EB-2010-0221

IN THE MATTER OF the *Ontario Energy Board Act,* 1998, S.O. 1998, c. 15, (Schedule B);

AND IN THE MATTER OF a Notice of Intention to Make an Order for Compliance, Suspension and an Administrative Penalty against Summitt Energy Management Inc. dated June 17th, 2010

WRITTEN SUBMISSIONS OF COMPLIANCE COUNSEL ON THE MOTION OF SUMMITT ENERGY MANAGEMENT, INC.

August 11, 2010

Stockwoods LLP Barristers
Royal Trust Tower
77 King Street West
Suite 4130, P.O. Box 140
Toronto-Dominion Centre
Toronto, ON M5K 1H1

M. Philip Tunley LSUC #26402J
Tel: 416-593-3495
Fax: 416-593-9345
Email: *PhilT@stockwoods.ca*

ONTARIO ENERGY BOARD
P.O. Box 2319
2300 Yonge Street, 27th Floor
Toronto, ON M4P 1E4

Maureen Helt
Tel: (416) 440-7672
Email: *Maureen.Helt@oeb.gov.on.caS*

Compliance Counsel

TO: **ONTARIO ENERGY BOARD**
P.O. Box 2319
2300 Yonge Street, 27th Floor
Toronto, ON M4P 1E4

Attention: Kirsten Walli,
Board Secretary
Tel: 888.632.6273
Fax:416-440-7656
E Mail: *Boardsec@ oeb..qov.on.ca*

AND TO: **Cassels Brock & Blackwell LLP**
2100 Scotia Plaza, 40 King Street West
Toronto, ON M5H 3C2

Stephen I. Selznick LSUC#: 18593C
Tel: 416.860.6883
Fax: 416.642.7147
Email: *sselznick@ casselsbrock.com*

Jason Beitchman LSUC#: 564770
Tel: 416.860.2988
Fax: 647.259.7993
Email: *jbeitchman @ casselsbrock.com*

Lawyers for: Summitt Energy Management Inc.

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PART I—OVERVIEW

1. These submissions address the motion by Summitt Energy Management Inc. ("Summitt") dated August 4, 2010 for further disclosure and for a further procedural order providing for various pre-hearing procedures.

2. With respect to disclosure, Compliance counsel have made disclosure fully in accordance with the decision of the Board in a very recent case directly on point involving Toronto Hydro Electric Systems Limited. The disclosure provided specifically includes the information requested in paras. 1, 2, 3, 5 and 6 of Summitt's notice of motion. Compliance counsel are aware of their continuing obligations, and have also specifically invited Summitt's counsel to identify any specific items or categories of information missing from the disclosure provided.

3. The request for pre-hearing cross-examination of all 28 complainants and other witnesses in para. 4 of the notice of motion is unprecedented. Such examinations are not provided for in

the *Statutory Powers Procedures Act* ("*SPPA*") or in the Board's *Rules of Practice and Procedure*, nor are they required by the principles of fairness. The request for such pre-hearing examinations would delay the proceeding unduly, and be unfair to those witnesses, and it should be dismissed.

4. The other procedures Summitt proposes are generally not appropriate given the nature of this proceeding under ss. 112.3, 112.4 and 112.5 of the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Schedule B (the "Act").

5. Most proceedings that come before the Board, such as a rate proceeding or policy review, affect the interests of stakeholders, generally. The Board's *Rules of Practice and Procedure* permit, but do not require, a number of processes such as pre-filing of evidence, interrogatories, issues conferences and technical conferences, that are designed to give the Board broad power to control its own processes, by clarifying the evidence, narrowing the issues, and limiting the scope and focus of a hearing before it begins.

6. By contrast, in this case, Compliance counsel on behalf of the Board seek an Order requiring a particular Licensee, Summitt, to undergo a suspension of its door to door sales activities, to be subjected to specific conditions to ensure ongoing compliance with the relevant provisions of the legislation, Regulations and *Codes of Conduct*, and that it pay an administrative penalty and take other measures to remedy the infractions that are alleged to have occurred. This proceeding is essentially prosecutorial in form. It is brought in the public interest to achieve compliance by the Licensee with the law. In such proceedings, it is essential in the interests of fairness:

(a) that the issues be defined at the outset, as they have been by the detailed Notice of Intention to Make an Order in this case, in accordance with s. 112.2 of the *Act*;

(b) that, once the Licensee requires the Board to hold a hearing under s. 112.2(3), Compliance counsel then bear the onus of proving those allegations on all the evidence, on a balance of probabilities;

(c) that both Compliance counsel and counsel for the Licensee be permitted to conduct their case, and advance all defences available, during the hearing as they see fit; and

(d) that the essential role of the Hearing Panel is to hear and decide the case as it is presented at the hearing, including any contested determinations as to the evidence that may be admissible.

