

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.

**WRITTEN SUBMISSIONS OF COMPLIANCE COUNSEL ON THESE MOTION
ON INTERROGATORY RESPONSES**

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PART I - OVERVIEW

1. These submissions address the motion brought by Toronto Hydro Electric System Limited ("THESL") for:

- (a) an order directing Compliance Counsel to respond to interrogatories 10(v) to 10(viii) and 14 (v) to 14 (vii) (the "Refused Interrogatories"); and
- (b) if such an order is granted, an order granting THESL leave to file supplementary evidence to address the information provided by those interrogatory responses within 7 days of receipt of the materials.

2. The Refused Interrogatories seek information from Avonshire and Metrogate that THESL sought in its earlier production motion and that was rejected by the Board in its Decision and Order dated October 14, 2009, as amended on October 23, 2009 (the "Disclosure Order"). THESL should not be permitted to reargue a motion that has already been decided and lost.

3. Further, THESL's attempt to obtain information indirectly (through interrogatories) that it could not obtain directly (through a production motion) does not alter the legal burden that THESL has to meet. Compliance Counsel does not possess the information which THESL seeks; it is in the hands of third parties, Avonshire and Metrogate.

4. To obtain information from third parties, THESL has to demonstrate that the information is "clearly relevant". THESL was not able to prove this on its earlier motion and the circumstances have not changed. THESL's case for seeking this information remains entirely speculative.

5. Lastly, the Refused Interrogatories are not proper interrogatories. They are not directed at Compliance Counsel for the purpose of "clarifying" or "understanding" Compliance Counsel's evidence or the case against THESL.

Rather, they constitute a “fishing expedition” aimed at mounting an after-the-fact defence of THESL’s refusal to connect Avonshire and Metrogate.

PART II - ISSUES

6. The issues to be determined on this motion are the following:
 - (a) Do the Refused Interrogatories request information and documents the production of which has already been refused by the Board in the Disclosure Order?
 - (b) Has THESL met its burden of demonstrating that the information and documents that the Refused Interrogatories request from third parties (Avonshire and Metrogate) are clearly relevant and would not prejudice or place an undue burden on the third parties?
 - (c) Are the Refused Interrogatories proper interrogatories?
 - (d) Should the Board strike references to without prejudice communications included in THESL’s Motion Record?

PART III - LAW AND ARGUMENT

A. The Refused Interrogatories are covered by the Disclosure Order

7. The Refused Interrogatories seek information and documents that have already been the subject of an unsuccessful motion before the Board. In particular, they seek information and documents covered by THESL’s motion for disclosure and production from third parties dated September 4, 2009, which included a request for the following relief:

all communications among the “Complainants” [which included Metrogate and Avonshire] 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, including all documentation and records of fees paid by sub-meterers to condominium developers in the City of Toronto” (the “Complainant Information”).

8. The specific information requested from Avonshire and Metrogate in the Refused Interrogatories — information on financial compensation and “all contracts, agreements and other correspondence (including offers) with sub-meterers” — falls squarely within the scope of what THESL requested on its motion dated September 4, 2009 and which was denied by the Board in the Disclosure Order. The appropriate procedure to try to obtain this information would have been for THESL to bring a new motion, on notice to Avonshire and Metrogate and any other party with an interest in the requested information, for a variance of the Disclosure Order. THESL has not done so.

9. In effect, THESL is trying to use the interrogatory process to obtain information indirectly through Compliance Counsel (and which Compliance Counsel does not possess) that the Board ruled THESL could not obtain directly from Avonshire and Metrogate. In so doing, it is attempting to re-argue its unsuccessful production and disclosure motion. The Board, it is respectfully submitted, should reject this motion on the basis that the issue was already decided.

B. THESL has not met its Burden

(a) *The Test for the Production of Third Party Documents and Information*

10. It is Compliance Counsel’s position, as stated above, that THESL should not be permitted (through the guise of an interrogatories motion) to seek information from third parties that was already refused.

11. Alternatively, if THESL is permitted to seek this information a second time, the legal burden on THESL to obtain such production remains the same. The information is not in the possession of Compliance Counsel; it is in the hands of Avonshire and Metrogate.

12. Notwithstanding THESL’s attempts to cast its request as “a standard request for a response to an interrogatory” from Compliance Counsel, that is not

what it is — it is a request for information from third parties. Accordingly, the same test for obtaining information from a third party applies. That test was not satisfied on THESL's earlier motion and it is Compliance Counsel's position that it has not been satisfied now.

13. As the Board noted in its Disclosure Order, requiring the disclosure of information from a third party 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."

