Ministry of the Attorney General

Constitutional Law Branch

720 Bay Street, 4th Floor
Toronto ON M7A 2S9

Tel: (416) 326-0131
Fax: (416) 326-4015
arif.virani@ontario.ca

Ministère du Procureur général

Direction du droit constitutionnel

4e étage, 720 rue Bay
Toronto ON M7A 2S9

Tél.: (416) 326-0131
Télé.: (416) 326-4015

July 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

Please find attached the Written Argument of the Attorney General of Ontario respecting Procedural Order No. 4 – Motion for a Stay of Assessments in the above-captioned matter.

Yours truly,

Arif Virani
Counsel

AV/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 and Aubrey LeBlanc in relation to section 26.1 of the *Ontario Energy Board Act, 1998* and Ontario Regulation 66/10.

WRITTEN ARGUMENT OF THE INTERVENOR, THE ATTORNEY GENERAL OF ONTARIO

(RESPECTING PROCEDURAL ORDER NO.4 – MOTION FOR A STAY OF ASSESSMENTS, RETURNABLE JULY 26, 2010)

July 23, 2010

Ministry of the Attorney General of Ontario
Constitutional Law Branch
720 Bay Street, 4th Floor
Toronto ON M7A 2S9

Janet E. Minor
(LSUC #14898A)
Tel. 416-326-4137
janet.minor@ontario.ca

Arif Virani
(LSUC #44463H)
Tel. 416-326-0131
Fax. 416-326-4015
arif.virani@ontario.ca

Counsel for the Intervenor,
The Attorney General of Ontario

TO: Ontario Energy Board
Attention: Kirsten Walli, Board Secretary
Suite 2701 – 2300 Yonge Street
Toronto, ON M4P 1E4
Fax: 416-440-7656

AND TO: WeirFoulds LLP
Barristers & Solicitors
Suite 1600, Exchange Tower
130 King Street West
Toronto, ON M5X 1J5

Robert B. Warren
Catherine Powell
Tel: 416-365-1110
Fax: 416-365-1876

Solicitors for the Moving Parties

AND TO: Intervenors of Record

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PART I. OVERVIEW

1. The moving party is the intervenor the Canadian Manufacturers & Exporters ("CME"). The CME is an organization that includes, *inter alia*, approximately 1400 Ontario businesses who consume electricity as a primary source of energy for the manufacturing sector. In its motion the CME seeks interim relief in the form a stay of the assessments levied by the Ontario Energy Board ("Board"), pursuant to s. 26.1 of the *Ontario Energy Board Act, 1998* ("*OEBA*") and Ontario Regulation 66/10 ("Regulation") thereto, pending the final determination of the constitutional challenge to the legislation authorizing the assessments.

2. The original constitutional challenge was commenced by the Consumers Council of Canada ("CCC") and Mr. Aubrey LeBlanc. The CCC is an organization that represents the interests of residential consumers in a variety of economic sectors. Aubrey LeBlanc is a resident of the City of Toronto, and an individual consumer of electricity.

3. The CME's motion for a stay should be dismissed. The Supreme Court of Canada's strict test for interim relief to suspend the operation of duly enacted legislation has not been met by the moving party.

4. The CME's motion does not meet the Court's three-part test for obtaining a stay. First, the materials fail to disclose a serious issue to be tried. The moving party's claim under the division of powers is without merit. Second, the moving party has not adduced evidence of any irreparable harm they will face in the event interim relief is not awarded. The materials filed only raise the potential of future financial harm to third parties, in the form of potential class action lawsuits. This claim is without merit, and in any event, the harm presented by such potential suits is not irreparable. Third, the balance of convenience does not favour the granting of interim relief. The moving party has only a pecuniary interest in staying the assessments. It cannot identify a public interest in granting interim relief that outweighs the public interest in energy conservation and

renewable energy through the maintenance of Ontario's Home Energy Savings Program ("HESP") and the Ontario Solar Thermal Heating Initiative ("OSTHI").

PART II. FACTS

5. The facts for the purpose of the hearing on the merits have not yet been determined. Pursuant to the Board's Procedural Order No. 4, the current proceeding contemplates only the interim question of a stay of the impugned assessments issued by the Board under ss.26.1(1) and (4) of the *OEBA*, and s.2 of the Regulation. 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 the resolution of the instant motion.

Procedural Order No. 4, p. 3

6. Section 26.1 of the *OEBA* requires the Board to issue special purpose "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 licensed electricity distribution companies ("LDCs") and the Independent Electricity System Operator ("IESO"), in respect of electricity consumers in their service areas. Each LDC and the IESO pays its share of the total program costs on the basis of the volume of electricity delivered to electricity consumers.

***Ontario Energy* Board *Act, 1998*, S.O. 1998, c. 15, Sch. B, ("*OEBA*"), s. 26.1**

7. Under s.7 of the Regulation LDCs 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).

O. Reg. 66/10, s. 7

8. Section 4 of the Regulation indicates 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.)

O. Reg. 66/10, s. 4

9. The two programs funded by the assessments 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.

***OEBA*, s. 26.2(2)**

10. The Board issued the assessments under s.26.1 of the OEBA to LDCs and the IESO on 9 April 2010, in compliance with s.2 of the Regulation. Payment of the assessments to the Ministry of Finance is required by 30 July 2010.

11. In the main litigation, the Amended Notice of Motion, served by the CCC and Mr. Aubrey LeBlanc on 27 May 2010, challenges the legislative authority for the assessments pursuant to the constitutional division of powers. The Amended Notice stipulates that the assessment "constitutes an indirect tax, as opposed to a regulatory charge, and therefore

falls outside of the constitutional competence of the provincial Legislature, pursuant to s.92(2) of the *Constitution Act, 1867*, which limits provincial legislatures to direct taxation."

Amended Notice of Motion, CCC Amended Motion Record, Tab 1, p.4, para. 13(b)

12. The position of the Attorney General of Ontario is that the assessments are valid regulatory charges *intra vires* the province, imposed to recover specific regulatory costs in respect of energy conservation and renewable energy programs.

