THE 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 Assessments issued by the Ontario Energy Board pursuant to section 26.1 of the Ontario Energy Board Act and Ontario Regulation 66/10;

AND IN THE MATTER OF Rule 42 of the Rules of Practice and Procedure of the Ontario Energy Board.

AMENDED FACTUM OF THE MOVING PARTIES

THE CONSUMERS COUNCIL OF CANADA AND AUBREY LEBLANC

(MOTION RETURNABLE JULY 13, 2010)

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PART I — Overview of the Moving Parties' Position

1. This is a motion brought by The Consumers Council of Canada ("**CCC**") and Aubrey LeBlanc ("**LeBlanc**") for various relief related to the issuance by the Ontario Energy Board (the "**Board**") of an Assessment (as hereinafter defined) and the authorisation of a Variance Account (as hereinafter defined) pursuant to section 26.1 of the *Ontario Energy Board Act, 1998* (the "**OEB Act**") and Ontario Regulation 66/10.

2. The motion raises a fundamental question of constitutional validity, namely whether section 26.1 of the OEB Act amounts to an indirect tax which is *ultra vires* the Province of Ontario and, as such, of no force and effect.

3. The central issue raised by the Board, at this preliminary stage, is how and by whom this fundamental constitutional question is to be determined.

4. The Moving Parties submit that the Board must determine the constitutional question, and cancel the Assessment and the authorisation for the Variance Account. The Board has the necessary jurisdiction, pursuant to section 19 of the OEB Act and Rule 42 of the Ontario Energy Board Rules of Practice and Procedure (the "**OEB Rules**"), to answer the constitutional question and order the relief requested, and it ought to do so.

5. In the alternative, the Board may state a case, pursuant to section 32 of the OEB Act, for the opinion of the Divisional Court on the constitutional question. However, if the Board decides to state a case, it should do so after having made the necessary findings of fact.

PART II — The Facts

Aubrey LeBlanc

6. Aubrey LeBlanc ("**LeBlanc**") is a customer of Toronto Hydro-Electric System Limited ("**THESL**"). As a customer of THESL, he receives, and pays, a monthly account relating to electricity charges that pertain to his consumption of electricity, based upon the rates approved by the Board.

Reference: Affidavit of Aubrey LeBlanc sworn May 27, 2010 ("**LeBlanc Affidavit**"), para. 2, Amended Motion Record, Tab 3

7. As a customer of THESL, he will be directly affected by the Assessment and the application of Section 26.1 of the OEB Act, as THESL will, as it is entitled to pursuant to section

26.1 of the OEB Act and Ontario Regulation 66/10, seek to recover the costs of the Assessment from its customers, including LeBlanc.

Reference: LeBlanc Affidavit, para. 3, Amended Motion Record, Tab 3

The CCC

8. The CCC is a non-profit, public interest entity which represents the interests of residential consumers, in dealings with federal and provincial governments, and before federal and provincial boards and tribunals, in a number of economic sectors.

Reference: Affidavit of Tiffany Tsun sworn April 26, 2010 ("**Tsun Affidavit**"), para. 2, Amended Motion Record, Tab 2

9. The CCC has, for many years, represented the interests of residential consumers with respect to energy matters in Ontario. Included in those activities are the following:

(i) Appearing in numerous rate proceedings, before the Board, in applications by Licensed Electricity Distributors ("**LDCs**"), Hydro One Networks Inc., and Ontario Power Generation Inc., as well as in applications by the natural gas distribution companies;

(ii) Appearing in numerous policy-making proceedings before the Board, for both the electricity and natural gas sectors;

(iii) Making submissions to legislative committees on proposed changes to laws governing the energy sector; and

(iv) Participating in advisory committees, dealing with consumer matters, of Hydro One Networks Inc., the Independent Electricity System Operator, the Ontario Power Authority, as well as the natural gas distribution companies.

Reference: Tsun Affidavit, para. 3, Amended Motion Record, Tab 2

Statutory Background

10. Section 26.1(1) of the OEB Act requires the Board to assess LDCs with respect to "the expenses incurred and expenditures made by the Ministry of Energy and Infrastructure in respect of its energy conservation programs or renewable energy programs" (the "**Assessment**").

Reference: Tsun Affidavit, para. 4, Amended Motion Record, Tab 2

11. Section 26.1(2) of the OEB Act authorizes LDCs to collect amounts assessed under section 26.1(1) from consumers or classes of consumers as prescribed by regulation and in the manner prescribed by regulation.

Reference: Tsun Affidavit, para. 5, Amended Motion Record, Tab 2

12. Section 26.1(6) of the OEB Act provides that, if a person fails to pay an Assessment, the Board may, without a hearing, order the person to pay the Assessment.

Reference: Tsun Affidavit, para. 6, Amended Motion Record, Tab 2

13. Section 26.2 of the OEB Act sets out the "special purposes" for which amounts collected under section 26.1 relating to assessments are paid to Ontario. They are:

> 1. To fund conservation or renewable energy programs aimed at decreasing the consumption of two or more of the following fuels:
>
> i. natural gas,
>
> ii. electricity,
>
> iii. propane,
>
> iv. oil,
>
> v. coal, and
>
> vi. wood.
>
> 2. To fund conservation or renewable energy programs aimed at causing consumers of fuel to change from one or more of the fuels listed in paragraph 1 to any other fuel or fuels listed in that paragraph.
>
> 3. To fund conservation or renewable energy programs aimed at decreasing peak electricity demand, while increasing or decreasing the consumption of another type of fuel.
>
> 4. To fund research and development or other engineering or scientific activities aimed at furthering the conservation or the efficient use of fuels.
>
> 5. To fund conservation or renewable energy programs aimed at a specific geographical, social, income or other sector of Ontario.
>
> 6. To reimburse the Province for expenditures it incurs for any of the above purposes.

Reference: Tsun Affidavit, para. 7, Amended Motion Record, Tab 2

14. Section 7 of Ontario Regulation 66/10, passed pursuant to section 26.1 of the OEB Act, sets out the formula for the determination of the amounts to be assessed from each LDC and the formula by which each LDC can recover the amounts assessed from the consumers from whom it distributes electricity.

Reference: Tsun Affidavit, para. 8, Amended Motion Record, Tab 2

15. Section 8 of Ontario Regulation 66/10, passed pursuant to section 26.1 of the OEB Act, sets out the process by which LDCs shall apply to the Board for an order authorizing the LDC in question to clear the credit or debit balance in any variance account authorized by the Board to track the difference between the amounts remitted by the LDC pursuant to the Assessment and the amounts recovered by the LDC pursuant to section 7 of Ontario Regulation 66/10.

Reference: Tsun Affidavit, para. 9, Amended Motion Record, Tab 2

16. Section 78 of the OEB Act provides that "no transmitter shall charge for the transmission of electricity except in accordance with an order of the Board, which is not bound by the terms of any contract".

Reference: Tsun Affidavit, para. 10, Amended Motion Record, Tab 2

The Assessment

17. By letter dated April 9, 2010 (the "**Assessment Letter**"), the Board issued the Assessment to LDCs, pursuant to Section 26.1 of the OEB Act. Attached to the Board's letter was an invoice setting out the amount the LDC receiving the letter was being assessed for the Special Purpose Charge ("SPC").