7. However, Compliance counsel do not agree with Summitt's suggestion that this proceeding impugns its "character and propriety of conduct", as distinct from that of its sales agents. Nor is Summitt's ability to pursue its business, generally, at stake. Rather, the proceeding focuses on the adequacy of Summitt's training, supervision and discipline of its agents, and its due diligence in establishing other business processes sufficient to ensure that the conduct of its agents complies with the applicable law. No further moral imputations are raised against Summitt. Moreover, the Suspension Order sought only affects its door-to-door sales activities, and not its business, generally.

8. The motion by Summitt seeks to inject into this proceeding, a set of procedures that are not only unnecessary, but that may actually undermine the proper role of the Hearing Panel, and unduly complicate, delay, and even prejudice its fair, just and expeditious disposition.

9. Although prosecutorial in form, case law recognizes that compliance proceedings in a regulatory setting, such as this Board presides over, must be efficient and timely in order to protect the interests of vulnerable stakeholders, and to ensure prompt compliance with the law. Both the disclosure and the other procedures currently provided by the Board and Compliance counsel are more than sufficient to meet the obligation of fairness to Summitt, in a manner that is balanced with these important public interests that underlie the proceeding.

PART II—THE FACTS

10. This is a compliance proceeding in which Compliance counsel for the Board is seeking an Order under sections 112.3, 112.4 and 112.5 of the *Act*, which state in part:

> 112.3 (1) If the Board is satisfied that a person has contravened or is likely to contravene an enforceable provision, the Board may make an order requiring the person to comply with the enforceable provision and to take such action as the Board may specify to,
>
> (a) remedy a contravention that has occurred; or
>
> (b) prevent a contravention or further contravention of the enforceable provision.
>
> 112.4 (1) If the Board is satisfied that a person who holds a licence under Part IV or V has contravened an enforceable provision, the Board may make an order suspending or revoking the licence.
>
> 112.5 (1) If the Board is satisfied that a person has contravened an enforceable provision, the Board may, subject to the regulations under subsection (5), make an order requiring a person to pay an administrative penalty in the amount set out in the order for each day or part of a day on which the contravention occurred or continues.

Reference: *Act,* ss. 112.3(1), 112.4(1) and 112.5(1)

11. The Board's Notice of Intention to Make an Order For Compliance, Suspension and an Administrative Penalty was made on June 17, 2010 (the "Notice of Intention"). It sets out particulars of 28 allegations, involving five sales agents acting on behalf of Summitt, in their dealings with individual energy consumers. The Notice of Intention relates these specific allegations of non-compliance to enforceable provisions in the *Act*, in O.Reg 200/02, and in the Board's *Code of Conduct for Gas Marketers* and the *Electricity Retailers Code of Conduct* (the "*Codes*").

Reference: Notice of Intention: Affidavit of Daniel Lester, Exhibit A

12. Also on June 17, 2010, the Board issued an Interim Compliance Order, requiring Summitt to "take all steps necessary to ensure" compliance with these provisions of the *Act*, the

Regulations and the *Codes*, and to provide information to the Board, as required, with respect to the steps taken in that regard.

Reference: Interim Compliance Order: Compendium of Documents, Tab 1

13. On June 24, 2010 Compliance counsel provided counsel for Summitt with an extensive disclosure package (the "June 24 Disclosure"). The June 24 Disclosure has been served on Summitt in response to this motion and, subject to the Hearing Panel's direction, may be provided to the Panel if required to resolve the issues raised on the motion.[1] It contains:

(a) for each of the 28 complaints:

  (i) a witness statement of each complainant, signed by the complainant if available, and otherwise as an approved draft, setting out in summary the anticipated oral evidence that Compliance counsel intend to lead from them;

  (ii) all documents received by the Board from the complainant or from Summitt relating to their complaint;

  (iii) all written records of contacts and correspondence between the complainants and Compliance staff;

  (iv) all notes of Compliance staff's lead investigator, Chris Marijan, of her contacts with the complainants; and

  (v) any other documents in Compliance staff's investigation files relating to the complaints.

(b) certain forms of letters used by Compliance staff; and

(c) the complete Briefing Note prepared by Compliance staff and counsel,, setting out the background, relevant statutory and regulatory provisions, staff analysis and recommendation leading to the commencement of this proceeding.