Ontario Energy Board, Decision and Order dated October 14, 2009, as amended on October 23, 2009, EB-2009-0308 at para. 29.

14. The approach adopted by the Board in the Disclosure Order is consistent with the two-stage common law test for the disclosure of information from a third party outlined in the criminal context by the Supreme Court of Canada in *R. v. O'Connor*. The first stage of the *O'Connor* test requires a moving party to show that the records or information sought are "likely to be relevant". If the moving party discharges its onus of establishing "likely relevance," then the decision-making body balances the third party's privacy rights against any potential prejudice to the moving party caused by partial or non-disclosure.

R. v. O'Connor, [1995] 4 S.C.R. 411 at

15. The case of *R. v. McCarthy*, is instructive in defining the "likely relevance" test when a party asserts that third party information is necessary to make out a defence. In that case, the accused was charged with resisting arrest and assaulting a police officer and sought disclosure of all records of complaints of excessive force, abuse of authority or dishonesty made against the arresting officers. The Court rejected the request as failing to meet the "likely relevant" test established by the Supreme Court of Canada in *R. v. O'Connor*:

[10] ... the purpose of this standard is not to prevent the applicant from obtaining materials relevant to his or her ability to make a full answer and defence, but rather to prevent the applicant from engaging

in “speculative, fanciful, disruptive, unmeritorious, obstructive, and time-consuming requests”: *R. v. Chaplin*, 1995 CanLII 126 (S.C.C.), [1995] 1 S.C.R. 727 (“Chaplin”) at para. 32.

R. v. McCarthy, 2008 ABQB 215 at para. 10.

16. In *A.M. v. Ryan*, the Supreme Court of Canada acknowledged that a higher standard may be required for compelling disclosure of confidential information from a third party in a civil case. The Court justified a higher standard because in a civil case a defendant “stands to lose money and repute” as opposed to a criminal prosecution where the accused “stands to lose his or her liberty”:

Just as justice requires that the accused in a criminal case be permitted to answer the Crown's case, so justice requires that a defendant in a civil suit be permitted to answer the plaintiff's case... This said, the interest in disclosure of a defendant in a civil suit may be less compelling than the parallel interest of an accused charged with a crime. The defendant in a civil suit stands to lose money and repute; the accused in a criminal proceeding stands to lose his or her very liberty. As a consequence, the balance between the interest in disclosure and the complainant's interest in privacy may be struck at a different level in the civil and criminal case; documents produced in a criminal case may not always be producible in a civil case, where the privacy interest of the complainant may more easily outweigh the defendant's interest in production.

A.M. v. Ryan, [1997] 1 S.C.R. 157 at para. 36.

(b) *The Refused Interrogatories are based on Speculation*

17. THESL has not met its burden of demonstrating that the Refused Interrogatories seek information and documents that are “clearly relevant” to an issue in this proceeding. In response to THESL’s earlier motion for production from third parties, the Board ruled that THESL had not met the burden of showing the requested documents and information were “clearly relevant”, noting that it had concerns about a “fishing expedition”:

[30] As the Ontario Municipal Board cautioned in *Hammersmith Canada* 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 "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. [Footnotes omitted.]

Ontario Energy Board, Decision and Order dated October 14, 2009, as amended on October 23, 2009, EB-2009-0308 at paras. 30 and 31.

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

18. THESL has provided no further evidence, either as part of its interrogatories or on this motion, to demonstrate that the information and documents sought in the Refused Interrogatories are "clearly relevant".

19. The requests by THESL constitute the type of "speculative, fanciful, disruptive, unmeritorious, obstructive, and time-consuming requests" identified in *R. v. McCarthy*; in particular:

- (a) THESL did not identify a potential contravention of law under section 3.1.1(a) of the DSC as a justification for section 2.3.7.1.1 of its Conditions of Service ("COS") in any of the correspondence with the Board's Chief Compliance Officer between October 2008 and February 2009;
- (b) THESL did not identify a potential contravention of law under section 3.1.1(a) of the DSC as a justification for its refusal to connect Avonshire and Metrogate in its letters to those parties of April 22, 2009;

- (c) THESL has not put forward any evidence that either Avonshire or Metrogate intended to contravene the law at the time THESL refused to connect those facilities;
- (d) THESL did not identify contravention of law under section 3.1.1(a) of the DSC as a justification for its refusal to connect Avonshire and Metrogate in its letter to Board Compliance staff dated May 20, 2009; and
- (e) THESL did not identify contravention of law under section 3.1.1(a) of the DSC as a concern in its letter to the Board Chair dated May 20, 2009.