13. The Amended Notice of Motion served by the CCC and Mr. Aubrey LeBlanc does not formally request interim relief in the form of a stay of the assessments, pending the eventual determination of their constitutionality on the merits. Nevertheless, a stay request is contained in the written argument of the CCC and Mr. LeBlanc, filed 15 June 2010, and was adopted by counsel in oral argument before the Board on 13 July 2010, respecting the five preliminary questions stated in Amended Procedural Order No. 1.

Amended Factum, CCC and Aubrey Leblanc, (Motion Returnable July 13, 2010), filed June 15, 2010, at para. 40

Transcript of Motion Hearing, July 13, 2010 at pp. 72-73

14. As a result, at the 13 July 2010 hearing, the Board solicited oral submissions from a number of intervenors on the issue of an interim stay of the assessments. Following the hearing, the Board reserved on the five preliminary questions before it, together with the issue of whether to grant a stay.

Transcript of Motion Hearing, July 13, 2010 at p. 122

15. On 15 July 2010 the Board issued Procedural Order No. 4, noting that "no party has brought a formal motion to stay the assessments that is supported by evidence". The Board indicated it "is not satisfied with the state of the record regarding the stay issue" and as such "would like to afford parties the opportunity to file additional materials,

including evidence to support their position." The Order provided a schedule for the receipt of motion materials.

Procedural Order No. 4, p.2

16. Notwithstanding the Board's solicitation, the CCC and Mr. LeBlanc elected not to file additional materials. Five other industry intervenors similarly declined. CME was the sole intervenor that elected to file additional materials with the Board. CME filed its Notice of Motion and supporting Affidavit on 19 July 2010. For the purpose of supplementing the Board's acknowledged unsatisfactory evidentiary record to assist in determining whether irreparable harm has been substantiated to warrant a stay, the CME elected not to file evidence from a directly affected electricity consumer, or a directly affected LDC, but instead from counsel to the organization itself.

Affidavit of Vincent J. DeRose, sworn 19 July 2010, para. 1, CME Motion Record

PART III. ISSUES AND LAW

The Test for a Stay has not been met

17. The CME has not met the strict test for granting a stay set out by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*.

***RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at paras. 77-80 (noting that the test for a stay and for an interlocutory injunction is identical) ("*RJR-MacDonald*")**

A. The Test for a Stay in Constitutional Cases

18. In order to obtain an interim stay pending the constitutional challenge to a legislative provision, the moving party must prove each of the following:

a. There is a serious legal issue to be determined, and;

b. The moving party will suffer irreparable harm prior to the determination of the Application if the stay is refused, and;

c. The balance of convenience, taking into account the public interest, favours the granting of the stay.

***RJR-MacDonald, supra* at paras. 43, 77-80**

***Harper v.* Canada *(Attorney General)*, [2000] 2 S.C.R. 764 at para. 4 ("*Harper*")**

19. Given the significance to the public interest of granting a suspension of, or exemption from, the operation of legislation, the courts have very rarely granted interim relief in constitutional cases. Recent attempts in Ontario to obtain interim relief have, with rare exceptions, been unsuccessful for failure to meet the high threshold established by the Supreme Court of Canada. A list of recent jurisprudence denying interim interlocutory relief against Ontario is attached, at Appendix I.

20. There is no precedent to support the moving party's interim request for a stay in a constitutional challenge pursuant to the division of powers alone. *RJR-MacDonald* was a proceeding in which *Charter* rights were impugned. Although the same 3-part test for a stay enunciated in *RJR-MacDonald* is operative in constitutional challenges under the division of powers, the application of the test is nuanced in a manner that prescribes the denial of interim relief.

***Satschko v. Ontario (Minister of Government Services)*, [2007] O.J. No. 1600 at paras. 15-16, 20 (S.C.J.)**

***Airport Limousine Drivers Assn. v. Greater Toronto Airports Authority*, [2005] O.J. No. 3509 at paras. 84, 85, 91-92, 163 (S.C.J.)**

***Carbert v. Farm Credit*, [1992] S.J. No. 585 at 3, 4, 11 (Sask. Q.B.) (QL)**

***Doyle v. Newfoundland*, [2005] N.J. No. 222 at paras. 3, 29, 63, 65 (N.L.S.C.(T.D.))**

21. In *Charter* interlocutory cases the court is concerned about the importance of potentially safeguarding the fundamental freedoms of the applicant, prior to a full determination on the merits. Whereas in division of powers interlocutory litigation, the

court is only concerned with whether the appropriate level of government has enacted the impugned legislation—fundamental freedoms are not at issue.

> ***RJR-MacDonald Inc.*, *supra* at paras. 39, 75**
>
> ***Sauvé v. Canada (Chief Electoral Officer)*, [1997] F.C.J. No. 594 at para. 4 (F.C.T.D.) ("*Sauvé*")**

22. Furthermore, in all division of powers cases, the adjudicator is required to commence their analysis with a presumption of constitutionality, i.e. legislation is presumed *intra vires* the enacting legislature until a determination on the merits to the contrary. This presumption, coupled with the principle that interim relief that preserves the *status quo* is less disruptive to the administration of justice than relief which alters the *status quo*, tilts the assessment of the public interest in federalism cases in the government's favour. In the result, no court or tribunal has granted a request for interim relief suspending the application of a law impugned only under the division of powers, prior to a hearing on the merits.

> ***Nova Scotia Board of Censors v. McNeil*, [1978] 2 S.C.R. 662 at 15 (QL)**
>
> **Horsman, Karen, *Government Liability: Law and Practice*, looseleaf (Aurora, Ont.: Canada Law Book, 2007) at 12-46**

23. To the contrary, in an analogous case where a party raised only the claim that a regulatory charge levied by Ontario Ministry of Natural Resources against the company was an indirect tax *ultra vires* the province, the party's request for injunctive relief pending a determination of the constitutional question on the merits was denied by the General Division. Borins J. (as he then was) observed that "the remedy requested is an *extraordinary remedy*, and that, in the exercise of its discretion, the court must take care not to grant such remedy lightly" [italics added]. The Court proceeded to reject the moving parties assertion of irreparable harm, and concluded:

> This leads to the balance of convenience, where, in cases like this, the government has a low hurdle to overcome. I agree with Ms. Lee's submissions on this principle…the Crown would be severely prejudiced by the order if granted.

