

March 20, 2008

BY COURIER (10 COPIES) AND EMAIL

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, Suite 2700
Toronto, Ontario M4P 1E4
Fax: (416) 440-7656
Email: boardsec@oeb.gov.on.ca

Dear Ms. Walli:

**Re: Pollution Probe – Motion for Full and Adequate Interrogatory Responses
EB-2007-0050 – Hydro One – Bruce-Milton Transmission Reinforcement
Project**

Please find enclosed Pollution Probe's motion for Hydro One to provide full and adequate interrogatory responses in this matter.

Yours truly,



Basil Alexander

BA/ba

Encl.

cc: Applicant and Intervenors per Procedural Order #5

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 an Application by Hydro One Networks Inc. pursuant to section 92 of the Act, for an Order or Orders granting leave to construct a transmission reinforcement Project between the Bruce Power Facility and Milton Switching Station, all in the Province of Ontario (the "Leave to Construct Application").

MOTION RECORD

**(Pollution Probe Motion for
Full and Adequate Interrogatory Responses)**

March 20, 2008

KLIPPENSTEINS
Barristers & Solicitors
160 John St., 3rd Floor
Toronto ON M5V 2E5

Murray Klippenstein
Basil Alexander
Tel: (416) 598-0288
Fax: (416) 598-9520

Counsel for Pollution Probe

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A. The Historical Information Interrogatories

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- Dated May 2, 2007

- Exhibit B – Issues List [19-21]
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- Exhibit C – Letter from Hydro One’s Counsel to the Board Secretary [22-23]
- Dated February 26, 2008

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- Exhibit E – Hydro One Responses to Pollution Probe Interrogatory Nos. 1 and 2 [26-31]
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- Dated March 13, 2008

3	<i>Ontario (Human Rights Commission) v. Dofasco Inc.</i> , 2001 CanLII 2554, 208 D.L.R. (4th) 276 (Ont. C.A.) [57-81]
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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 an Application by Hydro One
Networks Inc. pursuant to section 92 of the Act, for an Order or
Orders granting leave to construct a transmission reinforcement
Project between the Bruce Power Facility and Milton Switching
Station, all in the Province of Ontario (the "Leave to Construct
Application").

**NOTICE OF MOTION
(Pollution Probe Motion for
Full and Adequate Interrogatory Responses)**

THE INTERVENOR, POLLUTION PROBE, will make a motion to the Board on a date and
time to be set by the Board, at the Board's Hearing Room, 25th Floor, 2300 Yonge Street,
Toronto, ON, M4P 1E4.

PROPOSED METHOD OF HEARING: The motion is to be heard:

- ☐ in writing because it is ;
- ☐ in writing as an opposed motion;
- ☒ orally.

THE MOTION IS FOR:***A. The Historical Information Interrogatories***

1. An Order that Hydro One shall provide full and adequate responses to Pollution Probe Interrogatory Nos. 1 and 2, and Ontario Power Generation Inc. and Bruce Power shall provide any necessary historical information regarding the Bruce Nuclear Station to Hydro One, the OPA, or the IESO to fully and adequately respond to these interrogatories;
2. In the alternative, an Order that Ontario Power Generation Inc. and Bruce Power shall provide full and adequate responses to Pollution Probe Interrogatory Nos. 1 and 2;
3. In the further alternative, an Order granting a summons for Ontario Power Generation Inc. and Bruce Power to provide the additional historical information regarding the Bruce Nuclear Station requested in Pollution Probe Interrogatory Nos. 1 and 2;

B. The Confidential Information Interrogatories

4. An Order that Hydro One shall provide full and adequate responses to Pollution Probe Interrogatory Nos. 9, 10, 11, 19(a) and (d), 38, 42(a), 47(a) and (c), 49(d), 50(a), and 51(a);
5. An Order that Hydro One may request that the full and adequate responses to Pollution Probe Interrogatory Nos. 9, 10, 11, 19(a) and (d), 38, 42(a), 47(a) and (c), 49(d), 50(a), and 51(a) be considered Confidential Information pursuant to Rule 10 and the *Practice Direction on Confidential Filings*, but, pending the Board's determination of confidentiality, these responses shall be provided in the interim to those representatives of parties who have executed and filed the Board's confidentiality Declaration and Undertaking;

C. Miscellaneous Relief

6. Such further and other relief as counsel may request and that seems just to the Board.

THE GROUNDS FOR THE MOTION ARE:

A. Summary

1. Pollution Probe is seeking Orders for the provision of full and adequate responses to certain Pollution Probe interrogatories. The relevant interrogatories can be grouped into two general classes:
 - a. Interrogatories requesting historical information regarding the Bruce Nuclear Station; and
 - b. Interrogatories that may involve commercially sensitive or confidential information.
2. With respect to the historical information interrogatories, Pollution Probe is simply seeking to obtain full relevant historical information about the Bruce Nuclear Station by:
 - a. Hydro One, the OPA, or the IESO providing the information by obtaining it from Ontario Power Generation Inc. and Bruce Power; or
 - b. Ontario Power Generation Inc. and Bruce Power directly providing the information; or
 - c. a summons requiring Ontario Power Generation Inc. and Bruce Power to provide the information.

3. With respect to the interrogatories that may involve commercially sensitive or confidential information, Pollution Probe seeks an Order that Hydro One provide full and adequate responses to these interrogatories. Pollution Probe notes that Hydro One can (and possibly should) make an application to the Board for an Order that these responses should be treated as Confidential Information pursuant to Rule 10 and the *Practice Direction on Confidential Filings*. However, pending the Board's determination of confidentiality, the responses should be provided in the interim to those representatives of parties who have executed the Board's confidentiality Declaration and Undertaking.
4. Pollution Probe notes that, for both sets of interrogatories, Hydro One does not appear to object to the relevance of these interrogatories.

B. The Historical Information Interrogatories (Pollution Probe Interrogatory Nos. 1 and 2)

1. Background

5. Pollution Probe Interrogatory Nos. 1 and 2 requested various historical information related to capacity and output for the Bruce Nuclear Station and each of its units from January 1984 to the present.
6. In response, Hydro One consulted with the Independent Electricity System Operator ("IESO") and the Ontario Power Authority ("OPA"). Hydro One then responded that the IESO and the OPA did not have data prior to 2002, and Hydro One accordingly provided data only from 2002 to the present.
7. While Pollution Probe was surprised and concerned that neither the IESO nor the OPA had this information, Pollution Probe subsequently requested that Hydro One obtain the information from Bruce Power (i.e. the current operator of the Bruce Nuclear Station) or Ontario Power Generation Inc. (i.e. the current owner of the Bruce Nuclear Station).

8. However, although Bruce Power and Ontario Power Generation Inc. are intervenors in this unique proceeding, Hydro One respectfully disagreed and stated that it acted reasonably by consulting only with the IESO and OPA. Hydro One further stated that Pollution Probe appears to now be taking a broad type of inquiry (although Pollution Probe's request was limited to only two specific interrogatories about the Bruce Nuclear Station), and that Hydro One's position to obtain the information was no better than Pollution Probe (even though Hydro One is the Applicant for the purposes of this unique application).
9. Pollution Probe notes that Hydro One does not appear to object to the *relevance* of these interrogatories; in fact, Hydro One has already provided the requested information from 2002 on, so the issue for this motion is the provision of the *full* historical information record as requested.

2. The Board's Broad Powers to Obtain Relevant Information

10. Pollution Probe submits that the Board has broad powers to obtain this relevant information for its consideration.
11. Sections 5.4 and 12(1) of the *Statutory Powers Procedure Act* both provide the Board with considerable powers regarding disclosure and summonses:

Disclosure

5.4 (1) If the tribunal's rules made under section 25.1 deal with disclosure, *the tribunal may*, at any stage of the proceeding before all hearings are complete, *make orders for*,

- (a) the exchange of documents;
- (b) the oral or written examination of a party;
- (c) the exchange of witness statements and reports of expert witnesses;
- (d) the provision of particulars;
- (e) *any other form of disclosure.*

Other Acts and regulations

- (1.1) The tribunal's power to make orders for disclosure is subject to any other Act or regulation that applies to the proceeding.

Exception, privileged information

- (2) Subsection (1) does not authorize the making of an order requiring disclosure of privileged information.

Summonses

12. (1) *A tribunal may require any person, including a party, by summons,*

(a) to give evidence on oath or affirmation at an oral or electronic hearing; and

(b) *to produce in evidence* at an oral or electronic hearing *documents and things specified by the tribunal,*

relevant to the subject-matter of the proceeding and admissible at a hearing.

[emphasis added]

12. It thus appears that the Board has broad powers to ensure that all arguably relevant information is properly before it.
13. Pollution Probe submits that the requested information is relevant to examining the need for the proposed project. For example, if future projections regarding the electricity generation from the Bruce Nuclear Station do not correspond to past experience, serious questions are raised regarding whether there is actually a need for the proposed new transmission line. Pollution Probe submits that this information is necessary in order to properly test the underlying assumptions of the proposal, and Pollution Probe notes that it is asking for a specific and narrow set of figures that are clearly relevant to the proposed project.
14. Pollution Probe submits that it thus appears likely that it is entitled to this relevant information; the only issue is how and when Pollution Probe will obtain the information and whether adjournments or other relief will be needed (e.g. additions or modifications to Pollution Probe's evidence, etc.).

15. A judgment of the Court of Appeal for Ontario contains useful comments on the practicalities of the Board and parties receiving information at hearings and the corresponding implications:

It is generally agreed that if documents under the control of non-parties are important to the fair and accurate resolution of issues it is preferable that they be produced before the hearing to avoid almost inevitable adjournments if they are produced for the first time at the hearing ... and to enable each side to prepare its case more effective. In this regard, s. 2 of the *Statutory Powers Procedure Act* (which provides that the Act and rules made under it “shall be liberally construed to secure the just, most expeditious and cost-effective determination of every proceeding on its merits”) may be of assistance in interpreting s. 5.4(1)(e) in a way that would support pre-hearing disclosure from third parties. This point was not argued and [the Court] express[es] no final opinion on it. [emphasis added]

Ontario (Human Rights Commission) v. Dofasco Inc. et al., 2001 CanLII 2554, 208 D.L.R. (4th) 276 (Ont. C.A.) at para. 50 [Motion Record – Tab 3].

16. Pollution Probe submits that analogous considerations apply here, particularly since this relevant information is important for Pollution Probe’s evidence. Accordingly, if Pollution Probe were to obtain this information only at the full hearing, adjournments would likely need to be sought depending on the implications of the information. Conversely, if this focused information is provided now through one of the Board’s statutory powers, the information can be appropriately considered as part of Pollution Probe’s case and potentially evidence.
17. Pollution Probe therefore requests that Hydro One provides full and adequate responses to these interrogatories, and Ontario Power Generation Inc. and Bruce Power shall provide any necessary historical information regarding the Bruce Nuclear Station to Hydro One, the OPA, or the IESO to fully and adequately respond to these interrogatories.
18. In the alternative, Pollution Probe seeks an Order that Ontario Power Generation Inc. and Bruce Power directly provide full and adequate responses to these interrogatories.

19. In the further alternative, Pollution Probe seeks an Order granting Summonses for Ontario Power Generation Inc. and Bruce Power to provide this information. However, Pollution Probe notes that if this relief is granted, Pollution Probe would likely need to seek an adjournment later in order to properly review, prepare for, and respond to the information.

C. The Confidential Information Interrogatories (Pollution Probe Interrogatory Nos. 9, 10, 11, 19(a) and (d), 38, 42(a), 47(a) and (c), 49(d), 50(a), and 51(a))

20. Pollution Probe Interrogatory Nos. 9, 10, 11, 19(a) and (d), 38, 42(a), 47(a) and (c), 49(d), 50(a), and 51(a) sought a variety of information, requested that various calculations be conducted, and requested that various assumptions be stated in order to understand the calculations.
21. However, in response, the OPA has asserted that some of this information includes “commercially sensitive confidential information” of Bruce Power and Ontario Power Generation Inc. and that “the OPA is not entitled to disclose this commercially sensitive confidential information *unless it is legally compelled to do so by a Governmental Authority.*” [emphasis added]
22. Hydro One has thus not provided full and adequate responses to these interrogatories, and Pollution Probe seeks an Order to compel full and adequate responses to these interrogatories. Pollution Probe notes that Hydro One does not appear to dispute the relevance of these interrogatories to this proceeding.
23. If the responses involve confidential information, Hydro One can (and probably should) apply to the Board to have those parts of the responses designated as Confidential Information pursuant to Rule 10 and the *Practice Direction on Confidential Filings*.
24. The Introduction and Purpose to the *Practice Direction on Confidential Filings* states that:

... [T]he Board relies on full and complete disclosure of ***all*** relevant information in order to ensure that its decisions are well-informed, and recognizes that some of that information may be of a confidential nature and should be protected as such.

This Practice Direction seeks to strike a balance between the objectives of transparency and openness and the need to protect information that has been properly designated as confidential. ... [emphasis added]

25. Pollution Probe submits that full and complete disclosure is needed in order to for the Board and parties to properly understand the responses to the interrogatories (as well as to be able to ultimately examine and test the proposed project's underlying assumptions and analysis). Pollution Probe further notes that Hydro One has already applied to designate certain information from the IESO as Confidential Information.
26. Assuming Hydro One requests that the information be designated as Confidential Information pursuant to Rule 10 and the *Practice Direction on Confidential Filings*, Pollution Probe requests that the Board use a process similar to the one used in Procedural Order No. 6. In other words, pending the Board's determination of confidentiality, the requested information shall be provided in the interim to representatives of parties who have executed and filed the Board's confidentiality Declaration and Undertaking. Pollution Probe submits that this process would allow the representatives of parties to proceed in a timely manner with their review of the potentially confidential information pending the Board's review.

D. Statutory Instruments and Orders Relied On

27. Pollution Probe particularly relies on sections 5.4 and 12.1 of the *Statutory Powers Procedure Act*, Rules 29.01, 29.02 and 29.03 of the *Ontario Energy Board Rules of Practices and Procedure* and the *Practice Direction on Confidential Filings*.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

1. The affidavit of Jack Gibbons and the exhibits attached thereto [Motion Record – Tab 2];
2. *Ontario (Human Rights Commission) v. Dofasco Inc.*, 2001 CanLII 2554, 208 D.L.R. (4th) 276 (Ont. C.A.) [Motion Record – Tab 3];
3. Such further materials as Pollution Probe may submit.

Date: March 20, 2008

KLIPPENSTEINS
Barristers & Solicitors
160 John St., Suite 300
Toronto ON
M5V 2E5

Murray Klippenstein, LSUC No. 26950G
Basil Alexander, LSUC No. 50950H
Tel.: (416) 598-0288
Fax: (416) 598-9520

Counsel for Pollution Probe

TO: HYDRO ONE NETWORKS INC.
per Procedural Order No. 5, Appendix B

AND TO: INTERVENORS
per Procedural Order No. 5, Appendix B

EB-2007-0050

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 an Application by Hydro One Networks Inc. pursuant to section 92 of the Act, for an Order or Orders granting leave to construct a transmission reinforcement Project between the Bruce Power Facility and Milton Switching Station, all in the Province of Ontario (the "Leave to Construct Application").

