

By e-mail



June 9, 2010

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To All Licensed Electricity Distributors
except Toronto Hydro-Electric System Limited
("THESL"), an Intervenor of Record in EB-2010-0184, and

To the Independent Electricity System Operator ("IESO")

Dear Sir\Madam,

**Motion by Consumers Council of Canada ("CCC")
to Cancel Special Purpose Charge ("SPC") Assessments**
Board File No.: EB-2010-0184
Our File No.: 339583-000072

Enclosed is a copy of the Factum submitted on behalf of our client, Canadian Manufacturers & Exporters ("CME"), in this proceeding.

We are providing you with a copy of this Factum in order to notify you of the interim order being requested in these proceedings, for issuance on or before July 30, 2010, to stay the SPC Assessments that the Ontario Energy Board ("OEB") sent to all Licensed Electricity Distributors and to the IESO on or about April 9, 2010.

Pursuant to Procedural Order No. 3 dated May 28, 2010, an oral hearing pertaining to preliminary matters with respect to CCC's Motion is scheduled to commence on Tuesday, July 13, 2010, at 9:30 a.m. in the Board's Hearing Room at 2300 Yonge Street, 25th floor, Toronto.

Feel free to contact me if you have any questions.

Yours very truly,

A handwritten signature in black ink, appearing to read 'P. Thompson', is written over a horizontal line.

Peter C.P. Thompson, Q.C.

PCT\slc
enclosure

c. Board Secretary
All Parties and Intervenor of Record
Paul Clipsham (CME)

OTT01\4073941\1

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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 Assessments issued by the Ontario Energy board pursuant to section 26.1 of the *Ontario Energy Board Act, 1998*, and Ontario Regulation 66/10;

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

**FACTUM OF
CANADIAN MANUFACTURERS & EXPORTERS (“CME”)
(MOTION RETURNABLE JULY 13, 2010)**

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AND TO: Intervenor of Record

AND TO: All Licensed Electricity Distributors other than Toronto Hydro-Electric System Limited ("THESL"), an Intervenor of Record

AND TO: Independent Electricity System Operator ("IESO")

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, 1998*, and Ontario Regulation 66/10;

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

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PART I – OVERVIEW OF CME’S POSITION

1. The assessment amounts the Board invoiced to each licensed electricity distributor and to the Independent Electricity System Operator (“IESO”) were the outcome of a process brought before the Board as a result of the enactment of Ontario Regulation 66/10 (“O.Reg. 66/10”). In the assessment process, the Board determined a quotient amount that it then applied to determine each of the amounts it subsequently invoiced to the assessed persons. Neither the assessed electricity distributors, nor their customers received any advance notice of the Board’s intent to issue the assessments. In the absence of receiving advance notice, representatives of parties adversely affected by an exercise by the Board of its responsibilities under the *OEB Act* are entitled to ask the Board to reconsider the legality of its actions.
2. The assessments that section 26.1 of the *Ontario Energy Board Act, 1998* (the “*OEB Act*”) requires the Ontario Energy Board (the “OEB” or the “Board”) to issue are, in pith and substance, constitutionally invalid taxation. As a fully empowered and independent quasi-judicial regulatory tribunal, with a statutory mandate, *inter alia*, to perform its responsibilities in a manner that protects the interests of consumers and utilities, the OEB is obliged to:
 - (a) Refrain from acting in accordance with constitutionally invalid legislation that adversely affects utilities and their customers; and
 - (b) To consider and determine a request by a party representing either consumer or utility interests to cancel the outcomes of the assessment process before the Board on the grounds that they stem from constitutionally invalid legislation and regulations thereunder.
3. The Board should seldom forego an opportunity to exercise the full ambit of its authority under section 19 of the *OEB Act*. The Board is as competent as a Court to decide a constitutional issue and a Court would benefit from having the Board’s view on the constitutional question pertaining to the Board’s assessment jurisdiction. While other process options exist, including stating a case for the opinion of the Divisional Court, they are inferior to an expeditious Board determination of the constitutional invalidity issue, preceded by the issuance of an Order staying the outcomes of the assessment process pending that determination.