Reference: Tsun Affidavit, para. 11, Amended Motion Record, Tab 2

18. In the Assessment Letter, the Board explained that the Assessment was made pursuant to Sections 26.1 and 26.2 of the OEB Act, as well as Ontario Regulation 66/10. The Board also went on to provide instructions relating to the recovery of the assessed amount from the LDCs' consumers, as reproduced below:

Recovery of your SPC Assessment

Section 26.1 of the Act and the SPC Regulation authorize each licensed electricity distributor to recover the amount of its SPC assessment from its customers, other than embedded licensed distributors, based on the volume of electricity distributed to the customer. Recovery is to be done using the formula set out in section 7 of the SPC Regulation. In accordance with section 9 of the SPC Regulation, recovery is to be spread over a one-year period, starting from the date on which you begin billing to recover your assessment. The amount that may be collected to recover the SPC assessment is not a rate, and it may be collected under the authority of the Act and the SPC Regulation. No rate order is required, and none will be issued.

Reference: Tsun Affidavit, para. 12, Amended Motion Record, Tab 2

The Variance Account

19. On April 23, 2010, the Board wrote to the LDCs (the "**Variance Account Letter**") advising that it had authorized Account 1521, Special Purpose Charge Assessment Variance Account (the "**Variance Account**").

Reference: Tsun Affidavit, para. 13, Amended Motion Record, Tab 2

20. The Board explained, in the Variance Account Letter, that Ontario Regulation 66/10 contemplates that each LDC will record in a variance account any differences between: (a) the amount remitted to the Minister of Finance for the LDCs' Assessment; and (b) the amounts recovered from consumers on account of the Assessment (the "**Variance Amounts**"). The Board also provided instructions for recording the Variance Amounts in the Variance Account.

Reference: Tsun Affidavit, para. 14, Amended Motion Record, Tab 2

21. In the Variance Account Letter, the Board advised the LDCs that in accordance with section 8 of Ontario Regulation 66/10, the LDCs were required to apply to the Board no later than April 15, 2012 for an order authorizing [the LDC] to clear any debit or credit balance in "Sub-account 2010 SPC Variance".

Reference: Tsun Affidavit, para. 15, Amended Motion Record, Tab 2

22. The Board further advised that it expected that requests for disposition of the balance in the Variance Account would be addressed as part of the proceedings to set rates for

the 2012 rate year, except in cases where this approach would result in non-compliance with the timeline set out in section 8 of Ontario Regulation 66/10.

Reference: Tsun Affidavit, para. 16, Amended Motion Record, Tab 2

PART III — Issues and Law

23. In Amended Procedural Order No. 1, the Board sets out five questions it states must be answered before the fundamental constitutional question can be considered. The Moving Parties disagree that the preliminary issues set out by the Board are in fact threshold issues, or indeed issues at all.

24. Nevertheless, the Moving Parties will provide the answers to the questions raised by the Board below. In order to do so, the following issues must be addressed:

(i) Does the Board have the jurisdiction, pursuant to the OEB Act, to answer the constitutional question?

(ii) If so, does the Board have the authority to cancel the Assessment and the authorisation for the Variance Account?

(iii) Do the Moving Parties have standing to raise the constitutional question?

(iv) In the alternative, would it be better if the Board were to state a case to the Divisional Court?

25. First, however, it is important to provide the context within which the preliminary issues arise by considering briefly the constitutional question posed by the motion.

(i) Section 26.1 of the OEB Act is unconstitutional on its face

26. Section 26.1 of the OEB Act states, in relevant part:

> **(1)** Subject to the regulations, the Board shall assess the following persons or classes of persons, as prescribed by regulation, with respect to the expenses incurred and expenditures made by the Ministry of Energy and Infrastructure in respect of its energy conservation programs or renewable energy programs provided under this Act, the *Green Energy Act, 2009*, the *Ministry of Energy and Infrastructure Act* or any other Act:
>
> 1. In respect of consumers in their service areas, gas distributors and licensed distributors.
>
> 2. The IESO.

3. Any other person prescribed by regulation.

Assessments, collection by gas distributors and licensed distributors

(2) Gas distributors and licensed distributors may collect the amounts assessed under subsection (1) from the consumers or classes of consumers as are prescribed by regulation and in the manner prescribed by regulation.

...

Assessment, amount and timing

(4) For the purposes of subsection (1), the Board shall assess the amount prescribed by regulation within the time prescribed by regulation in accordance with the methods or rules prescribed by regulation.

Assessment, obligation to pay

(5) Every person assessed under subsection (1) shall pay the amount assessed in accordance with the Board's assessment by remitting the amount to the Minister of Finance.

Failure to pay

(6) If a person fails to pay an assessment made under subsection (1), the Board may, without a hearing, order the person to pay the assessment.

Reference: OEB Act, s.26.1

27. Section 7 of Ontario Regulation 66/10, in turn, provides the formula by which LDCs can recover the amount of the Assessment from their customers.

Reference: Ontario Regulation 66/10, s.7

28. On its face, section 26.1 of the OEB Act is clearly unconstitutional: it mandates the Board to issue the Assessment against LDCs, which Assessment will ultimately be paid by ratepayers, for the purpose of raising revenue to fund the general activities and energy programs of the provincial government. In other words, it amounts to an indirect tax, which is not within the constitutional competence of the provincial government to enact.

29. The Province of Ontario derives its taxation power from s. 92(2) of the *Constitution Act, 1867*, which is as follows:

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, -

2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.

Reference: *Constitution Act, 1867*, (U.K.) 30 & 31 Vict., c.3, reprinted in R.S.C. 1985, App.11, No. 5 ("***Constitution Act, 1867***"), s.92

30. The Province does not have the constitutional jurisdiction to enact an indirect tax, unless it can properly be qualified as a regulatory charge imposed under one of the Province's heads of power under the *Constitution Act, 1867*.

Reference: Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. supp., looseleaf (Toronto: Thomson Reuters Canada Ltd., 2007) ("**Hogg**"), at 31-19

Re Exported Natural Gas Tax, [1982] 1 S.C.R. 1004

31. The determination of whether something is a direct or indirect tax depends on the general tendencies of the tax and the common understanding as to those tendencies. A direct tax is one with "the general tendency...for the tax to be paid by someone else".

Reference: Hogg, at 31-7

32. Conversely, if a tax can be "passed on" to the market as an element of the good or service, it is an indirect tax. In *C.P.R. v. A.-G. Sask.*, Justice Rand provided a useful description of a tax that can be passed on:

> If the tax is related or relatable, directly or indirectly, to a unit of the commodity or its price, imposed when the commodity is in course of being manufactured or marketed, then the tax tends to cling as a burden to the unit or the transaction presented to the market.

Reference: *C.P.R. v. A.-G. Sask*, [1952] 2 S.C.R. 231, at 251-252

33. In determining whether a particular charge is a tax, the Court must answer the following questions in the affirmative:

(i) Is the charge compulsory and enforceable by law?

(ii) Is the charge imposed under the authority of the legislature?

(iii) Is the charge levied by a public body?

(iv) Is the charge intended for a public purpose? and

(v) Is the charge unconnected to any form of a regulatory scheme?

Reference: *Westbank First Nation v. British Columbia Hydro and Power Authority*, [1999] 3 S.C.R. 134 ("***Westbank***"), at para. 43

34. In order to find a regulatory charge, a court must look for the presence of the indicia of a regulatory scheme:

(i) a complete, complex and detailed code of regulation;

(ii) a regulatory purpose which seeks to affect some behaviour;

(iii) the presence of actual or properly estimated costs of the regulation; and

(iv) a relationship between the person being regulated and the regulation, where the person being regulated either benefits from, or causes the need for, the regulation.

