Square.

Contestable Expansion Fees:	
Materials	$ 407,657.24
Labour (construction)	$ 213,180.32
Equipment	$ 29,568.46
Overhead (including administration)	$ 69,658.48
TOTAL CONTESTABLE EXPANSION FEES	**$ 720,064.50**
TOTAL UNCONTESTABLE EXPANSION FEES	**$1,075,780.14**
TOTAL EXPANSION FEES (CONTESTABLE AND UNCONTESTABLE)	**$1,795,844.64**
GST (5%)	$ 89,792.23
TOTAL EXPANSION FEES, GST	$1,885,636.87

The Expansion Fees are based on the Expansion Work being done during non-winter conditions. If the Customer requires the Expansion Work to be done during winter conditions that would result in additional costs, Toronto Hydro will advised the Customer of the estimated additional costs and if the Customer provides a written request to Toronto Hydro to proceed, a Project Invoice will be issued and payment must be received by Toronto Hydro prior to the commencement of any applicable work.

SCHEDULE C
CAPITAL CONTRIBUTION REQUIREMENTS and ECONOMIC EVALUATION

1. The Customer acknowledges that it has represented to Toronto Hydro that the estimated increased demand load attributable to the Project will be 3,100 kW ("Estimated Incremental Demand") and that 1586 residential units will be connected to the Toronto Hydro main distribution system.

1. To determine the amount of Capital Contribution that is required from the Customer for this Project, Toronto Hydro has performed, as described in Appendix B of the Distribution System Code, an economic evaluation ("Initial Economic Evaluation"). A copy of the Initial Economic Evaluation, including the calculation used to determine the amount of the Capital Contribution to be paid by the Customer, including all of the assumptions and inputs used to produce the Initial Economic Evaluation, is included with this Offer to Connect.

3. As a result of Toronto Hydro's Initial Economic Evaluation of the Project, the Customer will not be required to pay a Capital Contribution.

SCHEDULE D
EXPANSION DEPOSIT

1. An Expansion Deposit is intended to ensure that Toronto Hydro is held harmless in respect of the Expansion Fees and OM&A Costs by securing payment of the Total Expansion Fees in the event the Estimated Incremental Demand does not materialize. The Expansion Deposit shall be in the form of cash, or an irrevocable commercial letter of credit issued by a Schedule 1 bank as defined in the Bank Act, or a surety bond. The form of security must expressly provide for its use to cover the events for which it is held as a deposit. Any portion of the Expansion Deposit held as cash, which is returned to the Customer, shall include interest on the returned amount from the date of receipt of the full amount of the Expansion Deposit, at the Prime Business Rate set by the Bank of Canada less two (2) percent.

2. The Customer is required to post an Expansion Deposit, upon acceptance of this Offer to Connect, for the difference between the actual Expansion Fees and GST and the amount of the Capital Contribution and GST paid by the Customer, in accordance with Toronto Hydro's Initial Economic Evaluation of the Project.

3. This Expansion Deposit is in addition to any other charges that may be payable to Toronto Hydro under this Offer to Connect, or the Conditions of Service, or otherwise.

4. The amount of the Expansion Deposit is set out below.

5. After the facilities are energized, the Expansion Deposit shall be reduced, at the end of each 365-day period, by an amount calculated by multiplying the original Expansion Deposit by a percentage derived by dividing the actual demand materialized in that 365-day period, by the Estimated Incremental Demand contemplated in this Offer to Connect. For information about reduction in the amount of the Expansion Deposit after each 365 day period, please contact Carrie Matthew at (416) 542-3100 ext. 32076.

6. If after five (5) years from the energization date of the facilities, the Estimated Incremental Demand contemplated by this Offer to Connect has not materialized, Toronto Hydro shall retain any cash held as an Expansion Deposit, or be entitled to realize on any letter of credit or bond held as an Expansion Deposit and retain any cash resulting therefrom, with no obligation to return any portion of such monies to the Customer at any time.

EXPANSION DEPOSIT:

TOTAL EXPANSION FEES AND GST	**$1,885,636.87**
LESS CAPITAL CONTRIBUTION AND GST	**-$ 0**
EXPANSION DEPOSIT	**$1,885,636.87**

SCHEDULE E
ALTERNATIVE BID PROCESS AND CONTESTABLE WORK

1. Toronto Hydro advises the Customer that part of the work that will be required for the expansion and connection to the existing distribution facilities includes work for which the Customer may obtain an alternative bid i.e. work that would not involve work with existing Toronto Hydro assets. The work for which the Customer may obtain alternative bid, "Contestable Work" is described below.

2. The Customer must use a contractor for the Contestable Work qualified by Toronto Hydro in accordance with its Conditions of Service. To qualify, contractors shall submit a "Contractor Qualification Application" and meet the requirements posted at: http://www.torontohydro.com/electricsystem/customer_care/cond_of_services/index.cfm at least 30 business days prior to their selection by the Customer to undertake Contestable Work. The Customer shall not be entitled to start performance of the Contestable Work until the contractor has completed its qualification by Toronto Hydro and has been qualified for no less than 30 business days.

3. Toronto Hydro does not make any representation or warranty regarding any contractor selected by the Customer to do any work regardless of whether the contractor has been qualified by Toronto Hydro or not and shall have no liability to the Customer in respect of such work.

4. If the Customer decides to hire a qualified contractor to perform the Contestable Work, the Customer will be required to select, hire and pay the contractor's costs for such work and to assume full responsibility for the construction of all of the Contestable Work.

5. The Customer shall ensure that the Contestable Work is done in accordance with Toronto Hydro's design and technical standards and specifications.

6. The Customer and his qualified contractor shall only use materials that meet the same specifications as Toronto Hydro approved materials (i.e. same manufacturers and same part numbers). Once the Customer has hired a qualified contractor, the Customer may request and obtain from Toronto Hydro the listing of approved materials that may be required for the Contestable Work.

7. The Customer will be required to pay for administering the contract with the qualified contractor, or if agreed by Toronto Hydro, pay Toronto Hydro a fee for performing this activity on its behalf. Upon request if Toronto Hydro is agreeable to performing such activity, Toronto Hydro will advise the Customer of the amount of the fee. Administering the contract includes, among other things, acquiring all permissions, permits and easements.

8. Toronto Hydro shall have the right to inspect and approve all aspects of the facilities constructed by the qualified contractor as part of its system commissioning activities, prior to connecting the expanded facilities to the Toronto Hydro main distribution system. If all of Toronto Hydro's requirements for the Contestable Work, including but not limited to, those set out in Sections 5, 6, and 7 above, have not been completed satisfactorily to Toronto Hydro, acting reasonably, the Project will not be energized, until the Contestable Work is in compliance with all of Toronto Hydro's requirements.

9. If the Customer decides to pursue an alternative bid for the Contestable Work, Toronto Hydro may charge the Customer costs, including, but not limited to, the following, for:
   (a) additional design, engineering or installation of facilities required to complete the Project that are required in addition to the original Offer to Connect; and,
   (b) inspection or approval of the work performed by the contractor hired by the Customer; and
   (c) making the final connection of the new facilities to the Toronto Hydro distribution system.
   ("Additional Costs for Alternative Bid Work").

10. If the Customer decides to hire a qualified contractor to perform the Contestable Work, the Customer must:
    1. Sign an Alternative Bid Agreement;
    2. Hire a qualified contractor;
    3. Pay to Toronto Hydro, the firm amount of Toronto Hydro's Additional Costs for Alternative Bid Work, as set out below;
    4. Provide the Alternative Bid Expansion Deposit as set out below.

11. After the Customer has performed the Contestable Work and Toronto Hydro has inspected and approved the constructed facilities, the Customer shall transfer the expansion facilities that were constructed under the alternative bid option to Toronto Hydro and Toronto Hydro shall pay to the Customer, a transfer price, ("Transfer Price") to be determined, as hereinafter set out.

12. The Transfer Price for the Contestable Work shall be the lower of the Customer's Costs or the amount set out in this Offer to Connect of the Contestable Work. The Customer's Costs shall mean:
    (a) the costs the Customer paid to have the Contestable Work performed, excluding the Variable Connection Work, as provided by evidence satisfactory to Toronto Hydro;
    (b) the Additional Costs for Alternative Bid Work charged by Toronto Hydro.

    Toronto Hydro shall be satisfied that all Customer's Costs shall have been properly incurred.

13. If the Customer does not provide the calculation setting out the Customer's Costs to Toronto Hydro within 30 days of all new facilities being energized, then the amount of the Transfer Price shall be the amount set out in this Offer to Connect for the Contestable Work.

14. Toronto Hydro shall carry out a final economic evaluation after the facilities are energized ("Final Economic Evaluation"). The Final Economic Evaluation shall be based on the amounts used in this Offer to Connect for costs and forecasted revenues, and the amount of the Transfer Price to be paid by Toronto Hydro to the Customer for the Contestable Work, where applicable. A copy of the Final Economic Evaluation shall be provided to the Customer.

15. Any amount payable by the Customer to Toronto Hydro, may be deducted from the Transfer Price owing to the Customer by Toronto Hydro.

16. If the Customer pursues an Alternative Bid, the Customer shall post an Alternative Bid Expansion Deposit in the amount of 10% of the Expansion Deposit as set out in Schedule D.

17. Toronto Hydro will retain the Alternative Bid Expansion Deposit for a warranty period of up to two years. The warranty begins at the end of the Realization Period, defined below.

18. The Realization Period for a Project ends, upon the first to occur of:
    (i) the materialization of the last forecasted connection in the expansion project, or
    (ii) Five (5) years after energization of the new facilities.

19. Toronto Hydro shall be entitled to retain and use the Alternative Bid Expansion Deposit to complete, repairing or bring up to standard the facilities constructed by the Customer, including Toronto Hydro's costs to ensure that the expansion is completed to the proper design, technical standards and specifications, using approved materials and that the facilities operate properly when energized.

20. Toronto Hydro shall return to the Customer the unapplied portion of the Alternative Bid Expansion Deposit, if any, at the end of the two-year warranty period.

21. Upon receipt of notice from the Customer that it intends to hire an alternative bid contractor, Toronto Hydro will provide an Alternative Bid Agreement.

Contestable Work shall mean the following:

Note:

- All Customer-supplied materials must be submitted to Toronto Hydro for approval prior to installation and meet Toronto Hydro Distribution Construction Standards;
- All equipment and underground plant installed must be inspected and approved prior to connection to the Toronto Hydro distribution system;
- Customer is responsible for applying for and obtaining any necessary City road cut permits.

Description of Work to be Completed by the Customer:

- Supply & install:
  - All necessary duct structures, cable chambers, tap boxes, splice vaults, submersible transformer vaults, switchgear foundations on Village Green Square, Street 'A', Street 'B', Street 'C' and an extension to existing Toronto Hydro distribution system in Village Green Square;
  - All primary cables complete with terminations thereof, except final connection to the Toronto Hydro distribution system;
  - All secondary cables complete with terminations thereof, except final connection to the Toronto Hydro distribution system;
  - All switchgears, submersible transformers;
  - All cable risers completed to the installation of the first section of U-Guard on the termination poles.

Description of Work to Be Completed by Toronto Hydro:

- All necessary engineering design and inspections and material approvals;
- Connections to existing Toronto Hydro distribution system;
- Primary cable termination connections to the existing Toronto Hydro distribution system on Sufferance Road;
- The necessary switching and outage arrangements to allow connection to existing distribution system.

Toronto Hydro's Additional Costs for Alternative Bid Work	**$ 10,750.00**
GST (5%)	**$ 537.50**
TOTAL ADDITIONAL COSTS FOR ALTERNATIVE BID WORK, GST	**$ 11,287.50**
ALTERNATIVE BID EXPANSION DEPOSIT	**$188,563.68**

SCHEDULE F
GENERAL TERMS AND CONDITIONS
of OFFER TO CONNECT

1. ASSIGNMENT

1.1 Neither party may assign this Offer to Connect without the prior written consent of the other party, such consent not to be unreasonably withheld.

2. DEMARCATION POINTS

2.1 The ownership and operational demarcation points of the Project shall be identified as such by Toronto Hydro on the as-constructed drawings.

2.2 In accordance with Toronto Hydro's Conditions of Service, the Customer is responsible for maintaining, repairing and replacing, in a safe condition satisfactory to Toronto Hydro, all the Customer's civil infrastructure on private property that is deemed required by Toronto Hydro to house Toronto Hydro's Connection Assets, including but not limited to poles, underground conduits, cable chambers, cable pull rooms, transformer rooms, transformer vaults and transformer pads.

3. DISPUTE RESOLUTION

3.1 Any controversy between the parties arising under this Offer to Connect not resolved by discussions between the parties shall be determined by an arbitration tribunal convened pursuant to a notice of submission given either by Toronto Hydro or the Customer.

3.2 The notice shall name one arbitrator.

3.3 The party receiving the notice shall, within 10 days of notice to the other, name the second arbitrator or, if it fails to do so, the party giving the notice of submission shall name the second arbitrator.

3.4 The two arbitrators appointed shall name the third arbitrator within 10 days, or if they fail to do so within that time period, either party may make application to the applicable court for appointment of the third arbitrator.

3.5 Any arbitrator selected to act under this Offer to Connect shall be qualified by education, training and experience to pass on the particular question in dispute and shall have no connection to either of the parties other than acting in previous arbitrations.

3.6 The arbitration shall be conducted in accordance with the provisions of *The Arbitration Act, 1991* S.O. c-17, as amended.

3.7 The decisions of the arbitration tribunal shall be made in writing and shall be final and binding on the parties as to the questions submitted and the parties shall have no right of appeal therefrom.

4. EASEMENTS

4.1 Upon request by Toronto Hydro, the Customer shall, at its own expense, execute, register and provide a solicitor's opinion on title in a form acceptable to Toronto Hydro, within the time period specified by Toronto Hydro, and subject only to those encumbrances permitted in writing by Toronto Hydro, such easement agreements as Toronto Hydro may require for the installation and continued existence of any electrical or telecommunication plants or access to same for the life of such plant or as otherwise required to perform its responsibility as a distribution company.

4.2 The customer acknowledges that in order for an easement to be registered, it shall be required, at its expense, to arrange for and register any necessary documentation required by the appropriate Land Registry Office, including a Reference Plan, prepared by an Ontario Land Surveyor, describing the extent of the lands required for the easement.

5. FORCE MAJEURE

5.1 Force Majeure means any act, event, cause or condition that is beyond Toronto Hydro's reasonable control, including wind, ice, lightning or other storms, earthquakes, landslides, floods, washouts, fires, explosions, contamination, breakage of equipment or machinery, delays in transportation, strikes, lockouts or other labour disturbances, civil disobedience or disturbances, war, acts of sabotage, blockades, insurrections, vandals, riots, epidemics, loss of any relevant license or a declaration of force majeure by Hydro One Networks Inc., or any successor, under any agreement which Hydro One Networks Inc., or any successor, has with Toronto Hydro in connection with any work to be performed by Toronto Hydro under this Offer to Connect.

5.2 If by reason of Force Majeure, Toronto Hydro is unable, wholly or partially, to perform or comply with any or all of its obligations under, this Offer to Connect, it shall be relieved of such obligations, and any liability (including liability for any injury, damage or loss to the Customer caused by such event of Force Majeure) for failing to perform or comply with such obligations, during the continuance of Force Majeure.

6. LIMITATION OF LIABILITY

6.1 Toronto Hydro shall not be responsible for the acts or omissions of the Customer or its employees, contractors, subcontractors or agent.

6.2 Neither Toronto Hydro nor any of its employees, agents, officers, directors or other representatives ("Representatives") shall be liable for any loss, injury or damage to persons or property caused in whole or in part by negligence or fault of the Customer, or any of the Customer's Representatives, contractors or subcontractors.

6.3 Notwithstanding any other provision in this Offer to Connect, or any applicable statutory provision Toronto Hydro and its Representatives shall only be liable for any damages which arise directly out of the wilful misconduct or negligence of Toronto Hydro or its Representatives.

6.4 Neither Toronto Hydro nor any of its Representatives shall be liable under any circumstances whatsoever for any loss of profits or revenues, business interruption losses, loss of contract or loss of goodwill, or for any indirect, consequential, incidental or special damages, including but not limited to punitive or exemplary damages, arising from any breach of this Offer to Connect, fundamental or otherwise, or from any tortious acts, including the negligence or willful misconduct of it or its Representatives, however arising.

6.5 No action arising out of this Offer to Connect, regardless of the form thereof, may be brought by either party more than two (2) years following the date the cause of action arose, provided however that, subject to any applicable law, Toronto Hydro may bring an action for non-payment of amounts, or non-delivery of Expansion

Deposits, required to be paid or delivered by the Customer under this Offer to Connect at any time.

6.6 The Customer shall indemnify and save harmless Toronto Hydro and its Representatives from any action, claim, penalty, damages, losses, judgements, settlements, costs and expenses or other remedy brought by any party or governmental authority, arising out of or resulting from any negligent act or failure to act or any willful misconduct by the Customer or any of its Representatives.

6.7 All of the provisions of Sections 6.1, 6.2, 6.3, 6.4, 6.5 and 6.6 shall survive the termination of this Offer to Connect.

7. NOTICE

7.1 Any notice to be given under this Offer to Connect shall be in writing and delivered by prepaid registered mail, hand, courier or facsimile to the contact for the parties as set forth in the Offer to Connect.

7.2 Delivery by facsimile shall be deemed received on the day following transmittal provided the facsimile is received as confirmed by the issuance of a confirmation receipt at the point of transmission.

7.3 Delivery by hand or courier shall be deemed received on the date delivered.

7.4 Delivery by prepaid registered mail shall be deemed received on the 5th business day after mailing.

7.5 Either party may change its address for notice by providing written notice of that change to the other party.

8. REVISED PLANS

8.1 If the Customer submits revised plans or requires additional design work, Toronto Hydro may provide, at cost, a new offer based on the revised plans or the additional design work.

8.2 If the Plans are revised at any time, after acceptance of this Offer to Connect shall be withdrawn or terminated immediately, despite any acceptance by the Customer. A new Offer to Connect will only be provided to the Customer upon payment in the amount of $3,500.00 that must be paid prior to the new Offer to Connect being provided to the Customer.

9. SECURITY INTEREST

9.1 As security for its obligation under this Offer to Connect, the Customer grants to Toronto Hydro a present and continuing security interest in, and lien on (and right of set-off against), and assignment of all money, cash collateral and cash equivalent collateral and any and all proceeds resulting therefrom or the liquidation thereof, delivered as an Expansion Deposit or otherwise pursuant to the terms of this Offer to Connect, or for the benefit of Toronto Hydro.

9.2 The Customer agrees to take such action as Toronto Hydro reasonably requires in order to perfect Toronto Hydro's first-priority security interest in, and lien on (and right of set-off against), such collateral and any and all proceeds resulting therefrom or from the liquidation thereof.

9.3 Toronto Hydro shall apply the proceeds of the collateral realized upon the exercise of any such rights or remedies to reduce Customer's obligations under this Offer to Connect (Customer remaining liable for any amounts owing to Toronto Hydro after such application), subject to Toronto Hydro's obligation to return any surplus proceeds remaining after such obligations are satisfied in full.

10. TAXES

10.1 Unless specified, none of the amounts payable or deliverable under the Offer to Connect include goods and services taxes or any other taxes that may be payable.

10.2 The Customer shall pay all such taxes in accordance with applicable laws.

11. TERMINATION

11.1 Each of the following shall constitute an event of default ("Event of Default"):

(i) the Customer fails to make any payment at the time specified for payment in this Offer to Connect and such failure has not been remedied within 4 days notice of such failure;

(ii) the Customer fails to deliver any Expansion Deposit, including a renewal, or additional Expansion Deposit within the time period specified for delivery in this Offer to Connect;

(iii) the Customer fails to execute and deliver any agreement, or deliver any other document, within the time period specified for execution and/or delivery;

(iv) the Customer fails to commence the Expansion Work within 1 year from the date of this Offer to Connect;

(v) the Customer cancels the Project for any reason;

(vi) the Customer fails to comply with any other covenant or obligation in this Offer to Connect and such failure has not been remedied (where it is possible to remedy such failure) within 15 days of the initial failure to perform;

(vii) a resolution has passed, or documents filed at an office of public record, for the merger, amalgamation, dissolution, termination of existence, liquidation or winding-up of the Customer, unless the prior consent of Toronto Hydro has been obtained;

(viii) a receiver, manager, receiver-manager, liquidator, monitor or trustee in bankruptcy of the Customer or any of its property is appointed by any government authority, and such receiver, manager, receiver-manager, liquidator, monitor or trustee is not discharged within 30 days of appointment; or, if by decree of any government authority, the Customer is adjudicated bankrupt or insolvent, or any substantial part of its property is taken, and such decree is not discharged within 30 days after the entry thereof; or, if a petition to declare bankruptcy or to reorganize such party pursuant to any applicable law is filed against the Customer and is not dismissed within 30 days of such filing;

(ix) the Customer files, or consents to the filing of, a petition in bankruptcy or seeks, or consents to, an order or other protection under any provision of any legislation relating to insolvency or

bankruptcy ("Insolvency Legislation"); or files, or consents to the filing of, a petition, application, answer or consent seeking relief or assistance in respect of itself under provision of any Insolvency Legislation; or files, consents to the filing of, an answer admitting the material allegations of a petition filed against it in any proceeding described herein; or makes an assignment for the benefit of its creditors; or admits in writing its inability to pay its debts generally as they become due; or consents to the appointment of a receiver, trustee, or liquidator over any, or all, of its property.

11.2 Upon the occurrence of an Event of Default, Toronto Hydro may, at its sole option, do any one or more of the following:

(i) exercise any of the rights and remedies of a secured party including any such rights and remedies under law then in effect;

(ii) exercise its rights of set-off against any and all property of the Customer in the possession of Toronto Hydro;

(iii) declare the full amounts of the Expansion Fees and OM&A Costs that are unpaid and unrecovered as due and owing ("Accelerated Amounts");

(iv) draw on any cash, or draw under any letter of credit, then held by or for the benefit of Toronto Hydro as an Expansion Deposit or Capital Contribution or otherwise, free from any claim or right of any nature whatsoever of the Customer, including any equity or right of purchase or redemption by the Customer, to cover all costs incurred on, or prior to, the date of termination, including costs for materials ordered for the expansion, storage costs and facilities removal costs and any amounts owing under this Offer to Connect, including the Accelerated Amounts; and/or

(v) terminate this Offer to Connect, provided that, any termination shall not affect any obligations incurred prior to the effective date of termination or any other rights that Toronto Hydro may have arising out of any rights or obligations that are expressed to survive termination of this Offer to Connect.

12. TITLE AND RISK OF LOSS

12.1 Notwithstanding that Toronto Hydro may install equipment and materials under this Offer to Connect to which title is intended to pass to the Customer, title to such equipment or materials shall be transferred to the Customer, and risk of loss shall be assumed by the Customer, upon delivery to the Property.

12.2 Toronto Hydro shall be entitled to receive reasonable compensation for storing any materials or equipment not delivered to the Customer due to a delay caused by the Customer and such equipment or materials shall be held at the Customer's risk.

13. WARRANTIES

13.1 Toronto Hydro warrants that the services it provides are in accordance with Good Utility Practice.

13.2 Except as expressly set forth in this Offer to Connect, Toronto Hydro provides no warranties, for fitness for purpose or otherwise, and whether statutory or otherwise, to the Customer.

14. MISCELLANEOUS

14.1 This Offer to Connect, including the Schedules attached, shall constitute the entire agreement between the parties, and there are no other agreements or understandings, either written or oral, to conflict with, alter or enlarge this Offer to Connect unless agreed to in writing between the parties subsequent to the effective date of this Offer to Connect.

14.2 Failure or delay by Toronto Hydro in enforcing any right under, or provision of this Offer to Connect shall not be deemed a waiver of such provision or right with respect to the instant, or any previous, or subsequent, breach.

14.3 This Offer to Connect shall be governed by the laws of the Province of Ontario and the laws of Canada as applicable.

14.4 Toronto Hydro shall be entitled to access at all reasonable times to any of the Customer's properties to perform the services in this Offer to Connect.

14.5 Interest on unpaid amounts shall bear interest at the rate of 1.5 percent calculated and compounded monthly (19.56 percent per annum) at and from the due date up to and including the date of payment in full of such amount, together with all interest accrued to the date of payment.

14.6 Toronto Hydro and the Customer agree to execute and deliver such further documents as may be required for either party to fulfill its obligations and enforce its rights under this Offer to Connect.

14.7 If any provision of this Offer to Connect is declared illegal, invalid or unenforceable for any reason whatsoever, to the extent permitted by law, such illegality, invalidity or unenforceability shall not affect the legality, validity or enforceability of any of the other provisions.

14.8 This Offer to Connect and the obligations of the parties under it are subject to all applicable present and future laws, rules, regulations and orders of any regulatory or legislative body or other duly constituted authority having jurisdiction over Toronto Hydro or the Customer.

14.9 Time shall be of the essence.

14.10 If there is a conflict between this Offer to Connect and Toronto Hydro's Conditions of Service, this Offer to Connect shall govern.

REQUEST FOR ECONOMIC EVALUATION (NPV CALCULATION)

January 23, 2007 Version

Important: Enter Data in Yellow Boxes only, including zero values

Requested by:	DAN STANOEV		Date:	November 1, 2008
Tel. Ext:	416-542-7816			
Supervisor Approval:	Dave Graham			

Project Information:

Address	METROGATE DEVELOPMENTS	WO Number	170242

Service Type (key 'x' as applicable)		Res		✓	Commercial			Industrial

3,100 KW Power Factor: 95%

Transformer Size	[redacted]	kVA	Incremental Load	[redacted]	kVA
			Total Load	[redacted]	kVA

Customer Class	4	Expected In-Service Date	Oct-10
Type of Account Meter	Monthly demand > 1000 kW and up to 5000 kW	No. of Meters Installed	1597

EXPANSION FEES - ENHANCEMENT COSTS

	KW		Avg Charges ($)			
O/H and U/G	3,100	X	$260.00	=	$	806,000.00

Enhancements Costs	=	$ 806,000.00
NETWORK VAULT COST SHARING	=	$ -
IMPARTED EXPANSION COST	=	$ 806,000.00

MATERIALS	$ 448,457.24
LABOUR (DESIGN, ENG & CONSTRUCTION)	$ 256,860.32
EQUIPMENT	$ 33,368.46
BASIC CONNECTION FEE/ CONNECTION TRANSFORMATION COST	$ 77,310.00
TRANSFER PRICE	$ -
ADDITIONAL COST	$ -
ADMIN/OVERHEAD COST	= $ 173,728.63
GRAND TOTAL	$ 1,795,844.65

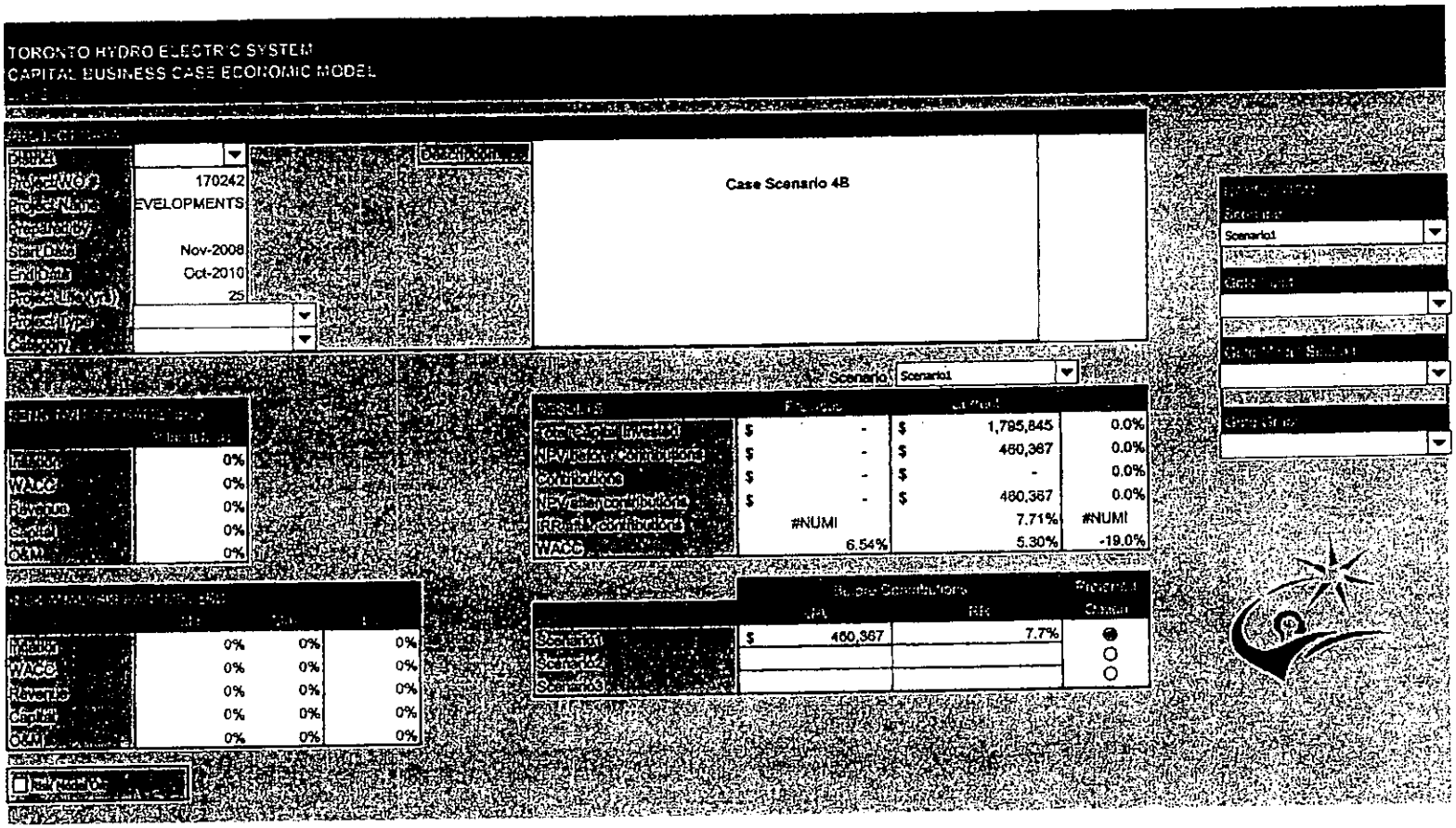
Customer Connection Forecast - Number of Installed Meter

Customer Class	[redacted]					
Residential	934	0	324	324	0	1.20
General Service (< 50 kW)	4	0	2	2	0	1.30
General Service (50 - 999 kW)	[redacted]				0	2.30
General Service (1000 - 4999 kW)	[redacted]				0	1.30
Large User (5000+ kW)	[redacted]				0	1.30

Total Customer Monthly Peak Demand - kva - (Class 3, 4 and/or 5)

Customer Class	[redacted]				Unit	Control
Residential	[redacted]					
General Service (< 50 kW)	[redacted]					
General Service (50 - 999 kW)	[redacted]					
General Service (1000 - 4999 kW)	[redacted]					0
Large User (5000+ kW)	[redacted]				0.0	0.0

Notes:


TORONTO HYDRO ELECTRIC SYSTEM
CAPITAL BUSINESS CASE ECONOMIC MODEL
170242
EVELOPMENTS
Nov-2008
Oct-2010
25
Case Scenario 4B
Scenario1
0%
0%
0%
0%
0%
$ - $ 1,785,845 0.0%
$ - $ 460,367 0.0%
$ - $ - 0.0%
$ - $ 460,367 0.0%
#NUM! 7.71% #NUM!
6.54% 5.30% -19.0%
$ 460,367 7.7%

TORONTO HYDRO ELECTRIC SYSTEM
CAPITAL BUSINESS CASE ECONOMIC MODEL

A. MODEL PARAMETBASE ASSUMPTIONS

Item	
Current Year	2008
Income Tax Rate	36.12%
LCT tax rate	0.13%
PCT tax rate	0.30%
Inflation	0.00%
WACC	5.30%

B. ASSET CLASSES

	Description		
1	Dist. System Assets (class1)	12.5	8%
2	Buildings (class 1)	50	4%
3	Computer Eqt. (class 10)	4	45%
4	Applications Software (class 12)	5	100%
5	Office Equipment (class 8)	10	20%

C. CUSTOMER CLASSES

	Description
1	Residential
2	General Service (< 50 kW)
3	General Service (50 - 999 kW)
4	General Service (1000 - 4999 kW)
5	Large User (5000+ kW)

D. CUSTOMER RATES

	Customer Class							
1	Residential	$	148.18	0.0154	$	48.8%	597210	0%
2	General Service (< 50 kW)	$	205	0.0184	$	7.6%	66,505	0%
3	General Service (50 - 999 kW)	$	321	0.0000	$ 4.97	20.1%		0%
4	General Service (1000 - 4999 kW)	$	8,593	0.0000	$ 4.15	17.3%		0%
5	Large User (5000+ kW)	$	33,004	0.0000	$ 3.54	8.3%		0%

E. AVERAGE CUSTOMER DEMAND

	Customer Class	
1	Residential	8,970
2	General Service (< 50 kW)	37,036
3	General Service (50 - 999 kW)	
4	General Service (1000 - 4999 kW)	
5	Large User (5000+ kW)	

G **% Engineering Admin Reclass**

Reclassed Item	
Engineering Admin	10.7%

METROGATE INC.
4800 DUFFERIN STREET
TORONTO, ONTARIO
M3H 5S9

March 10, 2009

Toronto Hydro-Electric System Limited
14 Carlton Street
Asset Management
3rd Floor, 500 Commissioner Street
Toronto, ON M4M 3N7

Attention: Jim Trgachef, Supervisor

Dear Sir:

Re: Metrogate Inc. development of Solaris at Metrogate, Phase I and II, Ventus at Metrogate, Phases I and II, and Metrogate Townhouses as legally described in PIN's 06164-0466 (LT), 06164-0469 (LT), 06164-0470 (LT), and 06164-0473 (LT) (Metrogate)
Number of Units: 1512 high-rise residential unit and 74 townhouses

You will recall that you hosted a meeting last fall with representatives of Deltera Inc. at which time the discussion turned to the metering of the planned condominium projects which Deltera and related companies are and will be building in Toronto. At this meeting, you advised that effective February 28, 2008, Toronto Hydro was the only entity that had the right to own and supply meters for any of our projects and that no other options for metering were available. As a result of this, Metrogate Inc.'s request for an offer to connect in respect of the above noted building did not contemplate this building being suite metered by any entity other than Toronto Hydro and the offer to connect received contemplates Toronto Hydro installing individual suite meters.