> Not only would the order tend to destabilize the pricing arrangement for the forest industry, the Crown would also lose the revenue.
>
> ***Kimberly Clark v. Ontario (Minister of Natural Resources),* unreported, February 26, 1996, Borins J., (Gen. Div.), at 1, leave to appeal ref'd April 16, 1996 (Div. Ct.)**

24. The authority relied upon by parties supporting a stay at the 13 July hearing is inapposite. In *Ontario Home Builders' Association* a full hearing on the merits occurred following which a determination was made by the Divisional Court that the by-laws authorizing the collection of education development charges were unconstitutional. *After* the decision on the merits, the school boards and the Attorney General moved for a stay of the Divisional Court's Order to permit them nevertheless to continue to collect the education development charges pending the appeal of the Divisional Court's ruling. The motion for a stay was denied. Clearly, these facts are not analogous to the case at bar. Here, the moving party requests that this Board pre-emptively suspend the operation of provisions in validly enacted legislation which authorize assessments against LDCs, *prior to* an extensive and considered evaluation of the merits of the constitutional challenge at first instance.

> ***Ontario Home Builders' Assn. v. York Region Board of Education,* [1993] O.J. No. 1086 at paras. 130-132 (Div. Ct., C.A. endorsement)**

25. The few exceptions where interim relief has been granted in Ontario in *Charter* cases are distinguishable from the present motion. Most of these concerned interlocutory injunctions in respect of age-based termination of children's eligibility for an autism treatment program, pending the resolution of *Wynberg et al v. Ontario*. In each case, the court accepted evidence adduced by psychologists that the affected children could regress if the treatment was terminated. By contrast, there is a complete absence of direct evidence before this Board to support the moving party's contention that levying the impugned assessment will cause them irreparable harm.

26. Appeals from the interlocutory orders in the autism cases were abandoned as they became moot as a result of the Court of Appeal's judgment in *Wynberg* that the autism program satisfied *Charter* requirements. Other than the autism cases, the only two recent

Charter cases in which an interim injunction against the government was granted involved the reinstatement of social assistance to protect fundamental rights: to address the health and safety of a pregnant woman and her foetus, where the applicant lacked the necessary funds for food or shelter (*Rogers v. Ontario*); to provide access to drug benefits for an individual whose mental condition (treated with drug therapy) posed a potential threat to himself and others (*Broomer v. Ontario*).

Social assistance

***Rogers v. Sudbury (Administrator of Ontario Works)* (2002), 57 O.R. (3d) 460 at paras. 18-19 (S.C.J.)**

***Broomer v. Ontario (Attorney General)*, [2002] O.J. No 2196 (S.C.J.) at para. 54. (See also para. 39, reinstating assistance to ensure the needs of innocent dependent children are met where the applicant was subject to a lifetime ban due to welfare fraud).**

Autism cases - injunction issued, leave to appeal granted from order issuing injunction (subsequently abandoned as moot):

***Burrows (Litigation guardian of) v. Ontario*, [2003] O.J. No. 5858 (S.C.J.), leave to appeal granted, [2004] O.J. No. 3217 (Div. Ct.)**

Autism cases - injunctions granted, leave to appeal motions dismissed or rendered moot by trial judgment in *Wynberg v. Ontario* [2005] O.J. No. 1228 (S.C.J.), reversed by C.A. [2006] O.J. No. 2732

e.g. *Lowrey (Litigation guardian of) v. Ontario* (2003), 64 O.R. (3d) 222 at para. 25 (S.C.J.)[1]

B. No Serious Issue to be Determined

27. This Tribunal on a motion for a stay must make a preliminary assessment of the merits of the case, and must be satisfied that there is a serious issue to be determined.

***RJR-MacDonald, supra* at paras. 49, 78**

[1] Eight other cases fall under this category: see Appendix II.

28. While the threshold for establishing a serious issue is not high, the Attorney General submits that the moving party cannot succeed on this branch of the test.

***RJR-MacDonald, supra* at para. 49**

29. The argument that the legislation is *ultra vires* the province does not raise a serious issue. The impugned levy is a valid regulatory charge and not an indirect tax that contravenes s.92 of the *Constitution*. This charge has been imposed to recover specific regulatory costs in respect of energy conservation and renewable energy programs. The charge satisfies the *indicia* for regulatory charges elaborated in the jurisprudence of the Supreme Court of Canada. In particular:

(i) The *Electricity Act, 1998*, S.O. 1998, c.15, Sched.A, *OEBA*, 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., $53,695,310), which corresponds to the estimated annual cost of the energy conservation and renewable energy programs for fiscal year 2009-10. Pursuant to s. 26.2 of the *OEBA*, funds are also placed in a special purpose account, ensuring they are separated from the Consolidated Revenue Fund and that they are not employed for the general purposes of government.

(iv) Consumers and LDCs, 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 at paras. 43-44**

***620 Connaught Ltd. v. Canada (Attorney General)*, [2008] 1 S.C.R. 131 at paras. 22-28, 38, 45-47**

***Confédération des Syndicats Nationaux v. Canada (Attorney General)*, [2008] 3 S.C.R. 511 at para. 72**

O. Reg. 66/10, s.4

***OEBA*, s. 26.2**

30. In the result, the CME's division of power challenge does not raise a serious issue, and their request for a stay ought to be dismissed on this basis alone.

C. No Irreparable Harm

31. In the alternative, if the Board concludes there is a serious issue to be determined, the moving party nevertheless fails to meet the second part of the test set out in *RJR-MacDonald*. The CME has not adduced direct evidence establishing that they will suffer irreparable harm if a stay is not granted. As the Court explained

> "Irreparable" refers to the nature of the harm suffered rather than its magnitude. **It is harm which either cannot be quantified in monetary terms or which cannot be cured**, usually because one party cannot collect damages from the other.
>
> ***RJR-MacDonald, supra* at para. 59 [emphasis added]**

32. In the present case, the alleged harm can be quantified in monetary terms. The harm, if any, is directly linked to the specific levy assessed by the Board against the LDCs, and passed on to electricity consumers. As such, it is readily ascertainable in accordance with the Supreme Court's requirements.