Reference: *Westbank*, at paras. 44-45

35. The central task for the Court is to identify the primary purpose of the impugned levy and whether its pith and substance is "(1) to tax, i.e., to raise revenue for general purposes; (2) to finance or constitute a regulatory scheme, i.e. to be a regulatory charge or to be ancillary or adhesive to a regulatory scheme; or (3) to charge for services directly rendered, i.e., to be a user fee."

Reference: *Westbank*, at para. 30

36. The burden to demonstrate that the charge has the attributes of a tax rests upon the party that challenges the charge as unconstitutional. Once that onus has been discharged, the burden shifts to the government to demonstrate that the charge is connected to a regulatory scheme.

Reference: *620 Connaught v. Canada*, [2008] 1 S.C.R. 131, at para. 28

37. The record filed by the Moving Parties demonstrates that the Assessment has the attributes of a tax: (i) it is compulsory and enforceable by law; (ii) it is imposed under the authority of the legislature; (iii) it is levied by the Board, which is a public body; (iv) it is intended for a public purpose, namely energy conservation programs in Ontario; and (v) it is unconnected to any form of regulatory scheme, as the broad purposes set out in section 26.2 of the OEB Act make clear.

38. The tax created by section 26.1 of the OEB Act is indirect. The general tendency of the Assessment is to be passed on from the initial payers of the Assessment, the LDCs, to consumers, in accordance with Ontario Regulation 66/10. The incidence of the Assessment is therefore indirect, for constitutional purposes.

39. The Moving Parties having discharged their onus to show that the Assessment is an indirect tax, if section 26.1 of the OEB Act is to be saved as constitutionally valid, the burden shifts to the government to demonstrate that it embodies a valid regulatory charge. No evidence has yet been put forward to discharge that onus. The Board can therefore proceed to rescind the Assessment and the authorisation for the Variance Account, or else it can allow the government to lead evidence and proceed to a full hearing on the merits.

40. In the event that the Board decides to proceed to a full hearing (or, in the alternative, to state a case to the Divisional Court), it should order a stay of the requirement that the LDCs pay the Assessment by July 30, 2010, pending the ultimate determination of the matter.

(ii) The Board has the jurisdiction to answer the constitutional question and must exercise it

(a) Section 19 of the OEB Act

41. This is not a review motion in the traditional sense. The motion has been brought pursuant to both Rule 42 of OEB Rules, as acknowledged by the Board in Amended Procedural Order No. 1, and section 19 of the OEB Act. Section 19 of the OEB Act provides the Board with the necessary jurisdiction to answer the constitutional question. This jurisdiction ought to be exercised in this case.

42. Section 19 of the OEB Act empowers the Board to determine all questions of law and fact in all matters within its jurisdiction.

Reference: OEB Act, s.19(1)

43. This jurisdiction includes the authority to consider the constitutional validity of the provisions of the OEB Act. "This is because the consistency of a provision with the Constitution is a question of law arising under that provision."

Reference: *Nova Scotia v. Martin*, [2003] 2 S.C.R. 504 ("***Martin***"), at para. 4

Cuddy Chicks Ltd. v. Ontario (Labour Relations Board), [1991] 2 S.C.R. 5 ("***Cuddy Chicks***")

44. In issuing the Assessment, the Board relied upon section 26.1 of the OEB Act. The Board not only has the authority to consider the constitutional validity of that provision, pursuant to section 19 of the OEB Act, but it has the duty to do so, as the Board has an obligation to ensure there exists a legal basis for its decisions.

45. This duty was recently expressed by the Supreme Court of Canada in *R. v. Conway*. After having reviewed (and re-affirmed) the *Cuddy Chicks* line of cases, the Court stated:

> These cases confirm that administrative tribunals with the authority to decide questions of law and whose *Charter* jurisdiction has not been clearly withdrawn have the corresponding authority – and duty – to consider and apply the Constitution, including the *Charter*, when answering those legal questions. [...]

Reference: *R. v. Conway*, 2010 SCC 22, at para. 77

(b) Rule 42 of the OEB Rules

46. The Board also has the necessary jurisdiction to grant the relief sought in the motion pursuant to Rule 42 of the OEB Rules.

47. In issuing the Assessment, the Board made a decision, by necessary implication, with respect to the constitutionality of section 26.1 of the OEB Act.

48. If section 26.1 of the OEB Act is unconstitutional, as the Moving Parties submit it is, the Board had no authority to issue the Assessment. Since the Board did issue the Assessment, it must be taken to have decided that section 26.1 of the OEB Act is constitutionally valid. It is that decision which the Moving Parties seek to review on this motion.

49. Section 52 of the *Constitution Act, 1982*, provides that the Constitution is the supreme law of Canada. If this section is to be given effect, what constitutes "law", for the purposes of section 52, must be construed broadly to include all exercises of state power:

> Section 52 is animated by the doctrine of constitutional supremacy. As such, a wide view of "law" under that provision is mandated so that all exercises of state power, whether legislative or administrative, are caught by the Charter.

Reference: *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (U.K.), 1982, c.11 ("***Constitution Act, 1982***"), s. 52

50. Therefore, the administrative nature of the issuance of the Assessment does not detract from the fact that it constitutes a decision by the Board, and is thus subject to review.

51. The authorisation of the Variance Account is also a reviewable decision pursuant to Rule 42 of the OEB Rules.

52. Section 8(1) of Ontario Regulation 66/10 does not mandate the Board to authorise the Variance Account. Rather, it states that LDCs must obtain an order from the Board with respect to clearing any balances with respect to Variance Amounts.

Reference: Ontario Regulation 66/10, s.8

53. The issuance of the authorisation of the Variance Account is therefore an explicit decision by the Board, made pursuant to the OEB Act, to create a mechanism to facilitate the process set out in section 8 of Ontario Regulation 66/10. This decision is reviewable pursuant to Rule 42 of the OEB Rules.

54. Finally, in issuing the Assessment and the authorisation for the Variance Account, the Board engaged its rate-making function pursuant to section 78 of the OEB Act, despite the Board's explicit denial, in the Assessment Letter, that it has done so. The Board's indication, in the Variance Account Letter, that it would consider requests for disposition of the balance in the Variance Account during the rate proceedings for the 2012 rate year makes explicit the link between the Assessment and the Board's rate-making function.

55. Yet, the Board failed to hold a hearing and issue a rate order, as required under sections 21 and 78 of the OEB Act. The Board's actions in that regard also constitute a reviewable decision pursuant to Rule 42 of the OEB Rules.

56. Accordingly, whether relying upon section 19 of the OEB Act or Rule 42 of the OEB Rules, the Board has the jurisdiction to determine whether section 26.1 of the OEB Act is unconstitutional in the circumstances of this case.

57. This jurisdiction ought to be exercised in this case; the Board is statutorily mandated to protect the interests of customers.

Reference: *Toronto Hydro-Electric System Limited v. Ontario Energy Board*, 2010 ONCA 284 ("***Toronto Hydro-Electric***"), at para. 5

OEB Act, s.1

58. In *Toronto Hydro-Electric System Limited v. Ontario Energy Board*, the Ontario Court of Appeal reviewed the duty of the Board to ratepayers. At issue in that case was a decision by the Board to impose, as a condition in its rate decision for 2006, a duty on THESL to obtain the approval of a majority of its independent directors before declaring any future dividends payable to its affiliates. THESL argued that the Board acted without jurisdiction in imposing the condition.