AFFIDAVIT OF JACK GIBBONS
(Affidavit Supporting Pollution Probe Motion for
Full and Adequate Interrogatory Responses)

I, **JACK GIBBONS**, of the City of Toronto in the Province of Ontario, **MAKE OATH AND SAY:**

A. Background

1. I am an economist and a consultant to Pollution Probe and Director of the Energy Programme at Pollution Probe, and I am authorized to swear this affidavit on Pollution Probe's behalf. I have participated and provided evidence at OEB hearings on multiple occasions, and I am a former Toronto Hydro Commissioner.
2. Except where I obtained information from other sources, I have personal knowledge of the matters discussed here. In cases where I obtained information from other sources, I state the sources of such information, and I declare that I verily believe all such information to be true.

3. I swear this affidavit in support of the motion being brought by Pollution Probe for Hydro One to provide full and adequate responses to certain Pollution Probe interrogatories. I do not swear this affidavit for any improper purpose.

B. The Historical Information Interrogatories

4. In accordance with the Board's oral decision on February 21, 2008, Pollution Probe submitted various interrogatories to Hydro One on February 22, 2008. Attached as **Exhibit "A"** is a copy of Pollution Probe Interrogatories Nos. 1 and 2, which are the first set of interrogatories at issue in this motion.
5. These interrogatories sought historical information regarding the Bruce Nuclear Station's capacity and output. Since the proposed new transmission line is to increase capacity from the Bruce Facility to Milton, Pollution Probe is seeking this information in order to examine and test the underlying assumptions of the proposal regarding the project's need. For example, if the project's assumptions do not correspond to historical experience, serious questions are raised about whether the proposed project is actually needed. I thus believe that these interrogatories are relevant to this proceeding, particularly in light of section 1.0 of the Issues List regarding "Project Need and Justification". For reference, attached as **Exhibit "B"** is a copy of the Issues List, which was attached as Appendix A to Procedural Order No. 5.
6. On February 26, 2008, Hydro One's counsel sent a letter to the Board Secretary regarding these and other interrogatories, and a marked-up copy is attached as **Exhibit "C"**. Unfortunately, Hydro One's counsel advised the Board in this letter that neither Hydro One, the Independent Electricity System Operator ("IESO") nor the Ontario Power Authority ("OPA") have historical data beyond opening of the Ontario energy market in 2002.
7. Hydro One's counsel subsequently provided some minor clarifications in an email to Pollution Probe's counsel on February 29, 2008, but this email does not appear to change

the substance of the previous February 26, 2008 letter. For reference, attached as **Exhibit "D"** is a copy of this email dated February 29, 2008 that was forwarded to me by Pollution Probe's counsel.

8. For reference, attached as **Exhibit "E"** are Hydro One's responses to Pollution Probe's Interrogatory Nos. 1 and 2, which were filed on March 7, 2008. These responses provide information in accordance with the above correspondence, so a sizeable gap is present as information is not provided for 1984 to 2002. However, since Hydro One provided information from 2002 on, I do not believe that Hydro One disputes the relevance of these interrogatories.
9. In an attempt to fill this gap, Pollution Probe's counsel sent a letter to the Board Secretary dated March 6, 2008, and a copy is attached as **Exhibit "F"**. In short, while Pollution Probe was frankly surprised and concerned that neither the OPA nor the IESO had the full historical information (particularly given the pending IPSP), Pollution Probe submitted that the information about the Bruce Nuclear Station should be readily available from Bruce Power or Ontario Power Generation Inc.. Hydro One could accordingly obtain the information from these parties with reasonable effort.
10. Bruce Power is the current operator of the Bruce Nuclear Station. Ontario Power Generation Inc., which was created as a result of the restructuring of the former Ontario Hydro and took over Ontario Hydro's generating facilities, is the current owner of the Bruce Nuclear Station. Both Bruce Power and Ontario Power Generation Inc. are intervenors in this proceeding, and, given their roles with respect to the Bruce Nuclear Station, I believe that either one or both of them has the required historical information to fully and adequately answer Pollution Probe Interrogatories Nos. 1 and 2.
11. However, in a letter dated March 10, 2008 sent by Hydro One's counsel to the Board Secretary (which is attached as **Exhibit "G"**), Hydro One respectfully disagreed. Hydro One further stated that it acted reasonably by consulting with the IESO and OPA. Hydro One further stated that Pollution Probe appears to now be taking a broad type of inquiry

(although Pollution Probe's request was limited to only two specific interrogatories about the Bruce Nuclear Station), and that Hydro One was in no better position to obtain the information than Pollution Probe (even though Hydro One is the Applicant for the purposes of this unique application where other parties, such as the IESO and OPA, play significant roles).

12. Pollution Probe simply wants this key relevant information in order to examine and test the assumptions regarding the need for the project relative to historical experience. Pollution Probe intends to correspond with Bruce Power and Ontario Power Generation Inc. in parallel with the filing of this motion in an attempt to obtain this information without the need for the motion. In addition, if necessary, Pollution Probe is prepared to summons Bruce Power and Ontario Power Generation Inc. to provide this information (although this situation is not ideal since I believe that Pollution Probe would then likely need an adjournment to review, examine, and potentially respond to the information).

2. The Confidential Information Interrogatories

13. The second set of interrogatories for this motion deals with potentially commercially sensitive confidential information. For reference, the interrogatories in questions are Pollution Probe Interrogatory Nos. 9, 10, 11, 19(a) and (d), 38, 42(a), 47(a) and (c), 49(d), 50(a), and 51(a), and a marked-up copy of these interrogatories is attached as **Exhibit "H"**. These interrogatories sought a variety of information, requested that various calculations be conducted, and requested that various assumptions be stated in order to understand the calculations.
14. Attached as **Exhibit "I"** is a marked-up copy of a letter dated February 29, 2008 from counsel for Hydro One to the Board Secretary. This letter advised that the Board that the OPA had confidential information concerns with Pollution Probe Interrogatory Nos. 10 and 11, that the OPA was in the process of determining whether and to what extent it is able to release the requested information.

15. The OPA subsequently responded in a letter to the Board Secretary dated March 6, 2008, which is attached as **Exhibit "J"**. The OPA stated that, with respect to Pollution Probe Interrogatory Nos. 9, 10, and 11, its assumption included "commercially sensitive confidential information" of Bruce Power. The OPA further stated that "[it] is not entitled to disclose this information without being legally compelled to do so by a Governmental Authority."
16. During subsequent correspondence, it became apparent that the OPA had similar concerns with other interrogatories by Pollution Probe.
17. Attached as **Exhibit "K"** is a copy of a letter dated March 6, 2008 from counsel for Hydro One to the Board Secretary. This letter indicated that Hydro One would not be able to answer Pollution Probe Interrogatory Nos. 19(a) and (d) due to similar "commercially sensitive confidential information" concerns that involved Bruce Power and Ontario Power Generation.
18. Attached as **Exhibit "L"** is a marked-up copy of a letter dated March 13, 2008 from counsel for Hydro One to the Board Secretary. On pages 5 and 6, this letter infers that Hydro One would not be able to answer Pollution Probe Interrogatory Nos. 38, 42(a), 47(a) and (c), 49(d), 50(a), and 51(a) due to the same concerns about "commercially sensitive confidential information" discussed in the OPA's letter of March 6, 2008 (previously attached as Exhibit "I").
19. Throughout this correspondence, it appears that the concern is only about "commercially sensitive confidential information", and it does not appear that Hydro One disputes the relevance of these interrogatories.
20. While Hydro One has provided some information, I do not believe that these responses constitute full and adequate responses to these interrogatories. For example, without the ability to review, examine, and test the possibly "commercially sensitive confidential information", Pollution Probe's counsel and experts are unable to determine what the

assumptions are (much less whether the assumptions are justified).

21. Accordingly, since it appears that the OPA requires formal legal direction to provide the “commercially sensitive confidential information”, I believe it is appropriate for the Board to order Hydro One to provide full and adequate responses to these interrogatories (including the “commercially sensitive confidential information”).
22. With respect to potential confidentiality concerns that the OPA and others may have regarding the “commercially sensitive confidential information”, I believe that the Board has adequate mechanisms to deal with potentially confidential information through Rule 10 and the *Practice Direction on Confidential Filings*. In fact, Hydro One has already used these mechanisms with respect to an interrogatory response involving the IESO, and I accordingly believe that Hydro One can (and possibly should) use those mechanisms again with respect to these interrogatory responses.
23. Assuming Hydro One chooses to use these mechanisms, I believe it would be helpful if the Board use a process similar to the one used in Procedural Order No. 6. In other words, pending the Board’s determination of confidentiality, the potentially confidential information would be provided in the interim to representatives of parties who have executed and filed the Board’s confidentiality Declaration and Undertaking. I believe that this process would again allow the representatives of parties to proceed in a timely manner with their review of the potentially confidential information pending the Board’s review.

D. Conclusion

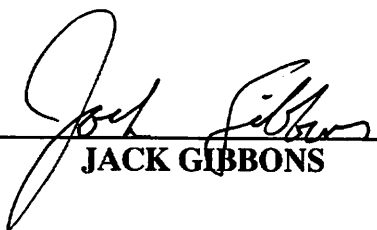
24. In light of all of the above, I believe that Hydro One should provide full and adequate answers to all of these interrogatories, and the Board should now order Hydro One to provide those responses.

SWORN before me at
the City of Toronto, in
the Province of Ontario, on
this 20th day of March, 2008



A Commissioner for taking affidavits, etc.)

Basil Alexander



JACK GIBBONS

EB-2007-0050

Pollution Probe's Interrogatories for Hydro One – Part 1

February 22, 2008

Interrogatory No. 1

Ref. Exh. B / T 1 / S 1

Issue Number 1.0

1.0 Issue: Project Need and Justification

Request

For each month from January 1984 to the present, please state:

- a) the installed capacity at the Bruce Nuclear Station;
- b) the total monthly output (MWh) of the Bruce Nuclear Station;
- c) the peak hour output (MW) of the Bruce Nuclear Station; and
- d) the average capacity factor of the Bruce Nuclear Station.

Interrogatory No. 2

Ref. Exh. B / T 1 / S 1 /

Issue Number 1.0

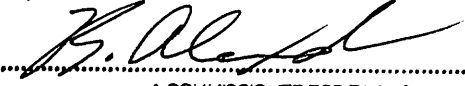
1.0 Issue: Project Need and Justification

Request

For each year from 1984 to the present, please state:

- a) the annual output (MWh) of the Bruce Nuclear Station;
- b) the peak hour output (MW) of the Bruce Nuclear Station;
- c) the average annual capacity factor of the Bruce Nuclear Station; and
- d) the average annual capacity factor for each unit of the Bruce Nuclear Station.

This is Exhibit A referred to in the
 affidavit of Jack Gibbons
 sworn before me, this 20th
 day of March, 2008.
[Signature]
 A COMMISSIONER FOR TAKING AFFIDAVITS

This is Exhibit B referred to in the 19
affidavit of Jack Gibbons
sworn before me, this 20th
day of March 2008

A COMMISSIONER FOR TAKING AFFIDAVITS

Issues List

1.0 Project Need and Justification

- 1.1 Has the need for the proposed project been established?
- 1.2 Does the project qualify as a non-discretionary project as per the OEB's Filing Requirements for Transmission and Distribution Applications and if so what categories of need as referred to in Section 5.2.2 of these Filing Requirements are relevant?
- 1.3 Have all appropriate project risk factors pertaining to the need and justification (including but not limited to forecasting, technical and financial risks) been taken into consideration in planning this project?
- 1.4 Is the project suitably chosen and sufficiently scalable so as to meet all reasonably foreseeable future needs of significantly increased or significantly reduced generation in the Bruce area?

2.0 Project Alternatives

- 2.1 Have all reasonable alternatives to the project been identified and considered?
- 2.2 Has an appropriate evaluation methodology been applied to all the alternatives considered?
- 2.3 For all of the considered alternatives, does the evaluation methodology utilized include a cost benefit comparison as well as a comparison of all quantitative and qualitative benefits?
- 2.4
 - a) Have appropriate evaluation criteria and criteria weightings been utilized in the evaluation process for the alternatives and the proposed project and what additional criteria/weightings could be considered?
 - b) Have appropriate comparisons been carried out on all reasonable alternatives with respect to reliability and quality of electricity service, including stability and transient stability levels, voltage performance and Loss of Load Expectation projections under normal and post-contingency conditions?
 - c) Do the alternatives meet the applicable standards for reliability and quality of electricity service?
- 2.5 Is the proposal a better project than the reasonable alternatives?
- 2.6 Are the project's rate impacts and costs reasonable for:

- the transmission line;
- the station modifications; and
- the Operating, Maintenance and Administration requirements.

3.0 Near Term and Interim Measures

- 3.1 Are the proposed near term and interim measures as outlined in the application appropriate?
- 3.2 Can the proposed near term and interim measures be utilized longer than the suggested two to three year time frame?
- 3.3 If these proposed near term and interim measures could be utilized for a longer period than proposed, could they (or some combination of similar measures) be considered an alternative to the double circuit 500 kV transmission line for which Hydro One has applied?

4.0 Reliability and Quality of Electricity Service

- 4.1 For the preferred option, does the project meet all the requirements as identified in the System Impact Assessment and the Customer Impact Assessment?
- 4.2 Does the project meet applicable standards for reliability and quality of electricity service?
- 4.3 Have all appropriate project risk factors pertaining to system reliability and quality of electricity service been taken into consideration in planning this project?

5.0 Land Matters

- 5.1 Are the forms of land agreements to be offered to affected landowners reasonable?
- 5.2 What is the status and process for Hydro One's acquisition of permanent and temporary land rights required for the project?

6.0 Aboriginal Peoples Consultations

Have all Aboriginal Peoples whose existing or asserted Aboriginal or treaty rights are affected by this project been identified, have appropriate consultations been conducted with these groups and if necessary, have appropriate accommodations been made with these groups?

7.0 Conditions of Approval

If Leave to Construct is approved, what conditions, if any, should be attached to the Board's order?

Osler, Hoskin & Harcourt LLP
Suite 2500, TransCanada Tower
450 - 1st Street S.W.
Calgary, Alberta, Canada T2P 5H1
403.260.7000 MAIN
403.260.7024 FACSIMILE

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OSLER

Calgary

February 26, 2008

Gordon M. Nettleton
Direct Dial: 403.260.7047
gnettleton@osler.com
Our Matter Number: 1099714

Toronto

Montréal

BY ELECTRONIC MAIL & COURIER

Ottawa

Ontario Energy Board
P.O. Box 2319
2300 Yonge Street
Suite 2700
Toronto, ON M4P 1E4

New York

Attention: Ms. Kirsten Walli, Board Secretary

This is Exhibit.....^C.....referred to in the
affidavit of.....Jack Gibbons.....
sworn before me, this.....20th.....
day of.....March.....2008.....


A COMMISSIONER FOR TAKING AFFIDAVITS

Dear Ms. Walli:

**Re: EB-2007-0050 – Hydro One Networks Inc., (“Hydro One”) Bruce to Milton
Transmission Reinforcement Project**

I am writing to you on behalf of Hydro One. We wish to advise the Board and parties of two general areas that will limit Hydro One's ability to provide responses to interrogatories, and thus impact Paragraph 3 to Procedural Order No. 5.

The first area concerns the availability of historical generation information. Hydro One is not responsible for generation operations and as such it is not in possession of historical generation data. When interrogatories request generation data Hydro One will consult with the Independent Electricity System Operator (“IESO”) and the Ontario Power Authority (“OPA”) to determine if either of these organizations are able to provide the requested information.

Hydro One has been advised that neither the IESO nor the OPA have energy market data that predates 2002, the year in which the Ontario energy market was restructured. As a result, energy market data requested before this date is not available and cannot be provided in responses to interrogatories.