33. Further, the harm, if any, can be cured. The Supreme Court has recently held that restitution is generally available for the recovery of monies collected pursuant to legislation that is later declared *ultra vires*:

> The Court's central concern must be to guarantee respect for constitutional principles. One such principle is that the Crown may not levy a tax except with authority of the Parliament or the legislature: *Constitution Act, 1867*, ss. 53 and 90. This principle of "no taxation without representation" is central to our conception of democracy and the rule of law. As Hogg and Monahan explain, this principle "ensures not merely that the executive branch is subject to the rule of law, but also that the executive branch must call the legislative branch into session to raise taxes".

> When the government collects and retains taxes pursuant to *ultra vires* legislation, it undermines the rule of law. To permit the Crown to retain an *ultra vires* tax would condone a breach of this most fundamental constitutional principle. As a result, a citizen who has made a payment pursuant to *ultra vires* legislation has a right to restitution.
>
> ***Kingstreet Investment Ltd. v. New Brunswick (Finance)*, [2007] 1 S.C.R. 3 at paras. 14-15 [citations omitted] ("*Kingstreet*")**

34. Contrary to the position asserted in the CME's Notice of Motion, the Court does not require a guarantee of indemnification in order to rebut a claim of irreparable harm. In *RJR-MacDonald* the Court simply held that where a legal mechanism exists by which the harm may be "cured", irreparable harm will not be established so as to ground a request for a stay. The availability of damages in a private law case, or the availability of restitution in the instant case, are mechanisms which defeat the assertion of irreparable harm.

> **Notice of Motion, at paras. 11, 17, 20, CME Motion Record**
>
> ***RJR-MacDonald, supra* at para. 59**

35. In any event, in this proceeding direct evidence of irreparable harm to the moving party has not been produced. A lack of evidence can prove fatal to an applicant's request for interim relief. On this branch of the test, the moving party bears the onus of demonstrating irreparable harm to themselves, not third parties:

> At this stage the only issue to be decided is whether a refusal to grant relief *could so adversely affect the applicant's own interests* that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.
>
> ***RJR-MacDonald, supra* at para. 58 [italics added]**
>
> ***Harper v. Canada, supra* at para. 4**
>
> ***Sauvé, supra* at paras. 8, 15-17**

36. Here, however, the parties that initiated the original constitutional challenge, the CCC and Mr. LeBlanc, elected not to adduce new evidence notwithstanding the Board's expressed concern respecting the unsatisfactory "state of the record". (The original affidavit of Mr. LeBlanc, sworn 27 May 2010, speaks only to the issue of his standing—it does not provide evidence respecting the irreparable harm he would allegedly suffer as an individual electricity consumer in the event the new regulatory charge is levied on LDCs, and subsequently passed on to him. The original affidavit of Tiffany Tsun, sworn 26 April 2010, is similarly silent on the irreparable harm that will be endured by any residential consumer members of the CCC.)

Procedural Order No. 4, p. 2

Affidavit of Aubrey LeBlanc, sworn 27 May 2010, Amended Motion Record, Tab 3, p.21.

Affidavit of Tiffany Tsun, sworn 26 April 2010, Amended Motion Record, Tab 2, pp 8-12

37. The moving party on the present request for a stay, the CME, did file new material to supplement the record before the Board. Nevertheless, this material also does not provide direct evidence from any of CME's approximately 1400 Ontario members, who consume electricity for business purposes, regarding the harm they will undergo if the new regulatory charge is not enjoined. Instead, the CME has simply produced an affidavit from counsel to the organization setting out the potential litigation risks other *third parties* may endure, in the event the assessment is levied and subsequently passed on to consumers.

Intervenor Request Letter, CME, at pp. 1, 3

Affidavit of Vincent J. DeRose, sworn 19 July 2010, paras. 1, 10, CME Motion Record

38. This affidavit is legally flawed in several respects. First, the potential litigation risks third party LDCs may face from class proceedings initiated by electricity consumers does not constitute evidence of irreparable harm to the moving party, the CME.

39. Second, and in any event, the potential litigation risks, on their face, are without merit. There is no cause of action in damages against a party that acts to recover a regulatory charge from electricity consumers pursuant to legislation that is subsequently deemed to be invalid.

> ***Gladstone Petroleum Ltd. v. Husky Oil (Alberta Ltd.),*** **[1982] S.J. No. 1057 (Sask. C.A.) at paras. 36, 41-42**
>
> ***Welbridge Holdings Ltd. v. Winnipeg (Greater),*** **[1971] S.C.R. 957 at 6 (QL)**
>
> ***Just v. British Columbia,*** **[1989] 2 S.C.R. 1228 at paras. 16-18**

40. A claim in restitution, however, could be initiated by ratepayers, seeking to recoup the costs of the regulatory charge passed on to them by LDCs, similar to the Class Proceeding that arose in *Garland*. As outlined above, any payment made by LDCs pursuant to a regulatory scheme subsequently deemed *ultra vires* would be recoverable from the government pursuant to the Supreme Court's ruling in *Kingstreet*. *Garland* demonstrates that such charges are recoverable by consumers (such as CME's members), and *Kingstreet* demonstrates that such charges are recoverable by the LDCs—thus "irreparable harm", as defined by the Supreme Court in *RJR-MacDonald*, is inapplicable.

> ***Kingstreet, supra*** **at paras. 14-15**
>
> ***Garland v. Consumers' Gas Co.,*** **[1998] 3 S.C.R. 112 at para. 9; [2004] 1 S.C.R. 629 at paras. 1, 7 (*"Garland, 2004"*)**

41. Third, the CME Affidavit stipulates that apart from restitution costs, LDCs will also suffer irreparable harm from the legal costs they will incur in inevitable future class proceedings. Independent of the speculative nature of such an assertion, the jurisprudence does not support the CME's position. The case law clearly indicates that the inability of a party to recover costs associated with litigation does not amount to irreparable harm at stage 2 of the *RJR-MacDonald* test.

