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BY EMAIL and RESS

March 3, 2010
Our File No. 2090426

Ontario Energy Board
2300 Yonge Street
27th Floor
Toronto, Ontario
M4P 1E4

Attn: Kirsten Walli, Board Secretary

Dear Ms. Walli:

Re: EB-2009-0172 – Enbridge 2010 IRM Rates

We are counsel for the School Energy Coalition. The Board will be aware that all parties except SEC have executed a Settlement Agreement for consideration by the Board at tomorrow's oral hearing. As we committed to all parties yesterday, we are in this letter setting out the reasons SEC has declined to be a party to that document.

Our submissions are as follows:

1. ***Substantive Issues not in Dispute.*** The Board will have noted that SEC is not listed as opposed to any of the settlements of the issues. This was at our request. We were actively involved in the negotiation of the settlement, and we support the settlement in all respects, subject to our comments below.

2. ***Legal Impact of Document.*** We have taken the unusual step of declining to be a party to the Agreement at all so that we are not listed as opposing the settlement of the issues, but so that we are also not put in a position inconsistent with our views on the legal impact of the document tabled to the Board by the parties.

3. ***Lack of Consensus Ad Idem.*** In our submission, the document that is listed as a Settlement Agreement is not a legally binding agreement, and therefore is not compliant with the Board's rules for ADR processes. The reason for this is that the parties to the

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document have "agreed to disagree" on the rules that will apply to the interpretation of the document. In our submission, failure to reach a *consensus ad idem* on a matter as fundamental as the interpretation rules for the document vitiates its legally binding intent, and it is no longer a valid settlement agreement.

4. ***Interpretation of Settlement Agreements.*** The problem here stems from the fact that almost every settlement agreement tabled before this Board contains a clause describing the extent of ADR privilege that attaches to the discussions, negotiations, and documentation surrounding ADR. That clause expresses the absolute privilege accepted by the parties, described in the Board's Rules, and seen also in the common law. It also expresses the normal exception to that privilege. The wording for that clause that has now become standard (taken from the agreement recently filed in EB-2009-0139) is as follows:

> *"The parties understand this to mean that the documents and other information provided, the discussion of each issue, the offers and counter-offers, and the negotiations leading to the settlement – or not – of each issue during the Settlement Conference are strictly confidential and without prejudice. None of the foregoing is admissible as evidence in this proceeding, or otherwise, with one exception: the need to resolve a subsequent dispute over the interpretation of any provision of this settlement proposal."*

5. This clause, which appears in every settlement agreement in which we have been involved in recent years (with an exception, noted below), is an expression of the exception or corollary to the parol evidence rule from contract law. That rule, most famously expressed by the then British Chief Justice (Tindal, C.J.) in 1842 and quoted in Chitty on Contracts (and elsewhere), is as follows:

> *"The general rule I take to be, that where the words of any written instrument are free from ambiguity in themselves, and where external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under the instrument, or the subject-matter to which the instrument relates, such instrument is always to be construed according to the strict, plain, common meaning of the words themselves; and that in such case evidence* dehors *the instrument, for the purpose of explaining it according to the surmised or alleged intention of the parties to the instrument, is utterly inadmissible… The true interpretation, however, of every instrument being manifestly that which will make the instrument speak the intention of the party at the time it was made, it has always been considered an exception, or perhaps, to speak more precisely, not so much an exception from, as a corollary to, the general rule above stated, that where any doubt arises upon the true sense and meaning of the words themselves, or any difficulty as to their application under the surrounding circumstances, the sense and meaning of the language may be investigated and ascertained by evidence* dehors *the instrument itself; for both reason and common sense agree that by no other means can the language of the instrument be made to speak the real mind of the party."*
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> *Shore v. Wilson (1842) 9 Cl. & Fin 355, 565; [1842] E.R. 950. [emphasis added]*

6. But for the impact of the ADR rules on the process, this is the rule that would apply to the interpretation of this document in the event of doubt as to the meaning of the words on its face.

7. In settlement documents coming before this Board in the last few years, the one that does not incorporate this interpretation rule is the Enbridge Settlement Agreement in EB-2007-0615. As the Board will be aware, there is now a material disagreement as to the meaning of certain terms of that agreement, and a dispute, reflected in a motion filed with this Board on March 1, 2010, as to whether the rule in Shore v. Wilson, cited above, does in fact apply to assist the Board in interpreting that document. On the one hand, one or more parties believe that the document must be interpreted only on its face, because any assisting documents would be privileged and thus not available to the Board. On the other hand, one or more parties believe that the surrounding documents are available to the Board to assist in interpretation of the Agreement, notwithstanding ADR privilege.