It has come to our attention that contrary to the advice received, Metrogate Inc. does have the right under Subsection 53.17 of the *Electricity Act, 1998* to choose to have this project smart sub-metered by a licensed sub-metering company. Metrogate Inc. is desirous of considering the sub-metered option and would have requested an offer to connect which contemplated the above project being smart sub-metered but for the information provided at the meeting at your offices last fall.

We therefore require that Toronto Hydro provide a further offer to connect which contemplates the above project being smart sub-metered by a licensed sub-metering company. This offer should specifically contemplate that Toronto Hydro will install a bulk meter and Metrogate Inc.'s intention to smart sub-meter the units at the project downstream of the bulk meter.

I would appreciate confirmation that an appropriate Offer to Connect will be prepared and forwarded to Metrogate Inc. within the next two weeks. Given your familiarity already with the project, and the fact that construction is underway we trust that you will make every effort to meet this timeframe.

Yours very truly,
METROGATE INC.
Per:

Lou Tersigni
Project Manager

Colin J. McLorg
14 Carlton St.
Toronto, Ontario
M5B 1K5

Telephone: 416-542-2513
Facsimile: 416-542-2776
cmclorg@torontohydro.com

toronto hydro
electric system

2009 April 22

Mr. Lou Tersigni
Project Manager
Metrogate Inc
4800 Dufferin Street
Toronto, ON M3H 5S9
via email

Dear Mr. Tersigni:

RE: Metering and Offers to Connect for 'Metrogate' Projects

Thank you for your letter of March 10, 2009 to our Mr. Trgachef. Unfortunately, conflicting address information in your letter resulted in delays in its delivery. Your letter, received by me April 20, has been referred to me for reply.

Your letter generally concerns Toronto Hydro's policy and practice regarding offers to connect and smart metering for new condominiums, particularly those mentioned in the subject line of your letter. Your letter goes on to request that Toronto Hydro prepare a revised Offer to Connect for those condominiums based on a bulk meter / sub-metering configuration. As explained below, Toronto Hydro does not offer that connection configuration for new condominiums and therefore will not prepare a revised Offer to Connect on that basis.

The Ontario Energy Board ('OEB') regulates Toronto Hydro rates and service offerings. The OEB has defined the term 'smart metering' as follows: "The Board uses the term "smart metering" to describe the situation in which a licensed distributor individually meters every condominium unit (and the condominium's common areas) with a smart meter. In this scenario, each unit will become a residential customer of the licensed distributor and each unit and the common areas must have a separate account with the licensed distributor.")[1]

As set out in Toronto Hydro's Conditions of Service, for condominium projects commenced with Toronto Hydro on and after February 28, 2008 ('new condominiums'), Toronto Hydro will provide smart metering as defined by the OEB (i.e., individual unit or suite metering

[1] [EB-2007-0772 Notice of Proposal etc. issued January 8, 2008]

compliant with smart metering regulations) for all separate units and for common areas ('individually metered units') at no charge to the developer. Upon registration and creation of the condominium corporation, the holders of the individually metered units become the direct customers of Toronto Hydro.

Toronto Hydro (along with other licensed distributors) has been specifically authorized to conduct smart metering as part of its standard, licensed distribution activities. The OEB has stated as follows:

> "The Board has previously determined in rates proceedings related to smart metering activities of certain distributors that smart metering is a part of the distribution activity that is already covered by distributors' distribution licences. As there is no distinction between smart metering condominiums and other residences, the Board has determined that only licensed distributors can smart meter condominiums. In the Board's view, this is in keeping with the current regulatory framework in the electricity sector.
>
> The Board is also of the view that Regulation 442 allows all licensed distributors to smart meter in condominiums."[2]
>
> "As set out in the January Notice, the Board remains of the view that smart metering is a distribution activity, and that the Electricity Act and Regulation 442 taken together allow all licensed distributors to undertake smart metering in condominiums. The distributor would do so as a distribution activity within its licensed service area."[3]

Toronto Hydro therefore asserts that it is authorized to connect new condominiums in the manner described in its Conditions of Service and that it has no obligation to do otherwise.

The statement of Toronto Hydro's position in this matter is not entirely correct in your letter. Specifically, you state your understanding that Toronto Hydro advised you that "Toronto Hydro was the only entity that had the right to own and supply meters for any of our projects and that no other options for metering were available."

While it is the case that ultimately Toronto Hydro will own the metering infrastructure and will attach the individually metered units as direct customers, Toronto Hydro's Conditions of Service provide for alternative bids for the installation of meters and do not preclude the installation of an additional sub-metering system, should the developer or condominium wish to install one, provided it does not interfere with Toronto Hydro's equipment.

Your request for a further Offer to Connect assuming bulk metering is based on an incorrect interpretation of Section 53.17 of the *Electricity Act*, which you state contradicts Toronto Hydro's advice referred to above. In fact, that Section provides as follows:

> "Despite the Condominium Act, 1998 and any other Act, a distributor and any other person licensed by the Board to do so shall, in the circumstances prescribed by regulation, install a smart meter, metering equipment, systems and technology and associated equipment, systems and technologies or smart sub-metering systems, equipment and technology and any associated equipment, systems and technologies of a type prescribed by regulation."

Section 53.17 of the *Electricity Act* does not contradict Toronto Hydro's position and is irrelevant to this issue, since with respect to new condominiums, it does not prohibit a

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[2] [EB-2007-0772 Notice of Proposal etc, January 8, 2008, pages 2-3]

[3] [EB-2007-0772 Notice of Proposal etc, June 10, 2008, pages 4]

distributor from installing smart metering, nor require a non-distributor to provide sub-metering, but rather goes to the requirement that whatever equipment is installed be of a type required by regulation. Furthermore, it clearly does not establish a right on the part of any person to install sub-metering equipment. Sub-metering is referred to because such configurations are allowed, but not required, in the case of existing condominiums already fitted with bulk meters.

In summary, nothing with respect to new condominiums in Toronto Hydro's metering or connection practice or in its Conditions of Service is out of compliance with Code, regulation, or legislation. The OEB has expressly concluded that smart metering of condominiums is a distribution activity authorized by the existing licenses of distributors, and has not established any obligation on distributors to provide for sub-metering configurations in new condominiums.

For these reasons Toronto Hydro does not accept the request set out in your letter. Please contact me if you have concerns or questions around any of these matters.

Yours truly,

(Original signed by)

Colin McLorg

Manager, Regulatory Policy and Relations

416-542-2513

cmclorg@torontohydro.com

FINAL

FINAL

Electricity Distribution Committee
Action Minutes
In Camera

Meeting Date: Friday May 1, 2009
9:35 – 10:00 a.m.
Room 2752

Attendees:

Board Members:
Ken Quesnelle, Chair
Paul Sommerville, Deputy Chair
David Balsillie
Pamela Nowina

Board Staff:
Jill Bada
Paul Gasparatto
Lee Harmer, Chair Staff Forum
Maureen Helt
Fiona O'Connell, Committee Note-taker

1. Items for Discussion

1.1. Toronto Hydro Metering Policies & Restricting Smart Sub-Metering

Topic Leader: Paul Gasparatto & Jill Bada

Highlights:

THESL has implemented a policy that requires individual units in all new condominiums to be directly metered by THESL. A developer or Condominium Board may install its own additional sub-metering system provided that there is no interference with THESL's smart metering system.

THESL has based this policy on its belief that there are no regulatory provisions which prohibit its policy and/or require that a distributor install smart metering only at the request of the condominium. THESL would like a Board hearing on the matter.

The views of the OEB Compliance Office are:

- Such policies are inconsistent with the Board's smart sub-metering licensing regime.

- THESL will refuse to connect customers that do not accept individual unit metering by THESL.
- Such THESL refusals are non-compliant with:
  - A distributor's obligation to connect, as set out in section 28 of the *Electricity Act, 1998*; and
  - The obligation to install an interval meter when requested to do so as set out in section 5.1.5 of the Distribution System Code.
- Other complaints have been received from the smart sub-metering industry regarding the metering activities of other distributors.

Recommendations:

The Committee recommended that:

- A new condominium owner has the right to install, either themselves or through a smart sub-meter provider, a smart sub-metering system for each unit, (serviced by a distributor bulk meter), rather than be required to have distributor smart metering be installed for each unit.
- The legal and regulatory requirements set out in legislation or regulations and/or Code are sufficiently clear.
- The Board issue a notice on its own motion to commence an enforcement proceeding on this matter.

Action Item:

1. The Compliance Department will prepare the necessary material to enable the Board to issue a notice on its own motion to commence an enforcement proceeding on this matter. – Jill Bada

Ontario

BRIEFING NOTE

ELECTRICITY DISTRIBUTION COMMITTEE
REQUEST FOR GUIDANCE

Toronto Hydro Metering Policies &
Restricting Smart Sub-metering

May 1, 2009

REQUEST FOR GUIDANCE

Staff request the Electricity Distribution Committee's views on the following two questions and subsequently, which of the outlined options would be the recommended course of action.

QUESTIONS

1. Does a new condominium owner have the right to install, either themselves or through a smart sub-meter provider, a smart sub-metering system for each unit, (serviced by a distributor bulk meter), rather than be required to have distributor smart metering be installed for each unit?

2. If so, are the legal and regulatory requirements set out in legislation or regulations and/or Code sufficiently clear?

BRIEF BACKGROUND

In July 2008, the Compliance Office received complaints from sub-meter providers about Toronto Hydro's ("THESL") policy regarding the metering of new condominiums. The Compliance Office began an investigation which resulted in a series of correspondence between THESL and Compliance staff. Details of this communication are outlined later in this note under the section "Detailed Background."

This correspondence determined that THESL has implemented a policy that requires individual units in all new condominiums to be directly metered by THESL. A developer or Condominium Board may install its own additional sub-metering system provided that there is no interference with THESL's smart metering system. However, it is THESL's policy that ultimately each residential and commercial unit in a new condominium must be a direct customer of THESL. THESL has based this policy on its belief that there are no regulatory provisions which prohibit its policy and/or require that a distributor install smart metering only at the request of the condominium.

The OEB Compliance Office expressed its that view that to the extent that THESL's policies require smart metering of new condominiums and that each unit must be a direct customer of THESL, such policies are inconsistent with the Board's smart sub-metering licensing regime.

It is also the concern of the Compliance Office, that if a customer were to refuse to accept individual unit metering by Toronto Hydro, it appears that THESL would refuse to connect the customer. This concern has become real with the filing of a new compliant with the Board. On April 25, 2009, the Compliance Office was provided with two letters from THESL to developers informing the developers that THESL will not prepare an Offer to Connect that provides for the installation of a bulk meter/sub-metering configuration. It is the view of the Compliance Office that such actions are non-compliant with a distributor's obligation to connect as set out in section 28 of the *Electricity Act, 1998* and the obligation to install an interval meter when requested to do so as set out in section 5.1.5 of the Distribution System Code.

The question of whether a distributor can require that customers be directly metered by the distributor will have an impact on more than just THESL's policies. The Compliance Office has received complaints from the smart sub-metering industry regarding the metering activities of other distributors. Compliance staff is also aware that other distributors are closely following the discussions between THESL and Compliance staff, including one distributor who has stated its refusal to discuss their metering activities with staff until the Board has taken a position on THESL's policies.

The most recent activity in this dispute was a meeting between Board and THESL staff. In this meeting THESL reaffirmed its commitment to its policy and requested a Board hearing on the matter. OEB staff stated that we would request guidance from the Board as to its intention in regards to sub-metering activities and then determine next steps.

RELEVANT REGULATORY & LEGAL REFERENCES

Distribution System Code

5.1.5 A distributor shall provide an interval meter within a reasonable period of time to any customer who submits to it a written request for such meter installation, either directly, or

through an authorized party, in accordance with the Retail Settlement Code …

5.1.9 When requested by either:

(a) the board of directors of a condominium corporation; or
(b) the developer of a building, in any stage of construction, on land for which a declaration and description is proposed or intended to be registered pursuant to section 2 of the Condominium Act, 1998,

a distributor shall install smart metering that meets the functional specification of Ontario Regulation 425/06 – Criteria and Requirements for Meters and Metering Equipment, Systems and Technology (made under the Electricity Act).

Electricity Act, 1998

28. A distributor shall connect a building to its distribution system if,

(a) the building lies along any of the lines of the distributor's distribution system; and
(b) the owner, occupant or other person in charge of the building requests the connection in writing.

53.17 (1) Despite the Condominium Act, 1998 *and any other Act, a distributor and any other person licensed by the Board to do so shall, in the circumstances prescribed by regulation, install a smart meter, metering equipment, systems and technology and associated equipment, systems and technologies or smart sub-metering systems, equipment and technology and any associated equipment, systems and technologies of a type prescribed by regulation, in a property or class of properties prescribed by regulation at a location prescribed by regulation and for consumers or classes of consumers prescribed by regulation at or within the time prescribed by regulation.*

Ontario Regulation 442/07

2. For the purposes of subsection 53.17 (1) of the Act, the following are prescribed classes of property:

1. A building on land for which a declaration and description have been registered pursuant to section 2 of the Condominium Act, 1998.

2. *A building on land for which a declaration and description have been registered creating a condominium corporation that was continued pursuant to section 178 of the* Condominium Act, 1998.
3. *A building, in any stage of construction, on land for which a declaration and description is proposed or intended to be registered pursuant to section 2 of the* Condominium Act, 1998.

3. For the purposes of subsection 53.17 (1) of the Act, the following are prescribed circumstances:

1. *The approval by the board of directors to install smart meters or smart sub-metering systems, in the case of a building that falls into a prescribed class of property described in paragraph 1 or 2 of section 2.*
2. *The installation of smart meters or smart sub-metering systems, in the case of a building that falls into a prescribed class of property described in paragraph 3 of section 2.*

4. (1) For a class of property prescribed under section 2 and in the circumstances prescribed under section 3, a licensed distributor, or any other person licensed by the Board to do so, shall install smart meters or smart sub-metering systems of a type, class or kind,
(a) that are authorized by an order of the Board or by a code issued by the Board; or
(b) that meet any criteria or requirements that may be set by an order of the Board or by a code issued by the

Smart Sub-Metering Code

2.2.1 A smart sub-metering provider shall ensure that either:

(c) the board of directors of a condominium corporation; or
(d) the developer of a building, in any stage of construction, on land for which a declaration and description is proposed or intended to be registered pursuant to section 2 of the Condominium Act, 1998,

has requested, and a distributor has installed, a master meter that is an interval meter before beginning to provide smart sub-metering services.

Notice of Proposal to Amend a Code and Notice of Proposal to issue a New Code, dated January 8, 2008, page #2.

> *The Board uses the term "smart metering" to describe the situation in which a licensed distributor individually meters every condominium unit (and the condominium's common areas) with a smart meter. In this scenario, each unit will become a residential customer of the licensed distributor and each unit and the common areas must have a separate account with the licensed distributor.*
>
> *The Board uses the term "smart sub-metering" to describe the situation in which a licensed distributor provides service to the condominium's bulk (master) meter and then a separate person (the smart sub-meter provider on behalf of the condominium corporation) allocates that bill to the individual units and the common areas through the smart sub-metering system. In this scenario, the condominium continues to be the customer of the licensed distributor and will receive a single bill based on the measurement of the bulk (master) meter.*

OPTIONS

The following options are based on the answer to Question #1 being that new condominiums do have the right to install, either themselves or with a smart sub-meter provider, a smart sub-metering system rather than be required to have distributor smart metering be installed for each unit

If the answer to Question #1 is that distributors have the right to impose smart metering on customers, then staff suggests that the only action necessary is to inform the smart sub-metering industry of that position.

Option A - The legal and regulatory requirements are sufficiently clear, no further clarification by the Board is necessary.

Option B - The legal and regulatory requirements could benefit from further clarification from the Board. This clarification should take the form of a letter to distributors explaining the Board's expectations.

Option C - The legal and regulatory requirements are not clear and a code amendment to clarify the position is necessary.

DETAILED BACKGROUND

CUSTOMER CONTACT

In July 2008, Carma Industries and Intellimeter have complained to the Compliance Office regarding what they see as unfair business practices by Toronto Hydro.

In December 2008, a group of private sub-meter providers known as the Smart Sub-Metering Work Group also submitted a compliant that electricity distributors are abusing their market power and as a result hindering the growth of the smart sub-metering industry in the province. The complaint specifically identifies the following utilities:

- Toronto Hydro, Enersource, Oakville Hydro, PowerStream

The alleged activity includes the following:

- Building owners/developers are told that only the LDC may install meters and provide individual suite metering.

- Where a building owner/developer has expressed an interest in smart sub-metering, the LDC refuses to provide an Offer to Connect, refuses to install a bulk meter or advises that such a choice would result in other causes of delay. The LDC's inform the developers that none of these events would occur if the LDC is permitted to do the metering.

- Certain Offers to Connect are being provided without the LDC undertaking an economic evaluation and as a result either inadequate or no financial contributions are being requested.

REVIEW OF COMPLIANCE OFFICE ACTIVITY

On July 16, 2008 and July 25, 2008, the Compliance Office received complaints from Carma Industries and Intellimeter.

On July 24, 2008, Compliance staff requested Toronto Hydro provide a response to questions relating to the distributor's policies regarding metering of multi-unit properties.

On July 29, 2008, Toronto Hydro responded to staff questions and provided the following positions.

- THESL requires distributor smart meters be installed in new facilities. However, it does allow customers to install these meters through alternative bid and then be transferred to the distributor.

- THESL's position is that unit holders and common areas (either residential or commercial) in new condominiums are individual residential or general service customers of THESL, the same as new customers in single detached homes.

- THESL believes that the Board supports this view since it has stated in its June 10th Notice for the Sub-Metering initiative that Smart Metering is a distribution activity and that only licensed distributors are allowed to undertake smart metering in condominiums.

On October 22, 2008, the Chief Compliance Officer issued a determination to Toronto Hydro stating that its policy is inconsistent with its regulatory obligations. The CCO stated the following views:

- THESL's policies are inappropriate in light of the legal and regulatory framework applicable to the metering of new condominiums as set out in section 53.17 (1) of the Electricity Act, 1998 which states

  "a distributor and any other person licensed by the Board to do so shall, ... , install a smart meter, metering equipment, systems and technology and associated equipment, systems and technologies or smart sub-metering systems, equipment and technology and any associated equipment, systems and technologies of a type prescribed by regulation." (emphasis added)

- The availability of the smart sub-metering option is clear from the materials issued by the Board when it amended the Distribution System Code (the "DSC") and created the Smart Sub-Metering Code. Section 5.1.9 of the DSC itself also clarifies that a distributor must install smart metering only when requested to do so by the condominium corporation or the developer.

- Under section 28 of the *Electricity Act, 1998*, a distributor must connect a building on request. The DSC sets out a list of the reasons that may justify a refusal to connect. However, the desire of a customer to install smart sub-metering is not one of those reasons.

On November 12, 2008, Toronto Hydro responded to the CCO's letter. THESL stated that it does not accept the opinions that were set out in the letter and would not change its metering policies. THESL presented the views that:

- It is incorrect to conclude that their policies preclude the installation of a sub-metering system; should a customer wish to install an additional sub-metering system, they are at liberty to do so provided there is no interference with THESL's smart metering system. In any case, each distinct residential or commercial unit (including common areas) would remain as a direct customer of THESL.

- Section 53.17 of the *Electricity Act* is irrelevant to this issue, since it does not require a non-distributor to provide sub-metering, nor prohibit a distributor from installing smart metering, but goes to the requirement that equipment be of a type required by regulation. Furthermore, it clearly does not establish a right on the part of any person to install sub-metering equipment.

- The thrust of Section 5.1.9 is clearly to require that the metering installed meet the functional specification of Ontario Regulation 425/06.

On January 29, 2009, the CCO sent a follow up letter to Toronto Hydro stating that after considering THESL's arguments, he remains of the view that their policies are inappropriate. The CCO stated the following views:

- Cannot agree with THESL's characterization of section 53.17 of the *Electricity Act, 1998* as being either irrelevant to this issue, or as speaking only to the nature of the equipment to be installed.

- Cannot agree with THESL's characterization of section 5.1.9 of the Distribution System Code as having, as its thrust, to require that the metering installed meet the specifications in regulation. Section 5.1.9 also makes it clear that the person responsible for a new condominium has the ability to choose between having a licensed distributor install smart meters or having a licensed smart sub-metering provider install smart sub-meters.

- THESL's position that each individual unit must be become a direct customer of THESL is incompatible with the Board's approach to smart sub-metering. As described by the Board, smart sub-metering clearly involves (a) a licensed distributor that bills its customer – the condominium corporation – based on the measurement of a bulk meter; and (b) a separate person – the licensed smart sub-metering provider – that bills the individual units and common areas based on the measurement of a smart sub-metering system.

- The provisions of the Board's Smart Sub-Metering Code make it clear that smart sub-metering as a competitive licensed activity goes beyond merely the installation of the meters.

- There are no regulatory provisions that provide licensed distributors with the authority to implement a requirement that each unit and common area in a new condominium must become a direct customer of the distributor.

On February 9, 2009, Toronto Hydro responded to the CCO's letter and restated its view that the CCO's interpretations are incorrect. THESL presented the views that:

- Section 5.1.9 of the DSC does not mention smart sub-metering, nor contain any statement that expressly 'makes it clear' that a distributor may only install smart

metering upon the request of a person in charge of a condominium. The unstated premise of your argument appears to be that the Section begins with the word 'Only', which it does not.

- In THESL's view that there are no regulatory provisions which prohibit its smart metering policy.

- Furthermore, the DSC states at Section 5.1.6:

> *"A distributor shall identify in its Conditions of Service the type of meters that are available to a customer, the process by which a customer may obtain such meters and the types of charges that would be levied on a customer for each meter type."*

This statement is not conditioned by any further obligation on the part of distributors concerning smart sub-metering in new condominiums.

On February 27, 2009, Compliance staff sent information request letters to Enersource, Powerstream and Oakville Hydro enquiring about their policies in regards to metering individual units in condominiums. Response to these enquiries has indicated that in the case of Enersource and Powersteam, they do not implement policies that require all customers in new condominiums be directly metered by the distributor. Oakville Hydro has stated that it will no longer communicate with staff on this issue until the Board settles the dispute with Toronto Hydro.

On April 17, 2009 OEB staff and THESL staff meet to discuss the dispute. THESL reaffirmed its previous position that individual customers in new condominiums should be customers of the distributor. They also acknowledged their policy is to not install a bulk meter even when requested by the customer and submitted that they have no regulatory obligation to do so. THESL expressed its willingness to participate in an enforcement proceeding in order for this matter to have a hearing before the Board. OEB staff informed THESL that they would request guidance from the Board regarding interpretation of the legal requirements. Among the results of this guidance could be a Board statement on the interpretation, an enforcement proceeding and/or a code amendment.

On April 24, 2009, the Sub-metering Working Group provided copies of letters from THESL to two property managers in which THESL states that they do not offer a connection configuration based on a bulk meter/sub-metering configuration. As a result THESL would not prepare an Offer to Connect on that basis.

STAFF ASSESMENT

Through the issuance of Smart Sub-Meter Provider licenses and the Smart Sub-Metering code, it is staff's view that the Board anticipated that all customers would have the option of hiring private contractors to install and operate smart sub-metering systems.

To accept Toronto Hydro's view and policies on this matter would, in staff's view, be a reversal of the intention of the Board when it established its smart sub-metering licensing regime. Despite Toronto Hydro's suggestion that a Condominium could chose to install both smart metering and smart sub-metering, THESL's policy will almost certainly eliminate the practical business opportunities of licensed smart sub-meter providers.

In addition to Toronto Hydro's specific actions, there is also the concern that many distributors around the province may be implementing similar policies that restrict the ability of licensed smart sub-meter providers to operate.

RELEVANT COMPLIANCE LEGAL REFERENCES

Section 112.3(1) of the OEB Act, 1998 states:

> *If the Board is satisfied that a person has contravened or is likely to contravene an enforceable provision, the Board may make an order requiring the person to comply with the enforceable provision and to take such action as the Board may specify to,*
>
> *(a) remedy a contravention that has occurred; or*
>
> *(b) prevent a contravention or further contravention of the enforceable provision.*

Section 112.4 of the OEB Act, 1998 states:

> *(1) If the Board is satisfied that a person who holds a licence under Part IV or V has contravened an enforceable provision, the Board may make an order suspending or revoking the licence.*
> *(2) This section applies to contraventions that occur before or after this section comes into force.*

Section 112.5 of the OEB Act, 1998 states:

> *(1) If the Board is satisfied that a person has contravened an enforceable provision, the Board may, subject to the regulations*

under subsection (5), make an order requiring a person to pay an administrative penalty in the amount set out in the order for each day or part of a day on which the contravention occurred or continues.

Prepared by: Paul Gasparatto

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0133

Paul Gasparatto

From: Jill Bada
Sent: May 4, 2009 8:35 AM
To: Paul Gasparatto; Maureen Helt
Subject: THESL udpate

Hi there,
Maureen and I met with Mark Friday and updated him on the Dx meeting on THESL. Here are our next steps:

1) Mark will speak to HW to update him on the meeting with the Dx committee.
2) You should continue with your investigations in each of the SSMWG complaints. We need as much information as possible about the each allegation.
3) I am going to contact THESL to inform them that we have spoken with the Board and they had little to say about the matter in terms of clarification or a code change. I will tell them that we have received formal complaints regarding the matter and we will be in touch with them to investigate and that we will be in touch with them soon.

We agreed that we should not be considering briefing the chair until the investigations are complete, so let Maureen and I know as things proceed.
Thanks
Jill

Jill Bada

Manager, Compliance
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For general enquiries please contact the Market participant Hotline at: Market.Operations@oeb.gov.on.ca

Paul Gasparatto 0134

From: Jill Bada
Sent: May 8, 2009 10:30 AM
To: Mark Garner
Cc: Maureen Helt; Paul Gasparatto
Subject: THESL - sub metering case

Here is an update on the THESL file:

- I spoke to Colin McLorg today and told him that a meeting of one of the Board committees had occurred. I told him that the committee expressed their view that the legislation if quite clear. I also informed Colin that we have received formal complaints relating to this matter and that Paul is investigating those allegations. I told Colin that Paul would contact him for further information on each allegation. Colin re-iterated that THESL is still willing to acknowledge the facts of each case so that we might proceed to an enforcement hearing. He made it clear to me that THESL wants a decision of the Board on this issue, and that if in fact THESL is found to be non-compliant that they will comply.

- I have told Paul to contact Colin today regarding the allegations (as Colin is going to CAMPUT and will be away next week).

I expect we will have THESL's reply in the next few weeks and we should be able to brief the Chair on the case by the end of May.
I hope this is consistent with your thinking?
Thanks
Jill

Jill Bada

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0135

Paul Gasparatto

From: Colin McLorg [cmclorg@torontohydro.com]
Sent: May 20, 2009 4:56 PM
To: Paul Gasparatto
Cc: George Vegh
Subject: TH reply re CO20090066 - Condo smart metering
Attachments: CondoSmartMeteringReply#3 C020090066 combined.pdf

Hello Paul - please see attached the TH reply to your letter of May 9. I mention in it a further letter from TH to Howard Wetston, which I expect to be able to forward to you tomorrow.

Regards,

Colin McLorg
Manager, Regulatory Policy & Relations
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Toronto, Ontario
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toronto hydro electric system

May 20, 2009

Mr. Paul Gasparatto
Project Advisor, Regulatory Policy and Compliance
Ontario Energy Board
P.O. Box 2319
2300 Yonge St
Toronto, ON M4P 1E4

via email and regular mail

Dear Mr. Gasparatto:

RE: Board File C020090066 – Installation of Metering in New Condominium Units

Thank you for your letter of May 9, 2009, with respect to allegations made by certain parties about Toronto Hydro-Electric System Limited (THESL) metering policy and practice for new condominiums. The purpose of this letter is to provide you with the facts that you are seeking as part of your investigation. In this letter, THESL does not engage in arguments over the merits of compliance staff's policy positions. THESL's positions on these matters have been canvassed in previous correspondence. In addition, THESL believes the position taken by compliance staff in this matter assumes articles of policy respecting the smart metering obligations of utilities that have not been determined by the Board and that should be addressed by the Board on a policy basis. I will forward copy of a letter from THESL to the Chair of the OEB to that effect for your reference.

The first two items in your letter concern letters I wrote to representatives of Tridel with respect to two condominium projects for which THESL has provided Offers to Connect. I have attached for your reference copies of those letters, which are identical except for address information.

The next two items concern statements allegedly made by THESL representatives at meetings attended by representatives of Deltera Inc and Enbridge Electric Connections Inc. It is, of course, not possible to confirm whether they or any representatives were properly understood by the audience, but in this instance the complainants evidently misunderstood THESL's policy if they believe that THESL's position is that only THESL is able to *supply* smart meters. As you are aware from our previous correspondence, THESL's Conditions of Service expressly provide for installation of suite metering infrastructure under the Alternative Bid option. Our previous correspondence has also made reference to

the Board's own statements that licensed distributors are entitled to conduct smart metering in condominiums, and that they are the only parties authorized to do so.

The next two items in your letter pertain to THESL's obligation to connect under Section 28 of the *Electricity Act* and its provision of bulk meters. You state at page 3 of your letter:

> "...the Compliance Office requests that THESL respond to one of the concerns outlined in the letters that the Compliance Office issued to THESL in October 2008 and January 2009. In those letters the Chief Compliance Officer stated the view that if THESL were to refuse to connect a property by reason of the customer's decision to install smart sub-metering, THESL would be non-compliant with its obligation to connect under section 28 of the Electricity Act, 1998. Based on the evidence, it appears that THESL has refused to connect customers in the manner that they have requested. THESL's responses to CCO's letters did not address concerns related to the obligation to connect. We once again request that THESL provide its view on how its policies and actions are compliant with section 28 of the Electricity Act, 1998."

THESL has in fact responded to the Chief Compliance Officer's concern around Section 28 by noting at page 2 of my February 9th letter "Furthermore, there are no grounds for your hypothetical under which THESL would refuse to connect a customer." THESL has not and will not refuse to connect new condominium developments to its distribution system. THESL's standard practice is to provide a bulk meter to the building under construction which itself is used to bill the electricity used after the main switchboard is energized, prior to which electricity is supplied on a temporary service basis. At no time under THESL's policy and practice is any customer denied or otherwise without electricity service, and nothing under that policy and practice conflicts in any way with THESL's obligations under Section 28 of the *Electricity Act*.

In summary,

- There is, and has been, no instance of any customer being denied connection to the electricity distribution network for the reasons suggested in your letter.
- There is no policy on THESL's part that requires that THESL provide or install suite metering infrastructure.

I trust that this responds to your inquiries. Please contact me if you require further information.

Yours truly,

(Original signed by)

Colin McLorg
Manager, Regulatory Affairs
416-542-2513
regulatoryaffairs@torontohydro.com

c. Ms. Kirsten Walli, Board Secretary

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toronto hydro
electric system

2009 April 22

Mr. Giuseppi Bello
Project Manager
Residences of Avonshire Inc
4800 Dufferin Street
Toronto, ON M3H 5S9
via email

Dear Mr. Bello:

RE: Metering and Offers to Connect for 'Avonshire' Projects

Thank you for your letter of March 10, 2009 to our Mr. Trgachef. Unfortunately, conflicting address information in your letter resulted in delays in its delivery. Your letter, received by me April 20, has been referred to me for reply.

Your letter generally concerns Toronto Hydro's policy and practice regarding offers to connect and smart metering for new condominiums, particularly those mentioned in the subject line of your letter. Your letter goes on to request that Toronto Hydro prepare a revised Offer to Connect for those condominiums based on a bulk meter / sub-metering configuration. As explained below, Toronto Hydro does not offer that connection configuration for new condominiums and therefore will not prepare a revised Offer to Connect on that basis.

The Ontario Energy Board ('OEB') regulates Toronto Hydro rates and service offerings. The OEB has defined the term 'smart metering' as follows: "The Board uses the term "smart metering" to describe the situation in which a licensed distributor individually meters every condominium unit (and the condominium's common areas) with a smart meter. In this scenario, each unit will become a residential customer of the licensed distributor and each unit and the common areas must have a separate account with the licensed distributor.")[1]

As set out in Toronto Hydro's Conditions of Service, for condominium projects commenced with Toronto Hydro on and after February 28, 2008 ('new condominiums'), Toronto Hydro will provide smart metering as defined by the OEB (i.e., individual unit or suite metering

[1] [EB-2007-0772 Notice of Proposal etc. issued January 8, 2008]

compliant with smart metering regulations) for all separate units and for common areas ('individually metered units') at no charge to the developer. Upon registration and creation of the condominium corporation, the holders of the individually metered units become the direct customers of Toronto Hydro.

Toronto Hydro (along with other licensed distributors) has been specifically authorized to conduct smart metering as part of its standard, licensed distribution activities. The OEB has stated as follows:

> "The Board has previously determined in rates proceedings related to smart metering activities of certain distributors that smart metering is a part of the distribution activity that is already covered by distributors' distribution licences. As there is no distinction between smart metering condominiums and other residences, the Board has determined that only licensed distributors can smart meter condominiums. In the Board's view, this is in keeping with the current regulatory framework in the electricity sector.
>
> The Board is also of the view that Regulation 442 allows all licensed distributors to smart meter in condominiums."[2]
>
> "As set out in the January Notice, the Board remains of the view that smart metering is a distribution activity, and that the Electricity Act and Regulation 442 taken together allow all licensed distributors to undertake smart metering in condominiums. The distributor would do so as a distribution activity within its licensed service area."[3]

Toronto Hydro therefore asserts that it is authorized to connect new condominiums in the manner described in its Conditions of Service and that it has no obligation to do otherwise.

The statement of Toronto Hydro's position in this matter is not entirely correct in your letter. Specifically, you state your understanding that Toronto Hydro advised you that "Toronto Hydro was the only entity that had the right to own and supply meters for any of our projects and that no other options for metering were available."

While it is the case that ultimately Toronto Hydro will own the metering infrastructure and will attach the individually metered units as direct customers, Toronto Hydro's Conditions of Service provide for alternative bids for the installation of meters and do not preclude the installation of an additional sub-metering system, should the developer or condominium wish to install one, provided it does not interfere with Toronto Hydro's equipment.

Your request for a further Offer to Connect assuming bulk metering is based on an incorrect interpretation of Section 53.17 of the *Electricity Act,* which you state contradicts Toronto Hydro's advice referred to above. In fact, that Section provides as follows:

> "Despite the Condominium Act, 1998 and any other Act, a distributor and any other person licensed by the Board to do so shall, in the circumstances prescribed by regulation, install a smart meter, metering equipment, systems and technology and associated equipment, systems and technologies or smart sub-metering systems, equipment and technology and any associated equipment, systems and technologies of a type prescribed by regulation."