---

[1] Compliance counsel submit that, while the disclosure material is properly put before the Hearing Panel on this motion by Summitt challenging its completeness, the Panel should only review it to the extent necessary, and should not rely upon it for any purpose other than the resolution of the motion. The disclosure should not form part of the public record of this motion unless and to the extent that the Hearing Panel specifically directs otherwise, in which event, the portions to be made public should be edited to ensure the privacy of individuals referred to therein.

Reference: June 24 Disclosure: Disclosure Brief, Tabs 1 - 6
Cover e-mail from Compliance counsel: Affidavit of Daniel Lester, Exhibit B

14. On June 28, 2010, after Summitt requested an extension of the time in which to exercise its right to require the Board to hold a hearing of the allegations under s. 112.2(4) of the *Act*, the Board issued Procedural Order No. 1 granting the extension, and requiring Summitt to provide written assurance by June 30, 2010 detailing the steps it was taking or would take to comply with the Interim Compliance Order. By letter dated June 30, 2010, outlined the steps taken or to be taken by Summitt as of that date. By further letter dated July 7, 2010, counsel for Summitt provided further information regarding those steps requested by Compliance counsel.

Reference: Procedural Order No. 1, June 28, 2010: Compendium of Documents, Tab 2
Letter from Cassels Brock, June 30, 2010: Compendium of Documents, Tab 3
Letter from Cassels Brock, July 7, 2010: Compendium of Documents, Tab 4

15. Summitt exercised its right to require the Board to hold a hearing of the allegations in the Notice of Intention, by letter dated July 8, 2010.

Reference: Letter from Cassels Brock, July 8, 2010: Compendium of Documents, Tab 5

16. On July 9, 2010 the Board issued Procedural Order No. 2 herein, which provides that the oral hearing will commence the week of August 23, 2010.

Reference: Procedural Order No. 2: Affidavit of Daniel Lester, Exhibit C

17. Almost two weeks later, on July 21, 2010, counsel for Summitt sent an e-mail to Compliance counsel requesting agreement on extensive additional pre-hearing procedures, and enclosing a proposed draft timetable with respect to them. That e-mail and timetable are

essentially reiterated in this motion to the Board, served two more weeks later on August 4, 2010.

Reference: E-mail and enclosed timetable from Cassels Brock: Affidavit of Daniel Lester, Exhibit D

18. Compliance counsel wrote back immediately on July 22, 2010. In that e-mail, Compliance counsel advised Summitt that:

(a) they could not agree to any unnecessary delay in the hearing dates set by the Board, especially as they had been made aware of further, similar complaints about the conduct of Summitt's agents since the Board's Interim Compliance Order had been made;

(b) they did not believe the allegations in the Notice of Intention were technical in nature, and as such did not believe a technical conference is either necessary or appropriate in this case; and

(c) they intended to call as witnesses at the hearing each of the 28 complainants who are available, such that pre-hearing cross-examination should not be required, adding:

> "However, if any of the complainants are unable to attend the hearing, and we decide to file their evidence in affidavit form, then in those particular cases we would agree to arrange for a pre-hearing cross-examination as requested".

Reference: E-Mail from Stockwoods, July 22, 2010: Affidavit of Daniel Lester, Exhibit F

19. On July 23, 2010, counsel for Summitt responded, raising additional concerns about the disclosure provided by Compliance counsel, and suggesting that Summitt intends to bring a motion or raise an issue challenging these proceedings on grounds of "institutional bias".

Reference: E-Mail from Cassels Brock, July 23, 2010: Affidavit of Daniel Lester, Exhibit G

20. In response to that correspondence, Compliance counsel further:

(a) confirmed that the June 24 Disclosure included witness statements which set out the substance of the evidence that Compliance counsel intend to lead from all 28

complainants, which fully satisfies even the highest obligations of disclosure in that regard;

(b) confirmed that Compliance counsel do not intend to call expert evidence, and that the absence of such evidence in the disclosure was not a deficiency; and

(c) asked:

"If you believe there are specific items or categories of information missing [from the disclosure], please tell me what they are and we will respond."

Reference: E-Mail from Stockwoods, July 27, 2010: Affidavit of Daniel Lester, Exhibit H

21. Counsel for Summitt has never identified any such items or categories of information missing from the disclosure provided to it, either prior to bringing this motion or in the material filed in support of it.