Reference: *Toronto Hydro-Electric*

59. The Court of Appeal found that the Board must "balance the interests of ratepayers in terms of prices and service while at the same time ensuring a financially viable electricity industry that is both economically efficient and cost effective." The Court of Appeal quoted with approval from Justice Lederman, who dissented in the court below:

> At the heart of a regulator's rate-making authority lies the "regulatory compact" which involves balancing the interests of investors and consumers. In this regard, there is an important distinction between private corporations and publicly regulated corporations...

Reference: *Toronto Hydro-Electric*, at para. 49

60. Having found that a regulated utility must operate in a manner that "balances the interests of the utility's shareholders against those of its ratepayers", the Court of Appeal went on to conclude that where a utility failed to operate in that manner, "it is incumbent on the OEB to intervene in order to strike this balance and protect the interests of the ratepayers" (emphasis added).

Reference: *Toronto Hydro-Electric*, at para. 50

(iii) The Board not only has the authority to cancel the Assessment and the authorisation for the Variance Account, but it is bound to do so

61. If the Board has the jurisdiction to determine that section 26.1 of the OEB Act is unconstitutional, as the Moving Parties contend it does, it necessarily follows that it has the authority to order a remedy that relieves affected parties from the effects of this provision – indeed, it is bound to do so. In this case, the appropriate remedy is to cancel the Assessment and the authorisation of the Variance Account.

62. Section 52(1) of the *Constitution Act, 1982*, provides that the Constitution is "the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect".

Reference: *Constitution Act, 1982*, s.52

63. The invalidity of a legislative provision inconsistent with the Constitution arises from the operation of section 52, and not from a judicial declaration of invalidity. It follows that an unconstitutional provision is invalid from the moment it is enacted, and it cannot be applied by the government, including any administrative organ of the state.

Reference: *Martin*, at para. 28

64. Therefore, an act made pursuant to unconstitutional legislation is itself invalid.

65. Remedies for unconstitutional legislation may be prospective or retrospective. The Supreme Court of Canada has confirmed that section 52(1) can operate retroactively, reaching into the past to annul the effects of the unconstitutional law:

> If the law was invalid from the outset, then any government action taken pursuant to that law is also invalid, and consequently, those affected by it have a right to redress which reaches back into the past.

Reference: *Canada (Attorney General) v. Hislop*, [2007] 1 S.C.R. 429, at para. 83

66. In this case, the only appropriate remedy is retrospective. The protection of parties affected by the unconstitutionality of section 26.1 of the OEB Act and Ontario Regulation 66/10 can only occur if the Assessment and authorisation for Variance Account are cancelled.

67. It is trite that the Board derives its powers from its enabling statute, the OEB Act. Put another way, the Board only has those powers that are conferred upon it by the OEB Act.

Reference: OEB Act, s.4(2)

68. Accordingly, if section 26.1 of the OEB Act, and Ontario Regulation 66/10, which is enacted under it, are void *ab initio* and of no force and effect, the Board does not have the power to issue the Assessment, or to authorise the Variance Account. To allow the Assessment and Variance Account to stand in the circumstances would constitute an excess of the Board's statutory jurisdiction.

69. That the Board was intended to have the jurisdiction to cancel the Assessment and the authorisation for the Variance Account is confirmed by Rule 43.01 of the OEB Rules, which provides that:

The Board may at any time indicate its intention to review all or part of any order or decision and may confirm, vary, suspend or cancel the order or decision by serving a letter on all parties to the proceeding.

Reference: *Ontario Energy Board Rules of Practice and Procedure*, Rule 43.01

(iv) The Moving Parties have standing to bring the motion

70. In light of the Amended Notice of Motion, which adds LeBlanc as a party, and Procedural Order No. 3 dated May 28, 2010, the Moving Parties do not believe that standing remains a live issue. If the Board is of the opinion that standing is still an issue, the Moving Parties submit that they have standing to bring this motion.

71. In this motion, the Moving Parties seek to have the Board exercise its jurisdiction pursuant to section 19 of the OEB Act to determine the constitutional validity of section 26.1 of the OEB Act. It is the Moving Parties' position that because the central issue in this motion is the constitutional validity of a Board action, the appropriate test for standing is that accepted by the Supreme Court of Canada in constitutional cases.

72. The law of standing in constitutional cases is flexible and accommodating. It can arise as of right, or as a matter of public interest.

Reference: Hogg, at 59-2

Andrew K. Lokan, *Constitutional Litigation in Canada*, looseleaf (Toronto: Thomson Carswell, 2006), at 3-2

73. It is now accepted that a private individual whose own legal rights have been interfered with by a law of general application that is unconstitutional or an act done without valid statutory authority has standing as of right to challenge that law and to pursue a claim against the government.

Reference: *A.G. Can. v. Law Society of B.C.*, [1982] 2 S.C.R. 307

Dyson v. Attorney General, (1910), [1911] K.B. 410 (Eng. C.A.)

Hogg, at 59-11

74. The Supreme Court has recognised that adjudicators have the discretion to grant standing to a plaintiff with no special personal interest in an issue of constitutional law where the following criteria are met:

(i) The proceeding raises a serious legal question;

(ii) The plaintiff has a genuine interest in the resolution of the matter; and

(iii) There is no other reasonable and effective manner for the question to be brought.

Reference: *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138
Nova Scotia Board of Censors v. McNeil, [1976] 2 S.C.R. 265
Minister of Justice of Canada v. Borowski, [1981] 2 S.C.R. 575
Finlay v. Canada (Minister of Finance), [1986] 2 S.C.R. 607

75. The Moving Parties have standing to bring this motion both as of right, in the case of LeBlanc, and as a matter of public interest, in the case of CCC.

76. LeBlanc is a ratepayer from whom THESL will seek to recover the cost of the Assessment. His legal rights have been directly affected by section 26.1 of the OEB Act. As such, he has standing, as of right, to bring this motion.

77. Similarly, CCC satisfies all three criteria for discretionary public interest standing:

(i) The constitutional validity of section 26.1 of the OEB Act is a serious legal issue. Indeed, it has been the subject matter of academic writing;

(ii) CCC has a genuine interest in the resolution of the matter. It has, for many years, represented the interests of residential consumers with respect to energy matters in Ontario, including, among other things, by appearing in rate and policy-making proceedings before the Board, and making submissions to legislative committees on proposed changes to laws governing the energy sector;

(iii) Having CCC bring this motion is reasonable and effective. Together with LeBlanc, it ensures that the interests of the general rate-paying public are represented and protected, in an effective manner by limiting the number of litigants.

78. In the alternative and if necessary, the Moving Parties hereby seek leave to bring this motion pursuant to Rule 42.02 of the OEB Rules.

79. For the reasons set out above, the Moving Parties are directly affected by section 26.1 of the OEB Act and have a genuine interest in the determination of its constitutional validity. Accordingly, it is appropriate for the Board to grant the Moving Parties standing to bring this motion.

(v) Alternatively, the Board may state a case to the Divisional Court

80. Despite the fact that the Board has the jurisdiction to adjudicate this motion and grant the relief sought, and should exercise its jurisdiction in the manner requested by the Moving Parties, the Board may, in the alternative, state a case to the Divisional Court.

81. The stated case would ask the Divisional Court to answer the following question: does section 26.1 of the OEB Act create an indirect tax, as opposed to a regulatory charge, and is therefore outside of the constitutional competence of the provincial legislature, pursuant to section 92(2) of the *Constitution Act, 1867*, which limits provincial legislatures to direct taxation?

82. Section 32 of the OEB Act provides that the Board may, of its own motion or upon the motion of any party to proceedings before the Board, state a case in writing for the opinion of the Divisional Court upon any question that, in the opinion of the Board, is a question of law.