PART II – FACTS

4. This Factum on behalf of CME has been prepared in consultation with counsel for the Consumers Council of Canada and Aubrey LeBlanc (hereinafter collectively referred to as “CCC”), in an attempt to minimize duplication. In an important precedent-setting case such as this, some duplication is unavoidable. The Factum of CCC provides details of the relevant facts.
5. CME’s summary of the facts relevant to a determination of the five (5) preliminary questions the Board lists in Procedural Order #1 dated May 11, 2010, is as follows:
 - (a) The Special Purpose Charge (“SPC”) to licensed electricity distributors and the IESO is the outcome of the performance by the Board of an “assessment” responsibility that the Legislature assigned to it by amendments to the *OEB Act*;¹
 - (b) The legislation requiring the Board to assess gas distributors, licensed electricity distributors and the IESO is “subject to the regulations”. The amount to be assessed under the legislation, like the persons to be assessed, is “subject to the regulations”;²
 - (c) Neither the method to be applied to determine the amount, nor the amount to be recovered is established by legislation. The legislation delegates the function of determining the amount to be assessed to the Lieutenant Governor-in-Council (“LGIC”);
 - (d) The assessment process before the Board was triggered by O.Reg. 66/10 enacted on or about March 27, 2010. O.Reg. 66/10 establishes the total amount to be assessed at \$53,615,310 and the persons to be assessed as being all licensed electricity distributors and the IESO;³
 - (e) The funds assessed pertain to program spending by the Minister of Energy and Infrastructure (the “Ministry”) in respect of its energy conservation and renewable energy programs. ⁴ Government consolidated revenues are the source of funds for Ministry program spending;

¹ *OEB Act*, s.26.1 and O.Reg. 66/10; Tsun Affidavit April 26, 2010, Amended Application Record (“AR”), Tab 2, pp.9 and 10 and Tab 5, pp.40 to 43 and 51 to 54.

² *OEB Act*, s.26.1(1); AR Tab 5, p.44.

³ O.Reg. 66/10, ss.3 and 4; AR Tab 5, p.52.

⁴ *OEB Act*, s.26.1(1) and (2); AR Tab 5, pp.41 to 43.

- (f) The Ministry does not generate, transmit, distribute, buy or sell electricity. It provides no particular services to those assessed, nor do the amounts assessed relate to any services the electricity distributors provide to their customers;
- (g) The amounts assessed for payment by the electricity distributors and the IESO are to be paid to the Minister of Finance;⁵
- (h) The Board conducted no examination of the amount to be assessed. O.Reg. 66/10 calls upon the Board to calculate and publish a quotient amount in accordance with the formula described in the Regulation. The Board then uses that quotient amount to allocate the total of \$53,615,310 between each licensed electricity distributor and the IESO;⁶
- (i) The Board-determined allocation amounts are then invoiced to each of the assessed persons. The Board-issued invoices direct payment of the assessed amounts to the Minister of Finance;⁷
- (j) The Board published and advised each assessed person of the quotient it calculated during the assessment process. O.Reg. 66/10 authorizes each electricity distributor to recover the amount of its SPC assessment from its customers and prescribes the use of a formula whereby the distributor applies the quotient the Board has determined to the volume of electricity distributed to each customer during the current billing period;⁸
- (k) O.Reg. 67/10, amending O.Reg. 275/04, enacted on or about March 27, 2010, requires electricity distributors, who pass on the SPC to their customers, to include the amount they charge their small volume customers in the "Regulatory Charges" line of those bills;⁹
- (l) Section 78(2) of the *OEB Act* prohibits distributors from charging for the distribution of electricity except in accordance with an order of the Board. The Board recognized and emphasized that the portion of the SPC amount that distributors invoice to their customers is not a rate pertaining to goods or services provided by the distributors to the customers. The Board emphasized that

⁵ *OEB Act*, s.26.1(5); O.Reg. 66/10, s.6; AR Tab 4, pp.41 and 53.

⁶ O.Reg. 66/10, s.5(1) to (4) inclusive; AR Tab 5, pp.52 and 53.

⁷ OEB April 9, 2010 letter to Licensed Electricity Distributors; Tsun Affidavit April 26, 2010, Exhibit A; AR Tab 2, pp.14 to 16.

⁸ O.Reg. 67/10; OEB April 9, 2010 letter supra; AR Tab 2, pp.14 and 15.