Section 53.17 of the *Electricity Act* does not contradict Toronto Hydro's position and is irrelevant to this issue, since with respect to new condominiums, it does not prohibit a

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[2] [EB-2007-0772 Notice of Proposal etc, January 8, 2008, pages 2-3]

[3] [EB-2007-0772 Notice of Proposal etc, June 10, 2008, pages 4]

distributor from installing smart metering, nor require a non-distributor to provide sub-metering, but rather goes to the requirement that whatever equipment is installed be of a type required by regulation. Furthermore, it clearly does not establish a right on the part of any person to install sub-metering equipment. Sub-metering is referred to because such configurations are allowed, but not required, in the case of existing condominiums already fitted with bulk meters.

In summary, nothing with respect to new condominiums in Toronto Hydro's metering or connection practice or in its Conditions of Service is out of compliance with Code, regulation, or legislation. The OEB has expressly concluded that smart metering of condominiums is a distribution activity authorized by the existing licenses of distributors, and has not established any obligation on distributors to provide for sub-metering configurations in new condominiums.

For these reasons Toronto Hydro does not accept the request set out in your letter. Please contact me if you have concerns or questions around any of these matters.

Yours truly,

(Original signed by)

Colin McLorg

Manager, Regulatory Policy and Relations

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cmclorg@torontohydro.com

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toronto hydro
electric system

2009 April 22

Mr. Lou Tersigni
Project Manager
Metrogate Inc
4800 Dufferin Street
Toronto, ON M3H 5S9
via email

Dear Mr. Tersigni:

RE: Metering and Offers to Connect for 'Metrogate' Projects

Thank you for your letter of March 10, 2009 to our Mr. Trgachef. Unfortunately, conflicting address information in your letter resulted in delays in its delivery. Your letter, received by me April 20, has been referred to me for reply.

Your letter generally concerns Toronto Hydro's policy and practice regarding offers to connect and smart metering for new condominiums, particularly those mentioned in the subject line of your letter. Your letter goes on to request that Toronto Hydro prepare a revised Offer to Connect for those condominiums based on a bulk meter / sub-metering configuration. As explained below, Toronto Hydro does not offer that connection configuration for new condominiums and therefore will not prepare a revised Offer to Connect on that basis.

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As set out in Toronto Hydro's Conditions of Service, for condominium projects commenced with Toronto Hydro on and after February 28, 2008 ('new condominiums'), Toronto Hydro will provide smart metering as defined by the OEB (i.e., individual unit or suite metering

[1] [EB-2007-0772 Notice of Proposal etc. issued January 8, 2008]

compliant with smart metering regulations) for all separate units and for common areas ('individually metered units') at no charge to the developer. Upon registration and creation of the condominium corporation, the holders of the individually metered units become the direct customers of Toronto Hydro.

Toronto Hydro (along with other licensed distributors) has been specifically authorized to conduct smart metering as part of its standard, licensed distribution activities. The OEB has stated as follows:

> "The Board has previously determined in rates proceedings related to smart metering activities of certain distributors that smart metering is a part of the distribution activity that is already covered by distributors' distribution licences. As there is no distinction between smart metering condominiums and other residences, the Board has determined that only licensed distributors can smart meter condominiums. In the Board's view, this is in keeping with the current regulatory framework in the electricity sector.
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[3] [EB-2007-0772 Notice of Proposal etc. June 10, 2008, pages 4]

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In summary, nothing with respect to new condominiums in Toronto Hydro's metering or connection practice or in its Conditions of Service is out of compliance with Code, regulation, or legislation. The OEB has expressly concluded that smart metering of condominiums is a distribution activity authorized by the existing licenses of distributors, and has not established any obligation on distributors to provide for sub-metering configurations in new condominiums.

For these reasons Toronto Hydro does not accept the request set out in your letter. Please contact me if you have concerns or questions around any of these matters.

Yours truly,

(Original signed by)

Colin McLorg

Manager, Regulatory Policy and Relations

416-542-2513

cmclorg@torontohydro.com

0144

Paul Gasparatto

From: Colin McLorg [cmclorg@torontohydro.com]
Sent: May 20, 2009 6:02 PM
To: Paul Gasparatto
Subject: Further response from TH re condo smart metering
Attachments: AH Letter to Mr. Howard Wetston_May 20.2009 Re Suite Metering.pdf

Hello Paul - here is the letter I mentioned in my earlier email.

Regards,

Colin McLorg
Manager, Regulatory Policy & Relations
Toronto Hydro-Electric System
416-542-2513 office
416-903-7837 cell
cmclorg@torontohydro.com

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toronto hydro
electric system

May 20, 2009

Mr. Howard Wetston
Chair, Ontario Energy Board
P.O. Box 2319, 2300 Yonge St
Toronto, ON M4P 1E4

By email and regular mail

Dear Mr. Wetston:

RE: Policy Concerning Distributor Connection and Metering of New Condominiums

Introduction and Summary

The OEB compliance office has indicated that it may seek enforcement action against Toronto Hydro Electric System Limited ("THESL"), with respect to THESL's policy concerning the connection and metering of new condominiums. The purpose of this letter is to provide information for the Board to consider in determining whether to issue notice of an intention to make an order in accordance with s. 112.2 of the *Ontario Energy Board Act* (the "*Act*"). THESL's main submission is that compliance staff's position goes to the heart of the new mandates governing distributors and the OEB under the *Green Energy Act*, namely to facilitate the implementation of the smart grid, to promote the connection and use of renewable energy sources, and to promote electricity conservation. THESL's position is that, rather than have these issues debated in a compliance hearing, the Board and the sector would be better served by addressing this issue on a policy basis, following a process that allows all of the issues to be debated and considered in a more forward looking manner.

Compliance Staff's Allegation and OEB Policy

Compliance staff's allegation is apparently that THESL's provision of smart suite metering services to new condominiums is inappropriate because it does not give primacy to a condominium developer's "ability to choose between having a licenced distributor install smart meters or having a licenced smart sub-metering provider install smart sub-meters."[1] Although THESL does not agree with compliance staff on the merits of the allegation, and will vigorously defend itself if a compliance action is commenced, raising all possible defences, including raising the policy issues outlined in this letter, the purpose of this letter is not to address the merits of a compliance action. Rather, it is to address the underlying policy position of compliance staff and its compatibility with the new mandates given to the OEB and distributors as a result of the enactment of the *Green Energy Act*.

[1] Letter from the Chief Compliance Officer to Toronto Hydro, January 29, 2009.

The Green Energy Act and the new Mandates for the OEB and Distributors

Under the *Green Energy Act*, distributors have been given distinct policy responsibilities, including the development and implementation of the smart grid, expanding and reinforcing distribution systems to accommodate the connection of renewable energy generation facilities, and achieving conservation targets. All of these responsibilities are aligned with new statutory objectives granted to the Board.[2] None of these responsibilities are shared by condominium developers or third party sub-meter providers. As is discussed immediately below, a distributor's ability to meet all of these responsibilities is affected by the provision of smart metering to condominium unit owners.

Smart Grid Development and Implementation

Section 70(2.1) of the *Act*, as amended by the *Green Energy Act*, requires distributors to prepare plans for, and make investments in, "the development and implementation of the smart grid in relation to their distribution system." Those investments include investments in smart metering. As was noted in the *Report of the Ontario Smart Grid Forum*, smart meters are "a major smart grid component."[3]The *Report* states:

> "Smart meters, a major smart grid component, can give consumers timely information on price and consumption. Emerging devices will empower consumers to act on this information automatically while at the same time improving their energy efficiency, comfort and convenience. New sensing, monitoring, protection and control technologies will enhance the ability of the grid to incorporate renewable generation.
>
> The institutional structure of the electricity industry makes it easy to look at how the smart grid will impact each piece of the system in isolation, but the most profound impact of a smart grid may be its ability to link these pieces more closely together. In Ontario we have numerous distribution utilities, one large transmission company and a few smaller ones; one large generating company and many smaller ones. The province has a system/market operator and a corporation responsible for longer-term system planning, and procuring electricity supply and demand resources. While the smart grid will affect each of these segments in different ways, it will affect all of them by increasing their ability to work together to better serve consumers."

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[2] The Board's new objectives in relation to electricity are:

- "To promote the conservation of electricity"
- "To facilitate the implementation of a smart grid in Ontario."
- "To promote the use and generation of electricity from renewable energy sources in a manner consistent with the policies of the Government of Ontario, including the timely expansion or reinforcement of transmission systems and distribution systems to accommodate the connection of renewable energy generation facilities." (*OEB Act*, s. 1(1)).

[3] *Enabling Tomorrow's Electricity System Report of the Ontario Smart Grid Forum*, p. 3

Smart meters are thus an integral component of Ontario's development of a smart grid. In order to ensure that all consumers will be able to benefit from smart grid technology, it is important to allow all customers' meters to be integrated with the smart grid. In other words, a meter is not just a commercial product purchased by condominium developers (like counter tops and appliances); it is an instrument that distributors are expected to use so that they can meet their statutory obligations to develop and implement the smart grid.

The smart grid mandate for distributors is at its nascent stage. As a result, all of the areas where distributor smart metering is superior to third party sub-metering have not yet emerged. However, some obvious initial areas are:

- Conservation
- Home automation
- Customer use of utility energy management internet portals;
- Theft detection (through observation of the difference between bulk meter readings and the sum of suite meter readings); and
- Future developments including domestic electricity storage and a widening scope of end-user participation in smart grid mechanisms

Renewable Energy Generation

A second new mandate given to distributors is to make plans for, and investments in, the expansion or reinforcement of distribution systems to accommodate the connection of renewable energy generation facilities.[4] In order to connect small scale solar panels for condominium units, distributors will have to install two meters for customers, one to record how much energy is purchased from the system, another to record how much is generated by the customers. This requires metering individual condominium units. Condominium developers and commercial sub-meter providers do not have this mandate, and in fact load displacement renewable generation would be directly contrary to the economic interests of sub-meterers.

Conservation

Finally, the *Green Energy Act* imposes obligations on distributors to meet conservation targets. The conservation targets can be met a number of ways, and smart metering is key to achieving them. For example, a distributor's smart meters can provide in-home display and load control applications. This is most effectively carried out at the customer specific level, not just the bulk meter level. There is also an important customer education element to this information, which is lost if the distributor can no longer communicate directly with consumers. Again, conservation activities are directly contrary to the economic interests of sub-meterers.

[4] *Ontario Energy Board Act*, s. 70(2.1).

Implications of Change in Mandate

It is not necessary at this stage to identify all of the ways in which metering technology at the customer specific level can facilitate smart grid development, renewable energy connection and achieving conservation targets. These will emerge over time. However, three points are clear:

First, the primary responsibility for all of these areas is with the distributor. Distributor's mandates are ambitious and challenging and they should be given the tools to do their jobs. These mandates are not shared by commercial sub-meter providers, and since sub-meterers are not rate-regulated and have no access to Lost Revenue Adjustment Mechanisms, in many circumstances their economic interests directly conflict with utility's GEA mandates.

Second, the OEB's mandate under the *Green Energy Act* is to facilitate distributor's meeting these obligations. This is reflected in the three new objectives given to the OEB through the *Green Energy Act* amendments. These objectives thus carry more weight than the objective of a condominium developer's so-called right to choose a service provider.

Third, given this new mandate, for both the Board and for THESL, it would be helpful to work through the policy implications in a thoughtful and orderly manner, one that can address the broader policy ramifications in an appropriate process. The Board can, of course, determine the process to address this in its discretion. However, it is clear that prosecutions under Part VII.1 of the *Act* are not well suited for this process. Further, it would be unfortunate if the purpose of the first initiative commenced by the OEB under its new mandate is to target distributors who are trying to implement government policy that animates the *Green Energy Act*.

Conclusion

THESL hopes that the Board will take these matters into consideration when considering whether to issue notice of an intention to make an order in accordance with s. 112.2 of the *Act* and would be pleased to meet with you or your staff to further discuss these issues at your convenience.

Thank you for your consideration.

Yours Sincerely,

Anthony Haines
President

\VS

Copy: George Vegh, Counsel, McCarthy Tétreault
OEB Compliance Office

Paul Gasparatto

From: Paul Gasparatto
Sent: May 21, 2009 8:36 AM
To: 'Colin McLorg'
Cc: George Vegh; Maureen Helt; Jill Bada
Subject: RE: TH reply re CO20090066 - Condo smart metering

Good Morning Colin,

Thank you for the two letters you e-mailed me. We shall review and consider the next steps.

Regards,

Paul Gasparatto
Regulatory Policy and Compliance
Project Advisor
Compliance

Ontario Energy Board
P.O. Box 2319
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Toronto, ON M4P 1E4
Tel: 416-440-7724
1-888-632-6273 ext. 724
Email: paul.gasparatto@oeb.gov.on.ca

For general enquiries, please contact the Market Participant Hotline at market.operations@oeb.gov.on.ca

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From: Colin McLorg [mailto:cmclorg@torontohydro.com]
Sent: May 20, 2009 4:56 PM
To: Paul Gasparatto
Cc: George Vegh
Subject: TH reply re CO20090066 - Condo smart metering

Hello Paul - please see attached the TH reply to your letter of May 9. I mention in it a further letter from TH to Howard Wetston, which I expect to be able to forward to you tomorrow.

Regards,

Colin McLorg
Manager, Regulatory Policy & Relations
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toronto hydro
electric system

May 20, 2009

Mr. Howard Wetston
Chair, Ontario Energy Board
P.O. Box 2319, 2300 Yonge St
Toronto, ON M4P 1E4

By email and regular mail

Dear Mr. Wetston:

RE: Policy Concerning Distributor Connection and Metering of New Condominiums

Introduction and Summary

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[1] Letter from the Chief Compliance Officer to Toronto Hydro, January 29, 2009.

The Green Energy Act and the new Mandates for the OEB and Distributors

Under the *Green Energy Act*, distributors have been given distinct policy responsibilities, including the development and implementation of the smart grid, expanding and reinforcing distribution systems to accommodate the connection of renewable energy generation facilities, and achieving conservation targets. All of these responsibilities are aligned with new statutory objectives granted to the Board.[2] None of these responsibilities are shared by condominium developers or third party sub-meter providers. As is discussed immediately below, a distributor's ability to meet all of these responsibilities is affected by the provision of smart metering to condominium unit owners.

Smart Grid Development and Implementation

Section 70(2.1) of the *Act*, as amended by the *Green Energy Act*, requires distributors to prepare plans for, and make investments in, "the development and implementation of the smart grid in relation to their distribution system." Those investments include investments in smart metering. As was noted in the *Report of the Ontario Smart Grid Forum*, smart meters are "a major smart grid component."[3] The *Report* states:

> "Smart meters, a major smart grid component, can give consumers timely information on price and consumption. Emerging devices will empower consumers to act on this information automatically while at the same time improving their energy efficiency, comfort and convenience. New sensing, monitoring, protection and control technologies will enhance the ability of the grid to incorporate renewable generation.
>
> The institutional structure of the electricity industry makes it easy to look at how the smart grid will impact each piece of the system in isolation, but the most profound impact of a smart grid may be its ability to link these pieces more closely together. In Ontario we have numerous distribution utilities, one large transmission company and a few smaller ones; one large generating company and many smaller ones. The province has a system/market operator and a corporation responsible for longer-term system planning, and procuring electricity supply and demand resources. While the smart grid will affect each of these segments in different ways, it will affect all of them by increasing their ability to work together to better serve consumers."

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[2] The Board's new objectives in relation to electricity are:

- "To promote the conservation of electricity"
- "To facilitate the implementation of a smart grid in Ontario."
- "To promote the use and generation of electricity from renewable energy sources in a manner consistent with the policies of the Government of Ontario, including the timely expansion or reinforcement of transmission systems and distribution systems to accommodate the connection of renewable energy generation facilities." (*OEB Act*, s. 1(1)).

[3] *Enabling Tomorrow's Electricity System Report of the Ontario Smart Grid Forum*, p. 3

Smart meters are thus an integral component of Ontario's development of a smart grid. In order to ensure that all consumers will be able to benefit from smart grid technology, it is important to allow all customers' meters to be integrated with the smart grid. In other words, a meter is not just a commercial product purchased by condominium developers (like counter tops and appliances); it is an instrument that distributors are expected to use so that they can meet their statutory obligations to develop and implement the smart grid.

The smart grid mandate for distributors is at its nascent stage. As a result, all of the areas where distributor smart metering is superior to third party sub-metering have not yet emerged. However, some obvious initial areas are:

- Conservation
- Home automation
- Customer use of utility energy management internet portals;
- Theft detection (through observation of the difference between bulk meter readings and the sum of suite meter readings); and
- Future developments including domestic electricity storage and a widening scope of end-user participation in smart grid mechanisms

Renewable Energy Generation

A second new mandate given to distributors is to make plans for, and investments in, the expansion or reinforcement of distribution systems to accommodate the connection of renewable energy generation facilities.[4] In order to connect small scale solar panels for condominium units, distributors will have to install two meters for customers, one to record how much energy is purchased from the system, another to record how much is generated by the customers. This requires metering individual condominium units. Condominium developers and commercial sub-meter providers do not have this mandate, and in fact load displacement renewable generation would be directly contrary to the economic interests of sub-meterers.

Conservation

Finally, the *Green Energy Act* imposes obligations on distributors to meet conservation targets. The conservation targets can be met a number of ways, and smart metering is key to achieving them. For example, a distributor's smart meters can provide in-home display and load control applications. This is most effectively carried out at the customer specific level, not just the bulk meter level. There is also an important customer education element to this information, which is lost if the distributor can no longer communicate directly with consumers. Again, conservation activities are directly contrary to the economic interests of sub-meterers.

[4] *Ontario Energy Board Act*, s. 70(2.1).

Implications of Change in Mandate

It is not necessary at this stage to identify all of the ways in which metering technology at the customer specific level can facilitate smart grid development, renewable energy connection and achieving conservation targets. These will emerge over time. However, three points are clear:

First, the primary responsibility for all of these areas is with the distributor. Distributor's mandates are ambitious and challenging and they should be given the tools to do their jobs. These mandates are not shared by commercial sub-meter providers, and since sub-meterers are not rate-regulated and have no access to Lost Revenue Adjustment Mechanisms, in many circumstances their economic interests directly conflict with utility's GEA mandates.

Second, the OEB's mandate under the *Green Energy Act* is to facilitate distributor's meeting these obligations. This is reflected in the three new objectives given to the OEB through the *Green Energy Act* amendments. These objectives thus carry more weight than the objective of a condominium developer's so-called right to choose a service provider.

Third, given this new mandate, for both the Board and for THESL, it would be helpful to work through the policy implications in a thoughtful and orderly manner, one that can address the broader policy ramifications in an appropriate process. The Board can, of course, determine the process to address this in its discretion. However, it is clear that prosecutions under Part VII.1 of the *Act* are not well suited for this process. Further, it would be unfortunate if the purpose of the first initiative commenced by the OEB under its new mandate is to target distributors who are trying to implement government policy that animates the *Green Energy Act*.

Conclusion

THESL hopes that the Board will take these matters into consideration when considering whether to issue notice of an intention to make an order in accordance with s. 112.2 of the *Act* and would be pleased to meet with you or your staff to further discuss these issues at your convenience.

Thank you for your consideration.

Yours Sincerely,

Anthony Haines
President

\VS

Copy: George Vegh, Counsel, McCarthy Tétreault
OEB Compliance Office

Date May 8/09

THESL	→ Met w/ the committee → In their view the legislation is clear. "In camera". → Rec'd formalized complaints. (416) 542-2513
Colin	- We want a determination of the Board. If we don't get one in our favour. we will abide by Board's decision - want's to avoid boxes of offer's to correct. - unless we need.

Ontario

BRIEFING NOTE

COMPLIANCE CASE BRIEFING NOTE

Toronto Hydro Metering Policies &
Restricting Smart Sub-metering

July 15, 2009

COMPLIANCE ISSUE

Toronto Hydro Electric System Ltd ("THESL") has implemented policies that require that individual units in all new condominiums be directly metered by THESL. As a result, developers and condominium corporations do not have the choice of having the individual units in the building metered solely by a licensed smart sub-meter provider.

EVIDENCE AND ALLEGED NON-COMPLIANCE

A number of licensed sub-meter providers and developers have provided Compliance staff with anecdotal stories of instances where they have been informed by THESL that the installation of a sub-metering system by a licensed sub-meter provider would not be allowed.

The Compliance Office has confirmed two incidents where a developer has requested that THESL provide an offer to connect that contemplates the project being smart sub-metered and specifically that THESL install a bulk meter. In response to both requests, THESL informed the developers that THESL does not offer a connection agreement that contemplates a bulk meter / sub-metering configuration.

It is the view of the Compliance Office that THESL's actions are a violation of a distributor's obligation to connect a building upon request, as per section 28 of the *Electricity Act, 1998*. Additionally, THESL's actions are a violation of a distributor's obligation to provide an interval meter upon request, as per section 5.1.5 of the Distribution System Code.

THESL RESPONSE

THESL has argued that it has not and will not refuse to connect new condominiums to the distribution system. They have stated that it is their standard practice to provide a bulk meter to a building under construction which is used to bill electricity after the main switchboard is energized and prior to which energy is supplied on a temporary service basis.

THESL has also argued that there are no regulatory requirements that would restrict a distributor from imposing a policy that all individual units in a condominium must be metered by the distributor or that restrict a distributor to installing smart metering only at the request of the customer.

THESL have also submitted that their policy allows developers to hire a licensed sub-meter provider as long as the sub-metering system does not interfere with THESL's own metering system.

Most recently, THESL submitted to Howard Wetston that in light of the Green Energy Act, the Board should address the issue of metering new condominiums on broader policy basis rather than on a compliance or enforcement basis. THESL suggests that a distributors ability to meet the demands of implementing the smart grid, connecting renewable generation and reaching conservation targets, is affected by the provision of smart metering to condominium unit holders. Therefore, the Board should promote the use of distributor metering.

COMPLIANCE STAFF ASSESMENT

It is staff's view that THESL's response that they will provide a connection to all new condominiums is in contradiction to the statements made by THESL to developers that THESL will not provide an Offer to Connect that contemplates a bulk meter / sub-metering configuration. THESL may provide a temporary bulk meter and connection but they admit that they will not provide the connection configuration requested by the customer.

It is Compliance staff's opinion that refusing to connect in the configuration requested by the customer is the equivalent of refusing connection outright. Based on THESL's demand that all units be metered by the distributor, staff also believes it is likely that THESL will breach section 28 of the *Electricity Act, 1998,* by refusing to continue to connect a customer if the customer does not allow the distributor to install individual unit metering.

Additionally, THESL's actions are denying developers the rights set out in O. Reg 442/07, which states that a condominium building may choose to install either smart meters or a smart sub-metering system. THESL's suggestion that a developer has the right to install a sub-metering system in addition to the distributor's metering is

impractical and does not take into account that there would be no benefit to the developer to install a sub-metering system in a scenario where individual units are already metered by the distributor.

In regards to THESL's desire to have a broader policy discussion, Compliance staff submit that the Board has already held such discussions during the proceedings which issued the Smart Sub-Meter Provider licenses, the Smart Sub-Metering code, and amended the DSC to require distributors install individual unit meters upon request of the customer. At no point in these proceedings did THESL or any other distributor present an argument that individual units must be smart metered by the distributor rather than smart sub-meter providers. It is staff's view that the issuances of new licenses and codes, plus the amendment to the DSC is evidence that the Board anticipated that condominium developers would have the option of hiring private contractors to install and operate smart sub-metering systems rather than have distributor smart meters installed. When asked for guidance, the members of the Electricity Distribution Committee strongly supported Compliance staff's view.

Compliance staff also submit that all of THESL's arguments that sub-metering would hinder the goals of the *Green Energy Act* are without merit. THESL's idea that there will be renewable generation projects on an individual condominium unit level appears to unrealistic. Also, conservation is driven by customer choice regardless of who bills them for electricity. THESL's contention that sub-meter providers would interfere with conservation efforts is unfounded as a sub-meter provider's revenue is not based on a customer's usage.

Staff note that it was the Ministry of Energy itself who established both the *Green Energy Act* and the regulation that allows for people other than distributors to install and operate smart sub-metering systems. As recently as May 21st, Minister Smitherman told the Toronto Star that he intends to introduce new legislation that will allow landlords to install smart sub-metering systems in residential apartment buildings. It seems apparent that contrary to THESL's arguments, the Ministry believes that smart sub-metering can play an important role in achieving the green energy goals. To accept Toronto Hydro's policies would, in staff's view, be a reversal of the intention of the Board and the Ministry of Energy in establishing a smart sub-metering licensing regime.

It is important to note that Compliance staff have been informed by other distributors that they too have an interest in the outcome of this dispute. Therefore, whatever decisions the Board arrives at will likely impact the activities on all distributors in the province.

BRIEF BACKGROUND OF CASE PROGRESS

In July 2008, the Compliance Office received complaints from sub-meter providers about Toronto Hydro's ("THESL") policy regarding the metering of new condominiums. The Compliance Office began an investigation which resulted in a series of

correspondence between THESL and Compliance staff. Details of this communication are outlined later in this note under the section "Detailed Background."

This correspondence determined that THESL has implemented a policy that requires individual units in all new condominiums to be directly metered by THESL. A developer or Condominium Board may install its own additional sub-metering system provided that there is no interference with THESL's smart metering system. However, it is THESL's policy that ultimately each residential and commercial unit in a new condominium must be a direct customer of THESL. THESL has based this policy on its belief that there are no regulatory provisions which prohibit its policy and/or require that a distributor install smart metering only at the request of the condominium.

The OEB Compliance Office expressed its that view that to the extent that THESL's policies require smart metering of new condominiums and that each unit must be a direct customer of THESL, such policies are inconsistent with the Board's smart sub-metering licensing regime.

It is also the concern of the Compliance Office, that if a customer were to refuse to accept individual unit metering by Toronto Hydro, it appears that THESL would refuse to connect the customer. This concern has become real with the filing of a new compliant with the Board. On April 25, 2009, the Compliance Office was provided with two letters from THESL to developers informing the developers that THESL will not prepare an Offer to Connect that provides for the installation of a bulk meter/sub-metering configuration. It is the view of the Compliance Office that such actions are non-compliant with a distributor's obligation to connect as set out in section 28 of the *Electricity Act, 1998* and the obligation to install an interval meter when requested to do so as set out in section 5.1.5 of the Distribution System Code.

The question of whether a distributor can require that customers be directly metered by the distributor will have an impact on more than just THESL's policies. The Compliance Office has received complaints from the smart sub-metering industry regarding the metering activities of other distributors. Compliance staff is also aware that other distributors are closely following the discussions between THESL and Compliance staff, including one distributor who has stated its refusal to discuss their metering activities with staff until the Board has taken a position on THESL's policies.

A meeting was held on April 17th between Board and THESL staff. In this meeting THESL reaffirmed its commitment to its policy and requested a Board hearing on the matter. OEB staff stated that we would request guidance from the Board as to its intention in regards to sub-metering activities and then determine next steps.

On May 1st, Compliance staff meet with the members of the Electricity Distribution Committee. Staff sought guidance on whether a new condominium owner has the right to install a smart sub-metering system rather than be required to have distributor smart metering be installed? The Committee members were all in agreement that a distributor

may not require a developer to have distributor meters installed for each unit. The Members also felt that the existing legislation was sufficiently clear on this matter.

On May 20th, THESL sent a letter to Mr. Wetston requesting that the Board initiate a policy consultation on this matter rather an enforcement hearing. THESL submits that the ability of a distributor to install smart meters in individual condominium units is essential to meet their obligations under the *Green Energy Act*.

OPTIONS

A. Pursue enforcement action against Toronto Hydro under section 112.3 of the OEB Act for non-compliance with section 28 of the Electricity Act (obligation to connect), and section 5.1.5 of the DSC (obligation to provide interval meter).

PRO – An enforcement proceeding will allow the Board the opportunity to fully consider the arguments of both Toronto Hydro and staff. A decision will also provide the opportunity for the Board to formally issue its position on the matter.

A formal Board order on this matter will eliminate any misconceptions that may exist in all regions of the province, not just within the Toronto Area.

An enforcement action will reinforce the Board's Compliance process and will demonstrate that the Board is willing to take action against a distributor who has been alleged to be non-compliant with its obligations.

An enforcement proceeding does not preclude the option, if deemed necessary, of implementing a proceeding to amend any relevant code to clarify the Board's intention.

CON – An enforcement proceeding may take an extended time period to fully complete. Such a schedule may not provide timely assistance for licensed smart sub-meter providers who claim to be suffering economic hardship due to the actions of distributors.

An enforcement proceeding may need to be focused on the alleged breach (ie: refusal to connect) and may not provide the opportunity for the Board to directly express its intentions in regard to the ability for new condominium customers to choose to be sub-metered.

Toronto Hydro has expressed its desire to have a broad policy proceeding on this matter rather than enforcement proceeding.

B. Amend the DSC, or other relevant codes to make it clear that distributors must provide customers with the right to have a bulk meter installed by the distributor and individual unit meters installed by a smart sub-meter provider.

PRO – A Code amendment proceeding will allow the Board the opportunity to fully consider the arguments of Toronto Hydro, staff and other interveners. A decision will also provide the opportunity for the Board to formally state its position on the matter.

A Code amendment will send a clear message to all parties involved and will eliminate any misconceptions that may exist in all regions of the province, not just within the Toronto Area.

CON – A Code amendment proceeding will take an extended period to fully complete. This schedule may not provide timely assistance for licensed smart sub-meter providers who are suffering economic hardship due to the actions of distributors.

Amending a Code in response to a dispute involving the interpretation of existing Board materials may send the message that distributors can avoid the consequence of non-compliant behaviour by demanding an amendment to clarify an intention that Compliance Office believes is clearly outlined in the Board's documents.

Opening this issue to a Notice and Comment process would provide interveners with the opportunity to re-raise and re-argue prior disagreements relating to smart sub-metering issues. Such commentary may move the initiative away the scope of the issue and expend unnecessary time and effort debating "old" issues.

C. The Board initiates, on its own motion, a written or oral hearing to review the question of whether distributors should have the right to impose individual distributor unit metering on customers and if so, under what circumstances.

PRO – Such a proceeding will allow the Board the opportunity to fully consider the arguments of Toronto Hydro, staff and other interveners. A decision will also provide the opportunity for the Board to formally state its position on the matter.

This proceeding may also allow the Board to determine the effect of the *Green Energy Act*, on certain Board's policies.

CON – It could be argued that government regulations allow for the use of smart sub-metering systems. There will likely be questions as to the Board's authority to supersede legislation.

The Board is currently engaged in a hearing (EB-2009-0111) to determine whether unlicensed distributors should be authorized to conduct discretionary metering activities in residential tenancies and other industrial and commercial properties. If the Board determines in EB-2009-0111 that unlicensed distributors can engage in discretionary metering activities, that decision may be in conflict with any consideration that distributors should be able to impose individual distributor unit metering on customers. Ultimately the Board could find itself in a position where it has ruled that unlicensed distributors have the right to install sub-metering systems but then rule that distributors have the right

to effectively restrict unlicensed distributors from installing sub-metering systems.

The Board has recently established a licensing and code regime for smart sub-meter providers. Issuing a decision to allow distributors to impose a requirement for customers to have distributor smart meters would effectively eliminate the business opportunities of smart sub-meter providers.

RELEVANT REGULATORY & LEGAL REFERENCES

Distribution System Code

5.1.5 A distributor shall provide an interval meter within a reasonable period of time to any customer who submits to it a written request for such meter installation, either directly, or through an authorized party, in accordance with the Retail Settlement Code …

5.1.9 When requested by either:

(a) the board of directors of a condominium corporation; or
(b) the developer of a building, in any stage of construction, on land for which a declaration and description is proposed or intended to be registered pursuant to section 2 of the Condominium Act, 1998,

a distributor shall install smart metering that meets the functional specification of Ontario Regulation 425/06 – Criteria and Requirements for Meters and Metering Equipment, Systems and Technology (made under the Electricity Act).

Electricity Act, 1998

28. A distributor shall connect a building to its distribution system if,

(a) the building lies along any of the lines of the distributor's distribution system; and
(b) the owner, occupant or other person in charge of the building requests the connection in writing.

53.17 (1) Despite the Condominium Act, 1998 *and any other Act, a distributor and any other person licensed by the Board to do so shall, in the circumstances prescribed by regulation, install a smart meter, metering equipment, systems and technology and associated equipment, systems and technologies or smart sub-metering systems, equipment and technology and any associated equipment, systems and technologies of a type prescribed by regulation, in a property or class of properties prescribed by regulation at a location prescribed by regulation and for consumers or classes of consumers prescribed by regulation at or within the time prescribed by regulation.*

Ontario Regulation 442/07

2. For the purposes of subsection 53.17 (1) of the Act, the following are prescribed classes of property:

1. *A building on land for which a declaration and description have been registered pursuant to section 2 of the* Condominium Act, 1998.
2. *A building on land for which a declaration and description have been registered creating a condominium corporation that was continued pursuant to section 178 of the* Condominium Act, 1998.
3. *A building, in any stage of construction, on land for which a declaration and description is proposed or intended to be registered pursuant to section 2 of the* Condominium Act, 1998.

3. For the purposes of subsection 53.17 (1) of the Act, the following are prescribed circumstances:

1. *The approval by the board of directors to install smart meters or smart sub-metering systems, in the case of a building that falls into a prescribed class of property described in paragraph 1 or 2 of section 2.*
2. *The installation of smart meters or smart sub-metering systems, in the case of a building that falls into a prescribed class of property described in paragraph 3 of section 2.*

4. (1) For a class of property prescribed under section 2 and in the circumstances prescribed under section 3, a licensed distributor, or any other person licensed by the Board to do so, shall install smart meters or smart sub-metering systems of a type, class or kind,

(a) that are authorized by an order of the Board or by a code issued by the Board; or

(b) that meet any criteria or requirements that may be set by an order of the Board or by a code issued by the

Smart Sub-Metering Code

2.2.1 A smart sub-metering provider shall ensure that either:

(c) the board of directors of a condominium corporation; or

(d) the developer of a building, in any stage of construction, on land for which a declaration and description is proposed or intended to be registered pursuant to section 2 of the Condominium Act, 1998,

has requested, and a distributor has installed, a master meter that is an interval meter before beginning to provide smart sub-metering services.

Notice of Proposal to Amend a Code and Notice of Proposal to issue a New Code, dated January 8, 2008, page #2.

The Board uses the term "smart metering" to describe the situation in which a licensed distributor individually meters every condominium unit (and the condominium's common areas) with a smart meter. In this scenario, each unit will become a residential customer of the licensed distributor and each unit and the common areas must have a separate account with the licensed distributor.