83. In *Ottawa (City) v. Ontario (Attorney General),* the Ontario Court of Appeal found that the Board's power to state a case of its own motion was free standing, in the sense that it is not required to be founded on a particular proceeding. The Court went on to note that this flexibility was consistent with the purpose of section 32 of the OEB Act, which is to provide the assistance of the Divisional Court on a question of law when the Board is of the view that this would be useful in connection with its statutory mandate.

Reference: *Ottawa (City) v. Ontario (Attorney General)* (2002), 64 O.R. (3d) 703 (C.A.) ("**Ottawa**"), at para. 22

84. The constitutional validity of section 26.1 of the OEB Act is a serious legal issue that affects all ratepayers, the very customers whose interests the Board is statutorily mandated to protect. It would be consistent with the Board's duty to state a case and seek the assistance of the Divisional Court in determining the constitutional question raised by this motion.

85. An advantage of the stated case is that the Divisional Court has the power to issue a declaration of invalidity with respect to section 26.1 of the OEB Act. The Board, on the other hand, only has the power to make a finding of unconstitutionality with respect to section 26.1 of the OEB Act in relation to the Assessment. In light of the fact that a similar exercise is anticipated to take place with respect to gas distributors, it may be in the interests of justice to determine the constitutionality of section 26.1 of the OEB Act once and for all.

Reference: *Cuddy Chicks*, *supra*, para. 17

86. The factual record in this case may not yet be complete. While the Moving Parties have filed evidence to establish that section 26.1 of the OEB has the attributes of an indirect tax, the government has not put forward any evidence to establish that the indirect tax is permissible as a regulatory charge. It is not yet known what, if any, evidence the government might adduce to discharge its burden, nor is it known whether this evidence, or the evidence presented by the Moving Parties, will be in dispute.

87. The current state of the record is not an impediment to having the Board state a case pursuant to section 32 of the OEB Act. There is no reason why a stated case and a hearing before the Board cannot be complementary proceedings. Therefore, if the Board determines that a stated case to the Divisional Court is the better alternative but believes that the government may have evidence relevant to the constitutional question, it must require that the evidence be produced, and, to the extent that the evidence indicates that facts are in dispute proceed to hear and decide the facts, and provide its factual findings to the Divisional Court as the basis for the stated case.

Reference: *Ottawa*, at para. 34

PART IV - Conclusion

88. This motion raises a fundamental constitutional question that affects all ratepayers in Ontario. It is a question that has already attracted considerable interest, and must be answered, preferably by the Board. To refuse to answer this fundamental constitutional question and to ask ratepayers to assume the burden of a charge levied pursuant to an unconstitutional provision out of procedural concerns amounts to a dereliction of the Board's obligations.

89. The Board, in Amended Procedural Order No. 1, asked five questions. The Moving Parties' answers to these questions are as follows:

(i) *Is the motion properly constituted? In other words, is there a Decision or Order of the Board that could be used as the basis for a motion to review under Rule 42 of the Rules?*

Answer: It is the Moving Parties' position that section 19 of the OEB Act provides the Board with the necessary jurisdiction to hear and determine the motion, without having recourse to Rule 42 of the OEB Rules. Nevertheless, the Board, in issuing the Assessment and authorising the Variance Account, and having done so without complying with sections 21 and 78 of the OEB Act, by necessary implication, made decisions with respect to the constitutional validity of section 26.1 of the OEB Act. These decisions provide a necessary basis for a motion to review under Rule 42 of the OEB Rules.

(ii) *Given Rule 42.02 of the Rules, does CCC have standing to bring the motion?*

Answer: The Moving Parties have standing, both as of right and as a matter of public interest, to bring this motion for the determination of a constitutional question. In the alternative, and if necessary, the Moving Parties seek leave to bring the motion pursuant to Rule 42.02 of the OEB Rules. The Moving Parties are affected by the Assessment, and have a genuine interest in the determination of the constitutional validity of section 26.1 of the OEB Act.

(iii) *Does the Board have the authority to cancel the assessments issued under section 26.1 of the Act?*

Answer: The Board derives the authority to cancel the Assessment pursuant to section 19 of the OEB Act and section 52 of the *Constitution Act, 1982*. This authority is confirmed by Rule 43.01 of the OEB Rules.

(iv) *Does the Board have the authority to determine whether section 26.1 of the Act (and Ontario Regulation 66/10 made under the Act) are constitutionally valid in the absence of another proceeding (i.e. can the constitutionality of the legislation be the only issue in the proceeding)?*

Answer: This motion raises several issues in addition to the constitutional validity of section 26.1 of the OEB Act, including a determination of the legality of each of the actions taken by the Board pursuant to section 26.1 of the OEB Act and Ontario Regulation 66/10, such as the determination of the quotient amount, the issuance of invoices, and the authorisation of the Variance Account.

Having said that, the Board has the authority to determine the constitutional validity of section 26.1 of the OEB Act even if this were the only issue in the proceeding. This authority is derived from section 19 of the OEB Act and the doctrine of constitutional supremacy, which is embodied in section 52 of the *Constitution Act, 1982*.

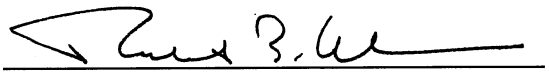
(v) *Would stating a case to the Divisional Court be a better alternative? What would the rationale be for stating a case? What question should be used if a stated case were to be pursued? What would form the evidentiary record for the stated case?*

Answer: the Moving Parties' position is that, while the Board has the jurisdiction to determine the constitutional question and order the relief sought, and ought to exercise that jurisdiction, a stated case to the Divisional Court is an alternative. A stated case is consistent with the Board's fulfilment of its mandate to protect ratepayers, and could result in a declaration of constitutional invalidity, which would be beneficial to the Board with respect to future assessments.

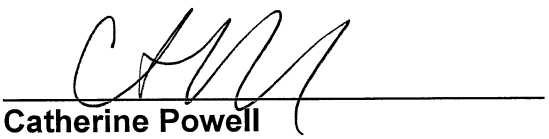
If the Board were to state a case to the Divisional Court, the appropriate question would be: does section 26.1 of the OEB Act create an indirect tax, as opposed to a regulatory charge, and is therefore outside of the constitutional competence of the provincial legislature, pursuant to section 92(2) of the *Constitution Act, 1867*, which limits provincial legislatures to direct taxation?

The evidentiary record for the stated case would consist of the record filed by the Moving Parties on this motion, in addition to the evidence presented by the government, if any. It would be possible for the parties to supplement the evidence before the Divisional Court by way of affidavit, if necessary.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.



Robert B. Warren



Catherine Powell

SCHEDULE "A"

1. *C.P.R. v. A.-G. Sask*, [1952] 2 S.C.R. 231

2. *Re Exported Natural Gas Tax*, [1982] 1 S.C.R. 1004

3. *Westbank First Nation v. British Columbia Hydro and Power Authority*, [1999] 3 S.C.R. 134

4. *620 Connaught v. Canada*, [2008] 1 S.C.R. 131

5. *Nova Scotia v. Martin*, [2003] 2 S.C.R. 504

6. *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5

7. *R. v. Conway*, 2010 SCC 22

8. *Toronto Hydro-Electric System Limited v. Ontario Energy Board*, 2010 ONCA 284

9. *Canada (Attorney General) v. Hislop*, [2007] 1 S.C.R. 429

10. *A.G. Can. v. Law Society of B.C.*, [1982] 2 S.C.R. 307

11. *Dyson v. Attorney General*, (1910), [1911] K.B. 410 (Eng. C.A.)