⁹ O.Reg. 275/04 as amended by O.Reg. 67/10, ss.1 and 4(2).

O.Reg. 66/10 is the authority for the distributors to pass on their SPC charges to their customers;¹⁰

- (m) Subsequently, the Board proceeded, ex parte, to establish Account 1521 as the SPC Assessment Variance Account;¹¹ The Board's authority to establish such accounts stems from its ratemaking jurisdiction under the *OEB Act*;¹²
- (n) Pursuant to O.Reg. 66/10, the full amount of the SPC is payable by those assessed on or before July 30, 2010.¹³ Those assessed are permitted to recover the amount paid from their customers over the ensuing twelve (12) months;
- (o) If the SPC is not paid, then the Board is empowered to order its payment. Failing compliance with such an order, the Board is empowered to suspend or cancel the license of the non-compliant electricity distributor;¹⁴
- (p) The amount to be assessed against gas distributors has not yet been quantified by regulation. Preliminary indications are that this amount is expected to be substantial;
- (q) By Notice of Motion dated April 26, 2010 (amended May 27, 2010), CCC requested an order cancelling the assessments on the grounds that they are constitutionally invalid;¹⁵
- (r) By order dated May 18, 2010, CME, representing the electricity consumer interests of its 1,400 Ontario members, was granted intervenor status in CCC's Motion;¹⁶ and
- (s) Procedural Order #1 dated May 11, 2010, lists five (5) questions the Board wishes to consider prior to determining whether it will hear, on its merits, CCC's challenge to the legality of the Board's actions in making and invoicing the assessments on the grounds that section 26(1) of the *OEB Act* and the provisions of O.Reg. 66/10 are constitutionally invalid.

¹⁰ OEB April 9, 2010 letter supra; AR Tab 2, p.15.

¹¹ OEB April 23, 2010 letter to Licensed Electricity Distributors; Tsun Affidavit April 26, 2010, Exhibit B; AR Tab 2, pp.18 and 19.

¹² *OEB Act*, s.78.

¹³ O.Reg. 66/10, s.6; AR Tab 4, p.53.

¹⁴ *OEB Act*, s.26.1(3) and (4); AR Tab 5, p.40.

¹⁵ Amended Notice of Motion dated May 27, 2010; AR Tab 1, pp.1 to 6.

¹⁶ OEB Procedural Order #3 dated May 18, 2010.

PART III – ISSUES AND LAW

6. We adopt the issues framework counsel for CCC present in their Factum.

(i) The Assessments are Constitutionally Invalid

7. The question of whether the assessment amounts are a tax, a regulatory charge, or a fee is question of law to be determined by applying the criteria articulated by the Supreme Court of Canada in *Westbank First Nation v. British Columbia Hydro and Power Authority*, [1999] 3 S.C.R. 134 (“**Westbank**”) cited by counsel for CCC in their Factum.

8. The \$53,615,310 that O.Reg. 66/10 required the OEB to assess against the electricity distributors and the IESO cannot reasonably be characterized as a regulatory charge or a fee. The total amount relates to program spending by the Ministry. It does not relate any goods or services the Ministry provides to the licensed electricity distributors and the IESO. It does not relate to any services the electricity distributors provide to their distribution customers. The assessed amount, and its allocation, between each of the electricity distributors and the IESO, and subsequent reallocation to electricity distribution customers is not a regulatory charge or a fee; it is a tax.

References: Re: *Eurig Estate*, [1998] 2 S.C.R. 565 (“**Eurig**”)
Westbank (supra)

9. The provisions of O.Reg. 67/10 requiring the electricity distributors to add the amounts they pass on to their smaller volume customers to the “Regulatory Charges” line of their bills do not provide any support for the proposition that the SPC charge to distributors and the IESO is a regulatory charge or fee.

10. The assessed amounts comprise unconstitutional taxation on two (2) grounds:

- (a) As a tax, they are unconstitutional because legislation is required to establish the amount of a tax. In this case, neither the method for calculating, nor the amount to be assessed is established by legislation. The amount to be recovered is established by O.Reg. 66/10; and
- (b) The assessed amounts comprise an indirect tax and indirect taxation is beyond the competence of the Ontario legislature.

Accordingly, section 26.1 of the *OEB Act* and O.Reg. 66/10 are void and have no force and effect.