22. Nevertheless, Compliance counsel have been mindful of their obligations of continuing disclosure of all potentially relevant information prior to the hearing. In that regard:

(a) by e-mail on July 30, 2010 Compliance counsel provided counsel for Summitt with copies of all relevant documents, including interview notes of Ms. Marijan, in regard to the further, similar complaints received by the Board since the Interim Compliance Order ("July 30 Disclosure"); and

(b) by e-mail on August 10, 2010, Compliance counsel provided counsel for Summitt with a signed witness statement of Ms. Marjan and other ongoing disclosure (the "August 10 Disclosure").

Reference: July 30 Disclosure: Disclosure Brief, Tabs 6
August 10 Disclosure: Disclosure Brief, Tabs 7, 8

23. This motion was commenced on August 4, 2010.

PART III—THE ISSUES

24. The issues to be determined are:

(a) Should the Board require further disclosure by Compliance counsel/

(b) Should the Board permit Summitt to conduct pre-hearing examinations of the 28 individual complainants referred to in the Notice of Intention, and any other witnesses that Compliance counsel intend to call at the hearing?

(c) Should the Board issue a further Procedural Order to provide for any or all of the following, together with a schedule for the completion of any such steps:

(i) the exchange and filing of written interrogatories;

(ii) a technical conference;

(iii) an issues conference;

(iv) facilitated mediation or ADR; and/or

(v) a pre-hearing conference?

(d) If the Board grants Summitt's request that the hearing be adjourned, what, if any, conditions should the Board place upon that order, given the delay already incurred?

PART IV—LAW AND ANALYSIS

A. Disclosure

25. The Board has recently ruled on the scope of Compliance counsel's disclosure obligations in a proceeding of this nature, under Rule 14 of the Board's *Rules of Practice and Procedure*. The Board followed recent appellate decisions of high authority in holding that the *Stichcombe* standard of disclosure, developed in the context of true criminal proceedings, does not apply to this type of regulatory proceeding, because no individual rights are at stake, because the sanctions available are administrative rather than penal in nature, and because:

> "To require a Board to disclose all possibly relevant information gathered in the course of regulatory activities could easily impede its work from a regulatory standpoint."

Reference: *Re Toronto Hydro Electric Systems Ltd.*, EB-2009-0308, Decision and Order on Motion for Disclosure, October 14, 2010, especially at paras. 12-21
May v. Ferndale Institution, [2005] 3 S.C.R. 809,2005 SCC 82 at paras. 91 and 92
Re CIBA-Geigy Canada Ltd. (1994), 83 F.T.R. 2 at paras. 15, 30, 32, 38, affirmed [1994] 3 F.C. 425 at para. 8 (Fed. C.A.)
Ontario Energy Board *Rules of Practice and Procedure*,

26. In *Re Toronto Hydro Electric Systems Ltd.*, the Board ordered that Compliance counsel disclose "all documents" in their possession related to the smart-metering activities of THESL in relation to the two condominiums with respect to which complaints had been received, and allegations had been made in the Notice of Intention to Make an Order which was before the Board in that case. However, the Board limited the disclosure obligations to those specific allegations.

Reference: *Re Toronto Hydro Electric Systems Ltd.*, above, at paras. 24-27

27. Guided by that decision, Compliance counsel in this case have already made the disclosure which it requires. Specifically, Compliance counsel have:

(a) disclosed and provided copies to Summitt's counsel of every relevant document in their possession, whether or not they currently intend to rely upon them as evidence or not (para. 1 of the Notice of Motion);

(b) produced to Summitt's counsel witness statements for all 28 complainants and the Board's lead investigator, that are either signed or in draft form, but in either case providing a full summary of the anticipated evidence of the witnesses (para. 2 of the Notice of Motion);

(c) provided the name and contact information for each witness they intend to call, including all 28 complainants (paras. 3 and 5 of the Notice of Motion);

(d) informed Summitt's counsel that they do not intend to call any expert evidence (para. 6 of the Notice of Motion); and

(e) invited Summitt's counsel to identify any specific items or categories of information missing from the disclosure provided.

28. Compliance counsel are aware of their continuing obligations of disclosure, and respectfully submit that no further Order for disclosure is warranted.

B. Pre-Hearing Examinations of Witnesses

29. Pre-hearing examination of all witnesses is not available as of right, even in a true criminal proceeding. While the procedure for a preliminary inquiry under the *Criminal Code* may provide some opportunities in that regard, it applies only to the most serious, indictable offences. No such process is available for summary conviction offences.