12. *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138

13. *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265

14. *Minister of Justice of Canada v. Borowski*, [1981] 2 S.C.R. 575

15. *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607

16. *Ottawa (City) v. Ontario (Attorney General)* (2002), 64 O.R. (3d) 703 (C.A.)

17. Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. supp., looseleaf (Toronto: Thomson Reuters Canada Ltd., 2007)

18. Andrew K. Lokan, *Constitutional Litigation in Canada*, looseleaf (Toronto: Thomson Carswell, 2006)

SCHEDULE "B"

1. *Ontario Energy Board Act*, 1998, S.O. 1998, c. 15

Board objectives, electricity

1.(1) The Board, in carrying out its responsibilities under this or any other Act in relation to electricity, shall be guided by the following objectives:

1. To protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service.
2. To promote economic efficiency and cost effectiveness in the generation, transmission, distribution, sale and demand management of electricity and to facilitate the maintenance of a financially viable electricity industry.
3. To promote electricity conservation and demand management in a manner consistent with the policies of the Government of Ontario, including having regard to the consumer's economic circumstances.
4. To facilitate the implementation of a smart grid in Ontario.
5. To promote the use and generation of electricity from renewable energy sources in a manner consistent with the policies of the Government of Ontario, including the timely expansion or reinforcement of transmission systems and distribution systems to accommodate the connection of renewable energy generation facilities. 2004, c. 23, Sched. B, s. 1; 2009, c. 12, Sched. D, s. 1.

Facilitation of integrated power system plans

(2) In exercising its powers and performing its duties under this or any other Act in relation to electricity, the Board shall facilitate the implementation of all integrated power system plans approved under the *Electricity Act, 1998*. 2004, c. 23, Sched. B, s. 1.

Board's powers, miscellaneous

21. (1) The Board may at any time on its own motion and without a hearing give directions or require the preparation of evidence incidental to the exercise of the powers conferred upon the Board by this or any other Act. 1998, c. 15, Sched. B, s. 21 (1).

Hearing upon notice

(2) Subject to any provision to the contrary in this or any other Act, the Board shall not make an order under this or any other Act until it has held a hearing after giving notice in such manner and to such persons as the Board may direct. 1998, c. 15, Sched. B, s. 21 (2).

(3) Repealed: 2000, c. 26, Sched. D, s. 2 (2).

No hearing

(4) Despite section 4.1 of the *Statutory Powers Procedure Act*, the Board may, in addition to its power under that section, dispose of a proceeding without a hearing if,

(a) no person requests a hearing within a reasonable time set by the Board after the Board gives notice of the right to request a hearing; or

(b) the Board determines that no person, other than the applicant, appellant or licence holder will be adversely affected in a material way by the outcome of the proceeding and the applicant, appellant or licence holder has consented to disposing of a proceeding without a hearing.

(c) Repealed: 2003, c. 3, s. 20 (1).

1998, c. 15, Sched. B, s. 21 (4); 2002, c. 1, Sched. B, s. 3; 2003, c. 3, s. 20 (1).

Consolidation of proceedings

(5) Despite subsection 9.1 (1) of the *Statutory Powers Procedure Act*, the Board may combine two or more proceedings or any part of them, or hear two or more proceedings at the same time, without the consent of the parties. 2003, c. 3, s. 20 (2).

Non-application

(6) Subsection 9.1 (3) of the *Statutory Powers Procedure Act* does not apply to proceedings before the Board. 1998, c. 15, Sched. B, s. 21 (6).

Use of same evidence

(6.1) Despite subsection 9.1 (5) of the *Statutory Powers Procedure Act*, the Board may treat evidence that is admitted in a proceeding as if it were also admitted in another proceeding that is heard at the same time, without the consent of the parties to the second-named proceeding. 2003, c. 3, s. 20 (3).

Interim orders

(7) The Board may make interim orders pending the final disposition of a matter before it. 1998, c. 15, Sched. B, s. 21 (7).

Assessment, Ministry conservation programs, etc.

26.1 (1) Subject to the regulations, the Board shall assess the following persons or classes of persons, as prescribed by regulation, with respect to the expenses incurred and expenditures made by the Ministry of Energy and Infrastructure in respect of its energy conservation programs or renewable energy programs provided under this Act, the *Green Energy Act, 2009*, the *Ministry of Energy and Infrastructure Act* or any other Act:

1. In respect of consumers in their service areas, gas distributors and licensed distributors.

2. The IESO.

3. Any other person prescribed by regulation. 2009, c. 12, Sched. D, s. 6.

Assessments, collection by gas distributors and licensed distributors

(2) Gas distributors and licensed distributors may collect the amounts assessed under subsection (1) from the consumers or classes of consumers as are prescribed by regulation and in the manner prescribed by regulation. 2009, c. 12, Sched. D, s. 6.

Assessments, IESO

(3) The IESO may collect the amounts assessed under subsection (1) from market participants or classes of market participants as are prescribed by regulation and in the manner prescribed by regulation. 2009, c. 12, Sched. D, s. 6.

Assessment, amount and timing

(4) For the purposes of subsection (1), the Board shall assess the amount prescribed by regulation within the time prescribed by regulation in accordance with the methods or rules prescribed by regulation. 2009, c. 12, Sched. D, s. 6.

Assessment, obligation to pay

(5) Every person assessed under subsection (1) shall pay the amount assessed in accordance with the Board's assessment by remitting the amount to the Minister of Finance. 2009, c. 12, Sched. D, s. 6.

Failure to pay

(6) If a person fails to pay an assessment made under subsection (1), the Board may, without a hearing, order the person to pay the assessment. 2009, c. 12, Sched. D, s. 6.

Reporting

(7) Persons referred to in subsection (1) shall report such information in such manner and at such times to the Board or to the Minister as is prescribed by regulation. 2009, c. 12, Sched. D, s. 6.

Regulations

(8) The Lieutenant Governor in Council may make regulations,

(a) governing assessments under this section, including,

(i) prescribing the amount to be assessed or the amounts to be assessed against each person, or class of person liable to pay an assessment or the method of calculating the amount or amounts, and

(ii) prescribing the time within which the assessments must occur;

(b) prescribing persons or classes of persons liable to pay an assessment under subsection (1);

(c) prescribing the frequency of the assessments;

(d) respecting the manner by which an assessment under this section is carried out;

(e) prescribing the proportion of the assessment for which each person or class of persons is liable or a method of determining the proportion;

(f) with respect to subsection (7), prescribing the time at which such reports must be made or submitted, the manner by which such reports must be made or submitted, and governing the information to be provided, including the manner in which such information is presented or provided;

(g) prescribing such other matters relating to the carrying out of an

assessment as the Lieutenant Governor in Council considers appropriate. 2009, c. 12, Sched. D, s. 6.

Special purposes

26.2 (1) For the purpose of the *Financial Administration Act*, all amounts collected under section 26.1 relating to assessments paid shall be deemed to be money paid to Ontario for the special purposes set out in subsection (2). 2009, c. 12, Sched. D, s. 6.