References: *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.) 1982 c.11 (“**Constitution Act, 1982**”), s.53
Constitution Act, 1867 (U.K.), 30 and 31 Vict., c.3, reprinted in R.S.C. 1985, App.11, No. 5 (“**Constitution Act, 1867**”), ss.53 and 92(2)
Eurig, (supra)
Westbank, (supra)

(ii) The Board has the Jurisdiction to Answer the Constitutional Question

11. The Board is an independent quasi-judicial regulatory tribunal that is fully empowered, under section 19 of the *OEB Act*, to hear and determine all questions of law and fact in all matters within its jurisdiction.¹⁷

References: *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**”)

12. The assessments are an outcome of a process before the Board initiated by O.Reg. 66/10.¹⁸ While the assessment process is mechanical, it nevertheless involves a determination by the Board of a quotient amount which it then applies to determine allocations of the total amount to be assessed to each electricity distributor and the IESO. Based on these Board determined allocations, Board created invoices are issued to each of the assessed persons. The Board determined invoice amounts and the Board determined quotient are then used by each of the electricity distributors to determine the amounts they charge to each of their distribution customers.
13. The SPC Variance Account the Board authorized, in an exercise of its rate-making jurisdiction, is not a deferral account from which refunds can be paid to electricity distributor customers if it is determined that the amounts they are charged and pay stem from actions taken by the Board in response to legislation and regulations thereunder that are constitutionally invalid.
14. Electricity consumers are materially affected by the outcomes of the assessment process before the Board.

¹⁷ *OEB Act*, s.19(1).

¹⁸ Rule 3.01 of the Board’s *Rules of Practice and Procedure* (the “*Board’s Rules*”) defines “proceeding” as “a process to decide a matter brought before the Board ...”. Under s.19(2) of the *OEB Act*, any determination made by the Board in a proceeding constitutes an “order”.

15. Having received no advance notice of the process, those representing the interests of electricity consumers are entitled to ask the Board to reconsider the legality of its actions and the assessment process in which it engaged.¹⁹
16. By proceeding with the assessment process contemplated by the combined effect of section 26.1 of the *OEB Act* and O.Reg. 66/10, the Board implicitly determined that the provisions thereof were constitutionally valid. This implicit determination is necessary in order for the Board to determine, first, the quotient amount and, second, the allocation amounts it subsequently invoiced to each licensed electricity distributor and the IESO. In turn, the Board determined invoice amounts and the Board determined quotient comprise the foundation for the amounts charged by the assessed utilities to each of their distribution customers.
17. The legality of the Board's implicit decision pertaining to the constitutional validity of section 26.1 of the *OEB Act* and the provisions of O.Reg. 66/10 and the explicit determinations of the quotient and allocation amounts followed by the Board's invoicing of such amounts to the assessed person are subject to challenge in proceedings before the Board under section 19 of the *OEB Act* and Rules 2.02 and 42.01 of the *Board's Rules*.²⁰

(iii) The Board is Both Authorized and Obligated to Cancel the Assessments and the Related Variance Account Authorization

18. Any law that is inconsistent with the provisions of the *Constitution Act* is, to the extent of the inconsistency, of no force and effect.

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

19. The Board is fully empowered to stay, suspend, cancel or rescind determinations it has made pursuant to legislation and regulations that are constitutionally invalid. As an independent quasi-judicial regulatory tribunal, fully empowered to determine all questions of law and fact pertaining to matters within its jurisdiction, and statutorily

¹⁹ The *Board's Rules* do not provide for a procedure whereby parties affected by a determination made by the Board, without any advance notice to anyone, can seek to have the Board reconsider the legalities of its actions. Rule 2.20 deals with situations not covered in the *Board's Rules*. Rule 2.20 provides that "Where procedures are not provided in these Rules, the Board may do whatever is necessary and permitted by law to enable it to effectively and completely adjudicate on the matter before it." CCC's Motion falls within the ambit of Rule 2.02.