The Board uses the term "smart sub-metering" to describe the situation in which a licensed distributor provides service to the condominium's bulk (master) meter and then a separate person (the smart sub-meter provider on behalf of the condominium corporation) allocates that bill to the individual units and the common areas through the smart sub-metering system. In this scenario, the condominium continues to be the customer of the licensed distributor and will receive a single bill based on the measurement of the bulk (master) meter.

Section 112.3(1) of the OEB Act, 1998 states:

If the Board is satisfied that a person has contravened or is likely to contravene an enforceable provision, the Board may make an order requiring the person to comply with the enforceable provision and to take such action as the Board may specify to,

(a) remedy a contravention that has occurred; or

(b) prevent a contravention or further contravention of the enforceable provision.

Section 112.4 of the OEB Act, 1998 states:

(1) If the Board is satisfied that a person who holds a licence under Part IV or V has contravened an enforceable provision, the Board may make an order suspending or revoking the licence.

(2) This section applies to contraventions that occur before or after this section comes into force.

Section 112.5 of the OEB Act, 1998 states:

(1) If the Board is satisfied that a person has contravened an enforceable provision, the Board may, subject to the regulations under subsection (5), make an order requiring a person to pay an administrative penalty in the amount set out in the order for each day or part of a day on which the contravention occurred or continues.

DETAILED BACKGROUND

CUSTOMER CONTACT

In July 2008, Carma Industries and Intellimeter have complained to the Compliance Office regarding what they see as unfair business practices by Toronto Hydro.

In December 2008, a group of private sub-meter providers known as the Smart Sub-Metering Work Group also submitted a compliant that electricity distributors are abusing their market power and as a result hindering the growth of the smart sub-metering industry in the province. The complaint specifically identifies the following utilities:

- Toronto Hydro, Enersource, Oakville Hydro, PowerStream

The alleged activity includes the following:

- Building owners/developers are told that only the LDC may install meters and provide individual suite metering.
- Where a building owner/developer has expressed an interest in smart sub-metering, the LDC refuses to provide an Offer to Connect, refuses to install a bulk meter or advises that such a choice would result in other causes of delay. The LDC's inform the developers that none of these events would occur if the LDC is permitted to do the metering.
- Certain Offers to Connect are being provided without the LDC undertaking an economic evaluation and as a result either inadequate or no financial contributions are being requested.

REVIEW OF COMPLIANCE OFFICE ACTIVITY

On July 16, 2008 and July 25, 2008, the Compliance Office received complaints from Carma Industries and Intellimeter.

On July 24, 2008, Compliance staff requested Toronto Hydro provide a response to questions relating to the distributor's policies regarding metering of multi-unit properties.

On July 29, 2008, Toronto Hydro responded to staff questions and provided the following positions.

- THESL requires distributor smart meters be installed in new facilities. However, it does allow customers to install these meters through alternative bid and then be transferred to the distributor.

- THESL's position is that unit holders and common areas (either residential or commercial) in new condominiums are individual residential or general service customers of THESL, the same as new customers in single detached homes.

- THESL believes that the Board supports this view since it has stated in its June 10th Notice for the Sub-Metering initiative that Smart Metering is a distribution activity and that only licensed distributors are allowed to undertake smart metering in condominiums.

On October 22, 2008, the Chief Compliance Officer issued a determination to Toronto Hydro stating that its policy is inconsistent with its regulatory obligations. The CCO stated the following views:

- THESL's policies are inappropriate in light of the legal and regulatory framework applicable to the metering of new condominiums as set out in section 53.17 (1) of the Electricity Act, 1998 which states

  "a distributor and any other person licensed by the Board to do so shall, ... , install a smart meter, metering equipment, systems and technology and associated equipment, systems and technologies or smart sub-metering systems, equipment and technology and any associated equipment, systems and technologies of a type prescribed by regulation." (emphasis added)

- The availability of the smart sub-metering option is clear from the materials issued by the Board when it amended the Distribution System Code (the "DSC") and created the Smart Sub-Metering Code. Section 5.1.9 of the DSC itself also clarifies that a distributor must install smart metering only when requested to do so by the condominium corporation or the developer.

- Under section 28 of the *Electricity Act, 1998*, a distributor must connect a building on request. The DSC sets out a list of the reasons that may justify a refusal to connect. However, the desire of a customer to install smart sub-metering is not one of those reasons.

On November 12, 2008, Toronto Hydro responded to the CCO's letter. THESL stated that it does not accept the opinions that were set out in the letter and would not change its metering policies. THESL presented the views that:

- It is incorrect to conclude that their policies preclude the installation of a sub-metering system; should a customer wish to install an additional sub-metering system, they are at liberty to do so provided there is no interference with

THESL's smart metering system. In any case, each distinct residential or commercial unit (including common areas) would remain as a direct customer of THESL.

- Section 53.17 of the *Electricity Act* is irrelevant to this issue, since it does not require a non-distributor to provide sub-metering, nor prohibit a distributor from installing smart metering, but goes to the requirement that equipment be of a type required by regulation. Furthermore, it clearly does not establish a right on the part of any person to install sub-metering equipment.

- The thrust of Section 5.1.9 is clearly to require that the metering installed meet the functional specification of Ontario Regulation 425/06.

On January 29, 2009, the CCO sent a follow up letter to Toronto Hydro stating that after considering THESL's arguments, he remains of the view that their policies are inappropriate. The CCO stated the following views:

- Cannot agree with THESL's characterization of section 53.17 of the *Electricity Act, 1998* as being either irrelevant to this issue, or as speaking only to the nature of the equipment to be installed.

- Cannot agree with THESL's characterization of section 5.1.9 of the Distribution System Code as having, as its thrust, to require that the metering installed meet the specifications in regulation. Section 5.1.9 also makes it clear that the person responsible for a new condominium has the ability to choose between having a licensed distributor install smart meters or having a licensed smart sub-metering provider install smart sub-meters.

- THESL's position that each individual unit must be become a direct customer of THESL is incompatible with the Board's approach to smart sub-metering. As described by the Board, smart sub-metering clearly involves (a) a licensed distributor that bills its customer – the condominium corporation – based on the measurement of a bulk meter; and (b) a separate person – the licensed smart sub-metering provider – that bills the individual units and common areas based on the measurement of a smart sub-metering system.

- The provisions of the Board's Smart Sub-Metering Code make it clear that smart sub-metering as a competitive licensed activity goes beyond merely the installation of the meters.

- There are no regulatory provisions that provide licensed distributors with the authority to implement a requirement that each unit and common area in a new condominium must become a direct customer of the distributor.

On February 9, 2009, Toronto Hydro responded to the CCO's letter and restated its view that the CCO's interpretations are incorrect. THESL presented the views that:

- Section 5.1.9 of the DSC does not mention smart sub-metering, nor contain any statement that expressly 'makes it clear' that a distributor may only install smart metering upon the request of a person in charge of a condominium. The unstated premise of your argument appears to be that the Section begins with the word 'Only', which it does not.

- In THESL's view that there are no regulatory provisions which prohibit its smart metering policy.

- Furthermore, the DSC states at Section 5.1.6:

> *"A distributor shall identify in its Conditions of Service the type of meters that are available to a customer, the process by which a customer may obtain such meters and the types of charges that would be levied on a customer for each meter type."*

This statement is not conditioned by any further obligation on the part of distributors concerning smart sub-metering in new condominiums.

On February 27, 2009, Compliance staff sent information request letters to Enersource, Powerstream and Oakville Hydro enquiring about their policies in regards to metering individual units in condominiums. Response to these enquiries has indicated that in the case of Enersource and Powersteam, they do not implement policies that require all customers in new condominiums be directly metered by the distributor. Oakville Hydro has stated that it will no longer communicate with staff on this issue until the Board settles the dispute with Toronto Hydro.

On April 17, 2009 OEB staff and THESL staff meet to discuss the dispute. THESL reaffirmed its previous position that individual customers in new condominiums should be customers of the distributor. They also acknowledged their policy is to not install a bulk meter even when requested by the customer and submitted that they have no regulatory obligation to do so. THESL expressed its willingness to participate in an enforcement proceeding in order for this matter to have a hearing before the Board. OEB staff informed THESL that they would request guidance from the Board regarding interpretation of the legal requirements. Among the results of this guidance could be a Board statement on the interpretation, an enforcement proceeding and/or a code amendment.

On April 24, 2009, the Sub-metering Working Group provided copies of letters from THESL to two property managers in which THESL states that they do not offer a connection configuration based on a bulk meter/sub-metering configuration. As a result THESL would not prepare an Offer to Connect on that basis.

A meeting was held on April 17th between Board and THESL staff. In this meeting THESL reaffirmed its commitment to its policy and requested a Board hearing on the matter. OEB staff stated that we would request guidance from the Board as to its intention in regards to sub-metering activities and then determine next steps.

On May 1st, Compliance staff meet with the members of the Electricity Distribution Committee. Staff sought guidance on whether a new condominium owner has the right to install a smart sub-metering system rather than be required to have distributor smart metering be installed? The Committee members were all in agreement that a distributor may not require a developer to have distributor meters installed for each unit. The Members also felt that the existing legislation was sufficiently clear on this matter.

On May 20th, THESL sent a letter to Mr. Wetston requesting that the Board initiate a policy consultation on this matter rather the an enforcement hearing. THESL submits that the ability of a distributor to install smart meters in individual condominium units is essential to meet their obligations under the *Green Energy Act*.

Prepared by: Paul Gasparatto

G:\Limited\Compliance Office\Electricity Distributors\Toronto Hydro-Electric\Compliance\2008\Smart Submetering\BN_THESL Sub Metering_Enforce Note_20090610_v 3.doc

0173

Maureen Helt

From: Maureen Helt
Sent: August 21, 2009 11:08 AM
To: 'cmclorg@torontohydro.com'
Subject: THESL hearing

Colin

As per my voicemail, it is my understanding the hearing will be scheduled for September 24 and 25th (if necessary) and a Notice of Hearing will be issued today indicating those dates. If you have any questions please feel free to call or email.

Maureen A. Helt
Legal Counsel
Ontario Energy Board
P.O. Box 2319
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August 28, 2009

Maureen Helt
Counsel
Ontario Energy Board
2300 Yonge Street
Toronto, Ontario
M4P 1E4

Dear Ms. Helt:

Re: Smart Metering and Smart Sub-Metering in New Condominiums
Board File No: EB 2009-0308

We are counsel for Toronto Hydro - Electric System Limited ("THESL") with respect to the above noted matter.

I am writing to express my concern with the lack of progress on obtaining production and disclosure of documents and clarity on the process for this proceeding.

The Board's Notice of Intention was issued on August 4, 2009 – close to four weeks ago. On August 21, 2009, I requested your consent, as prosecuting counsel, to disclose and produce all relevant material within the Board's possession or control and to consent to a process for conducting the prosecution, on the terms requested. Another copy of that letter is enclosed for your reference. On August 26, 2009, I spoke to your co-counsel, Ms. Rosset, and requested a meeting with you to discuss how the prosecution will proceed. I still have not heard back from you.

Despite this lack of a disclosure or a clear process, the Board issued a Notice of Hearing, setting a hearing date of September 24, 2009. In order to conduct a fair prosecution within that time frame, I am requesting that you consent to the schedule set out below. We may then jointly propose a procedural order to the Board that incorporates this schedule.

Date	Event
September 2	OEB Prosecuting Counsel provides disclosure and production and consent to process on terms

	requested by THESL on August 21, 2009
September 4	OEB Prosecuting Counsel serves and files pre-filed evidence
September 11	THESL serves Interrogatories on pre-filed evidence
September 15	OEB Prosecuting Counsel provides responses to Interrogatories
September 22	THESL serves and files defence evidence (if any)
September 24	Hearing Commences

Please provide your consent to this proposal by the end of day on August 31, 2009 so that we may proceed with the next steps as proposed above. I am sending a copy of this letter (with enclosure) to the Board Secretary so that it may be posted on the public record with the other documents in this proceeding.

Thank you for your consideration of this matter and I look forward to hearing from you.

Sincerely,

George Vegh

cc: Colin McLorg (THESL)
OEB Board Secretary

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STIKEMAN ELLIOTT

Stikeman Elliott LLP Barristers & Solicitors

5300 Commerce Court West, 199 Bay Street, Toronto, Canada M5L 1B9
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BY EMAIL

November 3, 2009
File No. 100519.1011

Mr. George Vegh
McCarthy Tétrault LLP
Barristers and Solicitors
Suite 5300, TD Bank Tower
Toronto Dominion Centre
Toronto ON M5K 1E6

Dear Mr. Vegh:

Re: Notice of Intention to Make an Order for Compliance under Section 112.3 of the *OEB Act*, 1998
Board File No: EB 2009-0308

We acknowledge receipt of your letter dated October 30, 2009.

Compliance Counsel has produced all documents required by the Board's decision and order dated October 14, 2009 and we object to your suggestion that we have withheld documents.

Your letter seeks to obtain documents that the Board ruled are not required to be disclosed. The Board's decision is clear that the Notice of Intention to Make an Order "limits the questionable conduct to actions of Toronto with respect to Metrogate and Avonshire" and "accordingly, any production of documents should be limited to documents in the possession of Compliance Counsel that relate to Metrogate and Avonshire". This point was reinforced by the clarification issued by the Board on October 23, 2009 in which the Board stated that: "The decision makes it clear that the order was only intended to require Compliance staff to produce information relating to THESL that also related to Avonshire or Metrogate (in addition to any other information related to Avonshire or Metrogate on their own)".

As is clear from the documents produced, the Board received the complaints of Avonshire and Metrogate on April 24, 2009 and those

complaints relate to THESL's refusal to connect those projects as of April 22, 2009. Compliance Counsel has produced all relevant (and non-privileged) documents that relate to these two complaints. Specifically, there are no documents included in the earlier SSMWG complaint concerning the suite metering or smart metering practices of THESL with respect to Metrogate or Avonshire that relate to the allegations made in the Notice of Intention to Make an Order.

With respect to the Briefing Note of July 15, 2009 that is referenced in your request number 5, this document was prepared by Paul Gasparatto and it was circulated to other Compliance staff and legal counsel. There are no agendas, notes or minutes that relate to this document.

During our call on November 2, 2009, you asked for clarification with regards to the reference in Tab 9 of the Produced Documents to a complaint by the SSMWG to the Market Surveillance Panel. This complaint, as noted above, is not relevant. That said, we can advise that upon receipt of the complaint, it was determined that the complaint was not related to the wholesale electricity market and it was therefore redirected to the Board's Compliance staff.

Yours truly,

Glenn Zacher

/mas

cc: Michael Miller
Patrick Duffy
Maureen Helt

Indexed as:

Majestic Contractors Ltd. v. N.C.L. Contracting Ltd.

IN THE MATTER OF an Application Pursuant to section 60 and subsection 56(2) of The Builders' Lien Act, S.S. 1984-85-86, C. B-7.1
Between
Majestic Contractors Limited, Applicant, and N.C.L. Contracting Ltd., Prairie Crane Ltd., LCM Sandblasting & Painting Ltd., Insulation Applicators Ltd., Turner Transport Ltd., AA-1 Trailer Hauling Ltd., Pinestone Contracting Ltd., Fuller Austin Insulation Inc., Pinetree Technical Services Ltd. and Campbell West (1991) Ltd., Respondents

[1994] S.J. No. 278

121 Sask.R. 175

16 C.L.R. (2d) 213

48 A.C.W.S. (3d) 271

Q.B.M. No. 139 of 1993 J.C.R.

Saskatchewan Court of Queen's Bench
Judicial Centre of Regina

Klebuc J.

April 27, 1994.

(13 pp.)

Mechanics' liens -- Builders' or construction liens -- Trust fund -- Entitlement to payment -- Set off.

Trial of issue of whether plaintiff was entitled to payment of an amount paid into court under section 56(4) of the Builders' Lien Act. At issue were whether the contract fund paid into court was subject to a set off claim, and whether the expenditures claimed by the plaintiff were debts, claims or damages within the meaning of sections 13 and 28(3).

HELD: The fund was subject to a set off. The common law right to a true set off was not abrogated by the Act. The trust provisions constituted a substantial change from the trust provisions in the Mechanics' Lien Act. The amount was reduced to $5,000 by an education and health tax claim. Also to be set off

were the claim for damages for breach of contract, consisting of legal fees, lost opportunity to earn interest and the premium paid for a lien bond.

Cases considered:

Majestic Contractors Ltd. v. N.C.L. Contracting Ltd. et al., [1994] 2 W.W.R. 619 (Sask. Q.B.).
Town-N-Country Plumbing and Heating (1985) Ltd. et al. v. Tokarski (1991), 86 D.L.R. (4th) 716 (Sask. C.A.).
Thunderbrick Ltd. v. Yorkton (City), [1993] 8 W.W.R. 237 (Sask. Q.B.).
Graham Construction and Engineering (1985) Ltd. v. Weyburn (City) et al. (1989), 81 Sask. R. 8 (Sask. Q.B.).
Board of Education of the Northern Lights School Division No. 113 v. Saskatchewan Government et al. (1981), 15 Sask. R. 195 (Sask. Q.B.).

Rules and Regulations considered:

ss. 13 and 28(3) of The Builders' Lien Act.

Statutes, Regulations and Rules Cited:

Builders' Lien Act, S.S. 1984-85-86, c. B-7.1, ss. 13, 28(3), 56(2), 56(4), 60.
Construction Lien Act, R.S.O. 1990, c. C.30, s. 12.
Judicature Act, R.S.O. 1990.
Mechanics' Lien Act, R.S.S. 1978,.
Revenue and Financial Services Act, S.S. 1983, c. R-22.01, ss. 48(2), 48(3), 48(4).

P.A. Kelly, Q.C., for Insulation Applicators Ltd. and Pinetree Technical Services Ltd.
J.S. Ehmann, for Majestic Contractors Limited.

---

1 KLEBUC J.:-- Insulation Applicators Ltd. and Pinetree Technical Services Ltd. (the "Subcontractors") seek a determination of the issue of whether Majestic Contractors Limited ("Majestic") is entitled to the payment of $29,851.39 paid into Court by Majestic under ss. 56(4) of The Builders' Lien Act, S.S. 1984-85-86, c. B-7.1 (the "Act"), which represents the outstanding balance due to N.C.L. Contracting Ltd. by Majestic (the "Contract Fund"). The following issues arise:

(1) Whether the Contract Fund paid into Court pursuant to ss. 56(4) is subject to a set off claim by the payer.
(2) Do the expenditures claimed by Majestic constitute "debts, claims or damages" within the meaning of s. 13 and ss. 28(3) of the Act?

BACKGROUND FACTS

2 The history of the action before me is set forth in an earlier decision dealing with related matters dated the 30th day of November, 1993, and reported at [1994] 2 W.W.R. 619 (Sask. Q.B.). Since

November 30, 1993, N.C.L. Contracting Ltd. ("NCL") discontinued the within lien action against Majestic; the amount secured by way of a lien pursuant to ss. 56(4) of the Act was reduced to the sum of $241,731.01; the statutory holdback of $211,879.62 was paid by Majestic to the respondents on a pro rata basis; the surety bond of Guarantee Company of North America filed with this Court was returned to Majestic for cancellation and Majestic paid the Contract Fund into court.

3 In the within lien action Majestic claimed a set off against NCL of $91,171.51 consisting of, inter alia, legal costs of $29,190.00 incurred in discharging the builders' liens filed by NCL's subcontractors; a loss of interest of $25,505.32 on funds held back by TransCanada Pipelines Limited pending discharge of the liens registered against its properties; premiums of $8,118.00 (annual figure) paid for lien bond issued by Guarantee Company of North America to this Court and the sum of $24,669.55 paid to the Saskatchewan Department of Finance on account of Education and Health Tax payable to the Province by NCL in relation to the performance of its subcontract with Majestic.

4 Mr. Justice Maurice by order dated February 24, 1994 directed the Contract Fund be paid out to Majestic within 10 days of the date of his order unless prior to the expiry of such period one or more of the respondents applied for a hearing. As previously noted, the Subcontractors applied for such hearing. All parties wish to have the issues determined in chambers rather than by way of a trial.

LEGISLATIVE PROVISIONS

5 Section 13 and ss. 28(3) of the Act read as follows:

> 13 Subject to the requirement to maintain a holdback, a trustee may, retain from trust funds an amount that, as between himself and the person he is liable to pay under a contract or subcontract related to the improvement, is equal to the balance in the trustee's favour of all outstanding debts, claims or damages, that are related to the improvement.
>
> . . .
>
> 28(3) Subject to Part IV, in determining the amount of a lien under subsection (1) or (2), there may be taken into account the amount that is, as between a payer and the person he is liable to pay, equal to the balance in the payer's favour of all outstanding debts, claims or damages, that are related to the improvement.

ANALYSIS

Issue 1: Whether the Contract Fund paid into Court pursuant to ss. 56(4) is subject to a set off claim by the payer.

6 The applicable principles are fully canvassed in Town-N-Country Plumbing and Heating (1985) Ltd. et al. v. Tokarski (1991), 86 D.L.R. (4th) 716 (Sask. C.A.); Majestic Contractors Ltd. v. N.C.L. Contracting Ltd. et al., (supra); Thunderbrick Ltd. v. Yorkton (City), [1993] 8 W.W.R. 237 (Sask. Q.B.); Graham Construction and Engineering (1985) Ltd. v. Weyburn (City) et al. (1989), 81 Sask. R. 8 (Sask. Q.B.). These decisions clearly provide that funds paid into court pursuant to ss. 56(4) in order to vacate liens do not enhance the amount of the liens discharged nor does such payment abrogate the payer's right

of set off. Baynton J. in Thunderbrick states the principles at pp. 251 to 253 as follows:

> The lien claimants contend that the funds paid into court to vacate their liens under s. 56 are not subject to set off by a subcontractor higher up the pyramid. They also claim they have priority to all the funds in court over others who are higher up in the pyramid. For these propositions they rely primarily on the Town-N-Country case. Unfortunately, they have misconstrued that decision and have failed to distinguish its facts and its focus from those of this case.
>
> . . .
>
> Dealing first of all with the set off contention, the provisions of the Act providing for vacation of liens on payment into court of the amount of lien claimed plus costs, do not enhance the amount of the lien the claimant had prior to payment of the funds into court. The effect of such payment, as clearly indicated by s. 56(6), is simply to substitute the funds in court for the land, trust funds, or holdback previously attached by the lien. The amount of the lien, as determined by s. 28, remains unaffected by payment of the funds into court.
>
> This interpretation is inherent in the Graham Construction & Engineering (1985) Ltd. case, supra. Although the claimants have a priority to the funds in court for the amount of their liens, this priority does not enhance the amount of their liens as they seem to contend. The amounts of their liens before and after payment into court remain the same.
>
> The distinction between the issues of the priority to funds in court and the determination of the lien amount is clearly indicated by the comments of Cameron J.A. in Town-N-Country, supra, at p. 297:
>
> > . . . the effect of ss. 56(8) and (9) is to give the lien claimant a first charge on that amount to the extent he can establish the validity of his claim and the amount secured by the discharged lien. [Emphasis added]

7 I am satisfied that s. 13 of the Act gives Majestic the right to claim a set off notwithstanding the Contract Fund may be subject to a charge under the Act. Further, the payment into Court of the Contract Fund does not obviate the provisions of s. 13 and ss. 28(3) of the Act.

8 The Subcontractors' argument that the Contract Fund constitutes a trust fund for the benefit of all lien claimants and therefore not subject to a set off, fails on other grounds. Before a trust fund in favour of NCL could possibly arise, Majestic must first be liable to pay funds to NCL with respect to the improvement. By reason of Majestic exercising its right of set off, funds beyond those required to maintain the holdback fund never became payable. Hence, the alleged trust never arises: Board of Education of the Northern Lights School Division No. 113 v. Saskatchewan Government et al. (1981), 15 Sask. R. 195 (Sask. Q.B.); S.I. Guttman Ltd. v. James D. Mokry Ltd., [1969] 1 O.R. 7 (Ont. C.A.); Standard Indust. Ltd. v. Treasury Trails Holdings Ltd. (1976), 24 C.B.R. (N.S.) 8 (Ont. Co. Ct.), affirmed 23 C.B.R. (N.S.) 244 (Ont. C.A.); Roberts Roofing Co. v. Tidemark Construction Ltd. (1981), 21 R.P.R. 130 (Ont. Co. Ct.). If no valid set off or counterclaim exists, then NCL's lien claim would constitute a "charge on the construction fund" but no trust relationship would exist between Majestic and the Subcontractors: Graham Construction and Engineering (1985) Ltd., supra.

Issue 2: Do the expenditures claimed by Majestic constitute "debts, claims or damages" within the meaning of s. 13 and ss. 28(3) of the Act?

9 The Subcontractors argue the amounts claimed as a set off by Majestic are not "debts, claims or damages, that are related to the improvement" because the work and improvement subject to its contract with NCL had been completed and hence, any expenditure by Majestic could not fall within the provisions of s. 13 and ss. 28(3) of the Act, regardless of whether the Contract Fund is a trust fund or not.

10 There appear to be no reported Saskatchewan decisions dealing with the meaning of "debts, claims or damages, that are related to the improvement" in the context of the Act. Consequently, reference must be made to other statutes and decisions dealing with similar provisions and to the plain and ordinary meaning of the aforementioned phrase.

11 Mr. Justice Wimmer in Board of Education of the Northern Lights School Division No.113 v. Saskatchewan, Government of et al., supra, held that while ss. 5(1) of The Mechanics' Lien Act, R.S.S. 1978, c. M-7 provides that all funds withheld by an owner or person primarily liable on the contract constitute a trust fund against which every person for whose benefit the trust was created has a lien, the owner or person primarily liable on the contract has the right to set off the cost of completing the improvement and any damages suffered as a consequence of the non-completion against the moneys payable under the contract that exceed the amount of the statutory holdback. He based his finding on the principle that the person primarily liable on a contract "ought to be entitled, so far as possible, to get the work at the contract price" agreed on but funds payable under one contract cannot be set off against claims under another contract.

12 In my view the decision in Northern Lights recognizes that the common law right to a true set off is not abrogated by The Mechanics' Lien Act but procedural rights of set off are abrogated. A true set off means something in the nature of a defence: where claim and cross-claim are merged and the lesser thereby being extinguished as distinguished from a procedural set off which permits two unrelated claims to be balanced up and a net judgment given: Stooke v. Taylor (1880), 5 Q.B.D. 569.

13 The provisions of s. 12 of The Construction Lien Act of Ontario, R.S.O. 1990, c. 30, are identical to those contained in s. 13 with the exception that the Ontario Act does not contain the phrase "debt, claims or damages, that are related to the improvement". As a consequence, a payer under a construction contract in Ontario may take advantage of the Ontario Judicature Act, which permits procedural set offs, to set off against a debt due to the payee notwithstanding that the debt and the set off arise under entirely different contracts: Royal Trust Co. v. Universal Sheet Metals Ltd., [1970] 1 O.R. 374 (Ont. C.A.); Freedman v. Guaranty Trust Co. (1929), 64 O.L.R. 200 (Ont. C.A.).

14 The New Brunswick Court of Appeal in Harding Carpets Ltd. v. St. John Tile & Terrazzo Co. Ltd. (1988), 49 D.L.R. (4th) 311, considered the right of set off in the context of the New Brunswick Mechanics Lien Act, which provides that construction funds in the hands of a trustee constitute a fund for the benefit of the contractor or subcontractor next in line. It concluded such funds cannot be diverted or applied to any set off of unrelated debts nor to unliquidated claims outside the contract at issue. It further found the common law right of set off was modified by the Mechanics' Lien Act and therefore the decision in Royal Trust could not be applied in the Province of New Brunswick. However, the decision in Harding Carpets is instructive for it acknowledges that the right to a true set off with respect to debts and unliquidated claims arising out of a construction contract is not taken away by the Act.

15 In Henry Hope & Sons of Canada Limited v. Richard Sheehy & Sons (1922), 52 O.L.R. 237, the Ontario High Court found a counterclaim by a contractor against a lien claimant for damages for delay, loss of use of money which it would have received from the owner had the lien not been filed and the cost for travelling to hire replacement workers all constituted a proper set off under The Mechanics' Lien Act. At the time the Act then did not contain a provision equivalent to s. 12 of the current Construction Lien Act of Ontario.

16 The Queen's Bench Court of Alberta in Belanger v. Pointer Construction Group Ltd. et al. (1984), 31 Alta. L.R. (2d) 320 (Q.B.) held that in a mechanics' lien action a payer may raise as a defence all damages suffered by the payer which flow from the payee's breach of their mutual construction contract. It concluded such defence to be the defence of set off which is discussed in detail in Aboussafy v. Abacus Cities Ltd., [1981] 4 W.W.R. 660, 124 D.L.R. (3d) 150, 29 A.R. 607 (Alta. C.A.). The court then held legal fees incurred with respect to lien action constituted a proper claim for set off because they were costs arising from the contractor's breach of contract.

17 In Baron Floors Ltd. v. Egon Enterprises Ltd. (1984), 7 C.L.R. 203 (B.C.Co.Ct.) the court denied the owner's counterclaim for legal expenses incurred to remove the lien but allowed his counterclaim for interest on moneys borrowed to secure a discharge of the lien claim.

18 In my judgment the trust provisions in the Act constitute a substantial change from the trust provisions contained in The Mechanics' Lien Act of Saskatchewan, which it replaced and the trust provisions contained in the Mechanics' Lien Act for New Brunswick and British Columbia. As a result, decisions dealing with such Acts are of limited assistance in interpreting the provisions of ss. 13 and 28(3). However, following the reasoning in Northern Lights, Belanger, Guttman and Standard Industries, I conclude that the right to a true set off by a payer is not obviated or modified by the Act beyond requiring the debts or unliquidated claim to be set off relate to the improvement which is the subject of a construction contract between the payer and payee.

19 Black's Law Dictionary, 5th ed. (St. Paul, Minn.: West Pub. Co., 1979) defines "related" as meaning: standing in relation; connected; allied; akin.

20 The Shorter Oxford English Dictionary (Clarendon Press, Oxford) defines "relate" as meaning:

> 1. to refer back, to have application to an earlier date
> 2. to have reference to.

and "related" as meaning:

> 2.a. Having relation to, or relationship with, something else, b. Having mutual relation or connection.

and "relation" as meaning, inter alia:

> 3. That feature or attribute of things which is involved in considering them in comparison or contrast with each other; the particular way in which one thing is thought of in connection with another; any connection, correspondence, or association, which can be conceived as naturally existing between things.

21 For the purposes of s. 13 and ss. 28(3) I am satisfied that the phrase "related to the improvement"

only means that the debt, claim or damage to be set off must have some material association with, connection with, or linkage with the improvement. Therefore, the party asserting a set off need only establish that the debt or unliquidated claim to be set off is connected or linked to the improvement or to a contract dealing with the construction of the improvement. Once such connection is established, the general principles relating to set off claims are to be applied subject to the proviso that the holdback fund cannot be encroached on.

22 I have considered the Subcontractors' argument that a set off can only be asserted under s. 13 with respect to debts and unliquidated damages related to the completion of an improvement, and have rejected it for the following reasons. First, the suggested limitation would be inconsistent with the purpose and operational effects of the Act outlined by Cameron J.A. in Town-N-Country Plumbing, and therefore could not have been intended. Second, the suggested limitation would diminish that right of set off to a right lesser than existed under The Mechanics' Lien Act which the Act replaced. Any intent to abrogate the right to a true set off recognized in Northern Lights must be expressed in clear terms. No such intent is set forth in the Act. Third, s. 13 is clearly patterned after s. 12 of the Ontario Construction Lien Act with the phrase "related to the improvement" being added not for the purposes of obviating the operational effects of s. 12, but to moderately limit them to true set offs.

23 I now turn to the question of whether the expenditures Majestic seeks to set off against the Contract Fund are connected or linked to the improvement, dealing first with the set off for Education and Health Tax paid to the Saskatchewan Department of Finance.

24 It is conceded by the Subcontractors that the Education and Health Tax claim of $24,669.55 was assessed in connection with NCL's performance of its subcontract with Majestic. Therefore, the expenditure directly relates to the improvement. In fact the tax comprises part of the purchase price payable by Majestic for the material and services provided by NCL in the construction of the improvements for TransCanada Pipelines Limited. I further note the provisions of ss. 48(2) of The Revenue and Financial Services Act, S.S. 1983, c. R-22.01, as amended, provide that every collector, in this case NCL, who collects or is deemed to have collected tax is deemed to hold the amount of the tax collected in trust for the Province. Subsection 48(3) provides that such trust has priority to all claims except those described in ss. (4). Hence, the trust described in ss. 48(2) of The Revenue and Financial Services Act attached to funds due to NCL from Majestic and the payment of such amount by Majestic to the Department of Finance reduced the balance due to NCL by a like amount, thereby leaving a balance due to NCL to a sum of less than $5,000.00.

25 With respect to the claim for damages resulting from NCL's breach of contract consisting of legal fees, lost opportunity to earn interest and the premium paid for a lien bond, I am likewise satisfied that they relate to the improvement. Consequently Majestic is entitled to set off such claims and unliquidated damages against the Contract Fund pursuant to the provisions of s. 13 and ss. 28(3) of the Act.

26 Majestic shall have its taxable costs against the Subcontractors. The Contract Fund shall be paid out to Majestic.

KLEBUC J.

Indexed as:

Zheng v. Canada (Minister of Citizenship and Immigration)

Between
Lu Lin Zheng, applicant, and
The Minister of Citizenship and Immigration, respondent

[2000] F.C.J. No. 484

[2000] A.C.F. no 484

187 F.T.R. 71

5 Imm. L.R. (3d) 151

96 A.C.W.S. (3d) 654

Court File No. IMM-1846-99

Federal Court of Canada - Trial Division
Vancouver, British Columbia

Lemieux J.

Heard: March 1, 2000.
Judgment: April 12, 2000.

(32 paras.)

Aliens and immigration -- Admission, immigrants -- Application for admission -- Immigrant visa, units of assessment, language -- Immigrant visa, units of assessment, occupations -- Immigrant visa, units of assessment, education -- Judicial review.

Application by Zheng for judicial review of a decision dismissing her application for a permanent resident's visa in the independent category of interpreter. Zheng studied English language and literature in the People's Republic of China and obtained an undergraduate degree in 1986. In 1992 she successfully completed a graduate study program in the English language. In 1998 she applied for a permanent resident's visa to Canada. In 1999 she was interviewed by a visa officer, and was told that she was not qualified for her intended occupation of interpreter/translator. The stated reason for disqualification was the fact that she did not have a bachelor's degree in translation, nor specialization in translation/interpretation at the graduate level. Zheng claimed that the visa officer erred in law by not assessing her in a related discipline, and in finding that a specialization in interpretation and translation at the graduate level was mandatory.