8. In respect of the instant document, the parties have deliberately been silent on whether this rule is applicable to its interpretation or not, knowing that they disagree on whether it does. In our submission, where parties knowingly disagree on an aspect of an "agreement" that is as fundamental as how it should be interpreted, there is a failure to achieve *consensus ad idem*, and there is no contract. A settlement agreement is first and foremost an agreement between parties, and it is only when presented with a binding and enforceable agreement that the Board's role - to approve or disapprove the deal - is engaged.

9. To provide a simple example which may assist, in Quebec there is a law that contracts in English must contain a phrase in French selecting English as the contractual language. Contracts that do not contain that phrase are not binding on the parties in certain circumstances. In this example, the parties exclude the legally mandated phrase. Party A does so because it believes that the law is unconstitutional, and therefore the agreement is legally binding without the phrase. Party B does so because it believes that, as a result, it is not legally bound by the agreement. Is there a *consensus ad idem* in that situation? The answer is that there clearly is no consensus, and the document is not a binding agreement.

10. ***Practical Impact.*** This is not at its root a discussion of legal nuance. It has material and real world implications.

11. Consider the future interpretation of para. 15 of the current proposed "Settlement Agreement": *"Enbridge will analyze and determine the impacts of the transition to a harmonized sales tax…"* If asked today, all parties to the Agreement will likely tell the Board that "impacts" refers to direct tax impacts, i.e. amounts of tax ultimately paid after all input tax credits. That, we believe, is the intention of the parties.

12. A year from now, when the account is first cleared, the provision will have to be interpreted by a panel of this Board. As the settlement document is currently worded, Enbridge (through its then representatives, which may not be the same as those who negotiated the deal today) seeks to be free to argue that "impacts" includes, for example:

a. The need to hire an additional person in the Accounting Department to deal with the greater complexity of new HST rules.

b. The revenue requirement impact (or perhaps even the capital expenditure impact) of a new CIS module to deal with aspects of HST not covered in the current GST module.

c. Hidden increases in prices by suppliers who seek to bury price increases in the component of prices now removed when PST is removed.

13. We believe it is fair to say that all parties to the current document do not agree that these are included in the meaning of the term "impacts". Hypothetically (and without saying whether this is true), there are documents (emails, memos, presentations, etc.) from the current ADR that make this shared interpretation clear. Enbridge takes the position that those documents, assuming they exist, are not available to assist in the future interpretation of the provision, and therefore if the words of the document can have the meanings set out above, Enbridge's representatives are free to argue that next year.

14. In our submission, the failure to agree on interpretation rules also means a failure to agree on substantive elements to the extent that simple language is used to describe them. For example, if Enbridge is free a year from now to argue an expanded meaning of the word "impacts", then there is no agreement today as to what that means. As this is a material disagreement between the parties, there is a failure to come to terms on this issue. It cannot be considered to be settled.

15. ***Impact on ADR.*** Our concern here is not primarily with the document currently before the Board, but rather with the problems that will be created if settlement agreements are no longer subject to the standard rules of contractual interpretation. To use the "impacts" example above, parties to settlement agreements will be forced to use much more extensive and technically precise wording to describe the terms, in an effort to limit further the potential for ambiguity. Settlement agreements will start to read like the Income Tax Act.

16. This is not so much of a problem in a simple document like this one, which due to IRM excludes most contentious issues. In a cost of service case, many, even most of the issues raise at least some potential for future interpretation issues. If parties are free to insist that interpretation be restricted to the face of the document, in our view that will present a further barrier to settlement of cases, because the drafting process will become much more detailed and challenging.

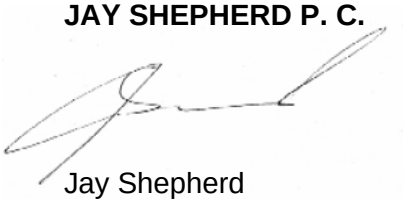
17. ***Proposed Solution.*** SEC is not proposing that the Board refuse to approve the document presented by the parties as the Settlement Agreement in this proceeding. Rather, we are proposing that the Board defer approval until a determination is made whether the rule in Shore v Wilson will apply to its interpretation.

18. If the determination – by the Board or by the parties in amending the settlement document - is that the rule will apply, then in our submission the document can be approved by the Board, and SEC would be pleased to sign on supporting its terms.

19. If the determination is, on the other hand, that interpretation of this document is limited to the words on its face, then in our submission the document should not be approved by this Board as a settlement agreement, as there is clear and obvious potential for erroneous interpretation of one or more of its provisions in the future. In this situation, in our view the Board should remit the document back to the parties, to be rewritten so that its provisions admit of less ambiguity in their future interpretation.

All of which is respectfully submitted.

Yours very truly,
JAY SHEPHERD P. C.



Jay Shepherd

cc: Wayne McNally, SEC (email)
Interested parties (email)