Reference: *Criminal Code*, s. 535

30. No such process is typically provided for regulatory enforcement, disciplinary or compliance proceedings such as the present. There is nothing in the *SPPA* that makes any such procedure available. Section 10.1 of the *SPPA* provides for cross examination that is "reasonably required", but only "at the hearing". Our courts recognize that, where the hearing

will provide that opportunity, no unfairness results by not permitting pre-hearing examinations.

Reference: *Statutory Powers Procedures Act*, R.S.O. 1990, c. S.22
Fischer v. Milo (2007), 44 R.F.L. (6th) 134, [2007] O.J. No. 3692, 2007 CarswellOnt 6144 (Ont. S.C.J. - D.M. Brown J.)

31. The Board's own *Rules of Practice and Procedure*, similarly, make no provision for pre-hearing examinations.

Reference: *Rules of Practice and Procedure*

32. Compliance counsel submit such pre-hearing examinations are not required as a matter of fairness to Summitt. Indeed, it is respectfully submitted that it would be oppressive and unfair to complainants to subject them to two rounds of cross-examination by a Licensee's counsel, once before and then again at the hearing. Such procedure would discourage legitimate complaints, and would interfere with this Board's ability to effectively monitor and ensure compliance by Licensees in the public interest. To require them would be duplicative, and unduly delay the hearing.

C. Further Procedural Order

33. Compliance counsel oppose Summitt's serial requests for the exchange and filing of written interrogatories, for a technical conference, for an issues conference, and for ADR, on the following grounds.

(i) Interrogatories

34. Under the Board's *Rules of Practice and Procedure*, the Board "may" establish an interrogatory procedure for any of the purposes outlined in Rule 28.01 (a) to (d).

35. However, Compliance counsel respectfully submit that none of those purposes are

applicable in a proceeding of this kind. Specifically:

(a) There is no pre-filed evidence requiring clarification as contemplated by Rule 28.01(a). Rather, given the prosecutorial form of the proceeding, and to ensure procedural fairness to Summitt, Compliance counsel intend to lead the testimony of each witness, and to prove each item of documentary evidence, at the hearing, where it can be the subject of objection, cross-examination or rebuttal by counsel for Summitt.

(b) As noted below, the issues for hearing in the proceeding are defined with great particularity by the Notice of Intention. The objective of "simplifying" issues before the hearing by an interrogatory process, under Rule 28.01(b), is designed to address the situation of complex pre-filed evidence, in the context of a recurring regulatory proceeding such as a periodic rate hearing. It simply does not apply here.

(c) As shown by the disclosure, the evidence to be led to support the allegations is straightforward. This, together with the onus of proof on Compliance counsel, makes a pre-hearing interrogatory process unnecessary to "permit a full and satisfactory understanding" of the case, under Rule 28.01(c).

(d) Finally, pre-hearing interrogatories will not "expedite" the proceeding, as Summitt suggests, but rather delay it to no purpose.

(ii) Technical Conference

36. As stated in their July 23 E-Mail, Compliance counsel do not view the allegations and evidence herein as being "technical" in nature.

37. The only "technical" issue raised in the materials in support of Summitt's motion concerns certain audio-tape recordings made by Summitt of the telephone calls it received from the 28 complainants. There is nothing unusual, either generally or for this Board, about the introduction of such evidence. Case law recognizes that best practices require the party relying on the tape to disclose the tapes in advance to the opposing party, and to prepare a transcript of the relevant portions, and prove the accuracy of the recording. Fairness to the complainant witnesses in this case dictates the same approach. The evidence may be introduced at the

hearing, either by playing the tapes or, with consent, simply filing the transcripts.

Reference: *F.(J.) v. C.(V.)*, 2000 CanLII 21095 (ON S.C.)

38. A technical conference under Rule 27.01 the Board's *Rules of Practice and Procedure* is not necessary, either to resolve this issue or otherwise in this case.

(iii) Issues Conference

39. As noted, the "issues" in this proceeding have been defined with great particularity in the Board's own Notice of Intention.

40. The main issue at the hearing will be whether, at the conclusion of the evidence, Compliance counsel have met the onus of proof which rests upon them to prove the particular allegations set out in the Notice of Hearing on a balance of probabilities.

Reference: *F.H. v. McDougall*, [2008] 3 S.C.R. 41

41. Contrary to para. 40 of Summitt's Notice of Motion, the requests for a Compliance Order and a Suspension Order in the Notice of Intention also raise an issue of whether the Interim Compliance Order, and the measures taken by Summitt pursuant to it, have proven effective, and if not, what further remedial measures are appropriate. The various remedial Orders sought also raise an issue of how the particular complaints that are made the subject of the Notice of Hearing fit within the broader picture of Summitt's compliance history.