> ***Canada (Attorney General) v. Amnesty International Canada*****, 2009 FC 426 at paras. 72-75**
>
> ***Canadian National Railways v. Leger,*** **[2000] F.C.J. No. 243 (F.C.T.D.) at para. 15.**

***Brocklebank v. Canada (Minister of National Defence)*, [1994] F.C.J. No. 1496 (F.C.T.D.) at para. 11 ("Brocklebank")**

***Bell Canada v. Communications, Energy and Paperworks Union*, [1997] F.C.J. No. 207 (F.C.T.D.) at paras. 37-41**

***Northwest Territories v. Public Service Alliance of Canada*, [2001] F.C.J. No. 19 (F.C.A.) at para 19**

cf. *Re Island Telephone Company*, (1987) 206 A.P.R. 158 (P.E.I.C.A.) at para. 29

42. Litigation expenses are recoverable through costs orders. In the result, the Ontario courts have rejected attempts by parties in Class Proceedings to characterize such expenses as irreparable harm, notwithstanding the fact that even substantial indemnity costs awards do not equate with full recovery for a party.

***1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada*, [2003] O.J. No. 1822 (Div. Ct.) at paras. 8-9**

See also: *Noble v. Noble*, [2002] O.J. No. 4997 (S.C.J.) paras. 17-18

43. The logic of the CME's position is untenable. As Rothstein J. (as he then was) observed in *Brocklebank*, rejecting the very same argument brought by the applicant in a request for a stay of a General Court Martial:

> If the applicant's arguments are taken to their logical conclusion, any time an accused raises a serious issue on any matter than can be raised prior to trial, such as the constitutional validity of a provision under which he is charged, or bias, a finding of irreparable harm would be inevitable.

***Brocklebank, supra* at para. 10**

44. Finally, the material in the record before the Board indicates that legal costs incurred in defending such Class Proceedings are not, in fact, irreparable. Pursuant to the very case appended as Exhibit "C" to CME's Affidavit it is clear that following the settlement of the *Garland* Class Proceeding by Enbridge Gas Distribution Inc., Enbridge successfully sought OEB approval of the recovery of the full amount of its $22 million settlement, including both its *de facto* restitution payment as well as its legal costs, from ratepayers.

Affidavit of Vincent J. DeRose, sworn 19 July 2010, Exhibit C, pp. 6, 8, CME Motion Record

45. In the result, the CME's assertion of irreparable harm is not tenable, and their request for a stay ought to be dismissed.

D. Balance of Convenience

46. Even if, contrary to the Attorney General's submissions, this Board finds that the moving party has established that there is a serious question to be tried, and that they will suffer irreparable harm if interim relief is not granted, the CME must also demonstrate that the balance of convenience operates in favour of granting a stay.

***RJR-MacDonald, supra* at paras. 43, 80**

47. The moving party cannot satisfy the balance of convenience test. The important public interest in energy conservation and renewable energy through the maintenance of Ontario's HESP and OSTHI programs clearly outweighs the moving party's purely pecuniary interest in securing reduced rates for electricity, for the CME's approximately 1400 provincial manufacturing members.

Intervenor Request Letter, CME, at pp. 1, 3

48. The courts have distinguished an application for a stay/injunction within a constitutional action from a similar application involving private parties. In the latter case it is only the parties' rights that are being determined; in constitutional cases such as

the present proceeding, the consideration of the public interest plays an important role, due to the wider impact of the constitutional challenge. In these cases, the test 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".

> ***Anglers & Hunters v. Ontario (Minister of Natural Resources),*** **[1999] O.J. No. 1690 (S.C.J.) at paras. 77-78**
>
> ***Ontario Restaurant Hotel & Motel Assn,*** **[2002] O.J. No. 2 (S.C.J.) (*"Ontario* Restaurant") at paras. 30-31, 36**
>
> ***Harper, supra*** **at para. 9**

49. The Supreme Court of Canada concluded in *RJR-MacDonald,* that adjudicators weighing the balance of convenience should nearly always assume that irreparable harm to the public interest will result from the suspension of the operation of legislation:

> 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.
>
> ***RJR-MacDonald, supra*** **at para. 71. See also, para. 88 [italics added]**
>
> *…in assessing the balance of convenience, the motions judge must proceed on the assumption that the law...is directed to the public good and serves a valid public purpose…The assumption of the public interest in enforcing the law weighs heavily in the balance.* Courts will not lightly order that laws that Parliament or the legislature has duly enacted for the public good are inoperable in advance of complete constitutional review, which is always a complex and difficult matter. *It follows that only in clear cases will interlocutory injunctions against the enforcement of law on grounds of alleged unconstitutionality succeed.*
>
> ***Harper v. Canada, supra*** **at para. 9 [italics added]**

50. In addition, the adjudicator should not, as a general rule, attempt to ascertain whether actual harm to the public interest would result from granting the stay. It is neither appropriate nor necessary for this tribunal to weigh or make an evidentiary determination on the validity of government policy:

> A court should not, as a general rule, attempt to ascertain whether actual harm would result from the restraint sought. To do so would in effect require judicial inquiry into whether the government is governing well, since it implies the possibility that the government action does not have the effect of promoting the public interest and that the restraint of the government action would therefore not harm the public interest. The *Charter* does not give the courts a license to evaluate the effectiveness of government action, but only to restrain it where it encroaches upon fundamental rights.
>
> ***RJR-MacDonald, supra* at para. 72**

51. The onus at this stage remains with the moving party. Pursuant to the Supreme Court, "private applicants are normally presumed to be pursuing their own interests rather than those of the public at large." As such, a stay does not issue unless the claimant demonstrates that granting the interim relief would itself provide a public benefit:

> In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest *must demonstrate that the suspension of the legislation would itself provide a public benefit.*
>
> ***RJR-MacDonald, supra* at paras. 68, 80 [italics added]**
>
> ***Harper, supra* at para. 9**

52. The CME's Notice of Motion asserts that the "public interest is better served by granting the stay in that, it eradicates the harm to the administration of justice and the inherent unfairness to utilities and consumers of the Board presuming its own actions in issuing Assessments to be valid, before considering the Constitutional Questions, on their merits". In effect, the moving party's submission is that the public interest is compromised where this or any other Board acts on the assumption that its authorizing legislation is constitutionally valid.

