



Jay Shepherd

Professional Corporation
120 Eglinton Avenue East
Suite 500
Toronto, Ontario M4P 1E2

BY EMAIL AND PERSONAL DELIVERY

August 3, 2010
Our File No. 2010008

Ontario Energy Board
2300 Yonge Street
27th Floor
Toronto, Ontario
M4P 1E4

Attn: Kirsten Walli, Board Secretary

Dear Ms. Walli:

Re: EB-2010-0008 – OPG Payment Amounts

I am writing this letter both in my individual capacity and as counsel for the School Energy Coalition. I have received the letter of July 30, 2010 from Charles Keizer, counsel for the Applicant, with respect to the release of confidential information by the undersigned, and this letter constitutes the response of both myself and School Energy Coalition.

On July 29, 2010 I filed two sets of interrogatories to the Applicant on behalf of School Energy Coalition. The first, labelled List #1, was filed on RESS and circulated to all intervenors of record. It was intended to contain interrogatories referring exclusively to non-confidential material. The second, labelled List #2, was sent by email to the Board Secretary, the Applicant, and the Applicant's counsel. It was intended to contain interrogatories referring to any confidential material. In the cover email for List #2, I asked the Applicant to provide a list of those who had signed the Declaration and Undertaking, so that only those persons would receive a copy of the interrogatories with confidential references.

The two lists were created as follows. List #1 started as a list of interrogatories drafted by a consultant. All interrogatories but one referred only to non-confidential material. The one that did refer to confidential material was clearly marked at my request. My task with that list was to add my own non-confidential interrogatories to the list, and move the confidential interrogatory on that list to List #2. List #2 started as a list of interrogatories drafted solely by me and referring to confidential material. My task with that list was to add the consultant's one confidential interrogatory.

(416) 804-2767
jay.shepherd@canadianenergylawyers.com
www.canadianenergylawyers.com

All went smoothly, except that apparently when I proceeded to “cut and paste” the one confidential interrogatory from List #1 to List #2, I inadvertently hit the “copy” menu item instead of the “cut” menu item. As a result, instead of moving the interrogatory, I copied it. While it appeared on List #2 as it should have, it still accidentally remained on List #1. Because it was a sub-question on List #1, the number of questions remained the same, and there were no other telltale signs of the error.

There is no question that responsibility for the error rests with me. The consultant did exactly as he should, marking the interrogatory clearly so that I would move it. As it was confidential information, there were of course no staff involved, and all actions were mine alone.

When it first came to my attention that this error had taken place (through a phone call from Board counsel), I immediately agreed to his suggestion that he issue a recall email so that those who had not read it would refrain from doing so, and destroy their copies. While it is true that most of those who had received the document had signed the Declaration and Undertaking, there were some who had not, and it is hoped that the recall email prevented them from reading the confidential numbers.

I also immediately communicated to the Applicant my sincerest apologies, and provided all parties with a revised List #1.

I also wish to apologize to the Board for the error. No disrespect to the Board’s rules or orders was intended in any way. I want to assure the Board that confidential information is taken very seriously by myself, my firm, and my client. Proper procedures are in place, and confidential information is properly safeguarded. No persons who have not signed a proper Declaration and Undertaking have access to any confidential information at any time.

Mr. Keizer in his letter has suggested that the Board apply the sanction applied by the Board in EB-2009-0096 against my colleague Mr. Thompson. In that case, the Board prohibited Mr. Thompson from any actions in the case involving confidential information, although it did allow him to brief his partner Mr. De Rose, and it allowed him to communicate with counsel for other parties who had signed the Declaration and Undertaking.

It is not my place to comment on the decision and sanction in EB-2009-0096. However, in this case I submit that it would be inappropriate and unfair to apply a similar sanction. There are a number of reasons for this, including at least the following:

1. The error in this case was a mechanical error in the use of software, not a judgment error, oversight, or any kind of carelessness. I intended to do exactly what I was supposed to do, and hit a wrong button without knowing it. Sanctions are intended to motivate people to improve their behaviour in the future. No sanction can change my behaviour in this kind of situation. Even with the greatest care possible, accidents can still happen, and this is of that type. Therefore, a sanction would not accomplish any worthwhile goal.
2. School Energy Coalition has only one counsel, and so imposing a sanction such as this would result in the intervenor being deprived of counsel. Further, since the case is one

involving so many parties, most of the counsel that could be retained are already working for someone else. SEC has an arrangement in place with another counsel to be available in the case of scheduling and other conflicts, for example, but that counsel is already retained by another party in this proceeding. In short, the consequences of sanctions in this case are much more severe than was the case in EB-2009-0096.

Once again, I reiterate my sincerest apology for the accidental disclosure of this information, and assure the Board that it does not imply any disrespect to the Board, nor that the Board's confidentiality rules are not taken sufficiently seriously.

I would be happy to appear before the Board in person at the Board's convenience if that would be useful in dealing with this regrettable incident.

All of which is respectfully submitted.

Yours very truly,
JAY SHEPHERD P. C.



Jay Shepherd

cc: Wayne McNally, SEC (email)
Mark Garner, SEC (email)
Charles Keizer, Torys (email)
Michael Millar, OEB (email)
Violet Binette, OEB (email)
Interested Parties (email)