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Ontario

June 23, 2010

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

Dear Ms. Walli:

**RE: Motion by the Consumer's Council of Canada ("CCC") in relation to s. 26.1 of the *Ontario Energy Board Act, 1998* (the "Act") and Ontario Regulation 66/10**
**Board File No.: EB-2010-0184**

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Please find attached the Written Argument of the Attorney General of Ontario on the preliminary issues in the above-captioned matter.

Yours truly,

Robert A. Donato
Counsel

RAD/gb

cc: Robert Warren (by email)
All Intervenors (by email)

File No. EB-2010-0184

**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** a motion by the Consumers Council of Canada in relation to section 26.1 of the *Ontario Energy Board Act, 1998* and Ontario Regulation 66/10.

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# WRITTEN ARGUMENT OF THE INTERVENER, THE ATTORNEY GENERAL OF ONTARIO

## (RESPECTING THE PRELIMINARY QUESTIONS STATED BY THE BOARD IN AMENDED PROCEDURAL ORDER NO. 1 – MOTION RETURNABLE JULY 13, 2010)

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June 23, 2010

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AND TO: Interveners of Record

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## I. OVERVIEW

1. Section 26.1 of the *Ontario Energy Board Act, 1998* ("*OEBA*") requires the Ontario Energy Board ("the Board") to issue assessments to recover specific costs of the Ministry of Energy and Infrastructure in respect of energy conservation programs or renewable energy programs. The moving parties, Aubrey Leblanc and the Consumers Council of Canada ("CCC"), allege that s. 26.1 of the *Ontario Energy Board Act, 1998* ("*OEBA*") is unconstitutional and should not be applied by the Board. The position of the Attorney General of Ontario ("Ontario") is that the assessments are valid regulatory charges, imposed to recover specific regulatory costs in respect of energy conservation and renewable energy programs.

2. In its Amended Notice of Hearing and Procedural Order No. 1, dated May 11, 2010 ("Amended Order No. 1"), the Board stated five preliminary questions:

> 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?
>
> 2. Given Rule 42.02 of the Rules, does CCC have standing to bring the Motion?
>
> 3. Does the Board have the authority to cancel the assessments issued under section 26.1 of the Act?
>
> 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)?
>
> 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?

3. The Board's Procedural Orders (Nos. 1-3) provided that the Attorney General of Ontario ("Ontario") could, if it wished, file a response to the moving parties' written argument on these questions. Ontario intervenes, pursuant to the Board's Procedural Orders and ss. 109(4) and (6) of the *Courts of Justice Act*, to respond and make submissions on several issues. The moving parties structured their submissions around three broad issues, and Ontario will follow a similar structure:

(i) The jurisdiction of the Board to determine the constitutional question;

(ii) The standing of the moving parties to bring the motion; and

(iii) Ontario's position on stating a case for the Divisional Court.

4. In brief, Ontario's position on the issues is as follows:

(i) *Jurisdiction of the Board*. Ontario agrees that the Board has jurisdiction to determine the constitutional issue of whether the charges imposed constitute valid regulatory charges or unconstitutional taxes.

(ii) *Standing of the moving parties*. Given that the moving party Aubrey Leblanc is a ratepayer who will be directly affected by the legislation imposing the charge, when the utility serving him (i.e., Toronto Hydro) imposes the charge on him as permitted under s. 7 of O.Reg. 66/10, Ontario agrees that Mr. Leblanc should be granted standing to bring the motion. It is open to CCC, which is not required to pay the charge, to apply to be heard as an intervener.

(iii) *Stating a case for the Divisional Court*. Ontario's position is that the Board should hear and determine all questions of facts and law in this matter, and not state a case for the opinion of the Divisional Court. Ontario intends to adduce evidence showing that the charges are valid regulatory charges and not taxes. There are no assurances that the facts upon which Ontario intends to rely would be accepted and agreed to by the moving parties. Given that contested facts would have to be determined by the Board in any event, Ontario's position is that it is a more efficacious and appropriate process for both the facts and the law to be determined by the Board. Ontario therefore submits that the Board ought to exercise its jurisdiction to hear the case in its entirety.

5. *Staying assessments pending a determination on the merits*. Ontario emphasizes that the question of whether the Board should "stay the requirement that utilities pay assessments by July 30, 2010, pending the ultimate determination of the matter" (Moving Parties' Factum at para. 40) is *not* one of the preliminary questions stated by the Board and is therefore not properly before the Board at this time. Such a request should be made as a separate motion.