HELD: Application allowed and the matter remitted for reconsideration by a different visa officer. The visa officer did not assess Zheng solely as an interpreter but rather as a translator/interpreter, which tainted her view on her interpretation of the employment requirements. By applying the requirement of a degree equivalent to or substituted for a translation degree, the visa officer confined the scope of employment requirements too narrowly and foreclosed a proper examination on whether Zheng's degree and graduate program were connected to her employment as an interpreter. By doing so, the visa officer committed a reviewable error.

Statutes, Regulations and Rules Cited:

Immigration Regulations, 1978, SOR/78-172, s. 2.

Counsel:

Dennis Tanack, for the applicant.
Victor Caux, for the respondent.

LEMIEUX J. (Reasons for Order):--

BACKGROUND

1 Lu Lin Zheng studied English language and literature at the Foreign Language Department of Zhengzhou University (the "University"), People's Republic of China ("PRC"), and obtained an undergraduate degree in 1986. In 1992, she successfully completed a one and a half year graduate study program in English Language and Western Culture at the University.

2 On March 27th, 1998, she applied for a permanent resident's visa to Canada in the independent category of interpreter (NOC 5125.3). She was interviewed on February 23rd, 1999 by designated immigration officer L. Chau (the "visa officer") who advised the applicant on March 9th, 1999 she did not qualify for her intended occupation of interpreter/translator (NOC 5125.3/5125.1). The stated reason for her lack of qualification was "...you do not have the required training to be assessed in these occupations, namely, a bachelor's degree in translation, and specialization in translation/interpretation at the graduate level, according to the NOC".

3 The applicant in this judicial review proceeding says the visa officer's decision contains two errors of law arising from her misinterpretation of the requirements of the NOC which have been incorporated into the Immigration Regulations, 1978, SOR/78-172, (the "Regulations") through definition in section 2. First, the visa officer did not assess the applicant in a "related discipline" as she was required to do, and second, the visa officer found that a specialization in interpretation, translation and terminology at the graduate level was mandatory when the NOC only says such is "usually required".

The Visa Officer's Rationale

4 The visa officer's reasons are expressed in her CAIPS notes, part of the tribunal's certified record. These notes record what happened at the interview. The visa officer did not provide an affidavit in these judicial review proceedings. All of the underlinings cited from the CAIPS notes are mine.

5 The visa officer said the interview was exceptionally long (two hours). The applicant was given a test:

> in translating a short paragraph from Chinese to English. PI was required to demonstrate her proficiency in translation skills as translating documents was listed as one of her duties in the reference letter issued by her current employer. I therefore assessed PI in the occupations of both interpreter and translator.

6 The visa officer in her CAIPS notes continued her reasoning by recording:

> PI applied as interpreter/translator. According to the NOC, these two occupations are required to have a bachelor's degree in translation, and specialization in translation/interpretation at the graduate level.

7 The visa officer reviewed the transcript of the university undergraduate and graduate courses the applicant took which included intensive English reading, extensive English grammar, writing, listening and speaking as well as British and American literature, world history and social science courses. The visa officer noted:

> Among these courses, PI took translation and linguistics. Her graduate studies indicated courses in lexicology, American culture, international relations, American history, Western civilization and American literature. No translation or interpretation courses noted in this transcript. With only two courses related to translation and interpretation, PI's education cannot be viewed as the equivalent or substitute for the specific employment requirements for interpreters / translators which are abundantly clear in the NOC.

8 The visa officer then assessed the applicant's language skills as required by the Regulations and gave her a second written test. The applicant was assessed as "fluent" in reading and speaking but only "well" in writing because the text did not "capture the meaning of the English text fully and precisely".

9 The visa officer continued her assessment by concluding:

> In the absence of required training and proficiency in translating skills, I am not satisfied that PI can undertake her intended occupation in Canada.

10 The visa officer advised the applicant of her concerns; the applicant responded by presenting to the visa officer two books which she claimed she was one of the translators, and argued that these books should enable her to meet the employment requirements in the NOC. The visa officer did not agree. She said in her CAIPS notes:

> I advised her that these books cannot be viewed as the equivalent or substitute for the entry requirements.

11 The applicant, at the interview, presented the visa officer with a resumé entitled "Professional Experiences" listing her various experiences in interpreting for visitors and trade delegations. The visa officer recorded her reaction as follows:

> I considered this information and determined that it does not overcome PI's inability in meeting the training and entry requirements for interpreter/translator

in the NOC. 0189

12 The applicant apparently told the visa officer she had taken a one year interpretation course in 1993/94 but did not bring that certificate with her. The visa officer remarked:

> Notwithstanding the absence of document to substantiate her claim, this program still cannot be viewed as a substitute for the bachelor's degree in translation and specialization in interpretation/translation at a graduate level.

The Applicant's Affidavit

13 The applicant filed an affidavit in this proceeding. She indicates she applied for permanent residence in Canada as an interpreter and states she has worked as an interpreter and translator for almost 15 years with experience in a commercial, governmental and academic setting.

14 The applicant says the visa officer at the end of the interview told her "she was refusing my application on the grounds that I had to have a bachelor's degree in translation as well as graduate level courses in translation in order to be qualified as an interpreter".

Other facts in the record

15 I note from the certified record the following additional facts. First, the visa officer's listing in her CAIPS notes of the undergraduate and graduate courses taken by the applicant are generally accurate but the visa officer omits to record course concentration in terms of hours. In her undergraduate courses, the applicant concentrated on language and literature as evidenced by:

Intensive English reading-	792 hours
Extensive English reading-	108 hours
English listening and speaking-	144 hours
English writing-	144 hours
American Literature-	108 hours
Translation-	72 hours
Linguistics-	72 hours

16 The applicant indicated in her application for permanent residence: (1) from 1995 to the present, her occupation was that of an interpreter with Zhengzhou Foreign Trade Company and from March 1988 to March 1995 as a teacher in the English Department at Zhengzhou University. This experience is confirmed in letters of recommendation. The Dean of the English Teaching Department at the University added that the applicant was often chosen to interpret for the President of the University "whenever a big occasion occurred".

ANALYSIS

(1) The intended occupation: The National Occupation Classification (NOC) requirements

17 There is no question that by the Regulations, the National Occupational Classification ("NOC") is incorporated by reference. Subsection 2(1) of the Regulations provides:

"National Occupational Classification" means the National Occupational Classification, including the Career Handbook and all other component publications, published by the Minister of Human Resources Development, as amended from time to time;

* * *

"classification nationale des professions" Le document intitulé Classification nationale des professions -- le Guide sur les carrières et autres publications accessoires étant compris -- publié par le ministre du Développement des ressources humaines, avec ses modifications éventuelles.

18 Translators, Terminologists and Interpreters are described in the NOC under item 5125 which reads:

> Translators translate written material from one language to another. Terminologists conduct research required to translate and interpret technical, professional and scientific vocabulary and material. Interpreters translate oral communication, such as speeches, proceedings and dialogue, from one language to another. Translators, Terminologists and Interpreters are employed by private translation and interpreting agencies, government, large private corporations, international organizations, the media or they may be self-employed. [emphasis mine]
>
> * * *
>
> Les traducteurs traduisent des textes dans une ou plusieurs langues. Les interprètes expriment oralement dans une langue ce qui a été dit dans une autre langue lors de discours, de réunions, de débats ou de dialogues. Les terminologues exécutent les recherches nécessaires pour traduire des termes et des documents techniques, professionnels ou scientifiques. Les traducteurs, les terminologues et les interprètes travaillent pour le gouvernement, dans des services de traduction et d'interprétation privés, des grandes sociétés privées, des organisations internationales, des médias d'information, ou peuvent travailler à leur compte.

19 The certified record shows the applicant submitted her application for permanent residence to the Consulate General in Hong Kong under the Independent Skilled Worker category as an Interpreter. But, it appears from the CAIPS notes that the visa officer interviewed the applicant as if she applied as an Interpreter-Translator.

20 The NOC for each of these occupations prescribe both the same employment (educational/training) requirements. However, the main duties are not the same nor are the required skills as is evident from item 5125 of the NOC.

21 It is fundamental that an applicant has his or her application evaluated under the stated intended occupation. Sharlow J. underlined the importance of this principle in Dauz v. Canada (M.C.I.), [1999] 2 Imm.L.R. (3d) 16 as follows:

> [6] In assessing the occupational factor, the visa officer was required to ask herself what the employment opportunities are in Canada in the occupation:
>
> (a) for which the applicant meets the requirements for Canada as set out in NOC,
> (b) in which the applicant has performed a substantial number of the main duties as set out in NOC, including the essential ones; and
> (c) that the applicant is prepared to follow in Canada.
>
> [...]
>
> [10] Counsel for the Minister argued that the occupational factor is intended to be merely a measure of occupational demand in Canada. No doubt that is so. But it also asks whether the applicant meets the employment requirements, and whether the applicant has performed a substantial number of the main duties for the intended occupation. This part of the regulation on its face requires a determination of facts relating to the applicant, as well as occupational demand in Canada. [emphasis mine]

22 On the face of the CAIPS notes, the visa officer did not assess the applicant solely as an interpreter but rather in a combined occupation of translator/interpreter and this fact tainted her view on her interpretation of the employment requirements for an interpreter discussed below. For this reason, I have to conclude that the decision of the visa officer cannot stand.

(2) Interpretation of the employment requirement under the NOC

23 The applicant argued the visa officer committed a reviewable error in interpreting the phrase "related discipline" as meaning the "equivalent or substitute" of a bachelor's degree in translation.

24 In interpreting the applicable provision, I am satisfied that it is appropriate to use the method of interpretation set out in the Supreme Court of Canada judgment of Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27 namely, the reading of the acts or regulations "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 Parliament".

25 The employment requirements in the NOC attached to these occupations are:

> Employment requirements A bachelor's degree in translation or a related discipline is required, and specialization interpretation, translation and terminology at the graduate level is usually required. [emphasis mine]
>
> * * *
>
> Conditions d'accès à la profession Un baccalauréat en traduction ou dans une discipline connexe et une spécialisation en traduction, en terminologie ou en interprétation au niveau des études supérieures sont exigés.

26 The word "related" is defined in the Shorter Oxford Dictionary as "connected" or "associated" and the word "connexe" is defined in the Robert dictionary as "qui a des rapports étroits".

27 "Equivalent" in the same dictionaries means "equal in value or corresponds with" and "qui peut la remplacer et chose qui a la même fonction que l'autre".

28 In the Shorter Oxford Dictionary "substitute" means replace.

29 Clearly, the word "related" does not have the same meaning as "equivalent" or "substitute". These words have different degrees of similarity or shades associated with them. "Equivalent" or "substitute" conveys the notion sameness, of being identical. Being related is more flexible in terms of linkages -- association or connection is required.

30 These distinctions make sense if the context of the provision is taken into account. The stated words in the NOC are "a bachelor degree in translation or a related discipline" and are found in an NOC item which covers translators, interpreters and terminologists which have different duties attached to them. Requiring a bachelor's degree in a related discipline was intended to provide flexibility in the assessment of the employment requirements enabling the visa officer a degree of latitude in order to take into account a person whose intended occupation was that of an interpreter or terminologist.

31 By applying the requirement of a degree equivalent to or substituted for a translation degree, the visa officer confined the scope of employment requirements too narrowly and foreclosed a proper examination on whether the applicant's degree in English language and literature and the courses she followed at the graduate level were connected to her employment as an interpreter. By doing so, the visa officer committed a reviewable error.

CONCLUSION

32 This application for judicial review is granted and the matter is remitted for reconsideration by a different visa officer.

LEMIEUX J.

* * * * *

ORDER

For the reasons given, the application for judicial review is granted and the matter is remitted for reconsideration by a different visa officer.

LEMIEUX J.

cp/d/qlndn

0193

Lougheed v. Filgate

BETWEEN: LINDA LOUGHEED PLAINTIFF AND: STEPHEN FILGATE AND JOHN ADOLPHUS HOLMAN DEFENDANTS - AND - BETWEEN: LINDA LOUGHEED PLAINTIFF AND: INSURANCE CORPORATION OF BRITISH COLUMBIA DEFENDANTS

53 A.C.W.S. (3d) 39
1995 CLB 7574, 5 B.C.L.R. (3d) 101, 32 C.P.C. (3d) 296
British Columbia Supreme Court
Hutchinson J. in Chambers
January 26, 1995
File No. 02001; 02473 Nanaimo

CIVIL PROCEDURE -- Discovery -- Privilege -- Passenger claimed against own driver and other driver for personal injuries in motor vehicle accident -- Insurance adjuster's file for both defendants was prepared for purposes of litigation and privilege attached to file -- Plaintiff failed to show necessity of setting aside privilege in order to achieve justice -- Order for production was refused.

CIVIL PROCEDURE -- Discovery -- Oral examination -- Plaintiff claiming for personal injuries in motor vehicle accident claimed against own driver who was her common law spouse and other driver -- Plaintiff disputed validity of settlement of her injury claim and spouse's property claim based on her mental incapacity from injuries -- Other driver was entitled to question spouse as to mental state of plaintiff at time of settlement -- It was not necessary to show that drivers were adverse in interest but merely that questions were on issues raised by pleadings (18 pp.).

Counsel for the Plaintiff: K.W. Thompson
Counsel for the Defendant Filgate: R.B. McDaniel
Counsel for the Defendant Holman: K.A. McCullagh

REASONS FOR JUDGMENT

MR. JUSTICE R.M.J. HUTCHINSON

1 The plaintiff was involved in a motor vehicle accident an January 31, 1988. She was a passenger in a vehicle owned and driven by the defendant Filgate, which was in collision with a vehicle driven by the defendant Holman. She has commenced two actions. In the first, which was commenced on December 10, 1992, she claims damages for personal injuries against Filgate and Holman. In the second which was commenced on February 12, 1993, she claims no fault benefits from the defendant insurance Corporation of British Columbia.

2 The plaintiff's injuries resulted in her being hospitalized for 18 days, and at first she was in a deep coma. It is alleged she had haemorrhaging to the left side of the brain and still has residual deficits.

3 On April 7, 1988, she and her common-law spouse, the defendant Filgate, accepted an offer that was made by Holman and Filgate's insurer to settle her personal injury claims and Filgate's property damage claim for $15,000. She accepted this and she signed a release after she consulted a lawyer, despite written and verbal advice from the lawyer that she should reject the offer.

4 In the action started by her against Holman and Filgate, each defendant has denied negligence and has alleged negligence on the part of the other driver. The defendants both plead the release and that the settlement agreement amount to accord and full satisfaction of her claims against

them and they both plead the plaintiff's claim is statute barred. The Insurance Corporation of British Columbia raises the two latter defences. In her reply the plaintiff says she was under a mental disability when she settled the claim and further that the agreement was unconscionable. She also pleads that the running of time against her should be postponed due to her mental incapacity.

5 There were two applications before the master. The first was by the plaintiff against both defendants in the first action and against the Insurance Corporation of British Columbia in the second action for the production of certain documents under Rule 26(10). The defendants have claimed solicitor/client privilege regarding those documents.

6 The second application is by the defendant Holman for an order that the defendant Filgate answer certain questions on examination for discovery under Rule 27(24).

The Production Documents

7 The documents sought to be produced are described by the master as being a "typical adjuster's file" containing invoices and working papers; correspondence to and from physicians, hospitals, engineer; and witness statements. The privilege claimed is that they were prepared for the sole or dominant purpose of contemplated or actual litigation or were correspondence between solicitor and client.

8 The master did not deal with the claim of privilege in relation to specific documents. He agreed to permit the defendants to amend their list of documents, if necessary, at a later time and said he would then deal with each document on the basis of the privilege claimed with respect to each document. For the purposes of the application before him, and this applies to the appeal, he treated all the documents for which privilege was claimed as if they were indeed so protected.

9 The master found there was no waiver of the privilege and that finding has not been challenged. He found, however, that on the basis of policy the privilege should be denied. He said on pages 7 - 9:

> There are a number of recent cases in which it has been held that a claimed privilege way be denied, not on the basis of any waiver, express or implied, but on the basis of policy.
>
> In *Pax Management Ltd. v. C.I.B.C.* (1987) 14 B.C.L.R. (2d) 237 (B.C.C.A.) the plaintiff alleged fraud against the defendant saying that the defendant had misrepresented to the plaintiff the legal effect of certain agreements that the plaintiff and the defendant were about to enter into. The defendant denied making any such misrepresentation. Though the defendant had not put the state of its corporate mind in issue, the court ordered that documents, otherwise privileged, relating to advice the defendant had received as to the legal effect of those agreements, should be disclosed. The court held that this was not a case of waiver, but that its order was made "simply on the policy basis that the benefits of maintaining the privilege are outweighed by the benefits to be derived from disclosure."
>
> In *Knights Mineral Exploration Company v. Corcoran and Company* (unreported) April 14, 1993, Vancouver Registry C704452 (B.C.S.C.), relying upon *Pax Management* , it was held that the policy grounds for setting aside the privilege were not confined to claims of fraud or unlawful acts, but "encompass any claim in which full disclosure of privileged documents is necessary to resolve the issues."
>
> In *Citizen's Trust Company v. Guarantee Company of North America* (unreported) October 28, 1988, Vancouver Registry C88094 (B.C.S.C.), a similar conclusion was reached where the plaintiff sued on a bond and the defendant pleaded a limitations bar. The defendant was given discovery of otherwise privileged communications between the plaintiff and its legal advisors in order to explore what the state of the plaintiff's knowledge was so as to determine when the running of time had been triggered.
>
> I propose, therefore, to weigh the benefits of disclosure against the benefits of maintaining

privilege in this case.

> It is clear that any advice received by the plaintiff at the time of settlement is relevant and that privilege has been waived by her pleadings. No obstruction has been put in the way of the defendants' ascertaining all the facts relating to the plaintiff's state of mind, her state of knowledge and what advice she received from her own solicitor.
>
> Her state of mind at that time will be an important issue, but so will be the state of mind of the defendants' insurer, represented by the adjuster. It is obvious that the adjuster will be a necessary witness at the trial and it is real possibility that, in giving evidence, he will support the fairness of the settlement upon the basis of the information he then had and the legal advice, if any, that he then received. What he knew will be a crucial question at the trial and the answer to question no doubt resides in his file. If, as seems likely, he will rely upon his file to refresh his memory about what he knew in 1988, then his file will be producible at the trial. if, as seems likely, the contents of his file are going to be produced at the trial, then as a matter of policy the contents of his file should be disclosed now.
>
> There can be little harm done by opening up his files now and a great deal of benefit in doing so.

10 In this appeal the defendants argue that the master erred in applying policy principles of disclosure that emanate from *Pax Management Ltd. v. C.I.B.C.* (*supra*). In the master's reasons cited above he said the *Pax Management* order was "made simply on the policy basis that the benefits of maintaining the privilege are to be outweighed by the benefits to be derived from ... disclosure." That is a direct quotation from the reasons for the court of Wallace, J.A. but it omits the key words in the passage which are "...in cases where fraud is a genuine issue." (see page 265). It is clear from reading the reasons for judgment of Wallace, J.A. that where there is some evidence to give colour to the charge of underhanded dealings or fraud, there must be full disclosure of all the circumstances relating to that issue which will override the protection accorded by privilege.

11 In *Middelkamp v. Fraser Valley Real Estate Board* (1992) 70 B.C.L.R. (2d) 157 the plaintiff alleged an illegal conspiracy to restrain competition and the chambers judge ruled a letter written by a solicitor to one of the defendants should be produced despite the claim of privilege. That decision was overruled by the Court of Appeal ((1992) 71 B.C.L.R. 273) for other reasons. The court did not disagree with the trial judge's proposition that on policy grounds the privilege claimed would not prevent disclosure if the claim was based on the unlawful acts alleged. The trial judge had extended the policy reasons expressed in *Pax Management* (*supra*) beyond fraud to other unlawful acts.

12 The master also relied on *Knight mineral Exploration Company v. Corcoran and Company* (*supra*). In that case the plaintiff alleged fraud and misrepresentation of material facts on the part of the Marathon Minerals Inc., which caused the plaintiff to make an investment it would not have otherwise made had it known the true facts. Solicitor/client privilege was claimed by Marathon. Marathon withdrew its defence and abandoned the action. In holding that the privilege claimed should be set aside Sinclair-Prowse, J. said:

> Further, it is not disputed that protection of solicitor-client privilege will only be set aside in limited circumstances, namely, when it is expressly or impliedly waived by the party holding the privilege or when the benefits of maintaining the privilege are outweighed by the benefits to be derived from full disclosure of all of the circumstances relevant to resolving the issues raised in the case (*Pax Management Ltd. v. A.R. Ristau Trucking Ltd.* (1987), 14 B.C.L.R. (2d) 257 [[1987] 5 W.W.R. 252] (C.A.)) ...

13 The important qualifier "...in cases where fraud is a genuine issue" was not included in the legal principle she derived from *Pax Management Ltd.* . This may be because in the case before her fraud had been alleged. Privilege was claimed by the party who was alleged to have been fraudulent who, by withdrawing from the lawsuit, was deemed to have admitted the fraud.

Sinclair-Prowse, J. later said at page 99:

> In my view, the cases of *Pax Management Ltd. V. A.R. Ristau Trucking Ltd.* (*supra*) and *MiddelKamp v. Fraser Valley Real Estate Board* (1992), 70 B.C.L.R. (2d) 157 [[1992] 6 W.W.R. 4511 (S.C.), do not restrict the setting aside of solicitor-client privilege on public policy grounds to claims of fraud or unlawful act but rather encompass any claim in which full disclosure of privileged documents is necessary to resolve the issues.

14 I conclude that analysis of policy reasons for setting aside privilege is *obiter dicta* and I am not constrained to follow it on the basis of judicial comity.

15 There is support for this view in the reasons of McDonald, J. in *Merritt v. Imasco Enterprises Inc.* (1992) 73 B.C.L.R. (2d) 330 at page 333.

> Considering those statements in the light of the recent decision of the Court of Appeal in *Middelkamp v. Fraser Valley Real Estate Board* (September 17, 1992), Doc. Vancouver CA012990 [now reported (1992), 71 B.C.L.R. (2d) 276 (C.A.)], it is my conclusion that where:
>
> > (a) the issue is the very existence of a fiduciary duty; and
> >
> > (b) the defendants claim entitlement to a "separate interest" in the fund (i.e.: that they themselves are beneficiaries of the trust); and
> >
> > (c) there is no allegation of fraud against the party alleged to owe the fiduciary duty;

16 The third case referred to by the master was *Citizens Trust Co. et al. v. the Guarantee Company of America* (unreported) October 7, 1988, Vancouver Registry #C880934, a decision of Legg, J. The issue before the court was whether privilege claimed by the plaintiff had been waived by documents already disclosed, and whether having disclosed part of a privileged document the balance of the document must be disclosed on the basis of fairness. Both issues were decided on the ground of waiver and there is no discussion in that decision of the policy grounds canvassed in *Pax Management* (*supra*) or any of the authorities on which *Pax Management* was based.

17 The underlying principle running through the cases is that there should be full disclosure of all relevant documents. This is limited by the competing policy that upholds the protection from disclosure of privileged documents. The Supreme Court of Canada in *Descoteaux v. Mierzwinski* (1982) 1 S.C.R. 80, 141 D.L.R. (3d) 590 held that solicitor/client privilege should be interfered with only to the extent absolutely necessary to achieve a just result. The Court of Appeal in this province has limited the removal of privilege to cases where fraud or unlawful acts on the part of the party claiming the privilege are in issue and there is *prima facie* evidence to give sufficient credence to the allegations, sufficient to override the claim of privilege. In this case I do not find it is absolutely necessary to set aside the privilege in order to achieve a just result. As no policy grounds recognized by the courts have been established to justify setting aside the privilege, I allow the appeal.

18 The defendants still have the right to apply to amend their list of documents and have the claim of privilege regarding specific documents decided upon by the master.

19 The defendants will recover their costs of this part of the application from the plaintiff on Scale 3 in any event of the cause.

The Examination for Discovery

20 Filgate was the owner and driver of the vehicle in which the plaintiff was riding as a passenger when the accident occurred. He was, and is now, the common-law spouse of the plaintiff. His property damage claim arising from the accident was settled at the same time as the plaintiff's

claims, and he was represented then by the plaintiff's solicitor. Counsel for Holman examined Filgate for discovery. in action No. 02001 and asked Filgate questions regarding the circumstances under which the defendant settled. Filgate's counsel objected to these questions saying there was no issue between those defendants relating to the settlement. Because of the relationship between Filgate and the plaintiff, the fact that they retained the same lawyer and entered into a settlement at the same time, it is likely that Filgate has some knowledge of the plaintiff's mental capacity at the time of the settlement, the state of her knowledge and her mental state. He would also be able to shed some light on the negotiations that took place with the adjuster before he and the plaintiff consulted a lawyer.

21 The relevant rules of court are as follows:

> Rule 27
>
> (3) A party to an action may examine for discovery any party adverse in interest.
>
> Rule 27
>
> (22) Unless the court otherwise orders, a person being examined for discovery shall answer any question within his or her knowledge or means of knowledge regarding any matter, not privileged, relating to a matter in question in the action, and is compellable to give the names and addresses of all persons who reasonably might be expected to have knowledge relating to any matter in question in the action.

22 The master reviewed the old rule, Marginal Rule 370(c) which reads as follows:

> A party to an action or issue, whether plaintiff or defendant, may, without order, be orally examined before the trial touching the matters in question by any party adverse in interest, and may be compelled to attend and testify in the same manner, upon the same terms, and subject to the same rules of examination of a witness except as hereinafter provided.

23 In *Whieldon v. Morrison* (1934) 3 W.W.R. 126 the Court of Appeal of this province concluded that under the old rule parties may only give discovery on the issues on which the parties are adverse in interest as disclosed by the pleadings.

24 The master said that the principles that applied to the old rule apply to Rule 27 and he concluded by saying:

> The rules do not contemplate, and there is no reason why they should contemplate, a case where parties who have an identity of interest, whether as plaintiffs or defendants, might decline to disclose to one another facts helpful or harmful to their common cause and might have to be forced to do so.
>
> In this unique case any lack of cooperation between defendants can, I am sure, be dealt with by their common insurer.

25 The master applied the dicta of Seaton, J.A. the Court of Appeal *Cominco v. Westinghouse Canada Ltd.* (1979) 11 B.C.L.R. 142 who, in discussing the scope of discovery, said at page 148:

> ... That is a new rule and it is somewhat different from the old. Why "touching the matters in question" was discarded in favour of "regarding any matter ... relating to a matter in question in the action" is not apparent to me. If there is a difference, nothing in this appeal turns upon the difference.
>
> The observations of Hunter C.J. in *Hopper v. Dunsmuir* (1903), 10 B.C.R. 23 (C.A.) at pp. 28-29, retain their validity and are worth repeating:
>
> "No doubt some of the questions propounded and refused to be answered seem at first sight to be somewhat remote from the matter in hand, but I think it is impossible to say that the answers may not be relevant to the issues, and such being the case they are within the right given the cross- examining party by the rule. Even under the decisions on the English practice the Court

> could not disallow an interrogatory unless it was plain that the answer could not be relevant to the issue: *Sheward v. Earl of Lonsdale* (1880), 42 L.T.N.S. 172; *In re Thowas Holloway* (1887), 12 P.D. 167."

26 This passage shows that Seaton J.A. was directing his remarks to the issue of relevance. Later at pages 148-149 he said:

> The matter in question in an action is defined by the pleadings. It does not follow that there ought to be a fine scrutiny of the pleadings. We have heard an interesting argument of that nature but it is an inappropriate exercise. Pleadings are amended; particulars are amended. The nature of the negligence or breach alleged is important, but not the precise nature. We are not interpreting a contract or a statute; we are looking at pleadings to determine the scope of a trial that is going to take place at some time in the future.

27 The *dicta* of Seaton, J.A. was considered by Hinkson, J.A. in *Jackson v. Belzberg* (1981) 6 W.W.R. 273 who said at page 277-276.

> The scope of examination for discovery is governed by the issues raised by the pleadings. I cannot see that the answer to the question is relevant to the pleadings in the form they were at the time the application was made.
>
> We are informed by counsel for the respondent that subsequently the statement of claim was amended. On the basis of the decision of this court in *Cudahy v. Can. Forest Products Ltd.* (1951), 4 W.W.R. (N.S.) 79, he contends that the present appeal should be governed by the amended statement of claim.
>
> In my view, that decision does not stand for that proposition. Rather, in my view, the outcome of this appeal must be governed by the pleadings as they stood at the time of the examination for discovery and of the application to the learned judge in chambers.

28 This in turn was considered by McEachern, C.J.S.C. in *Allarco Broadcasting Ltd. v. Duke* (1982) 26 C.P.C. 13 at page 26.

> The difference between the two judgments of the Court of Appeal, if there is a difference, relates mainly to the effect of amendments, or possible amendments. Both judgments make it clear that the scope of discovery is limited by the pleadings.

29 These two cases throw in some doubt the extent to which *Cominco v. Westinghouse* should be followed.

30 In this case the issue canvassed is not whether the questions are relevant, but rather whether the parties are adverse in interest respecting the issues canvassed in the questions. Under the old rule, as interpreted by *Whieldon v. Morrison* (1934) 3 W.W.R. 126, discovery was limited to the issues joined between the parties examining for discovery and the party examined. The question is whether the new rule has broadened the scope of discovery so as to justify the questions posed, on isses that have been raised in the pleadings, but on which these parties are not adverse. I accept the submission of counsel for Holman that the remarks of Seaton J.A. were limited to the issue of relevance and his remarks were not directed to the issue of adversity, so the question of whether the change in the rule requires answers to the questions asked is still to be decided.

31 I am of the view that the new rule has broadened the scope of an examination for discovery. The new rule changed the wording from "touching the matters in question" to "regarding any matter... relating to a matter in question in the action." The use of the adjective "any" in place of the definite article "the" broadens the scope of the rule. In *Clarke-Jervoise v. Scott* (1920) 1 ch 382, Eve, J. considered the construction of an agreement that contained the words "any grass land." After considering earlier authority (*Rush v. Lucas* (1910) 1 ch 437) he said:

> ..."Any is a word of very wide meaning and *prima facie* the use of it excludes limitation."

32 Furthermore, the words "relating to a matter in question" bear a close resemblance to the words in Rule 26(1) which permits a party to demand discovery of the documents "...relating to any matter in question in the action, " and which requires compliance ". . relating to every matter in question in the action." These phrases find their genesis in Order XXXI of the English Rules of Supreme Court 1875. In *Compagnie Financiere du Pacifique v. Peruvian Guano Co.* (1882) 11 ch 55, Brett, J. interpreted the words in that rule at page 62:

> The nature of the documents, which ought to be set out in the affidavit, may be gathered from the rules and orders of the Judicature Acts. The party swearing the affidavit is bound to set out all documents in his possession or under his control relating to any matters in question in the action. Then comes this difficulty: What is the meaning of that definition? What are the documents which are documents relating to any mater in question in the action? In *Jones v. Monte Video Gas Co.* (1) the Court stated its desire to make the rule as to the affidavit of documents as elastic as was possible. And I think that that is the view of the Court both as to the sources from which the information can be derived, and as to the nature of the documents. We desire to make the rule as large as we can with due regard to propriety; *and therefore I desire to give as large an interpretation as I can to the words of the rule, "a document relating to any matter in question in the action." I think it obvious from the use of these terms that the documents to be produced are not confined to those, which would be evidence either to prove or to disprove any matter in question in the action* ; and the practice with regard to insurance cases shows that the Court never thought that the person making the affidavit would satisfy the duty imposed upon him by merely setting out such documents, as would be evidence to support or defeat any issue in the cause.
>
> The doctrine seems to me to go farther than that and to go as far as the principle which I am about to lay down. *It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which way -- not which must -- either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary* . (Emphasis added)

33 Those principles have been followed in this province. See *St. Regis Timber Co. v. Lake Logging Co.* (1947) 1 W.W.R. 810 (B.C.C.A.) and *Brodie v. Campbell* (1964) 47 W.W.R. 577. It seems clear that the intention behind the change of rule relating to examinations for discovery was to harmonize the scope of those rules to the rules relating to discovery of documents, thereby burying *Whieldon v. Morrison* .

34 on the basis of the cases set out above, and the tendency of the courts to widen the scope of examinations for discovery, I allow the appeal and direct the defendant Filgate to answer the questions put to him. The defendant Holman will recover his costs of this branch of the appeal from Filgate on Scale 3.

ONTARIO LABOUR RELATIONS BOARD REPORTS

A MONTHLY SERIES OF DECISIONS FROM THE

ONTARIO LABOUR RELATIONS BOARD

CITED [1974] OLRB REP.

I

CASES REPORTED

find that none of them are employed in a confidential capacity in matters relating to labour relations.

17. We further find that all professional librarians employed by the respondent in the City of Thunder Bay, save and except chief librarian, secretary to the chief librarian, district librarians, stock editor, children's coordinator, and persons regularly employed for not more than twenty-four hours per week, constitute a unit of employees of the respondent appropriate for collective bargaining.

18. We note the agreement of the parties that persons engaged principally in clerical duties or as pages are excluded from the bargaining unit either on the basis that they do not have a community of interest with librarians or that they are covered by the subsisting collective agreement between the respondent and the Canadian Union of Public Employees, Local 87.

. . .

20. A certificate will issue to the applicant.

DECISION OF BOARD MEMBER D. B. ARCHER: October 25, 1974.

I dissent. I do not believe that any of the persons in dispute are employed in a confidential capacity in matters relating to labour relations or exercise such managerial authority that would make them ineligible for union membership. I feel this is particularly true of Miss English and to a lesser extent of Mrs. Illingsworth. Therefore, I would have included these two persons in the bargaining unit.

6105-74-U: Nikos Kotinopoulos (Complainant) v. THE BECKER MILK COMPANY LIMITED (Respondent).

-and-

6106-74-U: Abe Hajjar (Complainant) v. THE BECKER MILK COMPANY LIMITED (Respondent).

BEFORE: G.W. Adams, Vice-Chairman, and Board Members J.D. Bell and O. Hodges.

DECISION OF THE BOARD: October 25, 1974.