The second area concerns the availability of forecast information. For example, Pollution Probe Interrogatories 5 & 6, request long term (i.e. 2012 to 2036) consumption forecasts for the Bruce Area. In consultation with OPA, Hydro One has been advised that long term load forecasts are only undertaken in constrained areas and that the Bruce Area has not been identified as a constrained area. As a result, the requested information is not available and cannot be provided.

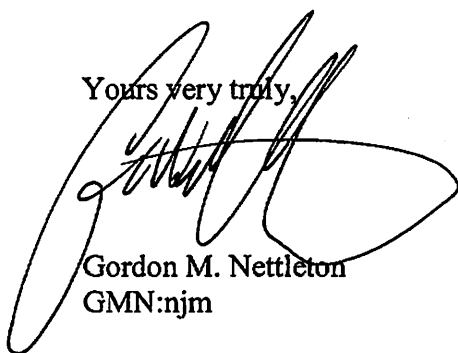
OSLER

Page 2

Based on the foregoing, Hydro One can advise that it does not have access to information necessary to respond to the following interrogatories:

- Fallis Group Questions 1-2, 18-23, 27
- Pollution Probe Questions: 1-2, 5-6

Yours very truly,

A large, stylized handwritten signature in black ink, appearing to read 'Gordon M. Nettleton', is written over the typed name and initials.

Gordon M. Nettleton
GMN:njm

c. All Interested Parties in EB-2007-0050

Subject: [Fwd: Feb 26, 2008 letter]
From: Basil Alexander <basil.alexander@klippensteins.ca>
Date: Fri, 29 Feb 2008 22:29:30 -0500
To: Jack Gibbons <jgibbons@pollutionprobe.org>
CC: Murray Klippenstein <murray.klippenstein@klippensteins.ca>

FYI... B.

----- Original Message -----

Subject: Feb 26, 2008 letter
Date: Fri, 29 Feb 2008 15:20:18 -0700
From: Nettleton, Gord <GNettleton@osler.com>
To: Basil Alexander <basil.alexander@klippensteins.ca>

This is Exhibit.....^D.....referred to in the
affidavit of.....Jack Gibbons.....
sworn before me, this.....20th.....
day of.....March.....20..08..
.....B. Alexander.....
A COMMISSIONER FOR TAKING AFFIDAVITS

Basil

I wanted to clarify with you the issue we are having in answering some of the questions. As per my Feb 26 letter, the IESO does not have energy market data pre May 2002 and we don't have historical generation information. We will be attempting to respond to the questions identified in our letter but we can't do so to the extent that the questions ask for this information.

Kind regards,

GMN

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--
Basil Alexander, LL.B., M.P.A.
Klippensteins, Barristers & Solicitors
160 John St., Suite 300
Toronto ON M5V 2E5
tel.: 416-598-0288
fax: 416-598-9520
basil.alexander@klippensteins.ca

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 EB-2007-0050
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 Page 1 of 4

Pollution Probe INTERROGATORY #1 List 1

Interrogatory

Issue Number: 1.0
 Issue: Project Need and Justification
 Ref. B/Tab 1/Sch 1

This is Exhibit E referred to in the
 affidavit of Jack Gibbons
 sworn before me, this 20th
 day of March, 2008
[Signature]
 A COMMISSIONER FOR TAKING AFFIDAVITS

For each month from January 1984 to the present, please state:

- a) the installed capacity at the Bruce Nuclear Station;
- b) the total monthly output (MWh) of the Bruce Nuclear Station;
- c) the peak hour output (MW) of the Bruce Nuclear Station; and
- d) the average capacity factor of the Bruce Nuclear Station.

Response

As noted in Hydro One's earlier correspondence dated February 26, 2008 to the Board and parties, generation production data prior to market opening is not available. The production data from market opening to the present is as follows:

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Year/Month	Bruce A					Bruce B			
	Capacity (MW)	Total Monthly Output (MWh)	Peak Hourly Output (MW)	Average Capacity Factor (%)		Capacity (MW)	Total Monthly Output (MWh)	Peak Hourly Output (MW)	Average Capacity Factor (%)
200205						3,180	1,717,900	2,398	73
200206						3,180	1,709,508	2,394	75
200207						3,180	1,766,080	2,402	75
200208						3,180	1,812,964	3,132	77
200209						3,180	1,951,634	3,179	85
200210						3,180	1,766,045	2,387	75
200211						3,180	1,711,077	2,390	75
200212						3,180	1,787,511	2,947	76
200301						3,180	2,353,939	3,187	99
200302						3,180	2,134,663	3,190	100
200303						3,180	2,362,288	3,237	100
200304						3,180	1,802,961	3,191	79
200305						3,180	1,773,058	2,395	75
200306						3,180	1,775,117	3,122	78
200307						3,180	2,320,372	3,181	98
200308						3,180	2,122,785	3,190	90
200309						3,180	2,062,760	3,172	90
200310						3,180	1,751,470	2,380	74
200311	770	383,794	716	69		3,180	1,653,791	2,386	72
200312	770	525,370	712	92		3,180	1,675,077	2,392	71
200401	1,540	586,388	1,395	51		3,180	1,812,649	3,166	77
200402	1,540	601,759	1,428	56		3,180	2,090,206	3,194	94
200403	1,540	768,670	1,502	67		3,180	2,365,452	3,197	100
200404	1,540	1,064,712	1,499	96		3,246	2,240,862	3,213	96

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Year/Month	Bruce A					Bruce B			
	Capacity (MW)	Total Monthly Output (MWh)	Peak Hourly Output (MW)	Average Capacity Factor (%)		Capacity (MW)	Total Monthly Output (MWh)	Peak Hourly Output (MW)	Average Capacity Factor (%)
200405	1,540	917,464	1,487	80		3,246	2,384,130	3,217	99
200406	1,540	512,496	744	46		3,246	2,300,882	3,216	98
200407	1,540	984,899	1,501	86		3,246	2,357,266	3,218	98
200408	1,540	1,039,960	1,514	91		3,246	2,275,630	3,220	94
200409	1,540	1,056,785	1,503	95		3,246	1,087,714	3,189	47
200410	1,540	1,106,266	1,500	97		3,246	709,421	1,585	29
200411	1,540	731,772	1,501	66		3,246	1,580,153	2,378	68
200412	1,540	1,097,002	1,491	96		3,246	2,287,976	3,207	95
200501	1,540	694,718	1,488	61		3,246	2,182,061	3,217	90
200502	1,540	506,642	762	49		3,246	2,011,053	3,208	92
200503	1,540	539,828	1,142	47		3,246	2,348,069	3,220	97
200504	1,540	373,831	1,354	34		3,246	1,690,298	3,154	72
200505	1,540	1,020,770	1,518	89		3,246	1,483,067	2,410	61
200506	1,540	1,075,439	1,521	97		3,246	1,741,539	2,473	75
200507	1,540	1,104,661	1,514	96		3,246	1,774,846	2,414	73
200508	1,540	1,084,376	1,513	95		3,246	2,085,252	3,237	86
200509	1,540	862,083	1,512	78		3,246	2,265,513	3,201	97
200510	1,540	1,114,801	1,515	97		3,246	1,922,252	3,180	80
200511	1,540	1,029,189	1,512	93		3,246	1,652,514	2,452	71
200512	1,540	1,041,670	1,514	91		3,246	1,542,761	2,886	64
200601	1,540	1,018,915	1,541	89		3,246	2,294,166	3,205	95
200602	1,540	822,278	1,558	79		3,246	1,972,431	3,219	90
200603	1,540	716,503	1,513	63		3,246	2,373,827	3,218	98
200604	1,540	931,815	1,523	84		3,246	2,217,925	3,210	95

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Year/Month	Bruce A					Bruce B			
	Capacity (MW)	Total Monthly Output (MWh)	Peak Hourly Output (MW)	Average Capacity Factor (%)		Capacity (MW)	Total Monthly Output (MWh)	Peak Hourly Output (MW)	Average Capacity Factor (%)
200605	1,540	556,142	760	49		3,246	2,269,594	3,237	94
200606	1,540	615,891	1,448	56		3,246	2,167,307	3,237	93
200607	1,540	927,894	1,504	81		3,246	2,366,508	3,245	98
200608	1,540	1,047,600	1,509	91		3,246	2,360,548	3,242	98
200609	1,540	902,005	1,516	81		3,246	1,826,177	3,245	78
200610	1,540	1,104,292	1,498	96		3,246	1,782,500	2,434	74
200611	1,540	1,019,454	1,501	92		3,246	1,890,090	3,292	81
200612	1,540	1,105,726	1,497	97		3,246	2,394,197	3,266	99
200701	1,540	1,102,006	1,489	96		3,246	2,152,489	3,242	89
200702	1,540	992,764	1,487	96		3,246	1,609,360	2,410	74
200703	1,540	838,342	1,495	73		3,246	1,693,787	2,509	70
200704	1,540	677,921	1,553	61		3,365	2,095,669	3,272	86
200705	1,575	726,958	1,541	62		3,365	2,257,257	3,237	90
200706	1,575	1,101,020	1,547	97		3,365	2,049,804	3,266	85
200707	1,575	1,030,478	1,553	88		3,365	2,363,992	3,228	94
200708	1,575	1,099,698	1,518	94		3,365	2,184,157	3,218	87
200709	1,575	620,465	1,523	55		3,365	2,284,742	3,225	94
200710	1,575	534,210	740	46		3,365	2,313,492	3,214	92
200711	1,575	685,278	1,459	60		3,365	2,123,964	3,282	88
200712	1,575	1,060,920	1,523	91		3,365	2,260,175	3,277	90
200801	1,575	1,103,638	1,496	94		3,365	2,274,749	3,324	91

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Pollution Probe INTERROGATORY # 2 List 1

Interrogatory

Issue Number: 1.0

Issue: Project Need and Justification

Ref. B/Tab 1/Sch 1

For each year from 1984 to the present, please state:

- a) the annual output (MWh) of the Bruce Nuclear Station;
- b) the peak hour output (MW) of the Bruce Nuclear Station;
- c) the average annual capacity factor of the Bruce Nuclear Station; and
- d) the average annual capacity factor for each unit of the Bruce Nuclear Station.

Response

As noted in Hydro One's earlier correspondence dated February 26, 2008 to the Board and parties, generation production data prior to market opening is not available. The production data requested from market opening to the present is as follows:

Filed: March 7, 2008
 EB-2007-0050
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a) to c)

Year	Bruce A				Bruce B		
	Annual Output (MWh)	Peak Hourly Output (MW)	Average Annual Capacity Factor (%)		Annual Output (MWh)	Peak Hourly Output (MW)	Average Annual Capacity Factor (%)
2002					14,222,719	3,179	76
2003	909,164	716	81		23,788,282	3,237	85
2004	10,468,173	1,514	77		23,492,341	3,220	83
2005	10,448,007	1,521	77		22,699,224	3,237	77
2006	10,768,517	1,558	80		25,915,270	3,292	88
2007	10,470,060	1,553	76		25,388,887	3,282	86
2008	1,103,638	1,496	94		2,274,749	3,324	91

d) The average annual capacity factory for each unit at the Bruce Nuclear Station is as follows:

Year	Bruce A Units Avg. Annual Capacity Factor (%)					Bruce B Units Avg. Annual Capacity Factor (%)			
	1	2	3	4		1	2	3	4
2002						98	51	55	99
2003				81		76	97	96	71
2004			74	81		85	75	92	82
2005			73	82		74	77	69	99
2006			81	79		97	95	93	76
2007			73	78		94	69	96	90
2008			92	96		97	96	86	85

KLIPPENSTEINS**BARRISTERS & SOLICITORS**

160 JOHN STREET, SUITE 300,

TORONTO, ONTARIO M5V 2E5

TEL: (416) 598-0288

FAX: (416) 598-9520

March 6, 2008

BY COURIER (10 COPIES) AND EMAIL

Ms. Kirsten Walli
 Board Secretary
 Ontario Energy Board
 P.O. Box 2319
 2300 Yonge Street, Suite 2700
 Toronto, Ontario M4P 1E4
 Fax: (416) 440-7656
 Email: boardsec@oeb.gov.on.ca

This is Exhibit F referred to in the
 affidavit of Jack Gibbons
 sworn before me, this 20th
 day of March 2008
[Signature]
 A COMMISSIONER FOR TAKING AFFIDAVITS

Dear Ms. Walli:

Re: Pollution Probe – Response to Hydro One Letter of February 26, 2008
EB-2007-0050 – Hydro One – Bruce-Milton Transmission
Reinforcement Project

We write in response to Hydro One's letter to the Board dated February 26, 2008 regarding a lack of historical generation information (which affects responses to Pollution Probe Interrogatories Nos. 1 and 2 regarding the Bruce Nuclear Station). In short, Pollution Probe respectfully submits that Hydro One can provide this information with reasonable effort by obtaining the requested information from Bruce Power and/or Ontario Power Generation Inc. (which are both intervenors in this proceeding).

In its letter dated February 26, 2008, Hydro One advised of areas that would limit Hydro One's ability to provide responses to interrogatories:¹

The first area concerns the availability of historical generation information. Hydro One is not responsible for generation operations and as such it is not in possession of historical generation data. *When interrogatories request generation data Hydro One will consult with the [IESO] and the [OPA] to determine if either of these organizations are able to provide the requested information.*

Hydro One has been advised that *neither the IESO nor the OPA have energy market data that predates 2002*, the year in which the Ontario energy market was restructured. As a result, energy market data requested before this date is not available and cannot be provided in responses to interrogatories. [emphasis added]

We note that Hydro One appears not to dispute the relevance of the affected Pollution Probe interrogatories.

¹ Letter from Gord M. Nettleton, Counsel for Hydro One, to the Board Secretary dated February 26, 2008.

Further, our understanding is that Hydro One will attempt to respond to Pollution Probe Interrogatories Nos. 1 and 2 (which seeks historical information respecting the Bruce Nuclear Station) to the extent that the OPA and IESO have the information, but that a gap arises in that Hydro One essentially cannot provide information prior to May 2002 given the limitation above.² It is that gap which is at issue.

Pollution Probe respectfully submits that Hydro One could in fact fill that gap and provide this information with reasonable effort by obtaining the requested information from Bruce Power and/or Ontario Power Generation Inc. instead. Pollution Probe is frankly surprised and concerned that neither the OPA nor the IESO have historical generation information prior to 2002 (particularly given the pending IPSP). Regardless, Pollution Probe submits that the requested information about the Bruce Nuclear Station should be readily available from Bruce Power (i.e. its current operator) and/or Ontario Power Generation Inc. (i.e. its current owner). Pollution Probe also submits that the requested information can be obtained with reasonable effort and minimal inconvenience since both organizations are already intervenors in this matter.

We hope that Hydro One and these organizations will take the initiative to provide the requested information. However, if necessary, Pollution Probe is prepared to appear before the Board by way of formal motion to obtain full and adequate responses to these interrogatories.

Yours truly,



Basil Alexander

BA/ba

cc: Applicant and Intervenors per Procedural Order #5

² This clarification was provided in an email dated February 29, 2008 from Hydro One's counsel to Pollution Probe's counsel.

