

By electronic filing and by e-mail



July 12, 2010

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

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Dear Ms Walli,

**Motion by Consumers Council of Canada (“CCC”)
in relation to section 26.1 of the *Ontario Energy Board Act, 1998* and
Ontario Regulation 66/10 (“O.Reg.66/10”)
Board File No.: EB-2010-0184
Our File No.: 339583-000072**

We are writing in our capacity as counsel for Canadian Manufacturers & Exporters (“CME”).

The purpose of this letter is to provide advance notice of the position that we will now be taking with respect to the status of the assessments, pending a determination of the constitutional issues on their merits.

Context

In paragraphs 24 to 26 of the Factum we filed on behalf of CME on June 9, 2010, we relied upon principles expressed by the Supreme Court of Canada in *RJR – MacDonald v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (“*MacDonald*”) at 347 to 349, pertaining to an exercise of discretion with respect to the request for an interim order staying the outcomes of the assessment process.

The landscape with respect to the status of the assessments, pending a determination of the constitutional issues on their merits, has changed with the acknowledgements, in paragraphs 11 and 12 of the Written Argument of the Attorney General for Ontario (“Ontario”), that the Supreme Court of Canada’s recent decision in *R. v. Conway*, [2010] S.C.C. 22 (“*Conway*”) at paragraphs 63 to 77, applies and its submissions, in paragraphs 15 and 16, that the Board should hear the constitutional issues, on their merits, after considering evidence yet to be adduced by Ontario, rather than stating a case for the opinion of the Divisional Court.

Having regard to these acknowledgements, we submit that principles other than those expressed in *MacDonald*, should apply to determine the status of the assessments, pending a disposition of the constitutional questions on their merits.

Assessments Must be Set Aside Pending a Determination of the Constitutional Questions

On the basis of *Conway*, we will be arguing as follows:

- (a) The Board's duty and obligation to determine the constitutional validity of Section 26.1 of the *Ontario Energy Board Act* and the provisions of O.Reg.66/10 is a "threshold" legal requirement;¹
- (b) Where a threshold legal requirement, pertaining to the issuance of assessments by an adjudicative tribunal having power to determine questions of law and jurisdiction, has not been met, the assessments must be set aside; and
- (c) The Board cannot, in an exercise of discretion, temporarily disregard threshold legal obligations. Threshold questions pertaining to the legality of the actions that O.Reg.66/10 directs the Board to perform must be determined before the Board acts, and not afterwards.

We will be submitting that, as a matter of law, the assessments must be set aside until the threshold determination of the constitutional questions has been made. We submit that this result follows, as a matter of law, even if the Board decides to ask the Divisional Court to provide its opinion on the constitutional questions instead of determining them itself, as Ontario and others urge.

A Separate Motion is Unnecessary

We will also be urging the Board to reject Ontario's contention that a separate motion pertaining to the status of the assessments, pending a determination of the constitutional questions on their merits, is necessary. We will be suggesting that this issue falls within the ambit of the "such further and other relief" requested in the Motion. Moreover, we will submit that, in the alternative, the Board should exercise its power under Rule 1.03 that states as follows:

"The Board may dispense with, amend, vary or supplement, with or without a hearing, all or part of any rule at any time, if it is satisfied that the circumstances of proceedings so require, or it is in the public interest to do so."

We submit that there is no good reason to postpone a determination of the issue pertaining to the status of the assessments when, by letter dated June 9, 2010 (copy attached), we alerted all Licensed Electricity Distributors and the Independent Electricity System Operator ("IESO") of the fact that matters pertaining to CCC's Motion, including the status of the assessments, would be argued on July 13, 2010.

Please contact me if there are any questions pertaining to the contents of this letter.

Yours very truly,



Peter C.P. Thompson, Q.C.

PCT\slc
enclosure

c. All parties and intervenors
Paul Clipsham (CME)

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¹ Paragraph 82 of the Supreme Court of Canada Decision in *Conway* makes it clear that, where an administrative tribunal has authority to decide questions of law, the duty of the tribunal pertaining to its mandate is to consider such questions, including constitutional questions, as threshold questions. (emphasis added)

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)

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