



By electronic filing and by e-mail

May 21, 2010

Kirsten Walli
Board Secretary
Ontario Energy Board
27th floor – 2300 Yonge Street
Toronto, ON M4P 1E4

Borden Ladner Gervais LLP
Lawyers • Patent & Trade-mark Agents
World Exchange Plaza
100 Queen Street, Suite 1100
Ottawa ON K1P 1J9
tel.: (613) 237-5160 fax: (613) 230-8842
www.blgcana.com

PETER C.P. THOMPSON, Q.C.
direct tel.: (613) 787-3528
e-mail: pthompson@blgcana.com

Dear Ms Walli,

**Motion by the Consumers Council of Canada (“CCC”) in relation to s. 26.1 of the
OEB Act, 1998, and Ont. Reg. 66/10**

Board File No.: EB-2010-0184

Our File No.: 339583-000003

We are writing on behalf of our client Canadian Manufacturers & Exporters (“CME”) to request permission to actively participate in the proceedings the Board has scheduled with respect to the motion brought by the CCC regarding the assessments issued by the Board pursuant to s. 26.1 of the *OEB Act*, 1998 (the “*OEB Act*”) (altogether, the “Motion”).

This request is made pursuant to Rule 23 of the Board’s Rules of Practice and Procedure.

In making this request, we recognize that the Board’s Notice of Hearing and Procedural Order No. 1 dated May 11, 2010 (the “Notice”) is addressed only to CCC, the Attorney Generals of Ontario and Canada, and the Ministry of Energy and Infrastructure, and that the Notice states that the Board is not inviting intervention by other parties in the hearing of preliminary matters upon which the Board intends to hear argument before determining whether or not to hear CCC’s Motion.

The preliminary questions upon which the Board intends to hear argument are matters of considerable significance to CME’s Ontario members as electricity consumers. They relate to the argument that the legislation and regulations under which the Board has acted in issuing the assessments are constitutionally invalid. The argument on the issues pertaining to constitutional invalidity includes points contained in a recent E-Brief published by the C.D. Howe Institute on April 22, 2010 entitled “Ontario’s Green Energy “Fee”: The Trouble with Taxation through Regulation”. This E-Brief is available at www.cdhowe.org.

The preliminary questions the Board has listed for argument that raise issues of significance to CME include matters pertaining to the following:

- (a) The standing or status of an association to challenge the constitutional validity of the legislation and regulations under which the Board has acted in issuing the assessments;

- (b) The Board's power to determine the constitutional questions CCC raises in the Motion proceeding CCC has initiated;
- (c) The Board's authority to cancel the assessment it has issued; and
- (d) The alternative of stating a case to the Divisional Court.

The Board's determination of these preliminary questions will be precedent-setting and will have a material affect on electricity consumers. CME, as a recognized representative of electricity consumers in proceedings before the Board, should be permitted to actively participate in the process the Board has established to deal with these preliminary questions.

It is essential that CME be able to participate during the argument of these preliminary questions in order to assure that the Board does ultimately address the substantive issues. If the preliminary questions are not correctly resolved, then that will have as great an impact on CME as will the incorrect resolution of the substantive issues with respect to the constitutional validity of the legislation and regulations giving rise to the assessments.

Criteria for Determining Requests for Intervenor Status

We respectfully submit that, under the Board's Rules, the absence of an invitation from the Board for intervention by other parties does not preclude a person, who wishes to actively participate in a proceeding, from applying for Intervenor status.

Any action that precludes requests for and the granting of Intervenor status constitutes a breach of the rules of natural justice. CME should not have to institute a proceeding either similar to or duplicative of that launched by CCC to obtain active participant status in the argument of the preliminary issues. Efficiency considerations warrant the granting of Intervenor status to CME.

For the purposes of the hearing of argument pertaining to the preliminary questions, the relevant portions of Rules 23.01 and 23.02 are as follows:

"23.01 [...] a person who wishes to actively participate in the proceeding shall apply for Intervenor status by filing and serving a letter of intervention [...]" (emphasis added)

23.02 The person applying for Intervenor status must satisfy the Board that he or she has a substantial interest and intends to participate actively and responsibly in the proceeding by submitting [...] argument [...]" (emphasis added)

We submit that CME should be granted Intervenor status because it wishes to actively participate in the preliminary questions process, it has a substantial interest therein, and it intends to participate actively and responsibly in the submission of argument with respect to the preliminary questions raised in the Notice. We submit that participation in this precedent-setting preliminary questions process should not be determined by invitation, but on the basis of the criteria specified in the provisions of Rule 23.