> **Notice of Motion, at para. 7 (see also paras. 5, 9, 10), CME <u>Motion Record</u>**

53. This assertion of the public interest is simply incorrect as a matter of law. The actions of the OEB, like the actions of all government officials that occupy their office under colour of authority, are immunized by the *de facto* doctrine. This doctrine operates to protect representatives of the Crown who act in good faith under legislation prior to a finding of constitutional invalidity. The doctrine is fundamental to the functioning of the modern state. It attaches to the government and its officials in order to protect and maintain the rule of law and the authority of government.

> Again, the doctrine is necessary to maintain the supremacy of the law and to preserve Peace and order in the community at large, since any other rule would lead to such uncertainty and confusion, as to break up the order and quiet of all civil administration. Indeed, if any individual or body of individuals were permitted, at his or their pleasure, to challenge the authority of and refuse obedience to the government of the state and the numerous functionaries through whom it exercises its various powers, or refuse to recognize municipal bodies and their officers, on the ground of irregular existence or defective titles, insubordination and disorder of the worst kind would be encouraged, which might at any time culminate in anarchy.
>
> ***Reference Re Manitoba Language Rights*, [1985] 1 S.C.R. 721 at para. 76**
>
> ***Garland 2004*, *supra*, at paras. 80-84**

54. To assert that the public interest lies in suspending the assessments of the Board prior to a determination of constitutional invalidity on the merits, is tantamount to a claim that the public would benefit from undermining the *de facto* doctrine and the very rule of law itself.

55. Further, the hurdle that the moving party must overcome in their request for interim relief is especially high where the party seeks a general suspension of the statute, rather than a constitutional "exemption" from the operation of a statute.

> Suspension is a power that…must be exercised sparingly.
>
> ***RJR-MacDonald, supra* at paras. 33, 73**

56. On its face, this is plainly a suspension case, and not a limited request for a constitutional exemption for one or a small number of parties. The relief sought in the

CME's Notice of Motion seeks broadly a stay of all the "Assessments" issued by the Board on April 9 against LDCs, which would subsequently be passed on to electricity consumers. Similarly, the request articulated in the written argument filed by the CCC seeks a stay of the requirement that all "LDCs pay the Assessment by July 30, 2010". Thus the relief, if granted, would likely have effect for LDCs, and prevent them from passing on this charge to business consumers, including all members of the CME, as well as individual consumers, such as Mr. LeBlanc and the residential consumers who comprise the CCC. Furthermore, no less than 5 additional industry groups have been granted status as intervenors in this proceeding, some of whom may seek to be bound by the terms of any stay awarded[2], failing which they would presumably move for similar relief in separate proceedings.

Notice of Motion, at para. 1, <u>CME Motion Record</u>

Amended Factum, CCC and Aubrey Leblanc, (Motion Returnable July 13, 2010), filed June 15, 2010, at para. 40

Intervenor Request Letter, CME, at p. 3

Decision, June 3, 2010 (Appendix A)

i) The Balance of Convenience lies in the Denial of a Stay

57. The moving party has failed to meet the high threshold of establishing that the balance of convenience weighs in its favour. CME's interest in suspending the operation of the new regulatory charge is, at its core, simply an economic and personal interest in paying less for electricity consumption, rather than a *bona fide* public interest. As the Court concluded in *RJR-MacDonald*, pecuniary interests in maintaining a reduced price for consumer products do not carry weight in the balance of convenience analysis. Clearly, this interest cannot override the pressing public interest in energy conservation and renewable energy through the maintenance of Ontario's HESP and OSTHI

[2] For example, the written arguments filed by the Vulnerable Energy Consumers Coalition (at para. 1) and Union Gas Ltd. (at para. 27) on the preliminary questions addressed by the Board on 13 July 2010, both express support for a stay.

programs. In the result, the moving party's request for interim relief ought to be dismissed.

***RJR-MacDonald, supra* at para. 93**

***Ontario Restaurant, supra* at paras. 30-31, 34-36**

***Rosen v. Ontario, supra* at 161**

PART IV. ORDER REQUESTED

58. The Attorney General of Ontario requests that all requests for interim relief in the form of a stay of the assessments levied by the Board be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

July 23, 2010

_____
Janet E. Minor

_____
Arif Virani

Counsel Attorney General of Ontario,
Constitutional Law Branch

APPENDIX I

Interlocutory injunctions denied:

John Doe v. Ontario, **[2007] O.J. No. 3889 (S.C.J.) at paras. 76-92**
Former participant in Witness Protection Program alleged breach of s. 7 Charter right. Injunction denied due to lack of serious issue.

Satschko v. Ontario (Minister of Government Services), **[2007] O.J. No. 1600 (S.C.J.) at paras. 34-36**
Prohibition on retailers distributing films not approved by Ontario Film Review Board. Injunction to halt seizure of films denied due to lack of serious issue, lack of irreparable harm and balance of convenience favouring public interest.

Giroux v. Ontario (Minister of Consumer and Business Services), **[2005] O.J. No. 1279 (Div. Ct.) at paras. 6, 15-16, 20-21 (S.C.J.)**
Closure of Land Title Office in Francophone community. Injunction denied due to lack of irreparable harm and balance of convenience favouring closure.

Germain (Litigation guardian of) v. Ontario (Minister of Education), **[2004] O.J. No. 1977 (S.C.J.) at paras. 35, 45, 47-49 (S.C.J.)**
Provincial test required to complete high school diploma. Injunction denied--disadvantaged students only suffering inconvenience, not irreparable harm, and greater potential for irreparable harm to non-plaintiff students.

Thomas v. Ontario, **[2004] O.J. No. 3340 at para. 21 (S.C.J.)**
Age-based termination of child's eligibility for autism treatment. Injunction denied due to lack of irreparable harm. Applicant was not receiving the same therapy as successful injunction applicants, thus would not suffer the harm of disrupted therapy.