Osler, Hoskin & Harcourt LLP
Suite 2500, TransCanada Tower
450 - 1st Street S.W.
Calgary, Alberta, Canada T2P 5H1
403.260.7000 MAIN
403.260.7024 FACSIMILE

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OSLER

Calgary

March 10, 2008

Gordon M. Nettleton
Direct Dial: 403.260.7047
gnetteleton@osler.com
Our Matter Number: 1099714

Toronto

Montréal

Ottawa

New York

BY ELECTRONIC MAIL & COURIER

Ontario Energy Board
P.O. Box 2319
2300 Yonge Street
Suite 2700
Toronto, ON M4P 1E4

This is Exhibit G referred to in the
affidavit of Jack Gibbons
sworn before me, this 20th
day of March 2008
B. Alexander
A COMMISSIONER FOR TAKING AFFIDAVITS

Attention: Ms. Kirsten Walli, Board Secretary

Dear Ms. Walli:

**Re: EB-2007-0050 – Hydro One Networks Inc., (“Hydro One”) Bruce to Milton
Transmission Reinforcement Project**

I am writing to you on behalf of Hydro One in response to Mr. Alexander's letter of March 6, 2008 on behalf of Pollution Probe. In that letter Pollution Probe suggests that Hydro One should take further efforts to obtain requested pre-2002 historical generation information.

Hydro One respectfully disagrees. Hydro One has acted reasonably in these circumstances by consulting with the Ontario Power Authority (“OPA”) and the Independent Electric System Operator (“IESO”). Hydro One undertook those steps given the roles that the OPA and the IESO have had in the preparation of this application. These circumstances are unique but they do not justify Hydro One being compelled to undertake the broad type of inquiry Pollution Probe now appears to be seeking. Hydro One stands in the same place as Pollution Probe in requesting information from third parties. If Pollution Probe wants to take the time to make those inquiries, it can certainly choose to do so. However, Hydro One's role as applicant does not place it in any better position to obtain the information that Pollution Probe seeks.

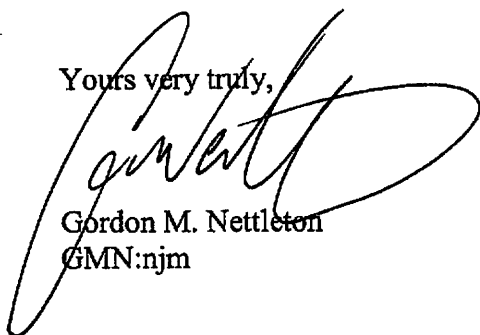
Finally, and with respect to Pollution Probe's comments on relevance, Hydro One has viewed its lack of possession of the requested information to be the most appropriate factor related to the purpose and obligations set out in Paragraph 3 of Procedural Order No. 5: to advise a requesting party of Hydro One's decision to not answer specific interrogatories and so that decisions could be expedited on whether formal motions should be made to provide such responses.

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Page 2

Hydro One has not interpreted Paragraph 3 of Procedural Order No. 5 to require it to identify all of the substantive arguments that it may choose to rely upon and in response to a yet to be filed formal motion. Those matters could only be determined after Hydro One has first reviewed any motion.

Yours very truly,

A large, stylized handwritten signature in black ink, appearing to read 'G. Nettleton', is written over the typed name.

Gordon M. Nettleton
GMN:njm

- c) re-built Bruce B nuclear reactors;
- d) new Bruce nuclear reactors;
- e) existing wind generation;
- f) committed wind generation;
- g) uncommitted wind generation; and
- h) other.

This is Exhibit H referred to in the
 affidavit of Jack Gibbons
 sworn before me, this 20th
 day of March, 2008
[Signature]
 A COMMISSIONER FOR TAKING AFFIDAVITS

Interrogatory No. 9

Ref. Exh. B / T 1 / S 1, Exh. B / T 4 / S 4, and Exh. KT.1

Issue Number 1.0

1.0 Issue: Project Need and Justification

Request

If the proposed Bruce to Milton high-voltage transmission line is not approved, please provide the OPA's estimates of the net present value (in 2007\$) of Bruce Area's locked-in electricity for each year from 2012 to 2036 inclusive under each of the following scenarios:

- a) The implementation of Hydro One's near-term measures (i.e. dynamic and static reactive resources and upgrading the Hanover to Orangeville line);
- b) The implementation of Scenario A plus the expansion of the Bruce special protection system;
- c) The implementation of Scenario B plus the installation of series capacitors;
- d) The implementation of Scenario C if the Bruce B nuclear reactors are not re-built at the end of their service lives and no new nuclear capacity is installed in the Bruce Area; and
- e) The implementation of Scenario C if the Bruce B nuclear reactors are not re-built at the end of their service lives, no new nuclear capacity is installed in the Bruce Area, and the average annual capacity factor of the Bruce Nuclear Station is 10% lower than the OPA's current estimate.

If the OPA's discount rate is not the same as the discount rate used by Hydro One to calculate the net present value of the cost for the proposed Bruce to Milton transmission line, please provide the OPA's net present value calculations using:

- a) the OPA's discount rate; and
- b) Hydro One's discount rate.

With respect to these net present value calculations, please provide all of the OPA's input and other assumptions, and please break-out the net present values for each year from 2012 to 2036 inclusive by the following generation categories:

- a) existing Bruce A nuclear reactors;
- b) existing Bruce B nuclear reactors;
- c) re-built Bruce B nuclear reactors;

- d) new Bruce nuclear reactors;
- e) existing wind generation;
- f) committed wind generation;
- g) uncommitted wind generation; and
- h) other.

Please also provide an electronic copy of the OPA's discounted cash flow model which will allow the Board and intervenors to vary the input and other assumptions and recalculate these net present values.

Interrogatory No. 10

Ref. Exh. KT.1

Issue Number 1.0

1.0 Issue: Project Need and Justification

Request

Please provide OPA's estimate of the net present value (in 2007\$) of expanding the Bruce special protection system.

If the OPA's discount rate is not the same as the discount rate used by Hydro One to calculate the net present value of the cost for the proposed Bruce to Milton transmission line, please provide the OPA's net present value calculations using:

- c) the OPA's discount rate; and
- d) Hydro One's discount rate.

With respect to these net present value calculations, please provide all of the OPA's input and other assumptions, and please break-out the net present values by each year.

Please also provide an electronic copy of the OPA's discounted cash flow model which will allow the Board and intervenors to vary the input and other assumptions and recalculate these net present values.

Interrogatory No. 11**Ref. Exh. KT.1****Issue Number 1.0****1.0 Issue: Project Need and Justification****Request**

Please provide OPA's estimate of the net present value (2007\$) of installing series capacitors.

If the OPA's discount rate is not the same as the discount rate used by Hydro One to calculate the net present value of the cost for the proposed Bruce to Milton transmission line, please provide the OPA's net present value calculations using:

- e) the OPA's discount rate; and
- f) Hydro One's discount rate.

With respect to these net present value calculations, please provide all of the OPA's input and other assumptions, and please break-out the net present values by each year.

Please also provide an electronic copy of the OPA's discounted cash flow model which will allow the Board and intervenors to vary the input and other assumptions and re-calculate these net present values.

Interrogatory No. 12**Ref. As Applicable****Issue Number – As Applicable****Request**

For all of Pollution Probe's interrogatories that ultimately require responses or other information from the OPA, please provide Hydro One's responses to these interrogatories if the OPA cannot provide the responses or other information.

Interrogatory No. 19

Ref. EB-2007-0050, Exhibit B, Tab 6, Schedule 5, Appendix 6, IPSP Discussion Paper #7, Integrating the Elements, page 162, Table 10.1

Issue Number 1.0

1.0 Issue: Project Need and Justification

Request

- a) Please provide detailed, year-by year breakdowns of the specific resources that comprise the "Existing Nuclear", "Refurbished Nuclear" and "New Nuclear" resources listed in Table 10.1.
 - b) Please provide detailed, year-by year breakdowns of the specific resources that comprise each of the remaining categories of resources listed in Table 10.1.
 - c) Please confirm that Hydro One uses the resources projection values in Tables 10.1 and 10.2 in determining need for the proposed transmission circuits.
- a) For both of responses to a) and b), please provide a copy of the data electronically in an MS Excel spreadsheet or other spreadsheet readable format.

Interrogatory No. 20

Ref. EB-2007-0050, Exhibit B, Tab 6, Schedule 5, Appendix 6, IPSP Discussion Paper #7, Integrating the Elements, page 130, Preliminary Plan price for new and refurbished nuclear plant.

Issue Number 1.0

1.0 Issue: Project Need and Justification

Request

- a) What is the "refurbished contract price" or yearly price stream associated with any Bruce B refurbishment power and over what years is this price assumed?
- b) Please provide all analyses in support of the use of the refurbished price reported in a) above.
- c) What is the assumed contract price or yearly price stream associated with any new nuclear units at the Bruce B site and over what years is this price assumed?
- d) Please provide all analyses in support of the use of the "new nuclear" price reported in c) above.

Interrogatory No. 38

Ref. Exh. B/T 6/S 5 Appendix 6 is Discussion Paper 7 Integrating the Elements. On Page 39 is a bar graph of the MW of installed nuclear capacity for each year from 2007 through 2027.

Issue Number 1.0**1.0 Issue: Project Need and Justification****Request**

For each year from 2007 through 2027, please provide the total nuclear capacity in MW and a breakdown of that capacity by nuclear unit, along with a description of whether such unit is considered to “existing”, “refurbished”, or “new”.

Interrogatory No. 39

Ref. Technical Conference Panel One (Oct 15, 2007) slide presentation, slide 31 of 43.

Issue Number 2.0**2.0 Issue: Project Alternatives****Request**

The slide shows eight options considered, including the proposed transmission line from Bruce to Milton, and five screening categories:

- a) For each of the options listed, please provide a description of the facilities included in each option.
- b) For each of the options listed, please provide a description of the total transmission capability in MW away from Bruce with no contingencies.
- c) For each of the options listed, please provide a description of the total transmission capability in MW away from Bruce with the worst single contingency, and a description of that contingency.
- d) For the capacity determinations addressed in (b) and (c) above, please describe and provide the assumptions for generation dispatch and system imports that were used in these determinations.
- e) For each of the options listed, please describe the effects on other transmission paths that were considered.
- f) For each of the options listed, please provide total cost for the option, a cost breakdown for the option, and cost workpapers.
- g) For each of the options listed, please describe the land use characteristics that were considered.

- d) Please provide the capacity of the transmission system away from Bruce with these measures installed on the existing system with no contingencies, and without these measures installed with no contingencies (assume that near-term measures described in Interrogatory 36 are in service).
- e) Please provide the capacity of the transmission system away from Bruce with these measures installed on the existing system with the worst single contingency, and provide a description of that contingency.
- f) The slide states that the installation of series capacitors is still under consideration. Please describe what progress has been made on such consideration since last October and provide a copy of any study results, analyses, reports, etc. that are available as a result.
- g) The slide states that the installation of series capacitors requires extensive changes to the Bruce transmission system. Please describe these expensive changes and provide a copy of any analyses, reports, etc. that address these changes.

Interrogatory No. 42

Ref. Exh. B/T 1/S 1. On page 2, Table 1 lists generation resources, loads, and interconnection capacities in SW Ontario.

Issue Number 1.0

1.0 Issue: Project Need and Justification

Request

- a) For each of the generation resources listed, please provide:
 - i. the name of each generating unit that is included in each generation resource listed;
 - ii. each generating unit's in-service date;
 - iii. each generating unit's projected shut-down date (if any);
 - iv. each generating unit's summer peak generating capacity;
 - v. each generating unit's winter peak generating capacity;
 - vi. each generating unit's minimum generating level
 - vii. each generating unit's primary fuel;
 - viii. each generating unit's net generation in each of the last three years; and
 - ix. each generating unit's per-MWH fuel and variable operating cost in each of the last three years.
- b) For each of the loads listed, please provide the summer peak load and the winter peak load in each of the past three years, and please also provide the annual energy consumed by each of the loads in each of the past three years.
- c) For each of the interconnections listed:

- i. please provide net summer MW and MWH supplied over the interconnection and the direction of the net supply;
- ii. please provide net winter MW and MWH supplied over the interconnection and the direction of the net supply; and
- iii. please explain how winter and summer are defined.
- d) What level of generation reserve margin is considered adequate to provide reliable supply in the Province?
- e) Please provide a copy of any planning criteria used in the Province to plan for reliable electric generation supply.

Interrogatory No. 43

Ref. The System Impact Assessment Report For the Proposed Installation of Series Capacitors in the 500kV Circuits between the Bruce Complex & Nanticoke GS, CAA ID No. 2005-200, as referenced in Hydro One Networks' letter of November 26, 2007 to C. Pappas with attachment (see Attachment 1).

Issue Number 2.0

2.0 Issue: Project Alternatives

Request

On page 5, the report discusses a load flow analysis of the system with all eight Bruce nuclear units and all committed wind generation projects.

- a) The report states: "Analysis has shown that regardless of the level of series compensation installed, it would not be possible to accommodate all eight Bruce units and all of the committed wind-turbine projects without having to employ generation rejection in response to a double-circuit contingency involving the 500kV circuits B560V & B561M."
 - i. Please describe and list the series compensation assumptions studied in order to reach this conclusion.
 - ii. Please estimate by substation the cost of installing the series compensation facilities that were assumed in the studies referenced in part i above.
 - iii. Please describe and list the "near-term measures" referenced in slide 38 of 43 of Panel One of the Technical Conference of October 15, 2007 that were included in the studies performed to reach this conclusion.
 - iv. Please provide saved cases in PTI-format, compatible with Siemen's PSS/E version 30, for the load flow studies performed by or for Hydro One, the OPA, and/or the IESO in studying the series compensation assumptions studied in order to reach this conclusion.

EB-2007-0050

Pollution Probe's Interrogatories for Hydro One – Part 5

March 10, 2008

Interrogatory No. 47

Ref. Response to Pollution Probe Interrogatory No. 7 List 1 (Exh. C / T 2 / S 7)

Issue Number 1.0

1.0 Issue: Project Need and Justification

Request

- a) Please provide all workpapers associated with the computation of locked-in energy quantities listed in the “undelivered energy (MWh)” table for parts a) through e) of the response. Provide these workpapers in Excel or equivalent spreadsheet format with formulas intact.
- b) Please describe in complete detail the analysis conducted to obtain the estimate of locked-in energy provided in the “undelivered energy (MWh)” table as a response to parts a) through e) of the interrogatory. Please include descriptions of the temporal detail for each component of the response (e.g. for wind, nuclear, and transmission components).
- c) Please provide the estimates of locked-in energy for the finest level of temporal detail calculated.
- d) Please provide the “probabilistic distributions” for both wind and nuclear generation that was developed as part of the response.
- e) Please provide the “probabilistic distribution of total generation in the Bruce area” that was developed as part of the response.
- f) Please provide the “transfer-capability probability distributions” that were developed as part of the response.
- g) Please describe the specific assumptions made concerning the overall state of the Ontario transmission system for the periods in which Bruce area transfer-capability probability distributions were developed.

Interrogatory No. 48

Ref. Response to Pollution Probe Interrogatory No. 8 List 1 (Exh. C / T 2 / S 8), Exh. B / T 1 / S 1, Exh. B / T 4 / S 4, and Exh. K / Tab 1

Issue Number 1.0

1.0 Issue: Project Need and Justification

Request

Please provide estimates of the Bruce area locked-in installed capacity (MW) for each of the scenarios a) through e) described in Pollution Probe Interrogatory #8 List 1.

Interrogatory No. 49

Ref. Response to Pollution Probe Interrogatory No. 9 List 1 (Exh. C / T 2 / S 9)

Issue Number 1.0

1.0 Issue: Project Need and Justification

Request

- a) On what basis is the assumption made that “the cost of undelivered energy is equal to the cost of the replacement energy”?
- b) On what basis is the assumption made that energy costs are “those” in the OEB-published Total Resource Cost Guide?
- c) Please confirm or correct a reference: the response indicated that energy costs were those in the OEB-published TRC Guide at Table 11, however there is no Table 11 in the TRC Guide available on the OEB website.
- d) Please provide all workpapers, including spreadsheets with formulas intact, used in computing the values in the response tables “Undelivered Energy Cost (M\$2007)” for both the “OPA Discount Rate” version and the “Hydro One Discount Rate” version.