²⁰ See para.12 of this Factum and Footnotes 18 and 19. Rule 42.01 applies to a determination made in a proceeding before the Board. Assessments issued by the Board in response to the process before it initiated by O.Reg. 66/10 are the ultimate cause of the adverse impacts on the persons assessed and their electricity distribution customers.

mandated, *inter alia*, to carry out its responsibilities in a manner that protects electricity consumers and utilities,²¹ the Board, like a Court, is obliged to rescind actions adversely affecting the interests of consumers and utilities and based on legislation and regulations that have been demonstrated to be constitutionally invalid.

(iv) CCC, CME, and Others have Standing

20. Parties, whose interests have been adversely affected, as a consequence of ex-parte determinations made by the Board, are entitled to ask the Board, as a fully empowered quasi-judicial regulatory tribunal, to reconsider the legalities of its actions.²² Interested parties should not be required to seek leave to request such a reconsideration.²³ If leave is required, then such leave should be granted where the Board has made determinations without advance notice to anyone affected thereby.

(v) A Board Determination of the Constitutional Issue is Better than the Other Process Alternatives, including a Stated Case to the Divisional Court

21. The process options for determining the constitutional question on its merits are:
- (a) A Board Decision;
 - (b) A Board Decision supplemented by a Stated Case to the Divisional Court;²⁴ and
 - (c) No Board Decision and, instead, a Stated Case to the Divisional Court.²⁵
22. CME considers a Board Decision to be the superior process alternative because:
- (a) The Board fulfills its obligation, as an independent quasi-judicial regulatory tribunal, to hear and determine all questions of law and fact pertaining to matters within its jurisdiction;

²¹ *OEB Act*, s.1(1)1. and 2.

²² See authorities cited by counsel for CCC in their Factum on this point.

²³ Rule 42.02 of the *Board's Rules* requiring Leave does not envisage a situation where none of the persons affected by the Board's determinations received any advance notice of the assessment process before the Board initiated by O.Reg. 66/10. Such a situation is not covered by Rule 42.02 which envisages that the process before the Board being challenged was not entirely an *ex parte* process. Rule 42.02 envisages that prior notice of the process was provided but the person seeking to have the outcome reviewed did not respond to that notice. In those situations, a "leave" requirement is appropriate. The provisions of Rule 2.02 apply to the circumstances of this particular case and empower the Board to respond to CCC's Motion without considering the issue of "leave" under Rule 42.02.

²⁴ *Ontario (Energy Board) v. Consumers Gas Co.* (1987), 59 O.R. (2d) 766, 39 D.L.R. (4th)161 ("**Consumers**").

²⁵ *Ottawa (City) v. Ontario (Attorney General)* (2002), 64 O.R. (3d) 703 ("**Ottawa**"), at para. 22.

- (b) There is no good reason for the Board to decline to exercise its statutory authority under section 19 of the *OEB Act*;
 - (c) The Board is as competent as a Court to determine the constitutional question;
 - (d) The Court will benefit from having the Board's Decision on the constitutional question, if that Decision is appealed or if the Board decides to state a case as a supplement to its Decision; and
 - (e) The consideration and determination of the constitutional question by the Board is likely to lead to the most expeditious determination of the constitutional question on its merits.
23. If the Board states a case for the opinion of the Divisional Court, either as a supplement to its own Decision or instead of deciding the constitutional question on its merits, then the question that CME suggests for inclusion in the Stated Case would be something to the following effect:
- “Are the quotient amount and the allocation amounts that the Board determined for each licensed electricity distributor and the IESO, including the Board issued invoices for such amounts, null and void and illegal because they stem from the provisions of legislation and regulations that comprise illegal and unconstitutional taxation?”
- (vi) **Interim Relief should be Granted Pending a Determination of the Constitutional Question on its merits**
24. On its face, the combined effect of the provisions of section 26.1 of the *OEB Act*, and O.Reg. 66/10 comprise unconstitutional taxation. The *prima facie* case in support of constitutional invalidity is strong. The issue of the constitutional validity of the legislation and regulations thereunder is a serious question. The amounts consumers are required to pay are not subject to a rate order calling for refund or other adjustments in the event that the outcomes of the Board's actions in issuing the assessments are nullified. Consumers will be irreparably harmed if they have to make payments to their electricity distributors pending the determination of the merits of CCC's Motion because they have no remedy against the Minister of Finance in the event the Board's actions in issuing the assessments are found to have been initiated by constitutionally invalid legislation and regulations.