Clough (Litigation guardian of) v. Ontario **[2003] O.J. No. 1074 at paras. 30, 38 (Div. Ct.)**
Age-based termination of child's eligibility for autism treatment. Injunction denied due to lack of irreparable harm based on short duration between end of current funding and chance to review funding.

Johnson v. Ontario (Attorney General), **[2003] O.J. No. 3085 at para. 19 (S.C.J.), leave to appeal dismissed, [2003] O.J. No. 4440 (Div. Ct.)**
Suspension of welfare benefits due to fraud. Injunction denied due to lack of irreparable harm.

Kotsopoulos v. North Bay General Hospital, **[2002] O.J. No. 715 (S.CJ.) at paras. 18, 26 (S.C.J.)**
Allegation that a mandatory vaccination violated Charter s. 7. Injunction denied--job loss not constituting irreparable harm, and legislation deemed necessary for the public good.

Ontario Restaurant Hotel & Motel Association v. Toronto (City), **[2002] O.J. No. 2 at paras. 29, 36 (Div. Ct.)**
City by-law required disclosing results of restaurant health inspections to the public. Injunction denied due to lack of evidence of inability of defendant to pay damages. Balance of convenience favours full hearing on merits due to the significant public interest in health and safety.

O.P.S.E.U. v. The Board of Governors of College des Grands Lacs and The Minister of Training, Colleges and Universities, **unreported, December 5, 2001 at 20-21, 24-25 Lax J., (S.C.J.)**
Closure of a Franco-Ontarian community college alleged to violate unwritten constitutional principles of the protection of minority language communities, in addition to collective bargaining issues. Injunction denied—not the role of the court to second-guess the college's own governing board on an interlocutory basis. Circumventing the board's statutory authority would pose significant harm to the public interest.

Thurasingam v. Ontario (Registrar of Motor Vehicles), **[2002] O.J. No. 3123 at para. 19 (S.C.J.)**
Alleged *Charter* violation during impaired driving investigation. Injunction denied due to uncertainty of whether suspended license would lead to loss of employment. Individual stay might have led to opening of "floodgates" and general suspension of the program.

Anglers & Hunters v. Ontario (Ministry of Natural Resources) **(1999), [1999] O.J. No. 1690 at paras. 77-78, 84-85 (S.C.J.)**
Regulation prohibited spring bear hunt. Injunction denied due to applicants failing to demonstrate how relief could be sufficiently limited so that general public interest in application of the law would be unaffected.

Kimberly Clark v. Ontario (Minister of Natural Resources), **unreported, February 26, 1996, Borins J., (Gen. Div.), leave to appeal ref'd April 16, 1996 (Div. Ct.)**
Applicant company alleged that natural resource charges constituted indirect taxation. Injunction denied due to lack of irreparable harm. Balance of convenience favoured avoiding the prejudice the Crown of suspending a law.

Masse v. Ontario (Attorney General), **unreported, September 29, 1995 at 2, Boland J., (Gen. Div.)**
Reduction of social assistance benefits. Injunction denied--balance of convenience favours avoiding the irreparable harm to the public interest by granting relief before a full hearing on the merits.

Ferrel v. Ontario (Attorney General), **unreported, December 28-29, 1995 at 4 MacPherson J., (Gen. Div.)**
Statute repealing a previous law was alleged to violate s. 15 of the *Charter*. Injunction denied due to lack of serious issue. Statute contained no substantive provisions which could be challenged under the *Charter*.

***Rosen v. Ontario (Attorney General),* (1994) 27 C.R.R. (2d) 159 at 161 (Gen. Div.)**
Prohibition on sale of tobacco at pharmacies. Injunction denied on balance of convenience. Case indistinguishable from *RJR-MacDonald*.

APPENDIX II

Autism cases - injunctions granted, leave to appeal motions dismissed or rendered moot by trial judgment in *Wynberg v. Ontario* [2005] O.J. No. 1228 (S.C.J.), reversed by C.A. [2006] O.J. No. 2732

Age-based termination of child's eligibility for autism treatment. Interim injunction granted due to potential for irreparable harm in disruption of treatment.