6. In the alternative, if the Board considers this, it is submitted that laws are presumed *intra vires* the Legislature until a determination that a law is unconstitutional. A request for a "stay" of assessments pending a determination on the merits essentially amounts to a request for interlocutory injunctive relief suspending the application of a law presumed valid. This would have to satisfy the stringent test established by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*. The moving parties in this case have provided no evidence

whatever that would discharge the significant burden of satisfying that test, and any request to suspend the operation of law pending a hearing on the merits should be denied.

## II. BACKGROUND

7. The facts in this matter have not been determined, and this hearing contemplates only the preliminary questions stated by the Board in Amended Order No. 1. As such, only a brief outline of the legislative and regulatory background in this matter will be provided, with the intention of assisting the Board in terms of the broader parameters of the case.

8. As noted, s. 26.1 of the *OEBA* requires the Board to issue "assessments" or charges to recover specific costs of the Ministry of Energy and Infrastructure ("MEI"), in respect of energy conservation programs or renewable energy programs. The charges are initially imposed on electricity distribution utilities ("utilities") and the Independent Electricity System Operator ("IESO") in respect of electricity consumers in their service areas. Each utility and the IESO pays its share of the total program costs on the basis of the volume of electricity delivered to electricity consumers. Under s. 7 of O.Reg. 66/10, electricity utilities and the IESO may recover the amount of the charges from electricity consumers on a volumetric basis (i.e., in accordance with the amount of electricity used by each consumer).

***OEBA*, s. 26.1**

**O.Reg. 66/10, s. 7**

9. Section 4 of O.Reg. 66/10 states the total amount of costs to be recovered by the Board's assessments: $53,695,310. This figure corresponds to the estimated total annual cost (for the

2009/10 fiscal year) of two specific energy conservation and renewable energy programs delivered by MEI, with respect to electricity conservation measures. (The figure excludes costs related to natural gas conservation measures, or those related to other fuels like propane or wood.) The two programs funded by the charges are the Home Energy Savings Program ("HESP") and the Ontario Solar Thermal Heating Initiative ("OSTHI"):

- HESP provides financial incentives to residential homeowners to carry out certain conservation measures at home. For example, an incentive is provided for obtaining a home energy audit (i.e., a review of the home by a licensed specialist to determine the areas of the home where energy benefit potential exists), at 50% of the cost of the audit, up to $150. HESP also provides incentives to homeowners who wish to carry out the energy saving improvements recommended by a home energy audit. For example, applicants can receive $60 per unit for the installation of Energy Star qualified windows or for the installation of an electronic thermostat.
- OSTHI provides similar incentives to businesses for the installation of large commercial solar air and solar water roofs.

**O.Reg. 66/10, s. 4**

10. Ontario's position with respect to the charges funding these programs is that they are regulatory charges and not taxes. The charges satisfy the *indicia* for regulatory charges elaborated in the jurisprudence of the Supreme Court of Canada. In particular:

(i) The *Electricity Act, 1998*, *Ontario Energy Board Act, 1998*, the regulations thereunder, and the energy conservation and renewable energy programs established under the statutes and regulations, constitute a "complete, complex and detailed code of regulation".

(ii) The programs funded by the regulatory charges have the clear regulatory purpose of encouraging energy conservation. The broader electricity and energy regulation scheme has numerous regulatory purposes.

(iii) The regulatory charges are limited to recovery of a fixed amount (i.e., $53.7 million), which corresponds to the estimated annual cost of the energy conservation and renewable energy programs. Pursuant to s. 26.2 of the *OEBA*, funds are also placed in a special purpose account, ensuring that they are not employed for the general purposes of government.

(iv) Consumers and utilities, who demand and supply electricity, cause the need for energy conservation programs, and in addition, benefit from energy conservation.

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

***620 Connaught Ltd. v. Canada (Attorney General)*, [2008] 1 S.C.R. 131**

***Confédération des Syndicats Nationaux v. Canada (Attorney General)*, [2008] 3 S.C.R. 511**

***OEBA*, s. 26.2**

## III. ARGUMENT

### (i) Jurisdiction of the Board to determine the constitutional issue

11. Where an administrative tribunal has explicit or implicit jurisdiction to decide questions of law arising under a legislative provision, it is presumed that the tribunal also has jurisdiction to decide on the constitutional validity of that provision. The presumption is rebuttable by

statutory language that demonstrates that the legislature clearly intended to exclude such authority from the tribunal's authority to determine questions of law.