25. Without the issuance of a stay before July 30, 2010, the electricity distributors must pay the full amount of their assessments. Thereafter, they can collect the amounts paid from their customers over the ensuing twelve (12) months. Without the issuance of an interim stay order before July 30, 2010, customers of electricity distributors will be irreparably harmed.
26. In the circumstances of this case, considerations of the seriousness of the question to be tried, irreparable harm, and the balance of inconvenience warrant the issuance of an interim order staying the Board issued assessments and invoices to parties assessed, and any amounts charged by electricity distributors to their customers pending a final disposition of the constitutional question on its merits.

Reference: *RJR – MacDonald v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (“**MacDonald**”) at 347 to 349

27. In these circumstances, the Board should not hesitate to exercise its power under section 21(7) of the *OEB Act* to:

“... make interim orders pending the final disposition of a matter before it.”

and under Rule 42.04, to stay the outcomes of its assessment process initiated by O.Reg. 66/10 pending the determination of the Motion.

(vii) CME’s Response to the Board’s Questions in Procedural Order #1

28. In Amended Procedural Order #1, the Board asks five (5) questions. CME’s answers to these questions are as follows:

1. *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: The Board determinations that are being challenged on this Motion include the Board determination of the quotient amount, the Board determination of the allocation amounts and the Board’s invoicing of the allocation amounts to each of the electricity distributors and the IESO. There is, as well, the Board determination to authorize a variance account for each of the licensed electricity distributors. Implicit in each of these determinations is a Board determination that the provisions of section 26.1 of the *OEB Act* and O.Reg. 66/10 are constitutionally valid. All of these explicit and implicit determinations are subject to challenge under *OEB Rules* 2.02 and 42.01, as well as under *OEB Act*, section 19(1).

2. *Given Rule 42.02 of the Rules, does CCC have standing to bring the Motion?*

Answer: As a well recognized representative of ratepayer interests in proceedings before the Board, CCC has standing for the reasons articulated by counsel for CCC in their Factum. Moreover, for the reasons outlined in paras. 12, 15 and 20 of this Factum, Rule 42.02 requiring “leave” does not apply in a case where the Board proceeded entirely *ex parte* to make the determinations being challenged. The applicable rule is Rule 2.02 Parties whose interests have been adversely affected by *ex parte* determinations made by the Board are entitled to ask the Board to reconsider the legalities of its actions without first having to obtain permission from the Board to make such a request.

3. *Does the Board have the authority to cancel the assessments issued under section 26.1 of the Act?*

Answer: We assume that the word “assessments” in this question refers to the outcomes of the process before the Board, namely, the Board’s determination of the quotient amount, the Board determined allocation to each licensed electricity distributor and the Board issued invoices to each distributor and the IESO. The Board has the authority under section 19 of the *OEB Act* and rule 43.01 of the *OEB Rules* to cancel each of those determinations. For the reasons outlined in paras. 11, 18 and 19 of this Factum and as required by section 52 of the *Constitution Act, 1982*, the Board is obliged to cancel and rescind actions that are unconstitutionally invalid. Moreover, for the reasons articulated in paras. 24 to 27 of this Factum, the Board should make an interim order pursuant section 21(7) of the *OEB Act* and 42.04 of the *OEB Rules* staying these determinations pending a determination of the constitutional question on its merits.

4. *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: While the constitutionality of section 26.1 of the *OEB Act* and the provisions of O.Reg. 66/10 is the fundamental issue, technically, it is not the only issue in the proceeding. The issues in this proceeding include a determination of the legality of each of the actions taken by the Board under the auspices of section 26.1 of the *OEB Act* and O.Reg. 66/10, including the Board’s determination of the quotient amount, the Board’s determination of the utility-specific allocations, the Board’s issuance of the invoices, and the Board’s establishment of the variance account for each electricity distributor. The Board has the authority and the obligation to determine each of these issues which depend upon a determination of the constitutional question.

Moreover, for the reasons provided by counsel for CCC in their response to this question, the Board has the authority to determine the constitutional validity of section 26.1 of the *OEB Act* and O.Reg. 66/10, even were this issue to be the only issue in this proceeding.