1. On behalf of the complainants, this Board issued the following summonses and the breadth of both these summonses is now challenged by the respondent. The summonses read:

> "You are hereby summoned and required to attend before the Ontario Labour Relations Board at a hearing to be held at the Board

Room, #400 University Avenue, in the City of Toronto, on Tuesday, the 27th day of August 1974, at the hour of 9:30 o'clock in the forenoon, (local time) and so from day to day until the hearing is concluded or the tribunal otherwise orders, to give evidence on oath touching the matters in question in the proceedings and to bring with you and produce at such time and place (1) employee records from January 1, 1971 to the present including the records of all employees dismissed during that period; (2) records of bank deposits made by all Becker Stores in Metropolitan Toronto, between March 30, 1972 and January 3, 1974; (3) copies of standard form Becker Store Manager Contracts used between January 1, 1970 and the present; (4) all correspondence sent or received by Becker Milk Company to or from its employees concerning the formation of an employees' association and all internal memoranda, notes, documents and minutes of meetings related to the formation or existence of an employees' association."

2. The respondent asserts the volume of documents involved in items (1) and (2) is oppressive and appears to be more in the form of a fishing expedition, and while the respondent is agreeable to item (3) it requests greater particularly in regard to item (4).

3. Counsel for the complainants argues that all of the documents requested are essential to his theory of the case. More specifically, the documents in items (1) and (2) of the subpoena will, it is hoped, establish that other employees have not been dealt with in a similar fashion in similar circumstances - a fact which, if established, the complainants will argue goes to the issue of the employer's anti-union animus. Item (3) was uncontested and the complainants argued that item (4) could be particularized in no greater detail.

4. Section 92(2)(a) of The Labour Relations Act reads:

> 92.-(2) Without limiting the generality of subsection 1, the Board has power,
>
> (a) to summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath, and to produce such documents and

> things as the Board considers requisite to the full investigation and consideration of matters within its jurisdiction in the same manner as a court of record in civil cases;

Thus, the Board derives its powers to summon witnesses and documents from this section, but the wording gives little hint to the parameters of these most important powers. However, it is necessary to note that while the section refers to what "the Board considers requisite to the full investigation and consideration of the matters within its jurisdictio - a standard that looks very discretionary - it also stipulates that such discretion should be exercised in accord with the practice of "a court of record in civil cases". Thus we should examine what these courts do in similar circumstances.

5. However it is equally as important to note the big differences between the Ontario Labour Relations Board's procedures and a civil court's in order to assess just how closely the "civil approach" should be followed. In this regard, no discovery accompanies the Board's procedures hence hearings before the Board cannot be completely analogized to hearings in civil matters, and a fortiori, the subpoena duces tecum (used by both the Board and the courts) may not have an identical nature in both proceedings. In other words, not only should this Board examine the judicial pronouncements depicting the nature of the subpoena duces tecum but it should go on to consider some of the principles that circumscribe the discovery procedures of a civil court. After having done this, it may become apparent that the Board's process should fall somewhere in between these two procedures.

6. The Board's "Summons to Witness" form is in the nature of a subpoena duces tecum which was defined in The Commissioner for Railways v. Small (1938), 38 N. So. Wales 564 at p. 573, in the following way:

> "A subpoena duces tecum is a writ which is issued by the Court as of course upon application by praecipe by or on behalf of a party to a cause or matter commanding some person or persons to attend before the Court to give evidence, and also to search for, bring and produce to the Court some document or documents relating to the cause or matter. In form, it is a writ of subpoena ad test., with an addendum directing the production of documents. The Court has undoubted jurisdiction to issue such a writ: Amey v. Long (1); and disobedience to the writ

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is punishable by fine or attachment or both; R. v. Daye (2)"

7. Obviously this power is a substantial one and must be exercised in a very circumspect manner. A subpoena duces tecum cannot be used as an instrument to harass or to annoy unreasonably an opponent; (see René v. Carling Export Brewing Co. (1927), 61 O.L.R. 495; Clemens v. Crown Trust Co. [1953] O.R. 87 at p. 94, [1952] O.W.N. 434; and Brittain Steel Fabricators Ltd. v. Amiable (1967), 64 D.L.R. (2d) 663 (B.C.)). And a subpoena duces tecum should state with reasonable particularly the documents which are to be produced; (see A.G. v. Wilson, 9 Sim. 526 at 529; Earl of Powis v. Negus [1923] 1 Ch. 186 at 190; The Commissioner for Railways v. Small, supra, and Lee v. Angas (1866), L.R. 2 Eq. 59). Furthermore, although the limits of this principle are vague, a subpoena duces tecum should not be used "for the purpose of fishing, i.e., endeavouring, not to obtain evidence to support [a] case, but to discover whether [one] has a case at all"; (see The Commissioner for Railways v. Small, supra, at p. 575; Hennessy v. Wright 24 Q.B.D. 445 at 448; Griebart v. Morris [1920] 1 K.B. 659 at 666). And finally, a subpoena to a party will be set aside as abusive if great numbers of documents are called for and it appears that they are not sufficiently relevant; (see Steele v. Savory [1891] W.N. 195).

8. Applying these principles to the present request we would rule, that at least at this point in the proceedings, item (1) (save for the records of those employees dismissed from January 1, 1971 until January 3, 1974) and item (2) are more in the nature of a fishing expedition, or at the very least, involve great numbers of documents that are not, at this time, sufficiently relevant. In regard to item (4), while the request is somewhat vague, the lack of particularity is understandable. Moreover, the request, with some effort on the part of the respondent, is not so general to be incapable of being fulfilled. Thus the Board expects the "best efforts" of the respondent in this regard.

9. Having made these rulings, the Board wishes both to emphasize that it is not precluding the complainants' requests for all time, and to justify the part of the subpoena that continues to apply to the records of those employees who have been dismissed within the period January 1, 1971 to January 3, 1974. A balance of convenience must be struck in these matters. We recognize that some "discovering" must go on by way of the subpoena duces tecum and that the courts can afford to take a narrower view because of the availability of a discovery process to civil litigants. A party to a civil proceeding has a right to obtain from his opponent discovery of anything which can fairly be said to be material to enable him to ascertain his own case or to destroy the case set up against him; (see Plymouth Mutual Co-operation and Industry Society Limited v. Traders' Publishing Association, Limited [1906] 1 K.B. 403; Silver Hill Realty Holdings Ltd. v. Minister of Highways for

Ontario [1968] 1 O.R. 357 at p. 360. Although it is of note that not even discovery can be used for the purposes of fishing, see Playfair v. Cormack and Steel (1913), 4 O.W.N. 817, 9 D.L.R. 455 (S.C.)). The following quotation from Williston and Rolls, The Law of Civil Procedure vol. 3, pp. 874-897, reflects the breadth of this right of discovery in the context of the production of documents:-

> The classic definition of documents "relating to any matters in question in the action" was given by Brett L.J. in Compagnie Financière du Pacifique v. Peruvian Guano Co..
>
> > "The party swearing the affidavit is bound to set out all documents in his possession or under his control relating to any matters in question in the action. Then comes this difficulty: What is the meaning of that definition? What are the documents which are documents relating to any matter in question in the action? In Jones v. Monte Video Gas Co., 5 Q.B.D. 556, the Court stated its desire to make the rule as to the affidavit of documents as elastic as was possible. And I think that that is the view of the Court both as to the sources from which the information can be derived, and as to the nature of the documents. We desire to make the rule as large as we can with due regard to propriety; and therefore I desire to give as large an interpretation as I can to the words of the rule, 'a document relating to any matter in question in the action.' I think it obvious from the use of these terms that the documents to be produced are not confined to those, which would be evidence either to prove or to disprove any matter in question in the action; and the practice with regard to insurance cases shews, that the Court never thought that the person making the affidavit would satisfy the duty imposed upon him by merely setting out such documents, as would be evidence to support or defeat any issue in the cause.

> The doctrine seems to me to go farther than that and to go as far as the principle which I am about to lay down. It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may - not which must - either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words 'either directly or indirectly,' because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences: the question upon a summons for a further affidavit is whether the party issuing it can shew, from one of the sources mentioned in Jones v. Monte Video Gas Co., 5 Q.B.D. 556, that the party swearing the first affidavit has not set out all the documents falling within the definition which I have mentioned and being in his possession or control."

Blackburn J. in Hutchinson v. Glover, said:

> "Everything which will throw light on the case is prima facie subject to inspection."

In Board v. Thomas Hedley & Co., the plaintiff claimed damages for negligence alleging that the defendants had manufactured and sold a dangerous cleaning product which she had used and as a result thereof had contracted dermatitis on both hands. The plaintiff applied for a further and better affidavit disclosing 'all complaints and other documents relating thereto' received by the defendants after the date she had purchased the product. Denning L.J. said:

> "Once it is held that evidence of dermatitis suffered by subsequent users would be admissible because it is relevant to the issue whether the product was dangerous, it follows that the documents relating to complaints of subsequent users ought to be disclosed, because they may fairly lead to a train of inquiry enabling the plaintiff to advance her case."

Documents which may throw light on the case must be produced even if the documents would be inadmissible in evidence. In Canada Central Ry. v. McLaren, Spragge C.J.O. stated:

> "...as was said by Blackburn, J., in Fenner v. The London and South-Eastern R. W. Co., L.R. 7 Q.B. at 769: 'It is not necessary that the documents should be in themselves evidence' to entitle the opposite party to their production. And the converse of this is probably true, that it does not follow, from a party being entitled to the production of documents in her adversary's possession, that the contends of these documents are in themselves evidence."

Documents taken individually may not be relevant but when taken together may be material. In Delap v. C.P.R., the plaintiff claimed under an alleged oral agreement, the existence of which was denied by the defendant. Most of the negotiations took place between the plaintiff's solicitor and the defendant's solicitor. It was contended that several hundreds of letters between the plaintiff and his solicitor were irrelevant. Middleton J. said:

> "Taken individually, it is quite possible that each letter may be said to be irrelevant. Taken collectively, the negative evidence which would be afforded by the complete absence of all reference to the alleged agreement may be of the greatest possible moment, particularly if a situation is developed in which such an agreement, if it existed, would naturally

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BEFORE:
E. Boyer

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DECISION

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be mentioned. It seems to me clear that all these letters are subject to production."

And accordingly, in light of this perspective we are prepared to let the subpoena stand in relation to the documents relating to dismissed employees, although we are in no way prejudging the admissibility of all such material at this time.

8. However, against this need to discover is the respondent's interest in not being put to an onerous and potentially embarrassing revelation of all of its employee records and bank deposits, and so, as indicated above, we have cut back the subpoena as it relates to such records of all employees. A substantial number of irrevelant but confidential matters are likely to be revealed in this material and it is not clear that the complainants cannot advance their primary objective through a careful cross-examination of the respondent's officials. Thus, for the moment, the balance of convenience tips in the respondent's favour on items (1) (in part) and (2) as described above, and the subpoena is hereby so amended.

6589-74-M: The Religious Hospitallers of Hotel Dieu of St. Joseph of the Diocese of London in Ontario at Windsor (Employer) v. SERVICE EMPLOYEES' UNION, LOCAL 210 (Trade Union).

BEFORE: D. H. Kates, Vice-Chairman, and Board Members H.J.F. Ade and E. Boyer.

APPEARANCES AT THE HEARING: L. P. Kavanaugh and D. G. Baker for the employer; T. Wohl and B. Janisse for the trade union.

DECISION OF THE BOARD: October 28, 1974.

1. This is a reference pursuant to section 96 of The Labour Relations Act where the Minister of Labour has referred to the Board the question as to whether he has the authority under the Labour Relations Act to appoint a conciliation officer.

2. The relevant facts precipitating the question of the Minister's authority are basically a matter of agreement between the parties. It appears that the employer and trade union through their representatives entered into negotiations with a view to renewing a collective agreement expired on May 31, 1974, covering a service unit of employees. Almost concurrently with these negotiations was the negotiation by the parties of a renewed agreement covering the office and clerical employees (and since consummated on August 23, 1974). It appears that there was some discussion during the negotiation of the office agreement that a certain employee classified as an elevator operator be transferred out of the

R. *v.* Campbell, [1999] 1 S.C.R. 565

John Campbell and Salvatore Shirose *Appellants*

v.

Her Majesty The Queen *Respondent*

Indexed as: R. *v.* Campbell

File No.: 25780.

1998: May 28; 1999: April 22.

Present: Lamer C.J. and L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Major, Bastarache and Binnie JJ.

on appeal from the court of appeal for ontario

Criminal law -- Abuse of process -- Stay of proceedings -- Reverse sting operation involving police "sale" of illegal drugs to drug organization executives -- Whether reverse sting operation abuse of process -- *Narcotic Control Act*, R.S.C., 1985, c. N-1, ss. 2 "traffic", 4 -- *Narcotic Control Regulations*, C.R.C., c. 1041, s. 3(1) -- *Royal Canadian Mounted Police Act*, R.S.C., 1985, c. R-10, s. 37.

Evidence -- Privilege -- Solicitor-client privilege -- Reverse sting operation involving police "sale" of illegal drugs to drug organization executives -- RCMP officer consulting Department of Justice lawyer as to legality of planned reverse sting operation -- Claim made that reverse sting operation predicated on its being considered legal -- Defence wanting to test disclosure of legal advice received by RCMP -- Whether communications between RCMP and Department of Justice lawyer should be disclosed.

The RCMP were alleged to have violated the *Narcotic Control Act* by selling a large quantity of hashish to senior "executives" in a drug trafficking organization as part of a reverse sting operation. The appellants, as purchasers, were charged with conspiracy to traffic in cannabis resin and conspiracy to possess cannabis resin for that purpose. The trial judge found the appellants guilty as charged but, before sentencing, heard their motion for a stay of any further steps in the proceeding. The appellants argued that the reverse sting constituted illegal police conduct which "shocks the conscience of the community and is so detrimental to the proper administration of justice that it warrants judicial intervention". The stay was refused by the courts below.

As part of their case for a stay the appellants sought, but were denied, access to the legal advice provided to the police by the Department of Justice on which the police claimed to have placed good faith reliance. The Crown's position implied that the RCMP acted in accordance with legal advice.

At issue here is the effect, in the context of the "war on drugs", of alleged police illegality on the grant of a judicial stay of proceedings, and related issues regarding

the solicitor-client privilege invoked by the RCMP and pre-trial disclosure of solicitor-client communications to which privilege has been waived.

Held: The appeal should be allowed in part.

At this stage of the proceedings, the door is finally and firmly closed against both appellants on the question of guilt or innocence notwithstanding the contention of one appellant that the conspiracy alleged by the Crown, and encompassed in the indictment, was a larger agreement than his demonstrated involvement. The appellant was clearly able to ascertain the conspiracy alleged against him from a plain reading of the indictment as was required by the jurisprudence.

The effect of police illegality on an application for a stay of proceedings depends very much on the facts of a particular case. This case-by-case approach is dictated by the requirement to balance factors which are specific to each fact situation. Here, the RCMP acted in a manner facially prohibited by the *Narcotic Control Act*. Their motive in doing so does not matter because, while motive may be relevant for some purposes, it is intent, not motive, that is an element of a full *mens rea* offence.

A police officer investigating a crime occupies a public office initially defined by the common law and subsequently set out in various statutes and is not acting as a government functionary or as an agent. Here, the only issue was the status of an RCMP officer in the course of a criminal investigation and in that regard the police are independent of the control of the executive government.

Even if the police could be considered agents of the Crown for some purposes, and even if the Crown itself were not bound by the *Narcotic Control Act*, in this case the police stepped outside the lawful ambit of their agency, and whatever immunity was associated with that agency was lost. Parliament made it clear that the RCMP must act "in accordance with the law" and that illegality by the RCMP is neither part of any valid public purpose nor necessarily "incidental" to its achievement. If some form of public interest immunity is to be extended to the police to assist in the "war on drugs", it should be left to Parliament to delineate the nature and scope of the immunity and the circumstances in which it is available.

Even if it should turn out here that the police acted contrary to the legal advice provided by the Department of Justice, there would still be no right to an automatic stay. The trial judge would still have to consider any other information or explanatory circumstances that emerge during the inquiry into whether the police or prosecutorial conduct "shocks the conscience of the community". A police force that chooses to operate outside the law is not the same thing as a police force that made an honest mistake on the basis of erroneous advice. There was no reason to think the RCMP ignored the advice it was given, but as the RCMP did make an issue of the legal advice it received in response to the stay applications, the appellants were entitled to have the bottom line of that advice corroborated.

The RCMP must be able to obtain professional legal advice in connection with criminal investigations without the chilling effect of potential disclosure of their confidences in subsequent proceedings. Here, the officer's consultation with the Department of Justice lawyer fell squarely within this functional definition, and the fact

that the lawyer worked for an "in-house" government legal service did not affect the creation or character of the privilege. Whether or not solicitor-client privilege attaches in any of these situations depends on the nature of the relationship, the subject matter of the advice and the circumstances in which it is sought and rendered.

An exception to the principle of confidentiality of solicitor-client communications exists where those communications are criminal or else made with a view to obtaining legal advice to facilitate the commission of a crime. Here, the officer sought advice as to whether or not the operation he had in mind was lawful. The privilege is not automatically destroyed if the transaction turns out to be illegal.

Destruction of the solicitor-client privilege takes more than evidence of the existence of a crime and proof of an anterior consultation with a lawyer. There must be something to suggest that the advice facilitated the crime or that the lawyer otherwise became a "dupe or conspirator". The RCMP, by adopting the position that the decision to proceed with the reverse sting had been taken with the participation and agreement of the Department of Justice, belatedly brought itself within the "future crimes" exception and put in question the continued existence of its privilege.

Another exception to the rule of confidentiality of solicitor-client privilege may arise where adherence to that rule would have the effect of preventing the accused from making full answer and defence. Although the entire jeopardy of the appellants remained an open issue until disposition of the stay application, the appellants were not providing "full answer and defence" to the stay application. They were the moving parties of an application being defended by the Crown. The appellants' initiative in

launching a stay application does not, of itself, authorize a fishing expedition into solicitor-client communications to which the Crown is a party.

The RCMP put the officer's good faith belief in the legality of the reverse sting in issue, and asserted its reliance upon his consultations with the Department of Justice to buttress that position. The RCMP thus waived the right to shelter the contents of that advice behind solicitor-client privilege. It is not always necessary for the client actually to disclose part of the contents of the advice in order to waive privilege to the relevant communications of which it forms a part. It was sufficient in this case for the RCMP to support its good faith argument by undisclosed advice from legal counsel in circumstances where, as here, the existence or non-existence of the asserted good faith depended on the content of that legal advice. Non-disclosure of information clearly relevant to the good faith reliance issue here cannot properly be disposed of by adverse inferences. The appellants were entitled to disclosure of legal advice with respect to: (1) the legality of the police posing as sellers of drugs to persons believed to be distributors of drugs; (2) the legality of the police offering drugs for sale to persons believed to be distributors of drugs; and (3) the possible consequences to the members of the RCMP who engaged in one or both of the above, including the likelihood of prosecution. If there is a dispute concerning the adequacy of disclosure, the disputed documents or information should be provided by the Crown to the trial judge for an initial determination whether this direction has been complied with. The trial judge should then determine what, if any, additional disclosure should be made to the appellants.

Cases Cited

Applied: *R. v. Mack*, [1988] 2 S.C.R. 903; *R. v. Eldorado Nuclear Ltd.*, [1983] 2 S.C.R. 551; *R. v. Douglas*, [1991] 1 S.C.R. 301; *R. v. Jewitt*, [1985] 2 S.C.R. 128; *Canadian Broadcasting Corp. v. The Queen*, [1983] 1 S.C.R. 339; *R. v. Pearson*, [1998] 3 S.C.R. 620; **disapproved:** *Rutherford v. Swanson*, [1993] 6 W.W.R. 126; *Re Girouard and the Queen* (1982), 68 C.C.C. (2d) 261; **considered:** *Rogers v. Bank of Montreal*, [1985] 4 W.W.R. 508; **referred to:** *R. v. Power*, [1994] 1 S.C.R. 601; *R. v. Lore*, Sup. Ct., No. 500-01-013926-891, March 8, 1991; *R. v. Conway*, [1989] 1 S.C.R. 1659; *R. v. Showman*, [1988] 2 S.C.R. 893; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217; *Roncarelli v. Duplessis*, [1959] S.C.R. 121; *Attorney General of Canada v. Lavell*, [1974] S.C.R. 1349; *R. v. Keyowski*, [1988] 1 S.C.R. 657; *R. v. Scott*, [1990] 3 S.C.R. 979; *R. v. T. (V.)*, [1992] 1 S.C.R. 749; *R. v. Potvin*, [1993] 2 S.C.R. 880; *R. v. O'Connor*, [1995] 4 S.C.R. 411; *R. v. Bond* (1993), 135 A.R. 329, leave to appeal refused, [1993] 3 S.C.R. v; *Lewis v. The Queen*, [1979] 2 S.C.R. 821; *R. v. Mancuso* (1989), 51 C.C.C. (3d) 380, leave to appeal refused, [1990] 2 S.C.R. viii; *R. v. Mamchur*, [1978] 4 W.W.R. 481; *R. v. Sherman* (1977), 36 C.C.C. (2d) 207; *McCleave v. City of Moncton* (1902), 32 S.C.R. 106; *Enever v. The King* (1906), 3 C.L.R. 969; *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311; *Ridge v. Baldwin*, [1964] A.C. 40; *Attorney-General for New South Wales v. Perpetual Trustee Co.*, [1955] A.C. 457; *R. v. Metropolitan Police Comr., Ex parte Blackburn*, [1968] 1 All E.R. 763; *R. v. Creswell*, [1998] B.C.J. No. 1090 (QL); *Doe v. Metropolitan Toronto (Municipality) Commissioners of Police* (1989), 58 D.L.R. (4th) 396, aff'd (1990), 74 O.R. (2d) 225; *Perrier v. Sorgat* (1979), 25 O.R. (2d) 645; *R. v. Salvador* (1981), 59 C.C.C. (2d) 521; *In re Neagle*, 135 U.S. 1 (1890); *Baucom v. Martin*, 677 F.2d 1346 (1982); *Perka v. The Queen*, [1984] 2 S.C.R. 232; *R. v. Lore* (1997), 116 C.C.C. (3d) 255; *R. v. Matthiessen* (1995), 172 A.R. 196; *R. v. Xenos* (1991), 70 C.C.C.

(3d) 362; *R. v. Gruenke*, [1991] 3 S.C.R. 263; *Smith v. Jones*, [1999] 1 S.C.R. 455; *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860; *Upjohn Co. v. United States*, 449 U.S. 383 (1981); *Minter v. Priest*, [1929] 1 K.B. 655; *Crompton (Alfred) Amusement Machines Ltd. v. Comrs. of Customs and Excise (No. 2)*, [1972] 2 All E.R. 353; *In re Lindsey*, 158 F.3d 1263 (1998); *R. v. Ladouceur*, [1992] B.C.J. No. 2854 (QL); *Solosky v. The Queen*, [1980] 1 S.C.R. 821; *R. v. Cox and Railton* (1884), 14 Q.B.D. 153; *O'Rourke v. Darbishire*, [1920] A.C. 581; *State ex rel. North Pacific Lumber Co. v. Unis*, 579 P.2d 1291; *R. v. Stinchcombe*, [1991] 3 S.C.R. 326; *R. v. Dunbar* (1982), 68 C.C.C. (2d) 13; *R. v. Gray* (1992), 74 C.C.C. (3d) 267; *R. v. Seaboyer*, [1991] 2 S.C.R. 577; *A. (L.L.) v. B. (A.)*, [1995] 4 S.C.R. 536; *United States v. Exxon Corp.*, 94 F.R.D. 246 (1981).

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APPEAL from a judgment of the Ontario Court of Appeal (1997), 32 O.R. (3d) 181, 96 O.A.C. 372, 115 C.C.C (3d) 310, 5 C.R. (5th) 391, [1997] O.J. No. 120 (QL), affirming a judgment of the Ontario Court (General Division), [1995] O.J. No. 431 (QL) denying the appellants' application for a stay of proceedings. Appeal allowed in part.

Alan D. Gold, for the appellant John Campbell.

Irwin Koziebrocki, for the appellant Salvatore Shirose.

Robert W. Hubbard, *Fergus C. O'Donnell* and *John North*, for the respondent.

The judgment of the Court was delivered by

//Binnie J.//

1 BINNIE J. – In this appeal the Court is asked to consider some implications of the constitutional principle that everyone from the highest officers of the state to the constable on the beat is subject to the ordinary law of the land. Here the police were alleged to have violated the *Narcotic Control Act*, R.S.C., 1985, c. N-1, by selling a large quantity of hashish (cannabis resin) to senior "executives" in a drug trafficking organization as part of what counsel called a "reverse sting" operation. The appellants, as purchasers, were charged with conspiracy to traffic in cannabis resin and conspiracy to possess cannabis resin for that purpose. The trial judge found the appellants guilty as charged but, before sentencing, heard the appellants' motion for a stay of any further steps in the proceeding. The appellants argued that the reverse sting constituted illegal police conduct which "shocks the conscience of the community and is so detrimental to the proper administration of justice that it warrants judicial intervention" (see *R. v. Power*, [1994] 1 S.C.R. 601, at p. 615). The stay was refused by the courts below.

2 As part of their case for a stay the appellants sought, but were denied, access to the legal advice provided to the police by the Department of Justice on which the police claimed to have placed good faith reliance. The Crown indicated that the undisclosed advice assured the police, rightly or wrongly, that sale of cannabis resin in

the circumstances of a reverse sting was lawful. The appellants argue that the truth of this assertion can only be tested by a review of the otherwise privileged communications.

3 We are therefore required to consider in the context of the "war on drugs", the effect of alleged police illegality on the grant of a judicial stay of proceedings, and related issues regarding the solicitor-client privilege invoked by the RCMP and pre-trial disclosure of solicitor-client communications to which privilege has been waived.

Facts

4 In the autumn of 1991, the RCMP initiated a reverse sting operation involving undercover officers posing as large-scale hashish vendors. This operation was undertaken after Corporal Richard Reynolds of the RCMP became aware of the decision of the Quebec Superior Court in *R. v. Lore* (an unreported decision of Pinard J., March 8, 1991, No. 500-01-013926-891) which, in Cpl. Reynolds' view, gave implicit approval to a reverse sting operation in which police offered to sell narcotics to suspected drug traffickers. Cpl. Reynolds contacted Mr. James Leising, an experienced senior lawyer employed by the Department of Justice in Toronto, to obtain professional advice as to the legality of a reverse sting operation. Seven or eight meetings were held between Cpl. Reynolds and the Department of Justice lawyer in relation to the proposed operation. In September of 1991, approval by senior RCMP officers was given to initiate the reverse sting. Using the help of a police informant, the police contacted two groups of potential purchasers through the appellant Shirose. Negotiations with these groups included showing the hashish to prospective purchasers. However, the RCMP was careful not to provide any samples, despite requests to do so. The hashish remained under the control

of the RCMP at all times. The appellant Campbell eventually participated in the negotiations as a financier for one of the two groups and in January 1992, the appellant Campbell, with the help of the appellant Shirose, agreed to pay $270,000 for 50 kilograms of cannabis resin. The retail value of these drugs at street level, as found by the trial judge, was close to $1 million. Instead of receiving the expected 50 kilograms of cannabis resin in exchange for payment, however, the appellants were arrested and charged with conspiracy to traffic in cannabis resin and conspiracy to possess cannabis resin for the purpose of trafficking.

5 In advance of the trial, to support their submission that if convicted, the proceedings should be stayed, the appellants sought to subpoena Mr. Leising from the Department of Justice to testify about the communications that had occurred with Cpl. Reynolds with respect to the legality of the reverse sting operation. The trial judge quashed the subpoena on the grounds that the communications were protected by solicitor-client privilege and did not fall within one of the recognized exceptions. Subsequently, during the application to stay the proceedings, counsel for the appellants sought to examine Cpl. Reynolds on the content of his communications with the Department of Justice. Again the trial judge upheld the assertion of solicitor-client privilege and denied the appellants' application to force disclosure of these communications. Based on the admissible evidence, the trial judge then dismissed the stay of proceedings application. The appellant Shirose was sentenced to six years in penitentiary. The appellant Campbell was sentenced to nine years in penitentiary, plus forfeiture of the purchase price paid to the police. The Court of Appeal dismissed the appellants' appeal except to remit the issue of forfeiture to the trial judge to await an

application by the Attorney General, if he sees fit to make it, for forfeiture of the purchase price under s. 462.37 of the *Criminal Code*, R.S.C., 1985, c. C-46.

Evidence of Police "Good Faith"

6 On the return of the stay motion, the Crown set out to establish that the police had at all stages acted in good faith and in the belief that the reverse sting was legal. At the application for a stay of proceedings hearing, counsel for the Crown questioned Cpl. Reynolds as follows:

> Q. Was your project [the reverse sting operation] tailored on the outlines of the project or [*sic*] the *Lore* case?
>
> A. Yes, sir.
>
> Q. And it was your understanding as a result of the *Lore* case that that was lawful behaviour?
>
> A. Yes, sir.

It emerged that Cpl. Reynolds had consulted the Department of Justice about the legality of the reverse sting. Appellants' counsel pursued this issue with Cpl. Reynolds as follows:

> Q. So to return then, based upon this [*Lore*] decision coming to your attention, did you also obtain any other advice regarding any concerns you might have had about this type of an operation?
>
> A. Sought legal advice.
>
> Q. And from whom did you seek legal advice?
>
> A. The Department of Justice, Toronto.
>
> Q. And was it one individual or more than one individual?

A. One individual.

Q. And who was that?

A. Mr. Leising.

The precise purpose of obtaining this legal advice came out under further questioning from appellants' counsel, as follows:

> Q. Now that you know what I am reading from sir, what I asked was, "The issues for which advice was sought concerned the propriety of the police posing as sellers of drugs to persons believed to be distributors of drugs." Is that accurate?
>
> A. That's correct.
>
> Q. "The propriety of the police offering hashish for sale to persons believed to be distributors of hashish." Is that correct?
>
> A. Yes, sir.
>
> Q. "The release of a sample of hashish to certain of those persons." Is that correct?
>
> A. Yes, sir.
>
> Q. "The possible consequences to the members who engaged in such conduct." Is that correct?
>
> A. Yes, sir.
>
> ...
>
> Q. When you went to Mr. Leising, were you concerned about any of the members of your force who did engage in this operation, being prosecuted?
>
> A. That would have been one of the issues.
>
> Q. And then to return to Officer Plomp's certificate, the last thing he said is, "and the issue of entrapment." Was that one of the items on the agenda with Mr. Leising?
>
> A. Yes, sir.

The Crown successfully objected to counsel for the appellants questioning Cpl. Reynolds with respect to the actual advice given because of the claim of solicitor-client privilege. The appellants' counsel then attempted to use this objection to narrow the potential ambit of the Crown's "good faith" argument:

> So it is my respectful submission that the Crown certainly cannot argue that the police acted in good faith because they acted on legal advice, because we don't know what legal advice they got. We don't know what qualifications or conditions were attached. We don't know whether they were told, 'This is going to be illegal and you're on your own. You're at risk.' We don't know if they were told, 'It's illegal but don't worry, we'll never prosecute you.'
>
> So, with respect, I certainly don't want to hear the argument that, 'Oh well, the police acted in good faith because they acted on legal advice,' because then I would like to know what that advice was so I can see whether that's true or not. So in my submission, if they are going to rely on solicitor/client privilege, then that issue has to drop completely out of the case.
>
> THE COURT: Well I am sure the Crown will have something to say about that.
>
> MR. GOLD: Well my suspicion is that they probably won't because they might be aware that that might open the door to further proceedings to an argument for disclosure of it, but I guess I will have to wait and see Your Honour. [Emphasis added.]

Judgments

Ontario Court (General Division), [1995] O.J. No. 431 (QL)

Ruling on Application for Stay of Proceedings

7 Caswell J. divided her analysis of the stay application into two parts. In the first part, she dealt with the issue of entrapment as a sub-issue of the abuse of process

doctrine. In the second part, she dealt with prosecutorial conduct more generally as giving rise to potential abuses of process.

8 In discussing entrapment, Caswell J. considered the judgment of this Court in *R. v. Mack*, [1988] 2 S.C.R. 903, in which Lamer J. (as he then was) pointed out that a stay of proceedings is not to be considered as a method of disciplining the police or the prosecution, but rather, that the Court is concerned with the larger issue of maintenance of public confidence in the judicial process. The trial judge noted that entrapment may be established where (a) the authorities provide an opportunity to persons to commit an offence without reasonable suspicion or acting *mala fides*, or (b) having a reasonable suspicion or acting in the course of a *bona fide* inquiry, they go beyond providing a mere opportunity and actually induce the commission of an offence. Caswell J. held that the police had acted with reasonable suspicion with respect to both appellants. She noted that the appellant Shirose had been involved in a search for a large-scale supplier of hashish long before the RCMP began its operation. She considered that the appellant Campbell volunteered himself "out of the woodwork" and joined the conspiracy completely on his own initiative. As to the allegation that the RCMP had induced the commission of the offences, Caswell J. concluded, based on the criteria set out in *Mack*, that the police conduct had not induced the offence or otherwise gone beyond "the limits that society deems proper". Accordingly, there was no entrapment on the facts of this case.

9 In considering the broader aspects of the doctrine of abuse of process, Caswell J. concluded that it was not necessary for her to decide whether or not the reverse sting operation was illegal. Instead, she posed the question whether this is one of

the "clearest cases" in which the proceedings are so overwhelmingly unfair that to proceed would be contrary to the interests of justice. After reviewing various cases involving police conduct that did not result in stays of proceedings, and measuring the conduct of the police and Crown counsel in this case against the criteria set out in *Mack, supra*, *R. v. Conway*, [1989] 1 S.C.R. 1659, *R. v. Showman*, [1988] 2 S.C.R. 893, and *Power, supra*, Caswell J. concluded that it was in the interest of justice to proceed to enter the conviction and impose sentence. In her view, society would not be offended by the acts of the prosecution. Society would be offended by the imposition of a stay.

Court of Appeal for Ontario (1997), 32 O.R. (3d) 181

10 Carthy J.A. disagreed with the conclusion of the trial judge that it was not necessary to determine the legality of the police conduct. Also basing himself on the judgment of Lamer J. in *Mack, supra*, Carthy J.A. considered that police illegality was an important factor to be weighed in evaluating an accused's claim of abuse of process and, indeed, he considered that illegality may in certain instances be determinative.

11 After setting out the relevant portions of the *Narcotic Control Act*, Carthy J.A. noted that the *Narcotic Control Regulations*, C.R.C., c. 1041, s. 3(1), saves the police harmless where possession of a narcotic results from sting operations. There is no corresponding regulation giving the police immunity when they are offering to sell a narcotic. Carthy J.A. concluded that the RCMP's offer to sell a narcotic to the appellants constituted trafficking, and that it was irrelevant that the RCMP had no intention of completing the sale. Therefore, on the face of the statute, the conduct of the RCMP in this case was, in Carthy J.A.'s view, illegal.