Interrogatory No. 50

Ref. Response to Pollution Probe Interrogatory #10 List 1 (Exh. C / T 2 / S 10)

Issue Number 1.0

1.0 Issue: Project Need and Justification

Request

- a) Please provide all workpapers, including spreadsheets with formulas intact, used in computing the values in the response tables "Net Present Cost of Expanding the BSPS" for both the "OPA Discount Rate" version and the "Hydro One Discount Rate" version.
- b) If these workpapers do not show how the LIE column is computed, please explain how it is computed and please also explain how the LIE column differs from the estimate of undelivered energy cost provided in response to Pollution Probe Interrogatory No. 9 List 1.

Interrogatory No. 51

Ref. Response to Pollution Probe Interrogatory #11 List 1 (Exh. C / T 2 / S 11)

Issue Number 1.0

1.0 Issue: Project Need and Justification

Request

- a) Please provide all workpapers, including spreadsheets with formulas intact, used in computing the values in the response tables "Net Present Cost of Series Capacitors" for both the "OPA Discount Rate" version and the "Hydro One Discount Rate" version.
- b) Please explain why the net present value of installing series capacitors includes a component of costs associated with undelivered energy.
- c) Are the "losses" shown in the computation associated solely with the transmission system effect of the installation of series capacitors, or are they associated with the increased losses if the proposed Bruce – Milton double circuit 500 kV line is not installed, or are they associated with something else? If the "losses" are associated with something else, please explain what the losses are associated with.

Osler, Hoskin & Harcourt LLP
 Suite 2500, TransCanada Tower
 450 - 1st Street S.W.
 Calgary, Alberta, Canada T2P 5H1
 403.260.7000 MAIN
 403.260.7024 FACSIMILE

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Calgary

February 29, 2008

Toronto

Gordon M. Nettleton
 Direct Dial: 403.260.7047
 gnettleton@osler.com
 Our Matter Number: 1099714


Montréal

Ottawa

BY ELECTRONIC MAIL & COURIER

New York

Ontario Energy Board
 P.O. Box 2319
 2300 Yonge Street
 Suite 2700
 Toronto, ON M4P 1E4

I am Exhibit I referred to in the
 affidavit of Jack Gibbons
 sworn before me, this 20th
 day of March 2008

 A COMMISSIONER FOR TAKING AFFIDAVITS

Attention: Ms. Kirsten Walli, Board Secretary

Dear Ms. Walli:

**Re: EB-2007-0050 – Hydro One Networks Inc., (“Hydro One”) Bruce to Milton
 Transmission Reinforcement Project**

I am writing to you on behalf of Hydro One. For the reasons explained in our letter of February 26, 2008, and pursuant to Paragraph 3 of Procedural Order No. 5, we wish to advise the Board and parties that Hydro One is unable to provide responses to Energy Probe Interrogatory 3. Hydro One has consulted with the IESO in respect of these requests and can advise that it does not have access to information necessary to respond to this interrogatory.

In addition, with respect to Saugeen Ojibway Nations Interrogatory 25, the requested model contains confidential information. As such, Hydro One can advise that prior to releasing the model the IESO is required to provide notice to all affected parties and provide such affected parties with an opportunity to object to the proposed release of the confidential information. Hydro One can advise on behalf of the IESO that the IESO will be requesting that the Board refrain from placing the model on the public record and release it to requesting intervenors only upon the entering into of a statutory declaration and undertaking, pursuant to Appendix D of the Board's practice direction on confidential filings. We understand that the IESO will be corresponding further in this regard.

Finally, Hydro One can advise that the OPA has similar confidential information concerns in respect of Pollution Probe Interrogatories 10 and 11. The OPA is in the process of determining whether and to what extent it is able to release the requested

Osler, Hoskin & Harcourt LLP
Suite 2500, TransCanada Tower
450 - 1st Street S.W.
Calgary, Alberta, Canada T2P 5H1
403.260.7000 MAIN
403.260.7024 FACSIMILE

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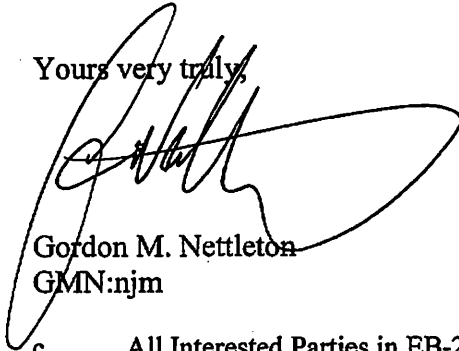
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information, and will advise the Board accordingly as soon as is practicable. ||

Yours very truly,



Gordon M. Nettleton
GMN:njm

c. All Interested Parties in EB-2007-0050



120 Adelaide Street West
Suite 1600
Toronto, Ontario M5H 1T1
T 416-967-7474
F 416-967-1947
www.powerauthority.on.ca

March 6, 2008

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
2300 Yonge Street, 27th Floor
Toronto, Ontario
M4P 1E4

This is Exhibit J referred to in the
affidavit of Jack Gibbons
sworn before me, this 20th
day of March, 2008
[Signature]
A COMMISSIONER FOR TAKING AFFIDAVITS

Dear Ms. Walli,

**Re: EB-2007-0050 – Hydro One Networks Inc.
Bruce - Milton Transmission Reinforcement Project**

Further to Gordon Nettleton's letter of February 29, 2008, I am writing to you on behalf of the Ontario Power Authority ("OPA") in relation to interrogatories #9, 10 and 11 of Pollution Probe.

Each of these interrogatories asks for a net present value calculation to be done. The interrogatories also ask for the OPA's input and other assumptions to be provided and for an electronic copy of the OPA's discounted cash flow model "which will allow the Board and intervenors to vary the input and other assumptions and recalculate these net present values".

The OPA's input assumptions include commercially sensitive confidential information of a counterparty of the OPA's, Bruce Power. These input assumptions are with respect to the out of service and in service dates of the Bruce units which are being refurbished under the terms of the Bruce Power Refurbishment Implementation Agreement dated October 17, 2005. The OPA is not entitled to disclose this commercially sensitive confidential information unless it is legally compelled to do so by a Governmental Authority.

The OPA will in response to these interrogatories provide an electronic copy of the OPA's discounted cash flow model with the confidential information redacted. This will allow the Board and intervenors to input their own assumptions and recalculate the net present values.

Yours truly,

A handwritten signature in black ink, appearing to read 'Michael Lyle', with a stylized flourish at the end.

Michael Lyle
General Counsel & Vice President

ML/nv

Osler, Hoskin & Harcourt LLP
 Suite 2500, TransCanada Tower
 450 - 1st Street S.W.
 Calgary, Alberta, Canada T2P 5H1
 403.260.7000 MAIN
 403.260.7024 FACSIMILE

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March 6, 2008

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Ottawa

New York

Gordon M. Nettleton
 Direct Dial: 403.260.7047
 gnettleton@osler.com
 Our Matter Number: 1099714

BY ELECTRONIC MAIL & COURIER

Ontario Energy Board
 P.O. Box 2319
 2300 Yonge Street
 Suite 2700
 Toronto, ON M4P 1E4

Attention: Ms. Kirsten Walli, Board Secretary

Dear Ms. Walli:

Re: EB-2007-0050 – Hydro One Networks Inc., (“Hydro One”) Bruce to Milton Transmission Reinforcement Project

I am writing to you on behalf of Hydro One. Pursuant to Paragraph 3 of Procedural Order No. 5, we wish to advise the Board and parties that Hydro One is unable to provide responses to Pollution Probe Interrogatories 19(a) and 19(d).

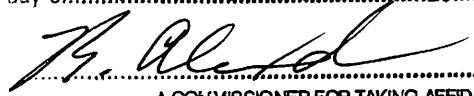
Hydro One has consulted with the Ontario Power Authority (“OPA”) in respect of these requests and can advise that these interrogatories concern commercially sensitive confidential information disclosed under the terms of confidentiality agreements between the OPA and each of Bruce Power and Ontario Power Generation.

Hydro One apologizes to all parties for the approximately two-hour delay in providing this response, which resulted from ongoing consultation processes undertaken between counsel for Hydro One and the OPA.

Yours very truly,


 for: Gordon M. Nettleton
 GMN:njm

- c. All Interested Parties in EB-2007-0050
 Andrew Barrett, Vice-President Regulatory Affairs, Ontario Power Generation
 Michael Lyle, General Counsel and Vice-President Regulatory Affairs, Ontario Power Authority

This is Exhibit K referred to in the
 affidavit of Jack Gibbons
 sworn before me, this 20th
 day of March, 2008

 A COMMISSIONER FOR TAKING AFFIDAVITS

Osler, Hoskin & Harcourt LLP
 Suite 2500, TransCanada Tower
 450 - 1st Street S.W.
 Calgary, Alberta, Canada T2P 5H1
 403.260.7000 MAIN
 403.260.7024 FACSIMILE

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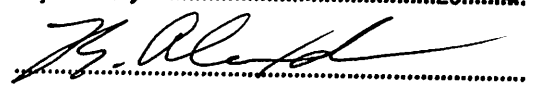
New York

Gordon M. Nettleton
 Direct Dial: 403.260.7047
 gnettleton@osler.com
 Our Matter Number: 1099714

BY ELECTRONIC MAIL & COURIER

Ontario Energy Board
 P.O. Box 2319
 2300 Yonge Street
 Suite 2700
 Toronto, ON M4P 1E4

Attention: Ms. Kirsten Walli, Board Secretary

This is Exhibit L referred to in the
 affidavit of Jack Gibbons
 sworn before me, this 20th
 day of March 2008

 A COMMISSIONER FOR TAKING AFFIDAVITS

Dear Ms. Walli:

**Re: EB-2007-0050 – Hydro One Networks Inc., (“Hydro One”) Bruce to Milton
 Transmission Reinforcement Project**

I am writing to you on behalf of Hydro One and in respect of the notification requirements set out in Paragraph 3 of Procedural Order No. 5.

On March 10, 2008 Hydro One received Interrogatories from Powerline Connections, the Ross Group and Pollution Probe. The Ross Group also provided Interrogatories to the Ontario Power Authority (“OPA”) and to the Independent Electricity System Operator (“IESO”) under separate cover. As indicated previously, Hydro One has been consulting with each of the OPA and the IESO throughout this process, given their roles in this application. We have presumed that the separate Interrogatories were intended to be sent to Hydro One and for Hydro One to consider these for the purposes of Paragraph 3 of Procedural Order No. 5. Hydro One’s responses below are made on this basis.

As a general comment Hydro One notes that the identified Interrogatories fall into several categories of concern: (a) Interrogatories that consider topics to be considered in the environmental assessment process, such as electromagnetic fields (“EMF”) and noise impacts; (b) Interrogatories that request broad-based disclosure, the relevance and purpose of which has not been demonstrated; (c) Interrogatories that request disclosure of generator-related commercially sensitive information, information subject to solicitor-client privilege, information that is not available at the level of detail requested, or (d) Interrogatories that seek the disclosure of information that could reasonably be expected to cause prejudice to Hydro One’s negotiations and/or expropriation of interests in land required for the Project.

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Powerline Connections Interrogatories 26-41 and 45

These Interrogatories concern the study and potential effects of EMFs, Hydro One's operating practices concerning EMF readings, and the reasons for taking such readings.

As the Board will recall, argument on whether the topic of EMFs should be included in the Issues List for this proceeding was made by counsel for Powerline Connections during the Issues Day proceeding (see: pages 148-171 of the transcript). At pages 5 and 6 of its Decision and Order the Board found that health and/or socio-economic impacts of EMFs are beyond the scope of this proceeding.

The technical design and the forecast costs of the Project are based upon established planning practices which incorporate EMF mitigation. The design is not, however, based upon specific, pre-existing magnetic field ("EMF") studies carried out along the existing Bruce to Milton transmission line. In the present circumstances, EMFs have not been identified to be a material technical attribute requiring advanced study and affecting Project design, cost, or the reliability or quality of the electricity service intended to be provided by the Project.

Hydro One has studied expected changes in the EMF levels at the existing and future edge of the corridor right-of-way in response to perceived human health concerns of the Project. This material will be part of the environmental assessment of the Project. Consistent with the Board's Issues Day Decision, Hydro One therefore considers these matters to fall outside of the scope of the OEB leave to construct proceeding and the Issues List. As such, and for purposes of the record in this proceeding, Hydro One declines to respond to Interrogatories that request production of such studies or related information.

Powerline Connections Interrogatories 47, 93- 94, 105-110, 123, and 137-142

Several of the Interrogatories contain duplicative requests. Duplicates of the questions will not be responded to.

Powerline Connections Interrogatories 51, 96 and 120

The subject-matter of these Interrogatories, in part, requests the disclosure of commercially sensitive information that Hydro One anticipates using for the purpose of negotiating the acquisition of land interests required for the Project. Issues respecting land compensation have been determined by the Board to be outside the purview of this leave to construct process. The Board was clear in its letter to landowners on May 25, 2007: compensation issues are not the subject of this proceeding. In addition, on page 6 of its Motions Day decision, dated July 4, 2007, the Board ruled as follows:

Osler, Hoskin & Harcourt LLP
 Suite 2500, TransCanada Tower
 450 - 1st Street S.W.
 Calgary, Alberta, Canada T2P 5H1
 403.260.7000 MAIN
 403.260.7024 FACSIMILE

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Therefore, while the Board considers alternatives to the project, those alternatives are assessed in the context of the specific factors listed in Section 96(2). These factors do not include the impact on individual landowners, except to the extent that the impact could materially affect the price (economics), reliability or quality of service to consumers generally as described in section 96(2). The environmental and socio-economic impacts of alternative routes are considered in the EA process. Individual land rights are considered in the context of a proceeding under the expropriations process.

Hydro One therefore does not consider such questions to be proper and relevant to this proceeding and on that basis declines to provide responses.

Powerline Connections Interrogatories 44, 50, 52, 53, 55-56, 64-67, 93-95, 112, and 121-122.

The subject-matter of these Interrogatories concerns Hydro One's historical land acquisition and compensation practices. These matters do not pertain to any of the Issues identified for consideration in this proceeding. Land compensation matters were determined by the Board to fall outside of the purview of this leave to construct process: see the Board Letter dated May 25, 2007 and the Motions Day decision. The Board also explained in its Issues Day Decision and Order that health and socio-economic matters are beyond the scope of this proceeding (page 6) and that issues must be framed in respect of price, reliability and quality of electricity and that it is not appropriate to consider a detailed breakdown of potential costs from individual land parcels (page 11). Hydro One therefore does not consider such questions to be proper and relevant to this proceeding and on that basis declines to provide responses.

Powerline Connections Interrogatories 57-63 and 103-104.

The subject-matter of these Interrogatories concerns Hydro One's noise impacts resulting from construction of the project and routine operational maintenance practices employed by Hydro One in respect of the care and upkeep of its existing facilities. Noise related impacts are socio-economic effects that will be considered as part of the environmental assessment of the Project. Noise impacts do not concern the List of Issues. As outlined above, the Board was clear in its Issues Day Decision and Order that health and socio-economic impacts are beyond the scope of this hearing. Hydro One therefore declines to provide responses to these Interrogatories.