5. *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: A Board Decision on the merits of the constitutional question is the best process option to follow. There is no good reason for the Board to forego the opportunity to exercise the full ambit of its authority under section 19 of the *OEB Act*. The Board is as competent as a Court to decide the issue and the Court would benefit from having the Board's view on the constitutional question if its decision is appealed or if the Board decides to supplement its Decision with a Stated Case to the Divisional Court. A Board Decision is the process option to follow because it will lead to an early determination of the constitutional question on its merits.

The Board could State a Case to the Divisional Court as a supplement to its Decision. The rationale for such a course of action is to seek the Divisional Court's opinion, not for the purpose of facilitating its own Decision, but to determine if the Board had decided the issue correctly.

Alternatively, the Board could decline to decide the matter and State a Case for the opinion of the Divisional Court in order to obtain the Court's opinion on the constitutional question before rendering its own Decision. We can see no good reason why the Board should proceed in this fashion. Provincially appointed members of an independent quasi-judicial regulatory tribunal are essentially in the same position as provincially and/or federally appointed judges who are called upon to determine the constitutional validity of laws enacted by the governments that appointed them to their adjudicative positions. They should not decline to determine such issues unless there are sound reasons for Stating a Case for the opinion of a higher judicial authority.

Were a Stated Case to be pursued, the question to be posed should be something to the following effect:

“Are the quotient amount and the allocation amounts that the Board determined for each licensed electricity distributor and the IESO, including the Board issued invoices for such amounts, null and void and illegal because they stem from the provisions of legislation and regulations that comprise illegal and unconstitutional taxation?”

The evidentiary record for the Stated Case would consist of the record in this case, which is not yet complete, and any further materials the parties agree upon or, in the absence of agreement, that the Board determines are arguably relevant to the question the Court is asked to answer.

(viii) Cost Award Eligibility and Costs

29. In Procedural Order #1, the Board expressed an intent not to make any cost awards with respect to the hearing pertaining to the five (5) preliminary questions the Board listed for determination. That statement of intent was made before the Board reconsidered the issue of broader participation in these proceedings and decided to allow CME and others to intervene in the process.
30. Three (3) large utilities, namely, Enbridge Gas Distribution Inc. ("EGD"), Union Gas Limited ("Union") and Toronto Hydro-Electric System Limited ("THESL") have intervened in the process. Union supports the positions that CCC and CME advocate in these proceedings.
31. Ratepayers provide funds that support the intervention of these utilities in these proceedings. Ratepayers also provide the funds that cover the participation of the Board and its staff in the process.
32. In these circumstances, it is unfair to preclude the ratepayer representatives that initiated and supported this process, in a *bona fide* attempt to benefit ratepayers, from seeking a designation of cost award eligibility and, if eligible, an award of their reasonably incurred costs of participating in this process.
33. CME respectfully requests that the issue of cost award eligibility be reconsidered. As a long standing cost award eligible participant in proceedings before the Board, CME respectfully requests that it be granted cost award eligibility in this proceeding. The issues raised in this proceeding are precedent-setting and of considerable importance to ratepayers. At the conclusion of this proceeding, cost award eligible ratepayer representatives, who have acted responsibly to assist the Board, should be awarded their reasonably incurred costs of participating in the process.

PART IV – ORDER REQUESTED

34. CME requests the issuance of an Order scheduling a Board hearing on the merits of the requests for relief contained in CCC's Motion.
35. CME requests the issuance of an Order staying the outcomes of the Board assessment process initiated by O.Reg. 66/10, pending the determination of CCC's Motion on its merits. A copy of this Factum will be sent to all Licensed Electricity Distributors

("LEDs"), excluding THESL, and to the IESO to notify them of the stay relief being sought in this proceeding.

36. CME requests a reconsideration of the issue of cost award eligibility and that it and other eligible intervenors be granted cost award eligibility so that, at the conclusion of this proceeding, they can seek an award of their reasonably incurred costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 9th day of June, 2010.

A handwritten signature in black ink, appearing to read 'P. Thompson', followed by a long horizontal flourish.

Peter C.P. Thompson, Q.C.