***Lowrey (Litigation guardian of) v. Ontario* (2003), 64 O.R. (3d) 222 at para. 25 (S.C.J.)**

***Juravsky v. Ontario (Attorney General)* [2003], O.J. No. 5857 at para. 37 (S.C.J.)**

***Eisler (Litigation guardian of) v. Ontario,* [2004], O.J. No. 1864 at para. 52 (S.C.J.)**

***Fleischmann (Litigation guardian of) v. Toronto District School Board,* [2004] O.J. No. 160 at para. 58 (S.C.J.)**

***Wynberg v. Ontario,* [2004] O.J. No. 1066 at para. 2 (S.C.J.) [motion for injunctive relief]**

***Naccarato (Litigation guardian of) v. Ontario,* [2004] O.J. No. 3278 at para. 65 (S.C.J.)**

***Kohn v. Ontario (Attorney General),* [2004] O.J. No. 4112 at para. 60 (S.C.J.)**

***Bettencourt (Litigation guardian of),* [2005] O.J. No. 70 at paras. 40-42 (Div. Ct.)**

***McNabb (Litigation guardian of) v. Ontario,* [2005] O.J. No. 76 at para. 6 (S.C.J.)**

SCHEDULE A

LIST OF AUTHORITIES

1. ***RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311**
2. ***Harper v. Canada (Attorney General)*, [2000] 2 S.C.R. 764**
3. ***Satschko v. Ontario (Minister of Government Services)*, [2007] O.J. No. 1600 (S.C.J.)**
4. ***Airport Limousine Drivers Assn. v. Greater Toronto Airports Authority*, [2005] O.J. No. 3509 (S.C.J.)**
5. ***Carbert v. Farm Credit*, [1992] S.J. No. 585 (Sask. Q.B.)**
6. ***Doyle v. Newfoundland and Labrador*, [2005] N.J. No. 222 (N.L.S.C.(T.D.))**
7. ***Sauvé v. Canada (Chief Electoral Officer)*, [1997] F.C.J. No. 594 (F.C.T.D.)**
8. ***Nova Scotia Board of Censors v. McNeil*, [1978] 2 S.C.R. 662**
9. ***Kimberly Clark v. Ontario (Minister of Natural Resources)*, unreported, February 26, 1996, Borins J., (Gen. Div.), leave to appeal ref'd April 16, 1996 (Div. Ct.)**
10. ***Ontario Home Builders' Assn. v. York Region Board of Education*, [1993] O.J. No. 1086 (Div. Ct., C.A. endorsement)**
11. ***Rogers v. Sudbury (Administrator of Ontario Works)* (2002), 57 O.R. (3d) 46 (S.C.J.)**
12. ***Broomer v. Ontario (Attorney General)*, [2002] O.J. No 2196 (S.C.J.)**
13. ***Burrows (Litigation guardian of) v. Ontario*, [2003] O.J. No. 5858 (S.C.J.); leave to appeal granted [2004] O.J. No. 3217 (Div.Ct.)**
14. ***Lowrey (Litigation guardian of) v. Ontario*, (2003) 64 O.R. (3d) 222 (S.C.J.)**
15. ***Westbank First Nation v. British Columbia Hydro and Power Authority*, [1999] 3 S.C.R. 134**
16. ***620 Connaught Ltd. v. Canada (Attorney General)*, [2008] 1 S.C.R. 131**
17. ***Confédération des Syndicats Nationaux v. Canada (Attorney General)*, [2008] 3 S.C.R. 511**
18. ***Kingstreet Investments Ltd. v. New Brunswick (Finance)*, [2007] 1. S.C.R. 3**

19. ***Gladstone Petroleum Ltd. v. Husky Oil (Alberta Ltd.),*** **[1982] S.J. No. 1057 (Sask. C.A.)**

20. ***Welbridge Holdings Ltd. v. Winnipeg (Greater),*** **[1971] S.C.R. 957**

21. ***Just v. British Columbia,*** **[1989] 2 S.C.R. 1228**

22. ***Garland v. Consumers' Gas Co.,*** **[1998] 3 S.C.R. 112; [2004] 1. S.C.R. 629**

23. ***Canada (Attorney General) v. Amnesty International Canada,*** **2009 FC 426**

24. ***Canadian National Railways v. Leger,*** **[2000] F.C.J. No. 243 (F.C.T.D.)**

25. ***Brocklebank v. Canada (Minister of National Defence),*** **[1994] F.C.J. No. 1496 (F.C.T.D.)**

26. ***Bell Canada v. Communications, Energy and Paperworks Union,*** **[1997] F.C.J. No. 207 (F.C.T.D.)**

27. ***Northwest Territories v. Public Service Alliance of Canada,*** **[2001] F.C.J. No. 19 (F.C.A.)**

28. ***Island Telephone Co., Re,*** **(1987) 206 A.P.R. 168 (P.E.I.C.A.)**

29. ***1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada,*** **[2003] O.J. No. 1822 (Div. Ct.)**

30. ***Noble v. Noble,*** **[2002] O.J. No. 4997 (S.C.J.)**

31. ***Anglers & Hunters v. Ontario (Ministry of Natural Resources),*** **[1999] O.J. No. 1690 (S.C.J.)**

32. ***Ontario Restaurant Hotel & Motel Assn. v. Toronto (City),*** **[2002] O.J. No. 2 (Div. Ct.)**

33. ***Reference re: Manitoba Language Rights,*** **[1985] 1 S.C.R. 721**

34. ***Rosen v. Ontario (Attorney General)*** **(1994), 27 C.R.R. (2d) 159 (Ont. Ct. (Gen. Div.))**

<u>Legal Writings</u>

35. Horsman, Karen, ***Government Liability: Law and Practice,*** **looseleaf (Aurora, Ont.: Canada Law Book, 2007)**

SCHEDULE B

LEGISLATION

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

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.

Ontario Regulation 66/10

Definitions

1. (1) In this Regulation,

"IESO-controlled grid" means the IESO-controlled grid as defined in the *Electricity Act, 1998*;

"market participant" has the same meaning as in section 56 of the Act;

"Ministry" means the Ministry of Energy and Infrastructure;

"net distributor volume" means the sum of the amount of electricity withdrawn from the IESO-controlled grid by a distributor licensed under Part V of the Act, the amount of electricity purchased from any host distributor and the amount of electricity supplied by qualified embedded generators, less the amount of electricity supplied to qualified embedded distributors;

"qualified embedded distributor" means a distributor that is licensed under Part V of the Act that is provided electricity by another licensed distributor;

"qualified embedded generator" means a generator who is connected to a distributor's distribution system;

"qualified host distributor" means a distributor licensed under Part V of the Act that distributes electricity to another distributor;

"Retail Settlement Code" has the same meaning as in section 56 of the Act. O. Reg. 66/10, s. 1 (1).

(2) In this Regulation, a reference to a volume of electricity distributed by or to a licensed distributor includes the volume for total losses, as defined in the Retail Settlement Code. O. Reg. 66/10, s. 1 (2).

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. O. Reg. 66/10, s. 2.

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. O. Reg. 66/10, s. 3.

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

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.

O. Reg. 66/10, s. 5 (1).

(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. O. Reg. 66/10, s. 5 (2).

(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).

O. Reg. 66/10, s. 5 (3).

(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 × C

where,

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

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

O. Reg. 66/10, s. 5 (4).

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 × 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).

Customer billing, distributors

9. A distributor licensed under Part V of the Act shall bill the persons referred to in subsection 7 (1) of this Regulation the amounts calculated in that subsection in each bill issued during the one-year period starting on the date the distributor begins the billing. O. Reg. 66/10, s. 9.

Information

10. (1) Every person assessed under section 2 shall provide the Board with the information, in the manner and at the times set out by the Board, that the Board requires to implement and administer the assessments. O. Reg. 66/10, s. 10 (1).

(2) The Ministry and the Board may share any invoicing and payment information that each may require from the other. O. Reg. 66/10, s. 10 (2).

11. OMITTED (PROVIDES FOR COMING INTO FORCE OF PROVISIONS OF THIS REGULATION). O. Reg. 66/10, s. 11.