42. While Rule 30 of the Board's *Rules of Practice and Procedure* provides that the Board "may" identify issues that it will consider, and may direct parties to participate in a pre-hearing "issues conference" in certain cases, Compliance counsel respectfully submit this is neither necessary nor appropriate in a proceeding such as the present.

(iv) ADR

43. The *Act* designates this Board to hear and determine allegations of non-compliance against a Licensee under its jurisdiction, for very good reasons related to the special expertise and authority of the Board in the regulated energy sector, and the fair, open, and accountable procedures that it follows. There is simply no basis for any adjudication of the allegations made in the Notice of Hearing to be assigned to any alternative forum.

(v) Conclusions

44. Compliance counsel remain open to an appropriate resolution based upon agreed facts and a consent Order, and would participate in a pre-hearing conference to that end if seriously requested by Summitt, even though the normal expectation is that any such process would occur before the Licensee requires the Board to hold a hearing under s. 112.2. Compliance counsel will comply with any further provision by the Board in that respect, whether informally or by Procedural Order, as it would not require the adjournment of the hearing that has been scheduled.

45. However, for the reasons given above, the balance of the relief sought in this motion is not appropriate, and should be dismissed.

D. The Board's Jurisdiction to Impose Conditions on any Adjournment of the Hearing

46. Compliance counsel are ready to proceed with the hearing as previously scheduled by the Board. They are concerned about the ongoing, similar complaints received by the Board since its Interim Compliance Order was made on June 17, 2010, and despite the measures implemented by Summitt described in its June 30 and July 7, 2010 correspondence to the Board. In those circumstances, it is submitted that the Board should consider its jurisdiction to impose terms of the Order sought by Summitt under Rule 26.01 of the *Rules of Practice and Procedure*.

47. It is respectfully submitted that the following conditions may be appropriate:

(a) requiring Summitt to file with the Board further information relating to the ongoing complaints received, as well as the steps taken by Summitt in response to them; and

(b) requiring Summitt to produce to Compliance counsel a transcript of any portions of the audio-tapes of telephone calls with any of the complainants which Summit anticipates it may seek to introduce as evidence at the hearing.

PART V—ORDER REQUESTED

48. Compliance counsel respectfully request that the motion by Summitt be dismissed.

49. In the alternative, if the Board grants an adjournment of the hearing, Compliance counsel respectfully requests that the conditions referred to in para. 45 of these Written Submissions be imposed, to be complied with on or before a date that is at least one week prior to the new hearing date.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Date: August 11, 2010

Stockwoods, LLP
M. Philip Tunley LSUC#: 26402J
Tel: (416) 593-3495

Maureen Helt, per MPT.
Ontario Energy Board
Maureen Helt
Tel: (416) 440-7672

SCHEDULE "A" STATUTORY AND REGULATORY PROVISIONS

Statutory Powers Procedures Act ("*SPPA*") or in the Board's *Rules of Practice and Procedure*,

Ontario Energy Board's Rules of Practice and Procedure

Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Schedule B, ss. 112.3, 112.4 and 112.5

Code of Conduct for Gas Marketers and Electricity Retailers of Conduct

SCHEDULE "B" COMPENDIUM OF DOCUMENTS

1. Interim Compliance Order
2. Procedural Order No. 1, June 28, 2010
3. Letter from Cassels Brock, June 30, 2010
4. Letter from Cassels Brock, July 7, 2010
5. Letter from Cassels Brock, July 8, 2010

SCHEDULE "C" AUTHORITIES

Re Toronto Hydro Electric Systems Ltd., EB-2009-0308 Decision and Order on Motion for Disclosure, October 14, 2010, especially at paras. 12-21

May v. Ferndale Institution, [2005] 3 S.C.R. 809,2005 SCC 82 at paras. 91 and 92

Re CIBA-Geigy Canada Ltd. (1994), 83 F.T.R. 2 at paras. 15, 30, 32, 38, affirmed [1994] 3 F.C. 425 at para. 8 (Fed. C.A.)

Fischer v. Milo (2007), 44 R.F.L. (6th) 134, [2007] O.J. No. 3692, 2007 CarswellOnt 6144 (Ont. S.C.J. - D.M. Brown J.)

F.(J.) v. C.(V.), 2000 CanLII 21095 (ON S.C.)

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