Same

(2) The following are the special purposes for which amounts collected under section 26.1 relating to assessments are paid to Ontario:

1. To fund conservation or renewable energy programs aimed at decreasing the consumption of two or more of the following fuels:
   i. natural gas,
   ii. electricity,
   iii. propane,
   iv. oil,
   v. coal, and
   vi. wood.
2. To fund conservation or renewable energy programs aimed at causing consumers of fuel to change from one or more of the fuels listed in paragraph 1 to any other fuel or fuels listed in that paragraph.
3. To fund conservation or renewable energy programs aimed at decreasing peak electricity demand, while increasing or decreasing the consumption of another type of fuel.
4. To fund research and development or other engineering or scientific activities aimed at furthering the conservation or the efficient use of fuels.
5. To fund conservation or renewable energy programs aimed at a specific geographical, social, income or other sector of Ontario.
6. To reimburse the Province for expenditures it incurs for any of the above purposes. 2009, c. 12, Sched. D, s. 6.

Special Purpose Conservation and Renewable Energy Conservation Fund

(3) The Minister of Finance shall maintain in the Public Accounts an account to be known as the Ministry of Energy and Infrastructure Special Purpose Conservation and Renewable Energy Fund in which shall be recorded all receipts and disbursements of public money under this section. 2009, c. 12, Sched. D, s. 6.

Non-interest bearing account

(4) The balances from time to time in the account do not bear interest. 2009, c. 12, Sched. D, s. 6.

Interpretation

(5) For the purposes of this section, the terms used in it that are not defined in this Act but that are defined in section 1 of the *Financial Administration Act* have the meanings provided in that Act. 2009, c. 12, Sched. D, s. 6.

Stated case

32. (1) The Board may, at the request of the Lieutenant Governor in Council or of its own motion or upon the motion of any party to proceedings before the Board and upon such security being given as it directs, state a case in writing for the opinion of the Divisional Court upon any question that is a question of law within the jurisdiction of the Board. 1998, c. 15, Sched. B, s. 32 (1); 2003, c. 3, s. 27.

Same

(2) The Divisional Court shall hear and determine the stated case and remit it to the Board with its opinion. 1998, c. 15, Sched. B, s. 32 (2).

Orders by Board, electricity rates

Order re: transmission of electricity

78. (1) No transmitter shall charge for the transmission of electricity except in accordance with an order of the Board, which is not bound by the terms of any contract. 2000, c. 26, Sched. D, s. 2 (7).

Order re: distribution of electricity

(2) No distributor shall charge for the distribution of electricity or for meeting its obligations under section 29 of the *Electricity Act, 1998* except in accordance with an order of the Board, which is not bound by the terms of any contract. 2000, c. 26, Sched. D, s. 2 (7).

Order re the Smart Metering Entity

(2.1) The Smart Metering Entity shall not charge for meeting its obligations under Part IV.2 of the *Electricity Act, 1998* except in accordance with an order of the Board, which is not bound by the terms of any contract. 2006, c. 3, Sched. C, s. 5 (1).

Rates

(3) The Board may make orders approving or fixing just and reasonable rates for the transmitting or distributing of electricity or such other activity as may be prescribed and for the retailing of electricity in order to meet a distributor's obligations under section 29 of the *Electricity Act, 1998*. 2009, c. 12, Sched. D, s. 12 (1).

Rates

(3.0.1) The Board may make orders approving or fixing just and reasonable rates for the Smart Metering Entity in order for it to meet its obligations under this Act or under Part IV.2 of the *Electricity Act, 1998*. 2006, c. 3, Sched. C, s. 5 (1).

Orders re deferral or variance accounts

(3.0.2) The Board may make orders permitting the Smart Metering Entity or distributors to establish one or more deferral or variance accounts related to costs associated with the smart metering initiative, in the circumstances

prescribed in the regulations. 2006, c. 3, Sched. C, s. 5 (1).

Orders re recovery of smart metering initiative costs

(3.0.3) The Board may make orders relating to the ability of the Smart Metering Entity, distributors, retailers and other persons to recover costs associated with the smart metering initiative, in the situations or circumstances prescribed by regulation and the orders may require them to meet such conditions or requirements as may be prescribed, including providing for the time over which costs may be recovered. 2006, c. 3, Sched. C, s. 5 (1).

Orders re deferral or variance accounts, s. 27.2

(3.0.4) The Board may make orders permitting the OPA, distributors or other licensees to establish one or more deferral or variance accounts related to costs associated with complying with a directive issued under section 27.2. 2009, c. 12, Sched. D, s. 12 (2).

Methods re incentives or recovery of costs

(3.0.5) The Board may, in approving or fixing just and reasonable rates or in exercising the power set out in clause 70 (2) (e), adopt methods that provide,

(a) incentives to a transmitter or a distributor in relation to the siting, design and construction of an expansion, reinforcement or other upgrade to the transmitter's transmission system or the distributor's distribution system; or

(b) for the recovery of costs incurred or to be incurred by a transmitter or distributor in relation to the activities referred to in clause (a). 2009, c. 12, Sched. D, s. 12 (2).

Annual rate plan and separate rates for situations prescribed by regulation

(3.1) The Board shall, in accordance with rules prescribed by the regulations, approve or fix separate rates for the retailing of electricity,

(a) to such different classes of consumers as may be prescribed by the regulations; and

(b) for such different situations as may be prescribed by the regulations. 2004, c. 23, Sched. B, s. 14 (1).

Same

(3.2) The first rates approved or fixed by the Board under subsection (3.1) shall remain in effect for not less than 12 months and the Board shall approve or fix separate rates under subsection (3.1) after that time for periods of not more than 12 months each or for such shorter time periods as the Minister may direct. 2004, c. 23, Sched. B, s. 14 (1).

Rates to reflect cost of electricity

(3.3) In approving or fixing rates under subsection (3.1),

(a) the Board shall forecast the cost of electricity to be consumed by the consumers to whom the rates apply, taking into consideration the adjustments required under section 25.33 of the *Electricity Act, 1998* and shall ensure that the rates reflect these costs; and

(b) the Board shall take into account balances in the OPA's variance

accounts established under section 25.33 of the *Electricity Act, 1998* and shall make adjustments with a view to eliminating those balances within 12 months or such shorter time periods as the Minister may direct. 2004, c. 23, Sched. B, s. 14 (1).

Forecasting cost of electricity

(3.4) In forecasting the cost of electricity for the purposes of subsection (3.3), the Board shall have regard to such matters as may be prescribed by the regulations. 2004, c. 23, Sched. B, s. 14 (1).

Imposition of conditions on consumer who enters into retail contract

(3.5) A consumer who enters into or renews a retail contract for electricity after the day he or she becomes subject to a rate approved or fixed under subsection (3.1) is subject to such conditions as may be determined by the Board. 2004, c. 23, Sched. B, 14 (1).

Rates

(4) The Board may make an order under subsection (3) with respect to the retailing of electricity in order to meet a distributor's obligations under section 29 of the *Electricity Act, 1998* even if the distributor is meeting its obligations through an affiliate or through another person with whom the distributor or an affiliate of the distributor has a contract. 1998, c. 15, Sched. B, s. 78 (4).

(5) Repealed: 2004, c. 23, Sched. B, s. 14 (2).

Same, obligations under s. 29 of *Electricity Act, 1998*

(5.0.1) In approving or fixing just and reasonable rates for the retailing of electricity in order to meet a distributor's obligations under section 29 of the *Electricity Act, 1998*, the Board shall comply with the regulations made under clause 88 (1) (g.5). 2003, c. 8, s. 1.

Same, Hydro One Inc. and subsidiaries

(5.1) In approving or fixing just and reasonable rates for Hydro One Inc. or a subsidiary of Hydro One Inc., the Board shall apply a method or technique prescribed by regulation for the calculation and treatment of transfers made by Hydro One Inc. or its subsidiary, as the case may be, that are authorized by section 50.1 of the *Electricity Act, 1998*. 2002, c. 1, Sched. B, s. 8; 2003, c. 3, s. 52 (2).