Powerline Connections Interrogatory 68

The subject-matter of this Interrogatory concerns all internal information in the possession of the Ontario Power Authority ("OPA") relating to the comparison of alternatives to the applied-for Project. OPA is not prepared to respond to such a request. The information that OPA is relying upon, for the evaluation of alternatives, has been

Osler, Hoskin & Harcourt LLP
 Suite 2500, TransCanada Tower
 450 - 1st Street S.W.
 Calgary, Alberta, Canada T2P 5H1
 403.260.7000 MAIN
 403.260.7024 FACSIMILE

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produced and is on the record. Hydro One and OPA expect that the Board will make determinations as to whether such evidence is sufficient, or not, in granting the applied-for relief.

Powerline Connections Interrogatory 74

The subject-matter of this Interrogatory requests confirmation of facts related to baseline environmental criteria unrelated to the Issues List set out in Procedural Order No. 5. As such Hydro One declines to respond to this Interrogatory.

Ross Group Interrogatory 1.1(i)

The subject-matter of the Interrogatory concerns the production and disclosure of information that pre-dates Hydro One's existence and relates generally to the question of the adequacy of the transmission system as it existed in 1985, some 23 years ago. Hydro One does not consider such matters to be relevant in this proceeding and as such is not prepared to conduct the search that would be necessary to address why the Ontario transmission system may have been considered by a party to be "sufficiently scalable" for eight units at Bruce in 1985. This is beyond the scope and the issues to be considered in this proceeding.

Ross Group Interrogatory 1.2

The subject-matter of this Interrogatory is an all-encompassing disclosure of "all transmission records from 1985 to present." No cogent reason is provided for such a request. No attempt has been made to relate such a request to any part of Hydro One's application or the relief sought, or any of the Issues approved in Procedural Order No. 5. The justification that is provided states "Federal Regulations require keeping generation records for seventy-five years after a unit is decommissioned." Hydro One fails to see how this has any bearing on the request that is made. Hydro One owns and operates transmission and not generation facilities.

Ross Group Interrogatory 2.1 (to Hydro One) and Interrogatory 17 (to OPA)

The subject-matter of these Interrogatories concern the disclosure of information that is protected by solicitor-client privilege. It is information not intended to be disclosed publicly and is not, in any event, information which Hydro One intends to rely upon for purposes of the relief that is sought as it is not contained or referenced in its application. Interpretations afforded to Government documents such as Land Use Policy are not matters of evidence but rather legal argument. As a result Hydro One is not prepared to disclose the requested information.

Osler, Hoskin & Harcourt LLP
 Suite 2500, TransCanada Tower
 450 - 1st Street S.W.
 Calgary, Alberta, Canada T2P 5H1
 403.260.7000 MAIN
 403.260.7024 FACSIMILE

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Ross Group Interrogatory 2.2

The subject-matter of this Interrogatory concerns the production of internal memos and reports relating to the interpretation provided to the Provincial Land Use Policy. The information requested does not exist and therefore a response cannot be provided. The Land Use Policy has been interpreted through the consideration of its plain and ordinary meaning and taking into account well-recognized, longstanding public policy objectives associated with minimizing overall impacts to the environment and the public.

Ross Group Interrogatory 9.1

The subject-matter of this Interrogatory requests the disclosure of the short circuit studies. The studies are included as part of the Customer Impact Assessments. This information cannot be disclosed as indicated in Hydro One's response to Energy Probe Interrogatory 8.

Ross Group Interrogatory 9.2 and Pollution Probe Interrogatories 28, 30(e), 32(d), 43(a)(iv), (b)(iv-vi), 46(a)(ii)

The subject-matter of these Interrogatories concerns the disclosure of all saved cases which the IESO has prepared in relation to the modelling and the analysis of the transmission system for the purposes of the System Impact Assessments ("SIA"). The steps necessary to prepare, annotate and make available the requested information, in a user-friendly format, would be substantial and consume time and resources well beyond that available to the IESO. As an alternative to the requests found in these Interrogatories, and to better utilize the IESO's resources, the IESO is prepared to consult with the Ross Group and Pollution Probe to identify a reasonable number of studies for their use. This information could then be used by the Ross Group or Pollution Probe as evidence in this proceeding.

Pollution Probe Interrogatories 34-37

The subject matter of these Interrogatories concerns historical statistics for the circuits which comprise the entirety of the Ontario grid, both on an individual circuit and aggregated circuit basis. While Hydro One will undertake reasonable efforts to provide responses to these Interrogatories, at this time it is unclear whether all requested information is readily available.

Pollution Probe Interrogatories 38, 42(a), 47(a) and (c), 49(d), 50(a) and 51(a)

The subject-matter of these Interrogatories requests the disclosure of documents (such as working papers) relating to analysis that has been included in earlier responses. Disclosure would reveal details that have previously been considered by the OPA and

Osler, Hoskin & Harcourt LLP
Suite 2500, TransCanada Tower
450 - 1st Street S.W.
Calgary, Alberta, Canada T2P 5H1
403.260.7000 MAIN
403.260.7024 FACSIMILE

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Hydro One to be commercially sensitive and confidential. Please refer to letters from OPA and Hydro One dated March 6, 2008.

Yours very truly,


for Gordon M. Nettleton
GMN:njm

c. All Interested Parties in EB-2007-0050

DATE: 20011116
DOCKET: C35181

COURT OF APPEAL FOR ONTARIO

MORDEN, ABELLA and ROSENBERG J.J.A.

B E T W E E N :)
)
ONTARIO HUMAN RIGHTS) Naomi Overend and Jennifer
COMMISSION) Scott for the Appellant
)
Applicant (Appellant)) Michael Hines for the Respondent
) Dofasco Inc.
- and -)
) Fiona Campbell for the
DOFASCO INC., CATHERINE) Complainant Catherine Jeffrey
JEFFREY and THE BOARD OF)
INQUIRY (<i>Human Rights Code</i>)) Margaret Leighton for the Board
) of Inquiry
Respondents (Respondents in Appeal))
)
)
)
) Heard: June 14, 2001

On appeal from an order of the Divisional Court (Hartt, Carnwath and Matlow JJ.) dated June 22, 2000.

MORDEN J.A.:

[1] This appeal is concerned with the nature and extent of the power of a board of inquiry under the *Human Rights Code*, R.S.O. 1990, c. H. 19 to order a complainant, who alleges that she was discriminated against in her employment on the basis of a physical handicap, to disclose medical and other documents relating to her.

[2] I shall, shortly, describe what has taken place in this proceeding but say now that the board of inquiry ("the board") which is composed of one person, Matthew D. Garfield, made an order, on a motion by Dofasco Inc., requiring the complainant, Catherine Jeffrey, to disclose certain documents. I shall set out the terms of the order, which are considerably more complex than this brief statement indicates, later in these reasons.

[3] The appellant, the Ontario Human Rights Commission (“the commission”), brought an application to the Divisional Court for judicial review of the board’s order, which the court dismissed. The commission, with leave, appeals to this court from this decision.

The Underlying Facts Relating to the Disclosure Order

[4] The facts relating to the board’s disclosure order and to the judicial review proceeding, which is before the court, are, in the main, those set forth in the pleadings filed with the board. Pleadings are provided for in the Rules 35 to 37 of the board’s Rules of Practice.

[5] The commission’s pleading alleged that the complainant was employed by Dofasco from 1976 to 1994. She worked as a crane operator. She was injured in 1988 and re-injured in 1990. She was diagnosed with chronic pain disability/fibromyositis/fibromyalgia. This condition made her incapable of working as a crane operator.

[6] The complainant was off work between 1990 and 1994 but continued to have contact with Dofasco Inc. from time to time. On March 1, 1994 Dofasco, for the first and only time, raised the possibility of assigning her reasonably suitable alternative work, as a switchboard operator. Her response was to defer the decision on whether or not to accept this work until after she had consulted with her specialist doctor. She informed Dofasco of this. Because of her doctor’s absence, she was unable to see him until April 26, 1994.

[7] Dofasco was unwilling to wait for this and demanded that the complainant report to Dofasco Medical Services on March 11 and report for work on March 14. She did report to Dofasco Medical Services on March 11. Despite knowing that she was unable to see her specialist until April 26, Dofasco Inc. terminated her employment forthwith after she did not report for work on March 14, claiming that her contract of employment had been frustrated because of her “prolonged and ongoing refusal to report for available and suitable work”.

[8] The commission alleged that the facts disclosed the following issues:

- (a) The complainant was terminated because of her handicap, which constitutes *prima facie* discrimination;
- (b) Dofasco did not attempt to accommodate the needs arising from the complainant’s handicap to the point of “undue hardship”, and therefore cannot establish that the complainant was “incapable” of her essential duties;

- (c) In fact, Dofasco was not engaged in a good faith process of accommodation, given the timing of its job offer, its refusal to wait for the complainant to get required medical advice, and its refusal to consider any other options;

(The commission raised additional issues in its pleading relating to harassment and reprisals on the part of Dofasco. They are not relevant to the proceeding before the court.)

[9] This is followed by the general allegation that Dofasco discriminated against the complainant on the ground of handicap contrary to ss. 5 and 9 of the *Human Rights Code*.

[10] The commission sought the following remedies:

- (a) Compensation for lost wages and benefits for the complainant for the period March 15, 1994 to the present, less any amounts of such compensation the complainant received for this period from the WSIB or CPP;
- (b) Compensation for the intrinsic value of the rights infringed in the amount of \$10,000;
- (c) Compensation for mental anguish suffered because of the wilful or reckless manner of infringement in the amount of \$10,000;

[11] Dofasco's pleading is relatively long and detailed. A summary set forth in paragraph 37 reads:

To summarize, for four years the Complainant consistently asserted inability to perform productive work for Dofasco, apparently supported by her physicians, while failing to provide relevant medical information and emphasizing her desire for WCB vocational training. In the four years between her second accident and her termination, the Complainant never stated she was ready to return to work or that her physicians had cleared her to return to work. During that time period, she never suggested there were any particular jobs or bundles of duties that she could productively perform, nor, to the Respondent's knowledge, did any of her physicians. During her four year absence from work, the Complainant repeatedly took the position that (initially) she was not ready to return to work, and

(later) that she was unlikely to ever be able to return to work at Dofasco. The Commission's Pleadings do not refer to any indication from the Complainant that she was, either prior to or subsequent to her termination, medically fit to return to any productive job at Dofasco. This background, coupled with her refusal to even attempt an ultra-light duty job, the WCB's concurrence that she could do the work and her clear focus on maintaining WCB eligibility, constituted ample grounds for terminating the employment relationship. For four years, the Complainant had not fulfilled the basic "essential duty" of an employee to, i.e., perform productive work. Apart from wishful thinking, there was no reason to believe that, whatever accommodation Dofasco made for her, she ever would. A "window of opportunity", arising out of the broader corporate restructuring process, became accessible for a short period of time [earlier in Dofasco's pleading it was alleged that there was a "pressing" need to fill the switchboard operator's vacancy]. Dofasco acted reasonably in stating its preparedness to accept medical clearance from a doctor other than the absent specialist and its readiness to physically modify the worksite. The Complainant declined to take advantage of this, and the window "closed". There was no prospect that such an opportunity would arise again in the foreseeable future. Dofasco then proceeded to exercise its rights of termination under Section 17 of the *Code*.

Dofasco also pleaded:

Dofasco has now learned that in August, 1993, the Complainant was awarded disability benefits under the Canada Pension Plan. Dofasco has requested but has not yet received documents explaining why this decision was reached despite the findings of Dr. Darracott in November, 1992 [that "from a physical point of view, there [was] no clinical evidence to suggest she has physically disabling pathology"].

Under the Canada Pension Plan, an applicant can only receive a CPP Disability Pension if they are "incapable regularly of pursuing any substantially gainful occupation" and their disability is "likely to be long continued and of indefinite duration".

[12] Dofasco then raised the following issues:

At the time of her termination, was the Complainant capable of performing any work, or was she “incapable of pursuing any substantially gainful occupation”, as her CPP Disability Pension status would suggest?

If the Complainant now claims to have been capable of performing work in March, 1994, should the Board of Inquiry dismiss this Complaint as an abuse of process, given the fact that such a position directly contradicts the position she has successfully taken before the Canada Pension Plan i[n] respect of the same time period?

If, as her CPP status would suggest, the Complainant was totally unemployable in March, 1994, did Dofasco have any obligation at all to accommodate her “needs”?

Assuming the Complainant was capable of some work in March, 1994, was she capable of the switchboard duties?

Assuming the Complainant’s needs were such that some measure of accommodation would have permitted her to perform work in March, 1994, were Dofasco’s efforts at accommodation sufficient to accommodate those needs?

Did the Complainant, herself, take all reasonable steps available to her to participate in the accommodative process?

The Motion Before The Board

[13] After the exchange of pleadings, Dofasco brought a motion for:

An Order compelling production of the files of Dr. Leong, Dr. Buckley, Dr Kean and Dr. Forrest relating to the Complainant during the period between March 22, 1990 and the present date;

An order compelling production of the files of any other medical practitioner who examined or treated the

Complainant during the period between March 22, 1990 until the present date;

An order compelling production of all files maintained by the Workplace Safety and Insurance Board regarding the Complainant;

An order compelling production of the Complainant's medical file maintained by the Medical Department of Dofasco Inc.

An order compelling production of the Complainant's disability pension file maintained by the Canada Pension Plan;

An order compelling production of true copies of the Complainant's income tax returns from 1993 until the present as well as true copies of any documents received by the Complainant from Revenue Canada which confirm or correct any of those returns.

Alternatively, an order requiring the Complainant's written consent to the disclosure of each of the foregoing documents to the Respondent's counsel.

Such further and other relief as to this Board of Inquiry seems just.

[14] The board heard the motion on December 16, 1999 and gave its decision orally that day. It stated the competing submissions of the parties as follows:

Dofasco brings a motion for production of medical files, WCB file, CPP file and income tax returns (TIs and notices of assessment) from the Complainant. Dofasco argues that it should have the same degree of access to original documents in a file as the Complainant. Dofasco also submits that it is being denied the ability to know the case it has to meet, prepare its defence under section 17 of the Code, and deal with central issues in this case including the quantum of damages. Dofasco has highlighted instances of imperfect disclosure in these proceedings including sequentially numbered documents not produced by the Complainant.

The Commission opposes the motion and argues that the relief sought is too wide and that Dofasco is not entitled to the production of files *per se* and documents not relevant to the handicap of the Complainant (chronic pain disability, fibromyositis, fibromyalgia). The Commission argues that the Board's rules do not contemplate such a wide net of disclosure – a “fishing expedition”.

Though not present, the Complainant, through letters by her counsel in the motion materials, indicates that she has met her disclosure obligations under the Rules.

[15] After stating that “[t]he motion is granted in part”, the board gave the following reasons:

The test for production is arguable relevance. Section 5.4(1) of the *Statutory Powers Procedure Act* and Board of Inquiry Rule 42 give me a broad power to order disclosure. Rule 42 confers on me the power to order disclosure of “...anything else the panel considers appropriate for a full and satisfactory understanding of the issues in the proceeding.”

The threshold for disclosure here, as in the courts, is not a very high one. There must be some relevance and the production must have some nexus to issues before the Board. The general movement is toward greater disclosure. This is reflected by the Ontario Court of Appeal's comments in *Cook v. Ip* (1985), 5 C.P.C. (2d) 81, at 86:

There can be no doubt that it is in the public interest to ensure that all relevant evidence is available to the Court. This is essential if justice is to be done between the parties...The production of medical records is thus fundamental to a Court's determination of the nature, extent and effect of the injuries which may have been suffered and the appropriate measure of damages flowing from them.