12 Carthy J.A. then considered the Crown's arguments about extending public interest immunity to the RCMP and concluded that the Crown does not exercise sufficient *de jure* control over the activities of RCMP members to justify such immunity from prosecution for breach of the criminal law as it relates to narcotics. As to the related concept of immunity derived from Crown agency, Carthy J.A. considered that, while members of the RCMP are entitled to seek out criminality through a variety of different methods, this mandate does not extend to methods that would be illegal if done by any other person. Carthy J.A. examined *R. v. Eldorado Nuclear Ltd.*, [1983] 2 S.C.R. 551. When Crown agents act within the scope of the public purposes they are statutorily empowered to pursue, they may be entitled to claim Crown immunity, he held, but in this case the RCMP officers had stepped outside the scope of any agency relationship that may have existed.

13 Carthy J.A. agreed with the trial judge that there was no entrapment. He went on, however, to consider whether the RCMP conduct amounted to an abuse of process for reasons other than entrapment. He noted that the illegal conduct of the RCMP did not involve a trifling amount of drugs. Further, he noted that the illegal conduct was authorized at all levels of the RCMP. He was prepared to infer that the reverse sting was considered lawful by the Department of Justice, and he treated this as an aggravating factor because "the full might of the Crown resources were set upon the task of illegal conduct" (p. 197). Carthy J.A. noted an alternate possibility that the police were acting on their own as "mavericks" contrary to legal advice. While he doubted that this was in fact the case, Carthy J.A. at p. 197 considered this would be

> . . . an aggravating factor against the Crown of about equal weight to the first assumption [i.e., of equal weight to the assumption that the RCMP did follow the legal advice].

14 A third possibility, he considered, was that the RCMP had been advised that the reverse sting would be legal provided no drugs were passed to the appellants as part of a "sale". If so, the RCMP had complied with the advice rendered, even though failure to complete the transaction did not change its illegality. Carthy J.A. recognized that all three scenarios were necessarily speculative on his part. He said, at p. 200, that had he been the trial judge he "would have directed production of the documents and evidence of the Crown law officer". However, while "[i]t obviously would have been better if the [Department of Justice] information had been conveyed [to the appellants] at trial" (p. 200), no miscarriage of justice occurred because even assuming "the worst" against the Crown no stay could be justified in the circumstances of this case. It was not one of the clearest cases, nor did it involve conduct that would cause the public conscience to be shocked if the convictions were permitted to stand. He concluded, at pp. 198-99, that "[h]aving condemned the actions of the R.C.M.P. and having held up [his] hand against repetition, it would, in [his] view, be sanctimonious to say that the rule of law ha[d] been eroded by these convictions and sentences". The Court of Appeal dismissed the other grounds of appeal, save for the technical variation in the order for forfeiture previously mentioned.

Analysis

Reverse Sting Operations

15 There is a general recognition that "[i]f the struggle against crime is to be won, the ingenuity of criminals must be matched by that of the police" (*Mack, supra, per* Lamer J., at p. 916). In a "sting" operation, the police pose as willing purchasers of narcotics to obtain evidence against traffickers. The *Narcotic Control Regulations* accept the legitimacy of this technique by deeming police possession in these circumstances to be authorized under that Act. The problem is that traffickers caught by ordinary "sting" purchases are generally minor street level personnel whose conviction has little deterrence effect on the day-to-day operations of the drug organization as a whole. As pointed out by Cpl. Reynolds in this case, the "executives" up the chain of command of large-scale drug organizations are able to insulate themselves from sting operations. The street level pushers apprehended by the police are easily sacrificed and easily replaced. For the purpose of more effective law enforcement, the police therefore devised what counsel referred to as "reverse sting" operations whereby the police became vendors rather than purchasers, i.e., the roles of vendor and purchaser were reversed within the sting operation. Because of the amount and value of drugs involved, reverse sting operations brought the police "vendors" into direct contact with the executive purchasers in the large drug organizations. It has proved to be an effective technique. It also, however, brought the police into conflict with the very law that they were attempting to enforce. Neither the *Narcotic Control Act* nor its regulations authorize the police to sell drugs. The appellants, as stated, purport to be shocked at the illegality of police conduct, and ask the Court to hold that the conduct so violates the community's fundamental sense of decency and values that it should result in a stay of proceedings against them.

Guilt or Innocence of the Appellants

16 This appeal was directed almost entirely at the conduct of the abuse of process application following the finding of the trial judge that the appellants were guilty as charged. The only surviving issue on the issue of guilt or innocence is the contention of the appellant Campbell that the conspiracy alleged by the Crown, and encompassed in the indictment, was a larger agreement, different in time and place, than his demonstrated involvement. The counts in the indictment span the period November 1, 1990 to January 15, 1992, whereas it appears Campbell first became involved on November 21, 1991. The counts in the indictment refer to activity in Windsor, London, Mississauga, Toronto, and elsewhere in Ontario, whereas Campbell's demonstrated involvement took place only in Mississauga. Campbell further contends that the evidence shows that he and Shirose were not related co-conspirators, because they were members of separate and distinct groups, acting without a common purpose or enterprise. I think the Crown is correct that the decision of this Court in *R. v. Douglas*, [1991] 1 S.C.R. 301, is fatal to this objection. After noting at pp. 315-16 that "[w]hile the offence of conspiracy is inherently difficult to frame, the indictment must be set forth with such reasonable precision as to inform the accused of the fundamental nature of the conspiracy charged". Cory J. nevertheless concluded, at p. 322, that:

> . . . it is not incumbent upon the Crown to prove the involvement of every member alleged to be part of the conspiracy. . . . If the conspiracy proven includes fewer members than the number of accused or extends over only part of the period alleged, then the conspiracy proven can still be said to be the same conspiracy as that charged in the indictment. In order to find that a specific conspiracy lies within the scope of the indictment, it is sufficient if the evidence adduced demonstrates that the conspiracy proven included some of the accused, establishes that it occurred at some time within the time frame alleged in the indictment, and had as its object the type of crime alleged.

The appellant was clearly able to ascertain the conspiracy alleged against him from a plain reading of the indictment and, in accordance with this Court's decision in *Douglas*, this ground of appeal must be dismissed.

17 For reasons to be discussed, it is important to note that, at this stage of the proceedings, the door is finally and firmly closed against both appellants on the question of guilt or innocence. The remaining issue is whether, notwithstanding the guilt of the appellants, the proceedings against them should be stayed because of abuse of process.

The Rule of Law

18 It is one of the proud accomplishments of the common law that everybody is subject to the ordinary law of the land regardless of public prominence or governmental status. As we explained in *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at p. 240, the rule of law is one of the "fundamental and organizing principles of the Constitution", and at p. 258, it was further emphasized that a crucial element of the rule of law is that "[t]here is ... one law for all". Thus a provincial premier was held to have no immunity against a claim in damages when he caused injury to a private citizen through wrongful interference with the exercise of statutory powers by a provincial liquor commission: *Roncarelli v. Duplessis*, [1959] S.C.R. 121. Professor F. R. Scott, who was counsel for the successful plaintiff, Roncarelli, in that case, subsequently observed in *Civil Liberties & Canadian Federalism* (1959), at p. 48:

> . . . it is always a triumph for the law to show that it is applied equally to all without fear or favour. This is what we mean when we say that all are equal before the law.

The principle was famously enunciated by Professor A. V. Dicey in *Introduction to the Study of the Law of the Constitution* (8th ed. 1927) as the second aspect of the "rule of law". This principle was noted with approval in *Attorney General of Canada v. Lavell*, [1974] S.C.R. 1349, at p. 1366:

> It means again equality before the law or the equal subjection of all classes to the ordinary law of the land administered by the ordinary courts; the 'rule of law' in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary courts.

19 The argument of the appellants is that not only are the police subject to prosecution for their participation in the very transaction that gave rise to the charges on which the appellants have been found guilty, but (more importantly from their perspective) police illegality should deprive the state of the benefit of a conviction against them. It is relevant that in s. 37 of the *Royal Canadian Mounted Police Act*, R.S.C., 1985, c. R-10, Parliament has specifically imposed on RCMP officers the duty to stay within the law, as follows:

> **37.** It is incumbent on every member
>
> (*a*) to respect the rights of all persons;
>
> (*b*) to maintain the integrity of the law, law enforcement and the administration of justice;
>
> (*c*) to perform the member's duties promptly, impartially and diligently, in accordance with the law and without abusing the member's authority;
>
> ...
>
> (*e*) to ensure that any improper or unlawful conduct of any member is not concealed or permitted to continue.... [Emphasis added.]

It is recognized, of course, that police officers gain nothing personally from conduct committed in good faith efforts to suppress crime that incidentally violates the law the police are attempting to enforce. Nevertheless, the seeming paradox of breaking a law in order to better enforce it has important ramifications for the rule of law.

Test for Abuse of Process

20 In *R. v. Jewitt*, [1985] 2 S.C.R. 128, the Court set down what has since become the standard formulation of the test for abuse of process, *per* Dickson C.J., at pp. 136-37:

> I would adopt the conclusion of the Ontario Court of Appeal in *R. v. Young* [(1984), 40 C.R. (3d) 289], and affirm that "there is a residual discretion in a trial court judge to stay proceedings where compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency and to prevent the abuse of a court's process through oppressive or vexatious proceedings". I would also adopt the caveat added by the Court in *Young* that this is a power which can be exercised only in the "clearest of cases".

This general test for abuse of process has been repeatedly affirmed: see *R. v. Keyowski*, [1988] 1 S.C.R. 657, at pp. 658-59; *Mack*, *supra*, at p. 941; *Conway*, *supra*, at p. 1667; *R. v. Scott*, [1990] 3 S.C.R. 979, at pp. 992-93; *Power*, *supra*, at pp. 612-15; *R. v. T. (V.)*, [1992] 1 S.C.R. 749, at pp. 762-63; *R. v. Potvin*, [1993] 2 S.C.R. 880, at p. 915; and most recently in *R. v. O'Connor*, [1995] 4 S.C.R. 411, at p. 455.

21 Entrapment is simply an application of the abuse of process doctrine. Lamer J., in *Mack*, *supra*, set out the applicable test as follows, at pp. 964-65:

> . . . there is entrapment when,

> (a) the authorities provide a person with an opportunity to commit an offence without acting on a reasonable suspicion that this person is already engaged in criminal activity or pursuant to a *bona fide* inquiry;
>
> (b) although having such a reasonable suspicion or acting in the course of a *bona fide* inquiry, they go beyond providing an opportunity and induce the commission of an offence.

The trial judge concluded that she was "satisfied that the police acted on reasonable suspicion. That being so, the police were fully entitled to provide both accused with opportunities to commit the offences". There was ample evidence to support her finding. She also found that the police had not crossed the boundary line from providing opportunity to commit the offence into the forbidden territory of inducing commission of the offence. The appellants needed no inducement. Once the opportunity presented itself, they, not the police, were the driving force behind the making of the deal.

22 In the absence of any plausible case for entrapment, the appellants can only succeed on the more general ground of a serious violation of "[the community's sense of] fair play and decency ... disproportionate to the societal interest in the effective prosecution of criminal cases" (*Conway*, *supra*, at p. 1667). In this regard, the centrepiece of the appellants' argument, as stated, is the allegation of police illegality, and the refusal of the courts below to order disclosure of what the appellants consider to be relevant communications between Cpl. Reynolds and Mr. Leising of the Department of Justice relied on by the police to establish their "good faith".

The Issue of Police Illegality

23 The allegation that the police have put themselves above the law is very serious, with constitutional ramifications beyond the boundaries of the criminal law. This was not a trivial breach. In the end, the transaction was for 50 kilograms, but at the outset the police were trying to organize the sale of over a ton of cannabis resin. The failure of the police to make a deal on that scale was not for want of trying.

24 The effect of police illegality on an application for a stay of proceedings depends very much on the facts of a particular case. This case-by-case approach is dictated by the requirement to balance factors which are specific to each fact situation. The problem confronting the police was well described by the Alberta Court of Appeal in *R. v. Bond* (1993), 135 A.R. 329 (leave to appeal refused, [1993] 3 S.C.R. v), at p. 333:

> Illegal conduct by the police during an investigation, while wholly relevant to the issue of abuse of the court's processes, is not per se fatal to prosecutions which may follow: *Mack*; supra at 558. Frequently it will be, but situational police illegality happens. Police involve themselves in high speed chases, travelling beyond posted speed limits. Police pose as prostitutes and communicate for that purpose in order to gather evidence. Police buy, possess, and transport illegal drugs on a daily basis during undercover operations. In a perfect world this would not be necessary but, patently illegal drug commerce is neither successfully investigated, nor resisted, by uniformed police peering through hotelroom transoms and keyholes or waiting patiently at police headquarters to receive the confessions of penitent drug-traffickers.

The Crown contends, as it did in the courts below, that the police did not violate the *Narcotic Control Act* which at the time the reverse sting was initiated provided in s. 4 as follows:

> **4.** (1) No person shall traffic in a narcotic or any substance represented or held out by the person to be a narcotic.
>
> (2) No person shall have in his possession any narcotic for the purpose of trafficking.

(3) Every person who contravenes subsection (1) or (2) is guilty of an indictable offence and liable to imprisonment for life.

"Traffic" is defined in the *Narcotic Control Act* as follows:

2. In this Act,

...

"traffic" means

(*a*) to manufacture, sell, give, administer, transport, send, deliver or distribute, or

(*b*) to offer to do anything referred to in paragraph (*a*)

otherwise than under the authority of this Act or the regulations. [Emphasis added.]

25 The conclusion that the RCMP acted in a manner facially prohibited by the Act is inescapable. Their motive in doing so does not matter because, while motive may be relevant for some purposes, it is intent, not motive, that is an element of a full *mens rea* offence: see *Lewis v. The Queen*, [1979] 2 S.C.R. 821, at p. 831. The *actus reus* of the offence of trafficking is the making of an offer, and when accompanied by intent to do so, the necessary *mens rea* is made out: see *R. v. Mancuso* (1989), 51 C.C.C. (3d) 380 (Que. C.A.), at p. 390, leave to appeal refused, [1990] 2 S.C.R. viii. There is no need to prove both the intent to make the offer to sell and the intent to carry out the offer: see *R. v. Mamchur*, [1978] 4 W.W.R. 481 (Sask. C.A.). See also, e.g., *R. v. Sherman* (1977), 36 C.C.C. (2d) 207 (B.C.C.A.), at p. 208, upholding a conviction where there was evidence that the accused had offered to sell heroin to a person he knew was an undercover police officer, with a view to "rip off" the officer and not complete the sale. *Sherman* was later followed on this point in *Mancuso*, *supra*, at pp. 389-90, where the

accused argued unsuccessfully that he did not intend actually to sell narcotics to a police informer, but really wished to steal his money.

Public Interest Immunity

26 The Crown submits that even if the conduct of the RCMP was facially prohibited by the terms of the *Narcotic Control Act*, no offence was committed because members of the RCMP are either part of the Crown or are agents of the Crown and as such partake of the Crown's public interest immunity. Such an argument is difficult to square with s. 3(1) of the *Narcotic Control Regulations* which authorizes the police to possess narcotics that come to them from "sting" operations:

> 3. (1) A person is authorized to have a narcotic in his possession where that person has obtained the narcotic pursuant to these Regulations and
>
> ...
>
> (*g*) is employed as an inspector, a member of the Royal Canadian Mounted Police, a police constable, [or] peace officer ... and such possession is for the purposes of and in connection with such employment. . . .

Even though the authority is contained in a regulation rather than the Act itself, it is clear that the Regulation would be entirely unnecessary and superfluous if the Act did not apply to the police in the first place.

The Status of the Police

27 The Crown's attempt to identify the RCMP with the Crown for immunity purposes misconceives the relationship between the police and the executive government

when the police are engaged in law enforcement. A police officer investigating a crime is not acting as a government functionary or as an agent of anybody. He or she occupies a public office initially defined by the common law and subsequently set out in various statutes. In the case of the RCMP, one of the relevant statutes is now the *Royal Canadian Mounted Police Act*, R.S.C., 1985, c. R-10.

28 Under the authority of that Act, it is true, RCMP officers perform a myriad of functions apart from the investigation of crimes. These include, by way of examples, purely ceremonial duties, the protection of Canadian dignitaries and foreign diplomats and activities associated with crime prevention. Some of these functions bring the RCMP into a closer relationship to the Crown than others. The *Department of the Solicitor General Act*, R.S.C., 1985, c. S-13, provides that the Solicitor General's powers, duties and functions extend to matters relating to the RCMP over which Parliament has jurisdiction, and that have not been assigned to another department. Section 5 of the *Royal Canadian Mounted Police Act* provides for the governance of the RCMP as follows:

> *5.* (1) The Governor in Council may appoint an officer, to be known as the Commissioner of the Royal Canadian Mounted Police, who, under the direction of the [Solicitor General], has the control and management of the Force and all matters connected therewith.

29 It is therefore possible that in one or other of its roles the RCMP could be acting in an agency relationship with the Crown. In this appeal, however, we are concerned only with the status of an RCMP officer in the course of a criminal investigation, and in that regard the police are independent of the control of the executive government. The importance of this principle, which itself underpins the rule of law, was

recognized by this Court in relation to municipal forces as long ago as *McCleave v. City of Moncton* (1902), 32 S.C.R. 106. That was a civil case, having to do with potential municipal liability for police negligence, but in the course of his judgment Strong C.J. cited with approval the following proposition, at pp. 108-9:

> Police officers can in no respect be regarded as agents or officers of the city. Their duties are of a public nature. Their appointment is devolved on cities and towns by the legislature as a convenient mode of exercising a function of government, but this does not render them liable for their unlawful or negligent acts. The detection and arrest of offenders, the preservation of the public peace, the enforcement of the laws, and other similar powers and duties with which police officers and constables are entrusted are derived from the law, and not from the city or town under which they hold their appointment.

30 At about the same time, the High Court of Australia rejected the notion that a police constable was an agent of the Crown so as to enjoy immunity against a civil action for wrongful arrest. Griffith C.J. had this to say in *Enever v. The King* (1906), 3 C.L.R. 969, at p. 977:

> Now, the powers of a constable, *quâ* peace officer, whether conferred by common or statute law, are exercised by him by virtue of his office, and cannot be exercised on the responsibility of any person but himself. If he arrests on suspicion of felony, the suspicion must be his suspicion, and must be reasonable to him. If he arrests in a case in which the arrest may be made on view, the view must be his view, not that of someone else. ... A constable, therefore, when acting as a peace officer, is not exercising a delegated authority, but an original authority, and the general law of agency has no application.

31 Over 70 years later, Laskin C.J. in *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311, at p. 322, speaking with reference to the status of a probationary police constable, affirmed that "we are dealing with the holder of a public office, engaged in duties connected with the maintenance of

public order and preservation of the peace, important values in any society" (emphasis added). See also *Ridge v. Baldwin*, [1964] A.C. 40 (H.L.), at p. 65.

32 Similar sentiments were expressed by the Judicial Committee of the Privy Council in *Attorney-General for New South Wales v. Perpetual Trustee Co.*, [1955] A.C. 457 (P.C.), another civil case dealing with the vicarious liability of the Crown, in which Viscount Simonds stated, at pp. 489-90:

> [A constable's] authority is original, not delegated, and is exercised at his own discretion by virtue of his office: he is a ministerial officer exercising statutory rights independently of contract. The essential difference is recognized in the fact that his relationship to the Government is not in ordinary parlance described as that of servant and master.

33 While for certain purposes the Commissioner of the RCMP reports to the Solicitor General, the Commissioner is not to be considered a servant or agent of the government while engaged in a criminal investigation. The Commissioner is not subject to political direction. Like every other police officer similarly engaged, he is answerable to the law and, no doubt, to his conscience. As Lord Denning put it in relation to the Commissioner of Police in *R. v. Metropolitan Police Comr., Ex parte Blackburn*, [1968] 1 All E.R. 763 (C.A.), at p. 769:

> I have no hesitation, however, in holding that, like every constable in the land, he [the Commissioner of Police] should be, and is, independent of the executive. He is not subject to the orders of the Secretary of State, save that under the Police Act 1964 the Secretary of State can call on him to give a report, or to retire in the interests of efficiency. I hold it to be the duty of the Commissioner of Police, as it is of every chief constable, to enforce the law of the land. He must take steps so to post his men that crimes may be detected; and that honest citizens may go about their affairs in peace. He must decide whether or not suspected persons are to be prosecuted; and, if need be, bring the prosecution or see that it is brought; but in all these things he is not the servant of anyone, save of the law itself. No Minister of the Crown can tell him that he must, or must not, keep observation on this place

> or that; or that he must, or must not, prosecute this man or that one. Nor can any police authority tell him so. The responsibility for law enforcement lies on him. He is answerable to the law and to the law alone. [Emphasis added.]

34 To the same effect, see the more recent Canadian cases of *R. v. Creswell*, [1998] B.C.J. No. 1090 (QL) (S.C.), which involves facts closer to those in the present appeal; *Doe v. Metropolitan Toronto (Municipality) Commissioners of Police* (1989), 58 D.L.R. (4th) 396 (Ont. H.C.), affirmed (1990), 74 O.R. (2d) 225 (Div. Ct.); and *Perrier v. Sorgat* (1979), 25 O.R. (2d) 645 (Co. Ct.). A contrary conclusion was reached by Bielby J. of the Alberta Court of Queen's Bench in *Rutherford v. Swanson*, [1993] 6 W.W.R. 126, but her decision, I think, suffers from the frailty of failing to differentiate the different functions the RCMP perform, and the potentially different relationship of the RCMP to the Crown in the exercise of those different functions.

35 While these cases generally examine the relationship between the police and various governments in terms of civil liability, the statements made are of much broader import. It would make no sense in either law or policy to hold the police to be agents of the Crown for the purposes of allowing the Crown to shelter the police under its immunity in criminal matters, but to hold the police <u>not</u> to be Crown agents in civil matters to enable the government to resile from liability for police misconduct. The Crown cannot have it both ways.

36 Parenthetically, it should be noted that Parliament has provided in the *Crown Liability and Proceedings Act*, R.S.C., 1985, c. C-50, s. 36, that:

> *36.* For the purposes of determining liability in any proceedings by or against the Crown, a person who was at any time a member of the Canadian

> Forces or of the Royal Canadian Mounted Police shall be deemed to have been at that time a servant of the Crown. [Emphasis added.]

A "deeming" section would not be necessary if it were the case that, at law, an RCMP officer was in any event a Crown servant for all purposes.

The Limitations on Crown Agency Expressed in R. v. Eldorado Nuclear Ltd.

37 Even if the police could be considered agents of the Crown for some purposes, and even if the Crown itself were not bound by the *Narcotic Control Act*, I agree with the Ontario Court of Appeal that in this case the police stepped outside the lawful ambit of their agency, and whatever immunity was associated with that agency was lost. This principle was elaborated upon by this Court in two cases decided in 1983, namely *Eldorado Nuclear*, *supra*, and *Canadian Broadcasting Corp. v. The Queen*, [1983] 1 S.C.R. 339. In the latter case, the CBC, which by its enabling statute is expressly constituted a Crown corporation, was nevertheless held subject to prosecution for broadcasting an obscene film. This Court held that the CBC's conduct put it outside the scope of its agency, *per* Estey J., at p. 351:

> ... even if Crown immunity may be attributed to the appellant [CBC] in some circumstances, and the actions of the appellant in such circumstances attributed to the Crown, it does not necessarily follow that the immunities attendant upon the status of Crown agency will flow through to the benefit and protection of the appellant in all circumstances.

38 In *Eldorado Nuclear*, on the other hand, the Court concluded that two Crown corporations, namely Eldorado Nuclear Limited and Uranium Canada Limited, who were accused of being parties to an unlawful uranium cartel, could not be prosecuted under the *Combines Investigation Act*. They were acting pursuant to their corporate objects set out

by Parliament in their respective constitutive statutes, and, in respect of acts done in furtherance of their statutory objects, the *Combines Investigation Act* had no application to them.

39 While it may be convenient and expeditious for the police to enforce the *Narcotic Control Act* by breaking it themselves under "controlled circumstances", such a strategy in the present case was not necessary to accomplish the RCMP's statutory mandate (*Eldorado Nuclear*, *supra*, at p. 568). Parliament made it clear in s. 37 of the *Royal Canadian Mounted Police Act*, that the RCMP must act "in accordance with the law". Parliament has made it clear that illegality by the RCMP is neither part of any valid public purpose nor necessarily "incidental" to its achievement. If some form of public interest immunity is to be extended to the police to assist in the "war on drugs", it should be left to Parliament to delineate the nature and scope of the immunity and the circumstances in which it is available, as indeed was done in 1996, after the events in question here, in s. 8 of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19.

40 The respondent raises one further argument concerning the legality of the RCMP's conduct in engaging in the reverse sting operation. This argument consists of the bald assertion that the police have available to them a so-called "necessity" justification or defence as that term was used in *R. v. Salvador* (1981), 59 C.C.C. (2d) 521 (N.S.C.A.), *per* Macdonald J.A., at p. 542:

> Generally speaking, the defence of necessity covers all cases where non-compliance with law is excused by an emergency or justified by the pursuit of some greater good.

It is not alleged that the RCMP conduct is such that it could be said to fall within one of the established "justification" defences (e.g., self-defence or defence of third parties) and

the Crown offers no authority for the proposition that there exists (or should exist) in Canada a so-called "law enforcement" justification defence generally. The United States experience is mixed: see G. Greaney, "Crossing the Constitutional Line: Due Process and the Law Enforcement Justification" (1992), 67 *Notre Dame L. Rev.* 745. In any event, the author points out that the law justification defence "only applies if the 'conduct is within the reasonable exercise of the policeman's duty ...'" (p. 784) and "... courts also look to an officer's adherence to state and federal laws when examining the reasonableness of the officer's conduct" (p. 787). The law enforcement justification is frequently raised in the United States in the context of federal law enforcement activity that complies with federal laws but breaches state laws. In such cases, the United States Supreme Court held in *In re Neagle*, 135 U.S. 1 (1890), *per* Miller J., at p. 68 and following, that the officer claiming the law enforcement justification must be performing an act that he or she is authorized by federal law to perform as part of police duties and that actions in violation of state law must be carefully circumscribed so as to do no more than is necessary and proper. See *Baucom v. Martin*, 677 F.2d 1346 (11th Cir. 1982), *per* Wood J., at p. 1350. It would therefore appear that in the United States a police officer would not be entitled to the law enforcement justification where, as here, the constitutive statute of the police force imposes on its members the duty to act "in accordance with the law" (*Royal Canadian Mounted Police Act*, s. 37).

41 In this country, it is accepted that it is for Parliament to determine when in the context of law enforcement the end justifies means that would otherwise be unlawful. As Dickson J. (as he then was) put it in *Perka v. The Queen*, [1984] 2 S.C.R. 232, at p. 248:

> The *Criminal Code* has specified a number of identifiable situations in which an actor is justified in committing what would otherwise be a criminal

> offence. To go beyond that and hold that ostensibly illegal acts can be validated on the basis of their expediency, would import an undue subjectivity into the criminal law. It would invite the courts to second-guess the legislature and to assess the relative merits of social policies underlying criminal prohibitions. Neither is a role which fits well with the judicial function.

While it is true that Dickson J. was not addressing the issue of police illegality in that case, a general "law enforcement justification" would run counter to the fundamental constitutional principles outlined earlier. It should be emphasized that the police in this case were not acting in an emergency or other exigent circumstances. This was a premeditated, carefully planned attempt to sell a ton of hashish. If the Crown wishes to argue for specific relief against criminal or civil liability of the police in emergency or other exigent circumstances in a future case on facts where the argument fairly arises, the issue will be more fully addressed at that time. Such arguments have no application here.

Evidence of Police "Good Faith"

42 The conclusion that the police conduct in undertaking a reverse sting is, on the facts of this case, illegal does not of itself amount to an abuse of process or, to take it a step further, entitle the appellants to a stay. The legality of police action is but a factor, albeit an important factor, to be considered in the determination of whether an abuse of process has taken place: see *R. v. Lore* (1997), 116 C.C.C. (3d) 255 (Que. C.A.), at p. 271; *R. v. Matthiessen* (1995), 172 A.R. 196 (Q.B.), at pp. 209-10; and *Bond*, *supra*, at p. 333. Where the courts have found that the illegality or other misconduct amounts to an abuse of process, it has by no means followed that a stay of proceedings was considered the appropriate remedy. In *R. v. Xenos* (1991), 70 C.C.C. (3d) 362 (Que. C.A.), for example, a

stay was refused despite the finding that the police had participated in conduct that was said to be totally unacceptable, *per* Brossard J.A., at p. 371.

43 I should make it clear that even if it should turn out here that the police acted contrary to the legal advice provided by the Department of Justice (and we have no reason at this stage to believe this to be the case), there would still be no right to an automatic stay. Apart from everything else, the trial judge would still have to consider any other information or explanatory circumstances that emerge during the inquiry into whether the police or prosecutorial conduct "shocks the conscience of the community". In *Mack*, *supra*, Lamer J. considered that the need to grant some leeway to law enforcement officials to combat consensual criminal offences such as drug trafficking must be weighed against the courts' concern about law enforcement techniques that involve conduct that the citizenry would not tolerate. The underlying rationale of the doctrine of abuse of process is to protect the integrity of the courts' process and the administration of justice from disrepute: see *Mack*, at pp. 938 and 940. Lamer J. stated, at p. 939, that "the doctrine of abuse of process draws on the notion that the state is limited in the way it may deal with its citizens".

Relevance of Legislative Change

44 It was considered in the court below, and by the Quebec Court of Appeal in *Lore*, *supra*, at p. 271, that the immunity provisions of the new *Controlled Drugs and Substances Act* should be seen as confirmation that the use of reverse stings would not shock the conscience of the community in such a way as to constitute an abuse of process. The fact that Parliament has now enacted specific legislation permitting (in defined

circumstances) the police to engage lawfully in the type of conduct at issue in this appeal confirms that the police conduct was not considered lawful by Parliament prior to the amendments' being made. The *Interpretation Act*, R.S.C., 1985, c. I-21, s. 10, provides that "[t]he law [is] always speaking", and Parliament's view at the relevant time was embodied in its then existing enactments. At the material time, Parliament had enacted that conduct otherwise illegal could be done lawfully "under the authority of this Act or the regulations", and under the regulations the police were authorized to possess but not to sell controlled drugs. Judicial notice can certainly be taken of continuing public concern about the drug trade, and in a general way of the difficulties of successfully employing traditional police techniques against large-scale crime organizations. There is little need in this case to resort for evidence of public concern to legislative amendments that were not made until two years after the trial. Nevertheless, given that the test in *Mack* calls for a broad inquiry into the balance of public interests, I would not want to exclude the possibility that after-the-fact legislation may throw some light on community acceptance of a reverse sting operation. It was but a short step from the existing regulatory authority to possess drugs as a result of a sting to the desired regulatory authority to sell drugs in the context of a reverse sting. One of the purposes of the balancing exercise discussed by L'Heureux-Dubé J. in *O'Connor*, *supra*, at paras. 129-30, is to put misconduct by the authorities, worrisome as it may be, in a larger societal perspective.

45 The point here, however, is slightly different. Superadded to the issue of illegal conduct is the possibility of a police operation planned and executed contrary to the advice (if this turns out to be true) of the Department of Justice. The suggestion is that the RCMP, after securing the relevant legal advice, nevertheless put itself above the law in its pursuit of the appellants. The community view of the police misconduct would, I think, be

influenced by knowing whether or not the police were told in advance by their legal advisers that the reverse sting was illegal. Standing by itself, therefore, the subsequent 1996 enactment addresses only part of the issue.

The Assertion of Police Good Faith Was Based in Part on Advice Received from the Department of Justice

46 Counsel for the Crown has invited the Court to evaluate the police conduct throughout the reverse sting and submits their actions do not constitute an abuse of process. One of the issues is good faith, as discussed in A. Choo, *Abuse of Process and Judicial Stays of Criminal Proceedings* (1993), at pp. 107-118. As evidence of the fact that the reverse sting was undertaken "with the purest of motives", the Crown has pointed out that the reverse sting proposal went through between 9 and 14 stages of approval before finally being authorized. The reverse sting operation was carefully planned, narrowly targeted, and ensured that no hashish actually changed hands, and thus never entered the criminal black market. Most importantly for present purposes is the fact that the Crown emphasized the good faith reliance of the police on legal advice. In the factum prepared for the Ontario Court of Appeal, for example, the argument was put as follows:

> 26. The conduct of the R.C.M.P. in the present case falls far short of conduct that has hitherto received the courts' seal of approval. In the case at bar, as in the aforementioned case law, there has been no abuse of process or any conduct by the police that could "shock the conscience of the community". In particular, regard must be had to the following considerations:
>
> ...
>
> (f) The R.C.M.P. based, at least in part, the legality of there [*sic*] investigatory techniques on valid case law (*R. v. Lore*, unreported, Quebec Superior Court, 26 February, 1991, Pinard, J.S.C.) and consulted with the Department of Justice with regard to any problems of illegality. [Emphasis added.]

The RCMP's reliance on legal advice was thus invoked as part of its "good faith" argument. The privilege belonged to the client, and the RCMP joined with the Crown to put forward that position. While not explicitly stated in so many words, the plain implication sought to be conveyed to the appellants and to the courts was that the RCMP accepted the legal advice they were given by the Department of Justice and acted in accordance with it. The credibility of a highly experienced departmental lawyer was invoked to assist the RCMP position in the abuse of process proceedings.

47 The Crown now says that the content of communications between the police and the Department of Justice could not affect the issue as to whether the conduct of the RCMP gave rise to an abuse of process. The Crown says it does not matter what the RCMP were told as to the legality of the reverse sting operation the RCMP planned. Assuming the worst, the Crown says, no stay is warranted. On this point they rely on the analysis of the Court of Appeal, already quoted at para. 13, that if it were shown that the RCMP "moved ahead on their own as mavericks" (p. 197) despite legal advice to the contrary, it would be "of about equal weight" to a situation where the RCMP acted on a positive legal opinion that what they proposed to do would be lawful. With respect, I do not agree. A police force that chooses to operate outside the law is not the same thing as a police force that made an honest mistake on the basis of erroneous advice. We have no reason to think the RCMP ignored the advice it was given, but as the RCMP did make an issue of the legal advice it received in response to the stay applications, the appellants were entitled to have the bottom line of that advice corroborated.