CME's Membership and Interest

CME has approximately 1,400 Ontario members. CME is Canada's leading business network. Its members represent 75% of manufactured output in the Province of Ontario, and 90% of all exports. Electricity is the primary source of energy for the manufacturing sector. As a result, the members of CME are vitally concerned with all matters pertaining to the total price of electricity.

Nature and Scope of CME's Intended Participation

CME wishes to actively participate in the argument of the preliminary questions on July 6, 2010, in order to support the following positions with respect to those preliminary questions:

- (a) Section 19(1) of the *OEB Act* fully empowers the Board to determine the constitutionality of the legislation and regulations pursuant to which the Board issued the assessments that form the subject matter of this proceeding;
- (b) Section 19(2) of the *OEB Act* fully empowers the Board to order that the assessments be cancelled if the applicable legislation and regulations are found to be constitutionally invalid;
- (c) CCC's Motion, based on the provisions of s. 19 of the *OEB Act*, is broader in scope than a traditional motion for review under s. 42 of the Board's Rules, and the Board is fully empowered to grant the relief CCC requests in its Motion;
- (d) Associations representing electricity consumers, such as CCC and CME, have standing to raise questions of constitutional validity in proceedings before the Board;
- (e) The assessments the Board issued are the result of a "proceeding" under s. 3.01 of the Board's Rules;
- (f) No funds can be recovered from Ratepayers without a determination by the Board of the utility-specific assessments;
- (g) The Board's determination of these assessments can only proceed from a premise that the legislation and regulations giving rise to them are constitutionally valid;
- (h) Stating a case to the Divisional Court is an alternative that the Board should adopt if the Board is satisfied that it should not determine the constitutional issue CCC raises, even though it is fully empowered to make those determinations; and
- (i) The questions to be included in any case stated for the opinion of the Divisional Court should include a question as to whether an interim Order should issue prohibiting collection of the assessments until such time as

the Court provides its opinion on the constitutional validity of the legislation and regulations giving rise to the assessments.

If granted Intervenor status, CME plans to collaborate with counsel for CCC in order to limit its submissions to points of argument on the preliminary questions that supplement the CCC's points of argument.

In order to minimize the possibility of duplication, and in the event CME is granted Intervenor status, we suggest that the deadline for the filing of written argument by CME be June 5, 2010, being five days after the May 31, 2010 deadline for the filing of written argument by CCC and six days before the June 11, 2010 deadline for the filing of written arguments by the Attorney Generals of Ontario and Canada and the Ministry of Energy and Infrastructure.

CME Contacts

If the relief requested in this letter is granted, then CME requests that further communications with respect to this matter be sent to the following:

Paul Clipsham
Director of Policy
Ontario Division
Canadian Manufacturers & Exporters
6725 Airport Road
Suite 200
Mississauga ON L4V 1V2

Tel (905) 672-3466 ext. 3236
Fax (905) 672-1764
E-mail paul.clipsham@cme-mec.ca

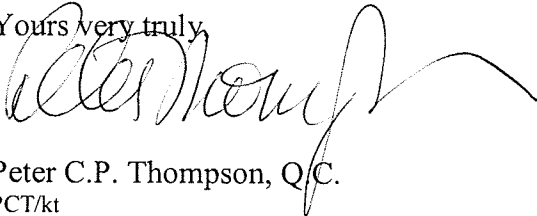
Borden Ladner Gervais LLP
Barristers & Solicitors
100 Queen Street
Suite 1100
Ottawa ON K1P 1J9

Peter C.P. Thompson, Q.C.
Tel (613) 787-3528
Fax (613) 230-8842
E-mail pthompson@blgcanada.com

Vincent J. DeRose
Tel (613) 787-3589
Fax (613) 230-8842
E-mail vderose@blgcanada.com

Please contact the undersigned if the Board requires any further information in connection with this request for Intervenor status.

Yours very truly,



Peter C.P. Thompson, Q.C.
PCT/kt

c. Robert B. Warren (CCC)
Janet Minor (AG Ontario)
Robert Donato (AG Ontario)
James Girling (Ministry of Energy and Infrastructure)
Paul Clipsham (CME)