> ***Okwuobi v. Lester B. Pearson School Board; Casimir v. Quebec (Attorney General); Zorrilla v. Quebec (Attorney General)*, [2005] 1 S.C.R. 257 ("*Okwuobi*") at para. 30**
>
> ***Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, [2003] 2 S.C.R. 504 ("*Martin*") at paras. 33-48**
>
> ***R. v. Conway*, 2010 SCC 22 at paras. 63-77**

12. In this case, s. 19 of the *OEBA* clearly provides that the Board has "in all matters within its jurisdiction authority to hear and determine all questions of law and of fact". Given this explicit provision granting jurisdiction to decide all questions of law and fact, the Board has jurisdiction to consider the constitutional issue raised in a matter within its jurisdiction. If the Board determined that the charges were unconstitutional, it would be open to the Board to "disregard the provision on constitutional grounds and rule on the claim as if the impugned provision were not in force".

> ***OEBA*, s. 19**
>
> ***Martin*, *supra* at para. 40:**
>
> In cases where the empowering legislation contains an express grant of jurisdiction to decide questions of law, there is no need to go beyond the language of the statute. An express grant of authority to consider or decide questions of law arising under a legislative provision is presumed to extend to determining the constitutional validity of that provision.

**(ii) Standing of the Moving Parties**

13. In this case, the moving party Aubrey Leblanc is a ratepayer who is directly affected by the legislation imposing the charge, when the utility serving him (i.e., Toronto Hydro-Electric System) recovers amounts from him as permitted under s. 7 of O.Reg. 66/10. As such, assuming

that this has occurred, Ontario agrees that Aubrey Leblanc should be granted standing to bring the motion. It is open to CCC, which is not required to pay the charge, to apply for intervener status.

**(iii) Stating a case for the Divisional Court**

14. In *Ottawa (City) v. Ontario (Attorney General),* the Court of Appeal explained that where the Board states a case for the Divisional Court, "if facts are contested [...] the Board must hear and decide those facts first." Those facts then form the basis for the stated case to the Divisional Court.

***Ottawa (City) v. Ontario (Attorney General)*** **(2002), 64 O.R. (3d) 703 (C.A.) at para. 34**

15. In this case, Ontario intends to adduce evidence showing that the impugned charges are valid regulatory charges, which satisfy the *indicia* elaborated in the jurisprudence. This evidence may include: (i) assessments of the costs of the programs funded by the regulatory charges, demonstrating that revenue raised by the charges is tied to regulatory costs; and (ii) evidence showing that users of the electricity system "cause the need for" and/or benefit from energy conservation. Ontario may also adduce other relevant evidence.

16. The constitutional issue sought to be determined is a question of mixed fact and law. Given that there are no assurances that the facts upon which Ontario intends to rely would be accepted and agreed to by other parties, Ontario submits that the Board should hear the case and determine the questions of fact and of law, rather than stating a case for the Divisional Court. One hearing is a more efficacious and appropriate process than to have a proceeding split into: (i) a separate fact-finding process before the Board, (ii) argument on the law before the Divisional Court, and (iii) an opinion of the Divisional Court referred back to the Board, and (iv) the

Board's application of the opinion. Ontario therefore submits that the Board ought to exercise its jurisdiction to determine the entire matter, rather than stating a case for the Divisional Court.

**(iv) Staying assessments pending the ultimate determination of the matter**

17. Ontario emphasizes that the question of whether the Board should "stay the requirement that utilities pay assessments by July 30, 2010, pending the ultimate determination of the matter" (Moving Parties' Factum at para. 40) is *not* one of the preliminary questions stated by the Board and is therefore not properly before the Board at this time. Such a request should be made as a separate motion.

**Factum of the Moving Parties at para. 40**

18. In the alternative, if the Board considers the request, it is submitted that laws are presumed *intra vires* the Legislature until a determination that a law is unconstitutional. A request for a "stay" of assessments pending a determination on the merits essentially amounts to a request for interlocutory injunctive relief suspending the application of a law presumed valid. The moving parties would have the burden of satisfying the stringent test established by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*. In this case, the moving parties have provided no evidence whatever that would discharge the significant burden of satisfying that test.

***RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at paras. 43, 77-80**

**PW Hogg, *Constitutional Law of Canada*, 5th ed. Supplemented (Scarborough: Carswell, 2007, loose-leaf ed.) at 15-23**

***Nova Scotia Board of Censors v. McNeil*, [1978] 2 S.C.R. 662 at 687-688**

19. The test in constitutional cases has been described as creating "a very low hurdle for governments and a high one for applicants seeking an interim injunction to restrain, even briefly, the operation of a law enacted by a democratically elected legislature". The hurdle that the applicant must overcome is especially high where the plaintiff seeks a general suspension of a statute, rather than a constitutional "exemption" from the operation of a statute. The Supreme Court of Canada concluded in *RJR-MacDonald* that courts weighing the balance of convenience should in most cases assume that irreparable harm to the public interest will result.

> ***Anglers & Hunters v. Ontario (Ministry of Natural Resources)*** **(1999), 43 O.R. (3d) 760 (S.C.J.) at paras.**
>
> ***RJR-MacDonald, supra*** **at paras. 71, 73:**
>
> In our view, the concept of inconvenience should be widely construed in *Charter* cases. In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. *The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility.* Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action. [emphasis added]

20. In this case, the moving parties have failed to adduce any evidence establishing that they have satisfied the stringent three-part test from *RJR-MacDonald*, and any request to stay the assessment pending a hearing on the merits should be denied.

## IV. ORDER REQUESTED

21. Ontario respectfully submits that:

(i) the Board should hear and determine all questions of fact and law in this proceeding, including the constitutional question; and

(ii) the Board should decline at this time to consider the request to stay the assessment pending a hearing on the merits; or alternatively, the Board should simply deny the request.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

June 23, 2010

Janet E. Minor

Robert A. Donato

Counsel for the Attorney General of Ontario

## Schedule A

Jurisprudence

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

2. *620 Connaught Ltd. v. Canada (Attorney General)*, [2008] 1 S.C.R. 131

3. *Confédération des Syndicats Nationaux v. Canada (Attorney General)*, [2008] 3 S.C.R. 511

4. *Okwuobi v. Lester B. Pearson School Board; Casimir v. Quebec (Attorney General); Zorrilla v. Quebec (Attorney General)*, [2005] 1 S.C.R. 257

5. *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, [2003] 2 S.C.R. 504

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

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

8. *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311

9. *Nova Scotia Board of Censors v. McNeil*, [1978] 2 S.C.R. 662

10. *Anglers & Hunters v. Ontario (Ministry of Natural Resources)* (1999), 43 O.R. (3d) 760 (S.C.J.)

Legal Writings

11. PW Hogg, *Constitutional Law of Canada*, 5th ed. Supplemented (Scarborough: Carswell, 2007, loose-leaf ed.) at 15-23

## Schedule B

***Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Schedule B, ss. 19, 26.1, 26.2, 32**

**Board's powers, general**

**Power to determine law and fact**

**19.** (1) The Board has in all matters within its jurisdiction authority to hear and determine all questions of law and of fact. 1998, c. 15, Sched. B, s. 19 (1).

**Order**

(2) The Board shall make any determination in a proceeding by order. 1998, c. 15, Sched. B, s. 19 (2); 2001, c. 9, Sched. F, s. 2 (1).

**Reference**

(3) If a proceeding before the Board is commenced by a reference to the Board by the Minister of Natural Resources, the Board shall proceed in accordance with the reference. 1998, c. 15, Sched. B, s. 19 (3).

**Additional powers and duties**

(4) The Board of its own motion may, and if so directed by the Minister under section 28 or otherwise shall, determine any matter that under this Act or the regulations it may upon an application determine and in so doing the Board has and may exercise the same powers as upon an application. 1998, c. 15, Sched. B, s. 19 (4).

**Exception**

(5) Unless specifically provided otherwise, subsection (4) does not apply to any application under the *Electricity Act, 1998* or any other Act. 1998, c. 15, Sched. B, s. 19 (5).

**Jurisdiction exclusive**

(6) The Board has exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it by this or any other Act. 1998, c. 15, Sched. B, s. 19 (6).

**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).

**Ontario Regulation 66/10, ss. 4, 7**

**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.

**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.

(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.

(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.