48 It appears, therefore, that the only satisfactory way to resolve the issue of good faith is to order disclosure of the content of the relevant advice. This should be done (for

the reasons to be discussed) on the basis of waiver by the RCMP of the solicitor-client privilege. It would be convenient, however, to address beforehand three additional contentions by the appellants. They say that disclosure of the communications between Cpl. Reynolds and the Department of Justice ought never to have been withheld in the first place because (a) no solicitor-client relationship exists between Department of Justice lawyers and police officers and therefore no privilege ever arose in this case, or, if such a relationship did exist, the communications at issue in the present case fell within either (b) the future crimes or (c) full answer and defence exceptions to the privilege.

(a) Existence of a Solicitor-Client Relationship between the RCMP Officers and Lawyers in the Department of Justice

49 The solicitor-client privilege is based on the functional needs of the administration of justice. The legal system, complicated as it is, calls for professional expertise. Access to justice is compromised where legal advice is unavailable. It is of great importance, therefore, that the RCMP be able to obtain professional legal advice in connection with criminal investigations without the chilling effect of potential disclosure of their confidences in subsequent proceedings. As Lamer C.J. stated in *R. v. Gruenke*, [1991] 3 S.C.R. 263, at p. 289:

> The *prima facie* protection for solicitor-client communications is based on the fact that the relationship and the communications between solicitor and client are essential to the effective operation of the legal system. Such communications are inextricably linked with the very system which desires the disclosure of the communication....

See also *Smith v. Jones*, [1999] 1 S.C.R. 455, *per* Cory J., at para. 46, and *per* Major J., at para. 5. This Court had previously, in *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860, at p. 872, adopted Wigmore's formulation of the substantive conditions precedent to the

existence of the right of the lawyer's client to confidentiality (*Wigmore on Evidence*, vol. 8 (McNaughton rev. 1961), § 2292, at p. 554):

> Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except the protection be waived. [Emphasis and numerotation deleted.]

Cpl. Reynolds' consultation with Mr. Leising of the Department of Justice falls squarely within this functional definition, and the fact that Mr. Leising works for an "in-house" government legal service does not affect the creation or character of the privilege.

50 It is, of course, not everything done by a government (or other) lawyer that attracts solicitor-client privilege. While some of what government lawyers do is indistinguishable from the work of private practitioners, they may and frequently do have multiple responsibilities including, for example, participation in various operating committees of their respective departments. Government lawyers who have spent years with a particular client department may be called upon to offer policy advice that has nothing to do with their legal training or expertise, but draws on departmental know-how. Advice given by lawyers on matters outside the solicitor-client relationship is not protected. A comparable range of functions is exhibited by salaried corporate counsel employed by business organizations. Solicitor-client communications by corporate employees with in-house counsel enjoy the privilege, although (as in government) the corporate context creates special problems: see, for example, the in-house inquiry into "questionable payments" to foreign governments at issue in *Upjohn Co. v. United States*, 449 U.S. 383 (1981), *per* Rehnquist J. (as he then was), at pp. 394-95. In private practice some lawyers are valued as much (or more) for raw business sense as for legal acumen. No

solicitor-client privilege attaches to advice on purely business matters even where it is provided by a lawyer. As Lord Hanworth, M.R., stated in *Minter v. Priest*, [1929] 1 K.B. 655 (C.A.), at pp. 668-69:

> [I]t is not sufficient for the witness to say, "I went to a solicitor's office." ... Questions are admissible to reveal and determine for what purpose and under what circumstances the intending client went to the office.

Whether or not solicitor-client privilege attaches in any of these situations depends on the nature of the relationship, the subject matter of the advice and the circumstances in which it is sought and rendered. One thing is clear: the fact that Mr. Leising is a salaried employee did not prevent the formation of a solicitor-client relationship and the attendant duties, responsibilities and privileges. This rule is well established, as set out in *Crompton (Alfred) Amusement Machines Ltd. v. Comrs. of Customs and Excise (No. 2)*, [1972] 2 All E.R. 353 (C.A.), *per* Lord Denning, M.R., at p. 376:

> Many barristers and solicitors are employed as legal advisers, whole time, by a single employer. Sometimes the employer is a great commercial concern. At other times it is a government department or a local authority. It may even be the government itself, like the Treasury Solicitor and his staff. In every case these legal advisers do legal work for their employer and for no one else. They are paid, not by fees for each piece of work, but by a fixed annual salary. They are, no doubt, servants or agents of the employer. For that reason the judge thought that they were in a different position from other legal advisers who are in private practice. I do not think this is correct. They are regarded by the law as in every respect in the same position as those who practise on their own account. The only difference is that they act for one client only, and not for several clients. They must uphold the same standards of honour and of etiquette. They are subject to the same duties to their client and to the court. They must respect the same confidences. They and their clients have the same privileges.... I have always proceeded on the footing that the communications between the legal advisers and their employer (who is their client) are the subject of legal professional privilege; and I have never known it questioned.

51 It is true that the Minister of Justice, who is *ex officio* the Attorney General of Canada, has a special legislated responsibility to ensure that "the administration of public

affairs is in accordance with law", and in that respect he or she is not subject to the same client direction as private clients: see *Department of Justice Act*, R.S.C., 1985, c. J-2, s. 4. We are not, however, concerned in this case with any conflict that may arise between the Minister and one of the "client departments". Here, the Attorney General and the RCMP are united in asserting the privilege.

52 In the United States, the courts have recognized that solicitor-client privilege attaches to communications between government employees and government lawyers that fulfill the *Wigmore* conditions mentioned in *Descôteaux*, *supra*. The point is made, for example, by the authors of the Restatement (Restatement (Third) of the Law Governing Lawyers, § 124 (Proposed Final Draft No. 1, 1996)), as follows:

> Unless applicable law otherwise provides, the attorney-client privilege extends to a communication of a governmental organization ... and of an individual officer ... of a governmental organization.

It is possible that in the United States the application of the privilege to government counsel may be circumscribed differently than in this country owing to the structure of the United States Constitution and government: see, e.g., the discussion of the U.S. Court of Appeals, District of Columbia Circuit, in the context of an investigation of alleged criminal conduct by government officials in *In re Lindsey*, 158 F.3d 1263 (D.C. Cir. 1998). In this country as well, the solicitor-client privilege may operate differently in some respects because of the public interest aspect of government administration, but such differences are not relevant to this appeal.

53 In support of their assertion that no privilege exists in respect of communications between the police and Crown counsel in the course of a criminal

investigation, the appellants rely upon *Re Girouard and the Queen* (1982), 68 C.C.C. (2d) 261 (S.C.B.C.), and *R. v. Ladouceur*, [1992] B.C.J. No. 2854 (QL) (S.C.). *Girouard* concerned the admissibility of the details of a conversation between Crown counsel and a police officer who was to be a Crown witness in the hallway outside the courtroom on the day of a preliminary inquiry. The conversation was overheard by defence counsel. The B.C. Supreme Court held, *inter alia*, that because the conversation had been overheard, any privilege that might have existed had been waived.

54 *Girouard* advocates the proposition that communications as to the question of identification between a police officer who is to be a Crown witness and Crown counsel are not protected by solicitor-client privilege. This seems to be based on the Court's view that because a police officer was not an agent of the Attorney General, no solicitor-client relationship could exist between a Crown counsel and a police officer. I disagree with this analysis. The existence of an agency relationship is not essential to the creation of solicitor-client privilege. In seeking advice from a lawyer about the exercise of his original authority that "cannot be exercised on the responsibility of any person but himself" (*Enever*, *supra*, p. 977), Cpl. Reynolds satisfied the conditions precedent "to the existence of the right of the lawyer's client to confidentiality" (*Descôteaux*, *supra*, p. 872). Subject to what is said below, when Mr. Leising of the Department of Justice initially advised Cpl. Reynolds about the legality of a reverse sting operation, these communications were protected by solicitor-client privilege.

(b) The "Future Crimes and Fraud" Exception

55 It is well established, as the appellants argue, that there is an exception to the principle of confidentiality of solicitor-client communications where those communications are criminal or else made with a view to obtaining legal advice to facilitate the commission of a crime. The exception was noted by Dickson J. in *Solosky v. The Queen*, [1980] 1 S.C.R. 821, at pp. 835-36:

> More significantly, if a client seeks guidance from a lawyer in order to facilitate the commission of a crime or a fraud, the communication will not be privileged and it is immaterial whether the lawyer is an unwitting dupe or knowing participant. The classic case is *R. v. Cox and Railton* [(1884), 14 Q.B.D. 153], in which Stephen J. had this to say (p. 167): "A communication in furtherance of a criminal purpose does not 'come in the ordinary scope of professional employment'."

56 The Court of Appeal concluded, at p. 200, that the "future crimes" exception applied because it was a "fair inference" from a memorandum dated June 1991 "that the lawyer was offering advice which, even given the utmost good faith, was being utilized by Corporal Reynolds in the planning of the venture". A distinction must be drawn, I think, between the evidence of Cpl. Reynolds and related documents, on the one hand, and the position taken by the Crown and the RCMP before the courts in this case, on the other hand. The testimony of Cpl. Reynolds was that he did not require legal advice "to plan the venture". He already knew about reverse sting operations. Nor did he seek the advice to "facilitate" the crime. He sought advice as to whether or not the operation he had in mind was lawful. This is the sort of transaction advice sought every day from lawyers. In my view, the privilege is not automatically destroyed if the transaction turns out to be illegal. As noted above, Dickson J., in *Solosky*, at p. 835, referred to *R. v. Cox and Railton* (1884), 14 Q.B.D. 153, as "[t]he classic case" on this point. In that case, a judgment debtor consulted a solicitor about the vulnerability of assets to seizure. The solicitor's advice was essentially that it could not be done without a *bona fide* sale of the property in question.

Later, when the judgment creditor attempted to realize against the assets, they had been sold. It was alleged that the sale was fraudulent as having been entered into in an attempt to deprive the judgment creditor of the fruits of his judgment. The solicitor was called as a witness and compelled to testify about the advice he had given. Stephen J., for the court on appeal, after affirming the importance of the solicitor-client privilege, went on to discuss the limits of this doctrine as follows, at p. 168:

> In order that the rule [the solicitor-client privilege] may apply there must be both professional confidence and professional employment, but if the client has a criminal object in view in his communications with his solicitor one of these elements must necessarily be absent. The client must either conspire with his solicitor or deceive him. If his criminal object is avowed, the client does not consult his adviser professionally, because it cannot be the solicitor's business to further any criminal object. If the client does not avow his object he reposes no confidence, for the state of facts, which is the foundation of the supposed confidence, does not exist. The solicitor's advice is obtained by a fraud. [Emphasis added.]

The court found in that case that although the solicitor was not an active part of the conspiracy to defraud the creditor, he had been duped by his clients, and the privilege was destroyed.

57 The language of the court in *Cox and Railton* ("... if the client has a criminal object in view in his communications with his solicitor...") implied that this exception can only apply where a client is knowingly pursuing a criminal purpose, and it is so laid down by Professor Wigmore (*Wigmore on Evidence*, *supra*, § 2298, at p. 573) where he gives an affirmative answer to the question, "Must . . . the advice be sought for a *knowingly* unlawful end?" (Emphasis in original.)

58 Although the issue has apparently not been directly considered in the Canadian case law, the Wigmore view was subsequently espoused by the authors of "The Future Crime or Tort Exception to Communications Privileges" (1964), 77 *Harv. L. Rev.* 730, where they state as follows, at pp. 730-31:

> The attorney-client privilege has always been subject to the qualification that protection is denied to communications wherein a lawyer's assistance is sought in activity that the client knows to constitute a crime or tort. [Emphasis added.]

The scope of the "future crimes" exception is circumscribed on a public policy basis, as explained at p. 731:

> The knowledge requirement minimizes the effect of the exception on proper communications; absent this requirement legitimate consultations would be inhibited by the risk that their subject matter might turn out to be illegal and therefore unprivileged. Moreover, counseling against unfounded claims or illegal projects is an important part of the lawyer's function. [Emphasis added.]

59 This explanation is consistent with the statement of the principle of Lamer J. in *Descôteaux*, *supra*, at p. 881:

> Confidential communications, whether they relate to financial means or to the legal problem itself, lose that character if and to the extent that they were made for the purpose of obtaining legal advice to facilitate the commission of a crime.

The exception to the formation of the privilege was elaborated upon by Lord Parmoor in *O'Rourke v. Darbishire*, [1920] A.C. 581 (H.L.), at p. 621:

> The third point relied on by the appellant, as an answer to the claim of professional privilege, is that the present case comes within the principle that such privilege does not attach where a fraud has been concocted between a solicitor and his client, or where advice has been given to a client by a solicitor in order to enable him to carry through a fraudulent transaction. If the present

> case can be brought within this principle, there will be no professional privilege, since it is no part of the professional duty of a solicitor either to take part in the concoction of fraud, or to advise his client how to carry through a fraud. Transactions and communications for such purposes cannot be said to pass in professional confidence in the course of professional employment. [Emphasis added.]

60 A leading U.S. case that considers this question is *State ex rel. North Pacific Lumber Co. v. Unis*, 579 P.2d 1291 (Or. 1978). In that case, it was alleged that an employer illegally eavesdropped on an employee's telephone conversations. The employer stated that before undertaking this eavesdropping, it had sought legal advice and it claimed solicitor-client privilege over these communications. The employee sought the disclosure of this advice, but disclosure was refused. The court made the following pertinent comment, at p. 1295:

> We approve of the requirement that, in order to invoke the exception to the privilege, the proponent of the evidence must show that the client, when consulting the attorney, knew or should have known that the intended conduct was unlawful. Good-faith consultations with attorneys by clients who are uncertain about the legal implications of a proposed course of action are entitled to the protection of the privilege, even if that action should later be held improper. [Emphasis added.]

61 In the present case, the only evidence of RCMP knowledge, constructive or otherwise, is the testimony of Cpl. Reynolds who insists that he believed the reverse sting operation to be lawful. In light of his prior study of the Superior Court decision in *Lore*, *supra*, it cannot fairly be said that Cpl. Reynolds "knew or should have known that the intended conduct was unlawful" at the time he approached Mr. Leising. Nor does the evidence establish that Mr. Leising was a "conspirator or a dupe". There is therefore no basis in Cpl. Reynold's evidence to suggest that in this case the solicitor-client privilege never came into existence.

62 The question remains whether the privilege was destroyed when the RCMP sold hashish to the appellants. It is argued by the authors of "The Future Crime or Tort Exception to Communications Privileges", *supra*, at p. 731, that a "subsequent formation of criminal intent should be held to destroy a preexisting privilege". This would suggest that proof of a crime which, except in offences of absolute liability, entails proof of intent, would automatically destroy the privilege in every case. Such a proposition could have a very broad impact, for example, in the field of regulatory crimes and offences. In my view, destruction of the privilege takes more than evidence of the existence of a crime and proof of an anterior consultation with a lawyer. There must be something to suggest that the advice facilitated the crime or that the lawyer otherwise became a "dupe or conspirator". The evidence of Cpl. Reynolds does not establish such things, but the formal position of the Crown, with the support of the RCMP, goes beyond his evidence. The RCMP position before the Court was that the decision to proceed with the reverse sting had been taken with the participation and agreement of the Department of Justice. By adopting this position, the RCMP belatedly brought itself within the "future crimes" exception, and put in question the continued existence of its privilege.

63 If there had been no waiver of privilege by the RCMP in this case, I would have taken the view that any papers documenting the legal advice (or, if there was no contemporaneous documentation, an affidavit setting out the content of the relevant advice) ought to be provided in the first instance to the trial judge. If he or she were satisfied, either on the basis of the documents themselves or on the basis of the documents supplemented by other evidence, that the documented advice could be fairly said in some way to have facilitated the crime, the documents would then be provided to the appellants. If the lawyer had merely advised about the legality of the operation, and thereby made

himself neither dupe nor conspirator in the facilitation of a crime, the proper course would have been to return the papers to the RCMP.

64 In this case, however, I think the RCMP did waive the privilege, as discussed below. The relevant solicitor-client communications that came within the scope of the waiver ought therefore to be turned over directly to the appellants without the need in the first instance of a two-stage procedure involving the trial judge.

(c) Full Answer and Defence

65 Another exception to the rule of confidentiality of solicitor-client privilege may arise where adherence to that rule would have the effect of preventing the accused from making full answer and defence: see *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, at p. 340; *R. v. Dunbar* (1982), 68 C.C.C. (2d) 13 (Ont. C.A.), at p. 43; *R. v. Gray* (1992), 74 C.C.C. (3d) 267 (B.C.S.C.), at pp. 273-74. The Crown concedes the validity of the principle, but suggests that it is irrelevant to an abuse of process application because it applies only where "innocence is at stake", which is no longer the case in the present appeal. Where innocence is not at stake, the Crown contends, the accused's right to make full answer and defence is not engaged. In this connection, the Crown relies upon *R. v. Seaboyer*, [1991] 2 S.C.R. 577, *per* McLachlin J., at p. 607, and *A. (L.L.) v. B. (A.)*, [1995] 4 S.C.R. 536, *per* L'Heureux-Dubé J., at p. 561. I do not think these cases can be taken as deciding an issue that was not before the Court on those occasions. The Ontario Court of Appeal concluded at p. 200 that the full answer and defence exception applied because "the entire jeopardy of the appellants remained an open issue until disposition of the stay application". This may be true, but the appellants were not providing "full answer and defence" to the stay

application. On the contrary, the appellants are the moving parties. The application is being defended by the Crown. The appellants' initiative in launching a stay application does not, of itself, authorize a fishing expedition into solicitor-client communications to which the Crown is a party.

66 As stated, the present appeal is decided on the basis of waiver of solicitor-client privilege and I leave for another day the decision whether, in the absence of waiver, full answer and defence considerations may themselves operate to compel the disclosure of solicitor-client privilege of communications in an abuse of process proceeding and, if so, in what circumstances.

Waiver of Solicitor-Client Privilege

67 The record is clear that the RCMP put in issue Cpl. Reynolds' good faith belief in the legality of the reverse sting, and asserted its reliance upon his consultations with the Department of Justice to buttress that position. The RCMP factum in the Ontario Court of Appeal has already been quoted in para. 46. In my view, the RCMP waived the right to shelter behind solicitor-client privilege the contents of the advice thus exposed and relied upon. I characterize the RCMP rather than Cpl. Reynolds as the client in these circumstances because even though he was exercising the duties of his public office as a police officer, Cpl. Reynolds was seeking the legal advice in the course of his RCMP employment. The identification of "the client" is a question of fact. There is no conceptual conflict between the individual responsibilities of the police officer and characterizing the "client" as the RCMP. Despite the existence of the *Royal Canadian Mounted Police Act* and related legislation, I believe the relationship among individual

policemen engaged in criminal investigations is accurately set out in *Halsbury's Laws of England* (4th ed. 1981), vol. 36, at p. 107:

> The history of the police is the history of the office of constable and, notwithstanding that present day police forces are the creation of statute and that the police have numerous statutory powers and duties, in essence a police force is neither more nor less than a number of individual constables, whose status derives from the common law, organised together in the interests of efficiency.

If Cpl. Reynolds himself were characterized as the client, it could be said that sharing the contents of that advice with his fellow officers would have breached the confidentiality and waived the privilege, which would be absurd. At the same time, if the legal advice were intentionally disclosed outside the RCMP, even to a department or agency of the federal government, such disclosure might waive the confidentiality, depending on the usual rules governing disclosure to third parties by a client of communications from its solicitor.

68 It is convenient to recall at this point that at the time of the original disclosure motions, the position of the appellants was clear, i.e., disclose the communications or forswear reliance upon them. Notwithstanding this caution, the RCMP and their legal counsel chose to rely upon the communications to support their argument of good faith reliance. In doing so, the privilege was waived.

69 In *Rogers v. Bank of Montreal*, [1985] 4 W.W.R. 508 (B.C.C.A.), the bank put a defaulting customer into receivership, and the customer sued both the bank and the receiver, who then launched third party proceedings at each other. The bank said it had relied on the receiver's advice in putting the customer into receivership. The receiver denied detrimental reliance on its advice, and wanted to know what other professional advice the bank had received at the relevant time. In particular, the receiver wanted to

know what legal advice the bank had received from its own lawyers, MacKimmie Matthews. The bank claimed solicitor-client privilege over this correspondence. In rejecting the bank's claim of privilege, the court, *per* Hutcheon J.A., stated as follows, at p. 513:

> The issue in this case is not the knowledge of the bank. The issue is whether the bank was induced to take certain steps in reliance upon the advice from the receiver on legal matters. To take one instance, the receiver, according to the bank, advised the bank that it was not necessary to allow Abacus [the plaintiff debtor] time for payment before the appointment of the receiver. A significant legal decision had been rendered some months earlier to the opposite of that advice. The extent to which the bank had been advised about that decision, not merely of its result, is important in the resolution of the issue whether the bank relied upon the advice of the receiver. [Emphasis added.]

The Court goes on to adopt the reasoning of the United States District Court for the District of Columbia in *United States v. Exxon Corp.*, 94 F.R.D. 246 (1981) as follows, at pp. 248-49:

> Most courts considering the matter have concluded that a party waives the protection of the attorney-client privilege when he voluntarily injects into the suit the question of his state of mind. For example, in *Anderson v. Nixon*, 444 F.Supp. 1195, 1200 (D.D.C. 1978), Judge Gesell stated that as a general principle "a client waives his attorney-client privilege when he brings suit or raises an affirmative defense that makes his intent and knowledge of the law relevant."
>
> ...
>
> Thus, the only way to assess the validity of Exxon's affirmative defenses, voluntarily injected into this dispute, is to investigate attorney-client communications where Exxon's interpretation of various DOE policies and directives was established and where Exxon expressed its intentions regarding compliance with those policies and directives.

It appears the court in *Rogers* found that any privilege with respect to correspondence with the bank's solicitors had been waived as necessarily inconsistent with its pleading of

reliance, even though the bank itself had not referred to, much less relied upon, the existence of advice from its own solicitors.

70 The present case presents a stronger argument for waiver than *Rogers*. The Crown led evidence from Cpl. Reynolds about his knowledge of the law with respect to reverse sting operations – he testified that he had read the Superior Court decision in *Lore*, *supra*, and was of the view that the operation in question was legal. But Cpl. Reynolds also testified, in answer to the appellants' counsel, that he sought out the opinion of Mr. Leising of the Department of Justice to verify the correctness of his own understanding. The appellants' counsel recognized that this alone was not enough to waive the privilege. Cpl. Reynolds was simply responding to questions crafted by the appellants, as he was required to do. Appellants' counsel accepted that he had no right at that point to access the communications. His comment to the judge was simply that "I certainly don't want to hear the argument that 'Oh well, the police acted in good faith because they acted on legal advice'". The critical point is that the Court did hear that precise argument from the Crown at a later date. The RCMP and its legal advisers were explicit in their factum in the Court of Appeal, where it was argued that "regard must be had to the following considerations ... (f) The R.C.M.P. ... consulted with the Department of Justice with regard to any problems of illegality" (emphasis added). We understand that the same position was advanced to the trial judge. As *Rogers*, *supra*, shows, it is not always necessary for the client actually to disclose part of the contents of the advice in order to waive privilege to the relevant communications of which it forms a part. It was sufficient in this case for the RCMP to support its good faith argument by undisclosed advice from legal counsel in circumstances where, as here, the existence or non-existence of the asserted good faith depended on the content of that legal advice. The clear implication sought to be conveyed to the court by the

RCMP was that Mr. Leising's advice had assured the RCMP that the proposed reverse sting was legal.

71 Cpl. Reynolds was not required to pledge his belief in the legality of the reverse sting operation (comparable to the bank's putting in issue its belief in the correctness of the advice it was obtaining from the receiver in *Rogers*, *supra*). Nor was it necessary for the RCMP to plead the existence of Mr. Leising's legal opinion as a factor weighing against the imposition of a stay of proceedings (which went beyond what was done in *Rogers*). The RCMP and the Crown having done so, however, I do not think disclosure of the advice in question could fairly be withheld.

Result of Non-Disclosure

72 Having found that the requested communications ought to have been disclosed at trial, the Court of Appeal nevertheless excused non-disclosure on the basis that it was willing to "assume the worst" against the Crown, observing at p. 197 that "[o]n any version there is no avoiding that this was very serious misconduct which should not be condoned by the courts in the sense of giving any encouragement to its repetition".

73 I do not agree, with respect, that non-disclosure of information clearly relevant to the good faith reliance issue can properly be disposed of by adverse inferences. The appellants were entitled to disclosure. The Court of Appeal said that it was prepared to assume the worst against the RCMP and on that basis felt able to use s. 686(1)(*b*)(iii) of the *Code* to uphold the decision of the trial judge. The difference between my approach and that of the Court of Appeal is that in my view, with respect, a Department of Justice opinion

pronouncing the reverse sting to be unlawful would weigh differently in the balancing of community values than a Department of Justice opinion to the opposite effect. Police illegality of any description is a serious matter. Police illegality that is planned and approved within the RCMP hierarchy and implemented in defiance of legal advice would, if established, suggest a potential systemic problem concerning police accountability and control. The RCMP position, on the other hand, that the Department of Justice lent its support to an illegal venture may, depending on the circumstances, raise a different but still serious dimension to the abuse of process proceeding. In either case, it is difficult to assume "the worst" if neither alternative has been explored to determine what "the worst" is. Because the RCMP made a live issue of the legal advice it received from the Department of Justice, the appellants were and are entitled to get to the bottom of it.

Disclosure Direction

74 The relevant legal advice received by Cpl. Reynolds should be disclosed to the appellants. This is not an "open file" order in respect of the RCMP's solicitor and client communications. The only legal advice that has to be disclosed is the specific advice relating to the following matters identified by Cpl. Reynolds:

1. The legality of the police posing as sellers of drugs to persons believed to be distributors of drugs.

2. The legality of the police offering drugs for sale to persons believed to be distributors of drugs.

3. The possible consequences to the members of the RCMP who engaged in one or both of the above, including the likelihood of prosecution.

While Cpl. Reynolds also sought advice from Mr. Leising about other matters, including the legality of any release of a sample of hashish to potential buyers, advice in these respects need not be disclosed as they do not relate to a live issue at this stage of the case. If the relevant advice is documented, those portions of the documents that deal with extraneous matters or that describe police methods of criminal investigation may be masked. All that is required is disclosure to the appellants of the bottom line advice to confirm or otherwise the truth of what the courts were advised about the legal opinions provided by the Department of Justice. If there is a dispute concerning the adequacy of disclosure, the disputed documents or information should be provided by the Crown to the trial judge for an initial determination whether this direction has been complied with. The trial judge should then determine what, if any, additional disclosure should be made to the appellants.

75 If it turns out that Mr. Leising simply erred in connection with this particular opinion, disclosure will support the RCMP officers' claim that they acted in good faith on legal advice, and the application for a stay of proceedings will have to be dealt with on that basis.

Nature of the New Trial

76 Even if it is established that the RCMP proceeded with the reverse sting contrary to the legal advice from the Department of Justice, the result would not automatically be a stay of proceedings. The test in *Mack* would still apply. The RCMP

used its alleged good faith reliance on the Department of Justice legal advice to neutralize or at least blunt any finding of police illegality. If it were determined that the police did not rely on Department of Justice advice, the result would be a finding of police illegality without extenuating circumstances. As discussed in paras. 42 and 43, police illegality does not automatically give rise to a stay of proceedings.

77 If it should turn out that the reverse sting was launched despite legal advice to the contrary, I think this would be an aggravating factor. However, to repeat, it will be up to the trial judge to determine whether or not a stay is warranted in light of all the circumstances, including the countervailing consideration that police conduct did not lead to any serious infringement of the accused's rights, the RCMP was careful to keep control of the drugs and ensure that none went on the market, and the acknowledged difficulty of combatting drug rings using traditional police methods.

78 In *R. v. Pearson*, [1998] 3 S.C.R. 620, this Court accepted that in entrapment applications where the innocence of the accused is no longer a live issue, a new trial may be limited to the stay of proceedings application. The authority to make such an order under ss. 686(2) and (8) is explained in *Pearson*, at para. 16:

> ... the quashing of the formal order of conviction does not, without more, entail the quashing of the underlying verdict of guilt. In most successful appeals against conviction, the court of appeal which quashes the conviction will also overturn the finding of guilt; however, the latter is not a legally necessary consequence of the former. Under s. 686(8), the court of appeal retains the jurisdiction to make an "additional order" to the effect that, although the formal order of conviction is quashed, the verdict of guilt is affirmed, and the new trial is to be limited to the post-verdict entrapment motion.

As entrapment is simply one form of abuse of process, the same approach should be adopted in the present case.

Conclusion

79 The appeal is allowed in part, a new trial is ordered limited to the issue of whether a stay of proceedings should be granted for abuse of process. The respondent is ordered to disclose to the appellants the materials referred to in para. 74 of these reasons in advance of the retrial.

Appeal allowed in part.

Solicitors for the appellant Campbell: Gold & Fuerst, Toronto.

Solicitor for the appellant Shirose: Irwin Koziebrocki, Toronto.

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September 28, 2009

Ontario Energy Board
2300 Yonge Street
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Attention: Ms Kirsten Walli
Board Secretary

Dear Ms. Walli:

Re: Smart Metering and Smart Sub-Metering in New Condominiums
Board File No: EB-2009-0308

Undertaking from Motion

We are counsel for Toronto Hydro Electric System Ltd. ("THESL"). During the Motion for Production of Materials heard on September 25, 2009, I undertook to provide the Board with a copy of the decision that I referred to respecting the Board's interpretation of s. 4.0.1 of Ontario Regulation 161/99 (the "Exemption Regulation"). The Exemption Regulation provides that exemptions from specified regulatory requirements (including licensing and rate regulation) are available for distributors (including condominiums and condominium developers) "who distribute electricity for a price no greater than that required to recover all reasonable costs."

In my submissions on September 25, I referred the Panel to the Board's decision in EB-2009-0111 which stated: "This means that the distribution of electricity cannot be undertaken by an Exempt Distributor for Profit." At the close of my submissions, I undertook to provide the Board with a copy of "the earlier decision of the service area amendment proceeding where the Board first looked at the exemption for unlicensed distributors and address[ed] the question of whether cost included a profit." (Transcript at p. 166).

To complete the undertaking, the earlier decision is RP-2003-0044, dated February 27, 2004 (the "Service Area Amendment Proceeding"). A copy of that decision is enclosed. The specific passage to which I was referring is at paragraph 183, which states:

> "The Board notes that section 4.0.1 of Ontario Regulation 161/99, as amended, provides an exemption from licensing for owners and operators of distribution systems in a broad range of settings including condominium buildings, residential complexes, industrial, commercial, or office buildings, and shopping malls. The exemption extends to distribution systems located entirely on land owned or leased by the distributor. For the exemption to apply, the distributor must simply recover its reasonable costs associated with the distribution, and not impose upon consumers a price which includes a profit."

In addition, in reviewing the transcript, I came across a typographical error. The transcript stated at p. 86, line 14: "Toronto Hydro's information here is speculative, but it's not complete." It should read: "Toronto Hydro's information here is *not* speculative, but it's not complete." Mr. Zacher's submission indicated that he understood me to say the former point, so it may be that I either did not speak clearly or misspoke. In any event, I apologize for the confusion and would like the record to be corrected to reflect my original intention.

Finally, I wanted to take this opportunity to invite Mr. Zacher to correct a statement that he made on the record as well. Mr. Zacher's submissions on Friday stated that letters were sent from THESL to Complainants in March, 2009, and "it was as a result of these letters that an inquiry, an investigation was commenced by Board Staff." (Transcript, p. 105, lines 20-21). However, the evidence from Compliance Staff included in Mr. Duffy's affidavit indicate that Board Staff's investigation of THESL commenced at least as early as July, 2008 (See Affidavit of Patrick Duffy, Exhibit A, Disclosure Index of Documents; see also, the same document in THESL's Amended Motion Materials at Tab 3.). Thus, to the extent that the time period of the enquiry is relevant for the Board's determination of this motion, it appears that the investigation commenced in July, 2008 and not, as Mr. Zacher suggested, March, 2009.

I invite Mr. Zacher to either correct the record or to correct my information as to when the investigation commenced

Sincerely,

George Vegh

c: Maureen Helt (OEB)
Dennis O'Leary (Aird & Berlis)

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12.04 The Board may require the whole or any part of a document filed to be verified by affidavit.

13. Written Evidence

13.01 Other than oral evidence given at the hearing, where a party intends to submit evidence, or is required to do so by the Board, the evidence shall be in writing and in a form approved by the Board.

13.02 The written evidence shall include a statement of the qualifications of the person who prepared the evidence or under whose direction or control the evidence was prepared.

13.03 Where a party is unable to submit written evidence as directed by the Board, the party shall:

(a) file such written evidence as is available at that time;

(b) identify the balance of the evidence to be filed; and

(c) state when the balance of the evidence will be filed.

28. Interrogatories

28.01 In any proceeding, the Board may establish an interrogatory procedure to:

(a) clarify evidence filed by a party;

(b) simplify the issues;

(c) permit a full and satisfactory understanding of the matters to be considered; or

(d) expedite the proceeding.

28.02 Interrogatories shall:

(a) be directed to the party from whom the response is sought;

(b) be numbered consecutively, or as otherwise directed by the Board, in respect of each item of information requested, and should contain a specific reference to the evidence;

(c) be grouped together according to the issues to which they relate;

(d) contain specific requests for clarification of a party's evidence, documents or other information in the possession of the party and relevant to the proceeding;

(e) be filed and served as directed by the Board; and

(f) set out the date on which they are filed and served.

29. Responses to Interrogatories

29.01 Subject to **Rule 29.02**, where interrogatories have been directed and served on a party, that party shall:

(a) provide a full and adequate response to each interrogatory;

(b) group the responses together according to the issue to which they relate;

(c) repeat the question at the beginning of its response;

(d) respond to each interrogatory on a separate page or pages;

(e) number each response to correspond with each item of information requested or with the relevant exhibit or evidence;

(f) specify the intended witness, witnesses or witness panel who prepared the response, if applicable;

(g) file and serve the response as directed by the Board; and

(h) set out the date on which the response is filed and served.

29.02 A party who is unable or unwilling to provide a full and adequate response to an interrogatory shall file and serve a response:

(a) where the party contends that the interrogatory is not relevant, setting out specific reasons in support of that contention;

(b) where the party contends that the information necessary to provide an answer is not available or cannot be provided with reasonable effort, setting out the reasons for the unavailability of such information, as well as any alternative available information in support of the response; or

(c) otherwise explaining why such a response cannot be given.

A party may request that all or any part of a response to an interrogatory be held in confidence by the Board in accordance with **Rule 10**.

29.03 Where a party is not satisfied with the response provided, the party may bring a motion seeking direction from the Board.

29.04 Where a party fails to respond to an interrogatory made by Board staff, the matter may be referred to the Board.