Dofasco has satisfied me that the nature of the documents sought (some of which are known and some of which are not known) are crucial to knowing its case to be met and preparing its key defence under section 17 of the Code. The motion materials clearly show that production by the Complainant has been incomplete. My goal is to balance the needs of Dofasco to know and prepare its case and the confidentiality of the Complainant inherent in such disclosure.

The Commission argues against an order of disclosure of documents from medical practitioners not enumerated by Dofasco and those parts of the file of Dr. Leong (the Complainant's family doctor) dealing with medical conditions not enumerated above. I find that ailments other than those listed above are arguably relevant to Dofasco's section 17 accommodation defence and the quantum of damages. Dofasco should not be prevented from presenting such arguments.

I find further that information contained in the Complainant's files at the WSB and CPP will arguably be relevant to the issues in this proceeding. Employment related income is clearly relevant to issues in this proceeding, including the quantum of damages. Information in the Complainant's file at Dofasco's medical department will no doubt be relevant to key issues in this proceeding.

[16] Following this, the board made its "order" as follows:

1. The Complainant shall provide to her counsel an executed Consent to the disclosure of the file of Dr. Leong, Dr. Buckley, Dr. Kean and Dr. Forrest relating to the Complainant during the period between March 22, 1990 and the present date. Complainant's counsel shall then provide said Consents to the doctors and request production by January 15, 2000.

2. The Complainant shall provide a list to Mr. Hines [counsel for Dofasco] by January 31, 2000 of any other medical practitioner who examined or treated her during the period between March 22, 1990 until the present date, the doctor's area of expertise or specialty, the dates of said visits, and the ailment or condition treated.

3. The Complainant shall provide to her counsel executed Consents to the disclosure of her files maintained at the Workplace Safety and Insurance Board, at the Canada Pension Plan regarding her disability and her medical file maintained by Dofasco's medical department, all for the period between March 22, 1990 until the present date. Complainant's counsel shall then provide said Consents to the above entities and request production by January 15, 2000.

4. The Complainant shall produce to Mr. Hines true copies of her T1 income tax returns and notices of assessment from 1993 until the present. Said documents may be edited by the Complainant so that non-employment income parts are expunged. Production of the income tax documents as above shall be given by January 31, 2000.

5. The Complainant shall provide a sworn Affidavit of Documents as stipulated in the Rules of Civil Procedure dealing with documents obtained from the above sources. The Affidavit shall also include a section listing those documents not provided to Dofasco for reason of not being arguably relevant. Said affidavit, including copies of productions shall be provided to Mr. Hines by January 31, 2000. Mr. Hines may see the originals of productions upon request to the Complainant's counsel.

6. Disbursements of the productions above shall be borne by Dofasco.

7. The Complainant's counsel shall get Mr. Hines' approval as to the form and content of the Consents and letters of request.

The Application for Judicial Review

[17] The commission brought an application for judicial review of the board's decision before the Divisional Court. It sought, in the notice of application, an order quashing the board's order and remitting the matter to the board for "a decision in accordance with proper legal principles to be specified" and stated the following grounds:

In making this order, the Board of Inquiry:

- i) Made an error of law in its interpretation of s. 17 of the *Human Rights Code*;
- ii) Made an error of law in its interpretation of the Rules of Practice of the Board of Inquiry in placing even more onerous procedural and substantive obligations on the complainant with respect to disclosure than would the *Rules of Civil Procedure*, despite the fact that the Rules of Practice of the Board of Inquiry specify, for parties other than the Human Rights Commission, only that disclosure must be made of documents on which that party will rely;
- iii) Exercised its discretion unreasonably, or patently unreasonably, in requiring disclosure concerning medical conditions unrelated to the handicaps alleged in the complaint, in the absence of any evidence that the complaint had *any* such conditions which might have affected her ability to work. This constitutes, almost by definition, a “fishing expedition” [emphasis in original].

[18] The Divisional Court (Hartt, Carnwath and Matlow JJ.) dismissed the application. Carnwath J. gave the following reasons for the court orally at the conclusion of the hearing:

We all agree the application fails. We find it would be unreasonable to interfere with the interim decision of the Board, a decision devoid of exceptional or extraordinary circumstances. The hearing before the Board should not be fragmented and should be permitted to run its course. The section 17 issue should receive a full hearing by the Board. Any aggrieved party may appeal, based on a full evidentiary record. Moreover, records are arguably relevant to the determination of a remedy and quantum of damages.

We find the Board’s decision was a reasonable exercise of its discretion at this preliminary stage. In carrying out the balancing of the fourth part of the test in *A.M. v. Ryan*, [1997] 1 S.C.R. 157, we find the Board’s exercise of discretion to be reasonable, particularly in the light of the acknowledgment of counsel that the usual undertaking of Mr. Hines to maintain confidentiality is in effect.

The panel, in the exercise of its discretion, awards party-and-party costs of \$3,500.00, inclusive of fees and disbursements, plus G.S.T. to Dofasco Inc. The costs are awarded solely against the Commission.

Legislative Provisions

[19] Before setting forth the issues argued before this court and my reasons relating to them, I set forth the relevant legislative provisions in the *Human Rights Code*, R.S.O. 1990, c. H. 19, as amended, the Rules of Practice made by the Board of Inquiry, and the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S. 22, as amended.

Human Rights Code

5. – (1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, same-sex partnership status, family status or handicap.

....

9. No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part.

....

17. (1) A right of a person under this Act is not infringed for the reason only that the person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of handicap.

(2) The Commission, the board of inquiry or a court shall not find a person incapable unless it is satisfied that the needs of the person cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

....

35.(1) There shall be a board of inquiry for the purposes of this Act composed of such members as are appointed by the Lieutenant Governor in Council.

....

(5) The board of inquiry may make rules regulating its practice and procedure and generally for the conduct and management of its affairs and such rules are not regulations within the meaning of the *Regulations Act*.

....

39. (1) The board of inquiry shall hold a hearing,

(a) to determine whether a right of the complainant under this Act has been infringed;

(b) to determine who infringed the right; and

(c) to decide upon an appropriate order under section 41,

and the hearing shall be commenced within thirty days after the date on which the subject-matter of the complaint was referred to the board.

(2) The parties to a proceeding before the board of inquiry are,

(a) the Commission, which shall have the carriage of the complaint;

(b) the complainant;

(c) any person who the Commission alleges has infringed the right;

(d) any person appearing to the board of inquiry to have infringed the right;

....

(4) Where the board exercises its power under clause 12 (1) (b) of the *Statutory Powers Procedure Act* to issue a summons requiring the production in evidence of

documents or things, it may, upon the production of documents or things before it, adjourn the proceedings to permit the parties to examine the documents or things.

Rules of Practice – Ontario Board of Inquiry – Effective November 1, 1996

1. These Rules apply to all proceedings of the Board of Inquiry....

MUTUAL DISCLOSURE

40. The Human Rights Commission, shall provide full disclosure of the results of its investigation including, but not limited to, witness statements, documents, and evidence relating to the complaint, to all parties and to any other person the panel directs, at least ten (10) days prior to the first scheduled mediation date or thirty (30) days before the case management-prehearing if no mediation is scheduled.

41. All other parties except the Human Rights Commission, shall deliver to all parties full disclosure of the information and evidence including, but not limited to, witness statements and documents it will rely on to support its case at least ten (10) days prior to the first scheduled case management-prehearing.

42. At any time in a proceeding, a panel may order any party to deliver to any other party further particulars, physical or documentary evidence, expert(s)' reports, lists of witnesses and witness statements for the purposes of the hearing, and anything else the panel considers appropriate for a full and satisfactory understanding of the issues in the proceeding.

43. If a party fails to disclose in accordance with these Rules or an order of the panel, the party may not refer to or enter the document or physical evidence at the hearing without an order or a ruling of the panel which may be on such conditions as the panel considers appropriate.

Statutory Powers Procedure Act

2. This Act, and any rule made by a tribunal under section 25.1 shall be liberally construed to secure the just,

most expeditious and cost-effective determination of every proceeding on its merits.

....

5.4(1) If the tribunal's rules made under section 25.1 deal with disclosure, the tribunal may, at any stage of the proceeding before all hearings are complete, make orders for,

- (a) the exchange of documents;
- (b) the oral or written examination of a party;
- (c) the exchange of witness statements and reports of expert witnesses;
- (d) the provision of particulars;
- (e) any other form of disclosure.

(1.1) The tribunal's power to make orders for disclosure is subject to any other Act or regulation that applies to the proceeding.

(2) Subsection (1) does not authorize the making of an order requiring disclosure of privileged information.

....

8. Where the good character, propriety of conduct or competence of a party is an issue in a proceeding, the party is entitled to be furnished prior to the hearing with reasonable information of any allegations with respect thereto.

....

12(1) A tribunal may require any person, including a party, by summons,

....

(b) to produce in evidence at an oral or electronic hearing documents and things specified by the tribunal,

relevant to the subject-matter of the proceeding and admissible at an oral or electronic hearing.

....

25.0.1 A tribunal has the power to determine its own procedures and practices and may for that purpose,

(a) make orders with respect to the procedures and practices that apply in any particular proceeding; and

(b) establish rules under section 25.1.

25.1(1) A tribunal may make rules governing the practice and procedure before it.

(2) The rules may be of general or particular application.

(3) The rules shall be consistent with this Act and with the other Acts to which they relate.

(4) The tribunal shall make the rules available to the public in English and in French.

(5) Rules adopted under this section are not regulations as defined in the *Regulations Act*.

(6) The power conferred by this section is in addition to any power to adopt rules that the tribunal may have under another Act.

32. Unless it is expressly provided in any other Act that its provisions and regulations, rules or by-laws made under it apply despite anything in this Act, the provisions of this Act prevail over the provisions of such other Act and over regulations, rules or by-laws made under such other Act which conflict therewith.

The Issues Raised by the Commission

[20] The basic issues raised by the commission are that the Divisional Court erred in applying the review standard of reasonableness rather than correctness and that the board committed jurisdictional error in ordering extensive disclosure and productions of records that (a) were in the hands of non-parties to the proceeding and (b) were privileged. The commission also argued that the Board erred in ordering disclosure of documents that were not arguably relevant to the proceeding and documents other than those on which the disclosing party intended to rely.

What the Board and the Divisional Court Decided

The Board's Order

[21] Before the issues raised by the commission can be properly addressed, it is essential to have an accurate understanding of the meaning and scope of the board's order. No doubt, and I say this with respect to the board, its order could be expressed more clearly than it is. Following the hearing of this appeal, we sought further submissions in writing from counsel for each party on particular questions relating to the meaning of the order. On the basis of all the submissions made, I now express my opinion on what the board did order in so far as it relates to the issues in this proceeding.

[22] I think that paragraph 5 in the order, which relates to the provision of an affidavit of documents, is the key paragraph in the order. It refers to the "documents obtained from the above sources." I take this to refer to the documents ("files") referred to in paragraphs 1 and 3 of the order. I do not interpret it as referring to paragraph 2, which does not refer to either files or documents, or to paragraph 4, which relates to the complainant's income tax returns and provides that they be produced to Mr. Hines, counsel for Dofasco. No argument was directed to paragraph 4 and I do not regard it as being a contentious matter in this proceeding.

[23] The difficulty in interpreting paragraph 5 is that, literally, it provides that both the affidavit of documents and copies of the productions are to be provided to Mr. Hines by a certain date. In my view, the only sensible meaning of the paragraph is that the complainant is obliged to produce only those documents for which no claim of privilege (provided for in an affidavit of documents) or for which no claim to withhold production on the ground of non-arguable relevance is asserted in the affidavit. I say this because there would be no point in requiring the use of the affidavit of documents if all of the documents listed in it, including those, on proper grounds, sought to be withheld, had to be produced to the opposite party at the outset of the process. The purpose of the affidavit, as in ordinary civil litigation, is to provide a framework within which the board may subsequently determine whether claims of privilege and irrelevance should be upheld. I shall expand on this point further later in these reasons.

[24] It may be noted that this interpretation is consistent with the second sentence in paragraph 5: "The affidavit shall also include a section listing those documents *not provided to Dofasco* for reason of not being arguably relevant" (emphasis added).

[25] The commission and the complainant argue against this interpretation largely on the basis that the board had earlier said in its reasons: "I find that ailments other than those listed above are arguably relevant to Dofasco's section 17 accommodation defence and the quantum of damages." In the context of the reasons and order as a whole, I do not read this as expressing a final decision on the producibility of every document. I read it as being subject to the affidavit of documents procedure contemplated by paragraph 5.

[26] Further, it may be noted that earlier in its reasons the board stated its basis conclusion in these words: "The motion is granted in part". This meant that the moving party, Dofasco, was not successful in obtaining immediate production of the documents it sought or, at least, all of them.

[27] I would also note that my interpretation of paragraph 5 of the board's order is in accord with the meaning contended for by counsel for the board itself. Because the correct interpretation of the order relates to the question of whether the board acted within or exceeded its jurisdiction, I think that it was appropriate for the board to make a submission on the subject (Brown and Evans, *Judicial Review of Administrative Action in Canada* (1998-) at pp. 4-49 to 4-54).

The Divisional Court's Reasons

[28] It is clear that the Divisional Court did not read the board's order as I have. The court assumed that the complainant was required to produce all of the documents sought by Dofasco. For the purpose of analyzing the court's reasons, I shall accept its interpretation. The first paragraph in its reasons indicates that the commission's application was premature and that the issues respecting the production of documents should await determination until after the board had heard the complaint on its substantive merits. The court said that the "records are arguably relevant to the determination of a remedy and quantum of damages" and, further, that an aggrieved party could appeal "based on a full evidentiary record". With respect, all of this overlooks the fact that the right of the complainant to protection from production of documents that are privileged or not arguably relevant would be irreparably infringed the moment the documents were handed over to Dofasco, whether or not they were used against the complainant at the hearing.

[29] I move on to the next paragraph in the Divisional Court's reasons. I do not think that it can rightly be said that the board carried out "the balancing of the fourth part of the test in *A.M. v. Ryan*, [1997] 1 S.C.R. 157". The board made no reference to this decision. The board did say that "my goal is to balance the needs of Dofasco to know and prepare its case and the confidentiality of the Complainant inherent in such disclosure". That "goal" was to be carried out at the next stage of the proceeding, before the main hearing, after the documents for which privilege and non-relevance was claimed had been identified in the affidavit of documents.

[30] The Divisional Court went on to say that the exercise of the board's discretion was reasonable particularly in light of the "usual undertaking of Mr. Hines to maintain confidentiality [being] in effect."

[31] There is no document in the material setting forth an undertaking and no undertaking is referred to in the order, as would be expected if an undertaking was material to the order made. The board, through its counsel, informed us that "[t]he undertaking referred to by the Divisional Court was not given to the Board. The Board has no knowledge of the specific terms of the undertaking and was not asked to consider or rule on this issue."

[32] Mr. Hines informed us that he gave an undertaking "not to disclose any document (or information contained therein) to my client *or anyone else* (including, for example, potential expert witnesses) without the permission of the Board of Inquiry. It was expressly acknowledged that such permission for further disclosure could only be obtained after argument involving the commission and Mrs. Jeffrey". (Emphasis in original.)

[33] Mr. Hines said that he could not explain why the Divisional Court referred to it as "the usual undertaking". He agreed with counsel for the commission that the undertaking was "unusual."

[34] The commission informed us that, during the hearing of the motion, Mr. Hines offered an undertaking not to disclose the documents ordered produced to him to his client Dofasco but that the undertaking did not form part of the board's order on production.