SCHEDULE “A”

Authorities not in Schedule “A” to CCC’s Factum

1. Re: *Eurig Estate*, [1998] 2 S.C.R. 565 (“**Eurig**”)
2. *Ontario (Energy Board) v. Consumers Gas Co.* (1987), 59 O.R. (2d) 766, 39 D.L.R. (4th) 161 (“**Consumers**”)
3. *RJR – MacDonald v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (“**MacDonald**”) at 347 to 349

SCHEDULE “B”

Statutes and Regulations not in Schedule “B” to CCC’s Factum

1. Ontario Regulation 66/10, Sections 2, 3, 4 and 5

Board assessments re energy conservation or renewable energy programs

2. The Board shall, with respect to the expenses incurred and expenditures made by the Ministry in respect of its energy conservation programs or renewable energy programs,

- (a) assess the persons and members of classes of persons referred to in section 3 for the amounts set out in section 4;
- (b) apportion the amount in accordance with section 5; and
- (c) issue the assessment on or before April 15, 2010.

Persons and classes of persons to be assessed

3. The following are the persons and classes of persons to be assessed for the purposes of subsection 26.1 (1) of the Act:

- 1. Distributors licensed under Part V of the Act.
- 2. The IESO.

Assessed amount

4. For the purposes of section 2, the total amount to be assessed by the Board in respect of persons and classes of persons referred to in paragraphs 1 and 2 of section 3 is \$53,695,310.

Rules re apportioning assessments

5. (1) For the purposes of this Regulation, the Board shall calculate a quotient based on the following formula:

$$A \div (C + D)$$

where,

- “A” is the amount prescribed under section 4,
- “C” is the total amount of electricity withdrawn from the IESO-controlled grid by all persons referred to in subsection 7 (3), as determined in accordance with the market rules, for use in Ontario for the most recent 12-month period for which the information is available for the person, and
- “D” is the sum of the net distributor volumes of all distributors licensed under Part V of the Act for the 12-month period ending December 31, 2008 or for the most recent 12-month period ending before December 31, 2008 for which the information is available for each distributor.

(2) The Board shall publish the quotient referred to in subsection (1) on its website as soon as is practical after the Board calculates it.

(3) For the purposes of section 2, the Board shall calculate the amount of the assessment for each distributor licensed under Part V of the Act according to the following formula:

$$Q \times B$$

where,

“Q” is the quotient calculated under subsection (1), and

“B” is the net distributor volume for each distributor licensed under Part V of the Act for the 12-month period ending December 31, 2008 or for the most recent 12-month period ending before December 31, 2008 for which the information is available for the distributor as used in the calculation of “D” in subsection (1).

(4) For the purposes of section 2, the Board shall calculate the amount of the assessment of the IESO according to the following formula:

$$Q \times C$$

where,

“Q” is the quotient calculated under subsection (1), and

“C” has the same meaning as in subsection (1).

2. Ontario Regulation 275/04, Section 4

Regulatory charges

4. (1) Under the sub-heading “Regulatory charges”, the invoice must clearly indicate the total cost of the regulatory charges. O.Reg. 275/04, s.4(1).

(2) The regulatory charges are to be calculated as the sum of the standard supply service administration charge, where applicable, the wholesale market service charge, including rural or remote rate protection compensation required under subsection 79(4) of the Act and the charges related to the assessment made under section 26.1 of the Act. O.Reg. 67/10, s.1.

3. Ontario Energy Board Rules of Practice and Procedure, Section 2 and 3

2. Interpretation of Rules

2.01 These Rules shall be liberally construed in the public interest to secure the most just, expeditious, and efficient determination on the merits of every proceeding before the Board.

2.02 Where procedures are not provided for in these Rules, the Board may do whatever is necessary and permitted by law to enable it to effectively and completely adjudicate on the matter before it.

2.03 These rules shall be interpreted in a manner that facilitates the introduction and use of electronic regulatory filing and, for greater certainty, the introduction and use of digital communication and storage media.

2.04 These Rules come into force upon publication on the Board's website.

3. Definitions

3.01 In these Rules,

“motion” means a request for an order or decision of the Board made in a proceeding.

“proceeding” means a process to decide a matter brought before the Board, including a matter commenced by application, notice of appeal, referral by the Director, reference, request of the Minister, or on the Board's own motion.

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

53. Bills for appropriating any Part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons.

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
CANADIAN MANUFACTURERS & EXPORTERS
("CME")**

(Motion returnable July 13, 2010)

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