20. The only “evidence” that THESL has included in its recently filed Pre-Filed Evidence to justify its defence under section 3.1.1(a) of the DSC concerns an unidentified sub-metering provider that THESL admits *is not in any way connected to the Avonshire or Metrogate projects*. It is clear that the aspersions being cast on Avonshire and Metrogate as grounds for refusing to connect them are without foundation and do not come anywhere close to meeting the burden of establishing that the information sought is clearly relevant.

(c) *Responding to the Refused Interrogatories would prejudice Avonshire and Metrogate*

21. Even if the Refused Interrogatories are found to be clearly relevant, the Board must still balance THESL’s need to obtain the requested information against the privacy and commercial interests of Avonshire and Metrogate. Such a balancing clearly favours Avonshire and Metrogate.

22. In this motion, THESL is seeking to obtain from its customers commercially sensitive information related to competitors of THESL with whom those customers deal. The production of such information is a *prima facie* invasion of the privacy and commercial interests of Avonshire and Metrogate that has not been justified. Obtaining such information could compromise the

competitive position of smart metering providers that compete with THESL which in turn, could result in less options being available for condominium developers such as Avonshire and Metrogate.

(d) The Refused Interrogatories are not proper interrogatories

23. The Refused Interrogatories are not proper interrogatory questions.

24. The purpose of interrogatories, as set out in Rule 28.01 of the Board's *Rules of Practice and Procedure*, is to "clarify" and "understand" the evidence of the party to whom the interrogatories are directed. That is not the purpose of the Refused Interrogatories.

25. The Refused Interrogatories are aimed at "fishing" for information to retroactively justify THESL's refusal to connect Avonshire and Metrogate. THESL is not seeking information to clarify or understand Compliance Counsel's evidence but rather to fill a void in its own evidence.

26. Interrogatory 10(viii), in particular, is not a proper interrogatory. It does not even purport to ask a question about the evidence; rather, it asks whether Avonshire would be agreeable to certain terms as a pre-condition to being connected. This is a compliance proceeding being brought by the Board in the public interest and whether Avonshire would agree to connection under certain conditions is irrelevant to the issues in this proceeding.

27. In any event, Avonshire responded directly to THESL on this issue by a letter dated December 9, 2009 and refused to accept a connection under the conditions demanded by THESL.

Letter dated December 9, 2009 from Harry Herskowitz, Del Zotto, Zorzi to Colin McLorg, THESL.

C. References to Without Prejudice Communications should be Struck

28. THESL has included references to "without prejudice" communications in paragraph 7 of its Notice of Motion and paragraph 4 of the Affidavit of Kristyn

Annis sworn December 8, 2009. Such communications are privileged and may not be disclosed without consent. No consent in this case was given.

Affidavit of Glenn Zacher sworn December 16, 2009.

Intra-Leasing Inc. v. Ontario, 2009 CanLII 63595 (ON S.C.D.C.).

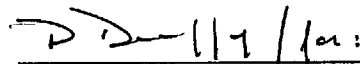
Hallman Estate (Re), 2009 CanLII 49643 (ON S.C.).

29. Compliance Counsel respectfully requests an order that all references to these without prejudice communications be struck.

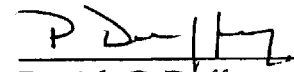
PART IV - ORDER REQUESTED

30. For the foregoing reasons, Compliance Counsel requests that THESL's motion be dismissed and that the evidence concerning without prejudice communications be struck from the record.

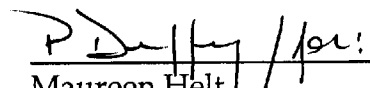
ALL OF WHICH IS RESPECTFULLY SUBMITTED



Glenn Zacher



Patrick G. Duffy



Maureen Helt

**SCHEDULE “A”
DOCUMENTS**

Tab #	Document
1	<i>R. v. O’Connor</i> , [1995] 4 S.C.R. 411.
2	<i>R. v. McCarthy</i> , 2008 ABQB 215.
3	<i>A.M. v. Ryan</i> , [1997] 1 S.C.R. 157.
4	<i>Hammerson Canada Inc. v. Guelph (City)</i> , [1999] O.M.B.D. No. 1174.
5	Letter dated December 9, 2009 from Harry Herskowitz, Del Zotto, Zorzi to Colin McLorg, THESL.
6	Affidavit of Glenn Zacher sworn December 16, 2009.
7	<i>Intra-Leasing Inc. v. Ontario</i> , 2009 CanLII 63595 (ON S.C.D.C.).
8	<i>Hallman Estate (Re)</i> , 2009 CanLII 49643 (ON S.C.).

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S.O. 1998, c. 15, (Schedule B);

EB-2009-0308

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

**WRITTEN SUBMISSIONS OF COMPLIANCE
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