[35] I, of course, have no hesitation in accepting Mr. Hines' statement that, in the course of argument he offered the undertaking he described. It appears, however, that it had no effect on the board's decision. In the circumstances, I have no doubt that the undertaking should not be taken into account in determining the meaning and legal effect of the board's order.

[36] I might add that the foregoing discussion shows that, if it is intended that an undertaking be material to the making of an order, the undertaking should be in writing and, also, referred to in the order.

The Board's General Powers relating to Disclosure

[37] Before addressing the specific jurisdictional issues raised by the commission, I shall deal with matters of a more general nature relating to the board's powers respecting disclosure.

[38] As far as history is concerned, it was the generally held view that administrative tribunals did not have an inherent power to order pre-hearing

disclosure of documents (see Mullan, *Administrative Law* (2001) at p. 242) but this could be subject to a tribunal's duty, in some cases, to order pre-hearing disclosure as part of its duty to give effect to principles of natural justice or procedural fairness: *Ontario (Human Rights Commission) v. Ontario (Board of Inquiry into Northwestern General Hospital)* (1993), 115 D.L.R. (4th) 279 (Ont. Div. Ct.); *Howe v. Institute of Chartered Accountants of Ontario* (1994), 19 O.R. (3d) 483 (C.A.), Laskin J.A. in dissent.

[39] When the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S. 22, as amended, was first enacted in 1971, S.O. 1971, c. 47, it conferred the right on a person whose "good character, propriety of conduct or competence was an issue" in a proceeding "to be furnished prior to the proceeding with reasonable information of any allegations with respect thereto" (emphasis added). This was the only right to pre-hearing disclosure conferred by the Act until 1994 and the enactment of s. 5.4 by S.O. 1994, c. 27, s. 56(12). This amendment was preceded by a proposal by the Society of Ontario Adjudicators and Regulators to amend the *Statutory Powers Procedure Act*, in several respects. The proposal respecting disclosure read as follows:

A tribunal may require disclosure at any stage of the proceedings, including

- (a) the disclosure and exchange of documents;
- (b) the examination of a party or witness;
- (c) an examination by written questions;
- (d) the inspection of property;
- (e) the filing of witness statements;
- (f) the provision of particulars.

See Appendix III of *Administrative Law – Issues and Practice*, Anisman and Reid ed., (1995) at page 266.

[40] The Society's brief explanation for the proposal was that it was "for greater certainty and to expedite proceedings". Before the amendment it may not have been that clear that tribunals could provide for pre-hearing disclosure, at least to the extent of having the power to order such disclosure. In any event, it can be seen from s. 5.4(1) that the Legislature did not enact a general provision conferring powers relating to disclosure on all tribunals. It restricted the power to only those tribunals that had made rules dealing with disclosure under s. 25.1.

[41] Having regard to the foregoing, if a tribunal was of the view that power relating to pre-hearing disclosure was not relevant to or appropriate for its proceedings, it would not make rules dealing with disclosure. Obviously, the Board of Inquiry provided for in the *Ontario Human Rights Code* thought that power to make orders relating to pre-hearing disclosure was important to its processes because it made Rules of Practice which included rules dealing with disclosure (Rules 40-44) which came into effect on November 1, 1996. It appears that these rules were made under both s. 25.1 of the *Statutory Powers Procedure Act* and s. 35(5) of the *Human Rights Code*. It may be noted that each of these statutory enabling provisions was enacted by the same statute, S.O. 1994, c. 27: s. 56(38) for the *Statutory Powers Procedure Act* and s. 65(10) for the *Human Rights Code*.

[42] I shall now consider some of the terms in the disclosure scheme. The first observation relates to the meaning of the key word "disclosure" in s. 5.4 of the *Statutory Powers Procedure Act* and in the board's rules. As the context of s. 5.4 and the rules make clear, the word clearly extends to the obligation of a party to furnish to the other party documents in its possession for the other party's inspection. I mention this because in the *Rules of Civil Procedure*, R.R.O. 1990, Regulation 194, as amended, "disclosure" means something less: the disclosure in a party's affidavit of documents of the existence of documents and does not extend to making the documents available to the other side for inspection. This latter step is called production. Disclosure and production in the *Rules of Civil Procedure* together comprise the total process of documentary discovery. See, in particular, rules 30.01 to 30.05.

[43] The foregoing analysis does not mean that under s. 5.4 and the board's rules the board cannot make orders which are part of, or a step in, the complete disclosure process as long as their purpose is to lead to the proper production of documents, e.g. an order directing the preparation and delivery of an affidavit of documents. This power would be included in the board's general power relating to disclosure. This observation is relevant to the board's order in this case, which provided for an affidavit of documents as a prelude to ruling subsequently on what documents should be produced.

[44] My second observation relates to the first. It can be seen at a glance that the disclosure provisions relating to the board are substantially fewer and much less detailed than those provided for in the *Rules of Civil Procedure*. It appears to me that what is expected with respect to the board's powers is that, in many proceedings before the board, the powers would not have to be exercised because parties would voluntarily exchange all relevant documents. In other proceedings the board might be required to make any one or more of a wide range of particular orders provided that they are directed toward the ultimate proper production of documents to the party seeking production.

The Jurisdiction of the Board to Make the Orders Challenged in this Proceeding

[45] I should mention at this point that, by reason of my interpretation of the board's order, which is different from that of the Divisional Court, it is not necessary to

consider the appropriate standard of review. For the reasons I shall give, whether the standard be reasonableness or correctness, paragraphs 1, 3, and 5 in the order are within the board's authority and paragraph 2 is not. I now address the remaining issues raised by the appellant.

Did the Board Err in not Confining its Order only to Documents on which the Complainant Intended to Rely to Support Her Case?

[46] The commission submits that the board's order should have been confined to only those documents on which the complainant intends to rely to support her case. It relies upon Rule 41 in making the submission. Rule 41, standing alone, appears to support the commission's submission. There is, however, more in the governing legislation than Rule 41. Rule 42, which is backed up by s. 5.4(1) of the *Statutory Powers Procedure Act*, confers on the board the power to order any party to deliver to any other party "further ... documentary evidence ... for the purposes of the hearing, and anything else the panel considers appropriate for a full and satisfactory understanding of the issues in the proceeding". This would clearly include any documents in a party's possession that are relevant to an issue in the proceeding and which may be helpful to the other party.

[47] This interpretation accords with one of the recognized purposes of discovery, which include not only enabling a party to know the case he or she has to meet but, also, to obtain documents "which *may* ... enable the party requiring the affidavit [of documents] either to advance his own case or to damage the case of his adversary" (*Compagnie Financière du Pacifique v. Peruvian Guano Co.* (1882), 11 Q.B.D. 55 (C.A.) at 63; and see Williston and Rolls, *The Law of Civil Procedure* (1970) at pp. 894-898). This, in turn, facilitates more accurate fact-finding at the trial or hearing, if the proceeding has not earlier resulted in a settlement. I refer, generally, to *Cook v. Ip* (1985), 52 O.R. (2d) 289 (C.A.) at 292.

[48] Section 5.4(1) of the *Statutory Powers Procedure Act*, which confers power on the board to "make orders for [a] the exchange of documents", should be read as meaning the exchange of documents to carry out the basic purposes of pre-hearing disclosure and so should not be read as confined to documents on which a party intends to rely.

[49] The commission has referred to Rule 43, which is concerned with the sanction for failing to disclose, as being some indication that a party's disclosure rights are confined to receiving only those documents on which the other party will rely. Clearly, this sanction relates only to the case of non-disclosure of a document on which a party wishes to rely, but this consideration cannot reasonably result in the conclusion that the whole of the disclosure scheme is confined to documents on which the producing party intends to rely.

Did the Board Err in Ordering Non-Parties to Disclose Documents?

[50] The commission submits that the board had no power to order disclosure from the complainant's doctors because they are not parties to the proceeding. It is not necessary to determine whether the disclosure provisions in the board's rules and s. 5.4 of the *Statutory Powers Procedure Act* confer power to order disclosure by non-parties because I think that the order in question is confined to imposing disclosure obligations on a party (the complainant) and not on her doctors, who are not parties. The complainant has a general right of access to her medical records in the form of obtaining copies of them from her doctors: *McInerney v. MacDonald*, [1992] 2 S.C.R. 138. This is consistent with the general position in civil proceedings that a party has control over his or her doctors' records and has the obligation to produce them: *Holmsted and Watson, Ontario Civil Procedure* [1984-] at pp. 30-38 to 30-39; and 30-49 to 30-62.

[51] It is generally agreed that if documents under the control of non-parties are important to the fair and accurate resolution of issues it is preferable that they be produced before the hearing to avoid almost inevitable adjournments if they are produced for the first time at the hearing (see s. 39(4) of the *Human Rights Code*) and to enable each side to prepare its case more effectively. In this regard s. 2 of the *Statutory Powers Procedure Act* (which provides that the Act and rules made under it "shall be liberally construed to secure the just, most expeditious and cost-effective determination of every proceeding on its merits") may be of assistance in interpreting s. 5.4(1)(e) in a way that would support pre-hearing disclosure from third parties. This point was not argued and I express no final opinion on it.

Did The Board Err in Ordering Production of Documents that are Privileged or are Not Arguably Relevant?

[52] I mention at the outset that Mr. Hines conceded that the board had no power to order the production of privileged documents. This is correct (*Statutory Powers Procedure Act*, s. 5.4(2)) and, in the same vein, I think that the board has no power to order the production of documents that are not arguably relevant. The exercise of such a power would invade a party's privacy rights without any countervailing advantage to the administration of justice. This does not mean that a court should not show deference to a decision by the board that a particular document is arguably relevant but this, of course, is a different issue.

[53] This is an appropriate place to deal in general terms with the question of substantive relevance in this proceeding. In its reasons, the board found that "the ailments other than those listed above [chronic pain disability, fibromyositis, and fibromyalgia] are arguably relevant to Dofasco's section 17 accommodation defence and the quantum of damages." In my view, the board had a reasonable basis for this finding. There was material before the board that the complainant had satisfied the Canada Pension Plan administrators that she was "incapable of pursuing any substantially gainful occupation."

[54] Dofasco's position, accepted by the board, is that the evidence relating to this disability benefit is relevant to its defence under s. 17(1) of the *Human Rights Code* that

the complainant was “incapable of performing or fulfilling the essential duties or requirements” of work at Dofasco. Further, there was a rational basis for the board’s finding that the “motion materials clearly show that production by the complainant has been incomplete.”

[55] In dealing with the specific issues of privilege and non-relevance I shall first consider paragraph 5 in the board’s order which relates to the provision by the complainant of an affidavit of documents and copies of production. I have, earlier in these reasons, set forth my interpretation of this paragraph. It appears to be concerned with the documents in the possession of the doctors named in paragraph 1 and with the documents referred in paragraph 3, which are in the files of the Workplace Safety and Insurance Board, the Canada Pension Plan, and Dofasco’s medical department. I shall then consider paragraph 2 of the order which requires the complainant to furnish to counsel for Dofasco the medical information referred to in it.

[56] I shall not consider paragraph 4, which relates to the production to Mr. Hines of income tax returns and notices of assessment, because, as I have earlier noted, no complaint was made with respect to it.

[57] If paragraph 5 were interpreted to require the complainant to provide to Mr. Hines *all* of the documents referred to in it, without any screening of them by the board to exclude those which are privileged or not arguably relevant, there would, to put it mildly, be a serious problem with respect to the validity of the order. However, as I have determined, the board’s order should not be interpreted as providing for such unrestricted production. The requirement of an affidavit of documents, which contains a paragraph in which privilege may be claimed for specified documents (Form 30A, para. 3) and, by virtue of the board’s order, a further section in which protection may be claimed for documents which are not arguably relevant, is in my view, within the powers of the board. Further, the requirement of the use of the procedure contemplated by the affidavit ensures that the order does not exceed the powers of the board. This procedure enables Dofasco to challenge the objections to production of identified documents on the basis of privilege and non-relevance, if it sees fit, and enables the board to deal with the challenges on a document by document basis. In carrying out this function the board, if it considers it to be helpful, could examine the document in question. Cf. rule 30.06(d) in the *Rules of Civil Procedure*.

[58] The requirement merely to disclose the existence of a document in an affidavit of documents does not involve a breach of privilege (*MacPhayden v. Employers Liability Assurance Corporation*, [1933] O.W.N. 72 (H. Ct.) and *Williston and Rolls*, *op. cit.*, at p. 897). It is an essential step to enable claims to privilege to be determined in an orderly and fair way.

[59] In short, paragraph 5 in the order and those paragraphs related to it (paragraphs 1 and 3) do not involve an infringement of the complainant’s right to privilege or to keep from Dofasco documents which are not arguably relevant. On the contrary, they afford protection for these rights.

[60] I do not think that the same can be said for paragraph 2 in the order. It requires the complainant to furnish to counsel for the Dofasco a document setting forth all medical practitioners not mentioned in paragraph 1 who treated the complaint between March 22, 1990 and the present, their area of expertise or speciality, the dates of the visits, and the ailment or condition treated. It is not known what particular information would be set forth in this document but the requirement to produce it inevitably carries with it the grave risk that, in complying with the order, the complainant would be providing to Dofasco information of a most intimate nature relating to her physical and emotional condition that is completely unrelated to her claims in this proceeding from both Dofasco's and her point of view. In my view, this particular part of the order, which contains no terms or conditions to protect the privacy interests of the complainant, exceeds the board's power under s. 5.4(1) and (2) of the *Statutory Powers Procedure Act* and its own rules.

[61] I appreciate that the board has, and should have, wide latitude in making procedural orders but, it appears to me, in paragraph 2, the board has made no attempt at all to balance the complainant's right to protect privileged or irrelevant information with Dofasco's right to obtain production of relevant material. In this respect, paragraph 2 stands in stark contrast to paragraphs 1, 3, and 5.

[62] What is required to be produced by paragraph 2 may, of course, include information and material which is not privileged and is relevant to Dofasco's defence. If this be the case, the board has sufficient powers under s. 5.4(1) of the *Statutory Powers Procedure Act*, and its own rules, to make an order which would require the information to be produced after the complainant's claims respecting privilege and non-relevance have been resolved.

An Observation

[63] I appreciate that the foregoing will make discouraging reading for those who value the speed and efficiency of the administrative process as an alternative to the cost, delay, and apparent red tape of the procedure which is generally thought to be part of the process in the ordinary courts. The discovery process in these courts has been subjected to severe criticism as a factor contributing to increased cost and delay (see Report of the Canadian Bar Association *Task Force on Systems of Civil Justice* (1996) at p. 43 and Andrews, *Principles of Civil Procedure* (1994) at para 21-041) and yet, in the present case, we have a serious example of discovery undoubtedly causing substantial delay and expense in the proceedings before an administrative tribunal.

[64] No doubt, the discovery process cannot work effectively, in either civil or administrative proceedings, without substantial cooperation between the parties in voluntarily disclosing the existence of all relevant documents. This has been lacking in the present case but, in saying this, I wish to make it clear that I do not intend to criticize the parties or their counsel. This case arose relatively early in the history of a right to disclosure under the *Statutory Powers Procedures Act* and the Rules of the Board of

Inquiry and it appears to me that the main cause of the difficulties has been growing pains with the new procedure.

Disposition

[65] I would allow the appeal, in part, set aside the order of the Divisional Court, and in its place make an order setting aside paragraph 2 in the board's order but otherwise dismissing the commission's application. In the circumstances, I would not make any costs order with respect to the application, the motion for leave to appeal, or this appeal.

"J.W. Morden J.A."

"I agree R.S. Abella J.A."

"I agree M. Rosenberg J.A."

RELEASED: November 16, 2001