Same, statutory right to use corridor land

(5.2) In approving or fixing just and reasonable rates for a transmitter who has a statutory right to use corridor land (as defined in section 114.1 of the *Electricity Act, 1998*), the Board shall apply a method or technique prescribed by regulation for the treatment of the statutory right. 2002, c. 1, Sched. B, s. 8; 2003, c. 3, s. 52 (3).

Conditions, etc.

(6) An order under this section may include conditions, classifications or practices, including rules respecting the calculation of rates, applicable,

(a) to the Smart Metering Entity in respect of meeting its obligations;

(b) to an activity prescribed for the purposes of subsection (3); and

(c) to the transmission, distribution or retailing of electricity. 2009, c. 12, Sched. D, s. 12 (3).

Deferral or variance accounts

(6.1) If a distributor has a deferral or variance account that relates to the commodity of electricity, the Board shall, at least once every three months, make an order under this section that determines whether and how amounts recorded in the account shall be reflected in rates. 2003, c. 3, s. 52 (4).

Same

(6.2) If a distributor has a deferral or variance account that does not relate to the commodity of electricity, the Board shall, at least once every 12 months, or such shorter period as is prescribed by the regulations, make an order under this section that determines whether and how amounts recorded in the account shall be reflected in rates. 2003, c. 3, s. 52 (4).

Same

(6.3) An order that determines whether and how amounts recorded in a deferral or variance account shall be reflected in rates shall be made in accordance with the regulations. 2003, c. 3, s. 52 (4).

Same

(6.4) If an order that determines whether and how amounts recorded in a deferral or variance account shall be reflected in rates is made after the time required by subsection (6.1) or (6.2) and the delay is due in whole or in part to the conduct of a distributor, the Board may reduce the amount that is reflected in rates. 2003, c. 3, s. 52 (4).

Same

(6.5) If an amount recorded in a deferral or variance account of a distributor is reflected in rates, the Board shall consider the appropriate number of billing periods over which the amount shall be divided in order to mitigate the impact on consumers. 2003, c. 3, s. 52 (4).

Same

(6.6) Subsections (6.1), (6.2) and (6.4) do not apply unless section 79.6 has been repealed under section 79.11. 2003, c. 3, s. 52 (4).

Fixing other rates

(7) Upon an application for an order approving or fixing rates, the Board may, if it is not satisfied that the rates applied for are just and reasonable, fix such other rates as it finds to be just and reasonable. 1998, c. 15, Sched. B, s. 78 (7).

Burden of proof

(8) Subject to subsection (9), in an application made under this section, the burden of proof is on the applicant. 1998, c. 15, Sched. B, s. 78 (8).

Order

(9) If the Board of its own motion, or upon the request of the Minister, commences a proceeding to determine whether any of the rates that the Board may approve or fix under this section are just and reasonable, the Board shall

make an order under subsection (3) and the burden of establishing that the rates are just and reasonable is on the transmitter or distributor, as the case may be. 1998, c. 15, Sched. B, s. 78 (9).

2. *Ontario Regulation 66/10*

Payment of assessment

6. On or before July 30, 2010, each person or member of a class of persons assessed under section 2 shall remit the assessed amount, together with such identifying information as may be specified by the Board, to the Minister of Finance in accordance with the instructions issued by the Board. O. Reg. 66/10, s. 6.

Recovery of funds

7. (1) A distributor licensed under Part V of the Act may recover from persons to whom it distributes electricity in its service area, other than persons who are distributors licensed under Part V of the Act, amounts calculated using the following formula:

$$Q \times E$$

where,

"Q" is the quotient published by the Board and referred to in subsection 5 (2), and

"E" is the volume of electricity distributed to the person during the current billing period in each bill referred to in section 9.

O. Reg. 66/10, s. 7 (1).

(2) The IESO may recover from the persons who are market participants and are referred to in subsection (3) the amount calculated under subsection 5 (4) using the following formula:

$$H \times (I \div J)$$

where,

"H" is the amount assessed under subsection 5 (4),

"I" is the volume of electricity withdrawn by the market participant from the IESO-controlled grid, as determined in accordance with the market rules, for use in Ontario over the most recent 12-month period for which information is available for the market participant, and

"J" is the sum of all volumes of electricity withdrawn from the IESO-controlled grid, as determined in accordance with the market rules, for use in Ontario by market participants from which the IESO may recover in accordance with subsection (3), over the most recent 12-month period for which information is available for the market participant.

O. Reg. 66/10, s. 7 (2).

(3) The IESO may recover the amount assessed under subsection 5 (4) from persons,

(a) who are market participants as of the date when the IESO calculates the amounts to recover under subsection (2) and who are not distributors licensed under Part V of the Act; and

(b) who are not licensed under Part V of the Act as a generator, unless their primary business activity is not the generation of electricity. O. Reg. 66/10, s. 7 (3).

Variance accounts

8. (1) Every distributor licensed under Part V of the Act shall apply to the Board by no later than April 15, 2012 for an order authorizing it to clear any debit or credit balance in any variance account established by the distributor and authorized by the Board to track the difference between the amounts remitted by the distributor pursuant to the assessment under subsection 5 (3) and the amounts recovered by the distributor under subsection 7 (1). O. Reg. 66/10, s. 8 (1).

(2) The IESO shall add any variance between the assessment referred to in subsection 5 (4) of this Regulation and the recovery referred to in subsection 7 (2) of this Regulation to the amount it may recover with respect to any future assessment under section 26.1 (1) of the Act. O. Reg. 66/10, s. 8 (2).

3. *Ontario Energy Board Rules of Practice and Procedure*

42. Request

42.01 Subject to **Rule 42.02**, any person may bring a motion requesting the Board to review all or part of a final order or decision, and to vary, suspend or cancel the order or decision.

42.02 A person who was not a party to the proceeding must first obtain the leave of the Board by way of a motion before it may bring a motion under **Rule 42.01**.

42.03 The notice of motion for a motion under **Rule 42.01** shall include the information required under **Rule 44**, and shall be filed and served within 20 calendar days of the date of the order or decision.

42.04 Subject to **Rule 42.05**, a motion brought under **Rule 42.01** may also include a request to stay the order or decision pending the determination of the motion.

42.05 For greater certainty, a request to stay shall not be made where a stay is precluded by statute.

42.06 In respect of a request to stay made in accordance with **Rule 42.04**, the Board may order that the implementation of the order or decision be delayed, on conditions as it considers appropriate.

43. Board Powers

43.01 The Board may at any time indicate its intention to review all or part of any order or decision and may confirm, vary, suspend or cancel the order or decision by serving a letter on all parties to the proceeding.

43.02 The Board may at any time, without notice or a hearing of any kind, correct a typographical error, error of calculation or similar error made in its orders or decisions.

4. *Constitution Act, 1867*, (U.K.) 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. 11, No. 5

> **92.** In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, -
>
> **2.** Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.

5. *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

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

AND IN THE MATTER OF Assessments issued by the Ontario Energy Board pursuant to section 26.1 of the Ontario Energy Board Act and Ontario Regulation 66/10;

AND IN THE MATTER OF Rule 42 of the Rules of Practice and Procedure of the Ontario Energy Board.

ONTARIO ENERGY BOARD

FACTUM OF THE MOVING PARTIES, THE CONSUMERS COUNCIL OF CANADA AND AUBREY LEBLANC

(Motion Returnable July 13, 2010)

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