



**EB-2010-0008**

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

**AND IN THE MATTER OF** an application by Ontario Power  
Generation Inc. pursuant to section 78.1 of the *Ontario  
Energy Board Act, 1998* for an order or orders determining  
payment amounts for the output of certain of its generating  
facilities.

### **PROCEDURAL ORDER NO. 5**

Ontario Power Generation Inc. ("OPG") filed an application, dated May 26, 2010, with the Ontario Energy Board under section 78.1 of the *Ontario Energy Board Act, 1998*, S.O. 1998, c.15, Schedule B (the "Act") seeking approval for increases in payment amounts for the output of certain of its generating facilities, to be effective March 1, 2011.

On June 29, 2010, the Board issued Procedural Order No. 1 which stated that counsel and consultants for intervenors would have the opportunity to execute and submit a Declaration and Undertaking (the "Undertaking") to review unredacted versions of documents for which OPG had requested confidential treatment. The procedural order also set out a schedule for the proceeding. On July 21, 2010, the Board issued Decisions and Orders on Confidential Filings and Issues List.

#### **Breach of Declaration and Undertaking respecting confidentiality**

On July 30, 2010, School Energy Coalition ("SEC") filed its interrogatories with the Board and sent electronic copies of these interrogatories to OPG and the other intervenors. One of the interrogatories disclosed information that the Board had declared to be confidential. OPG alerted the Board to this issue shortly after the interrogatories were filed, and the materials were immediately removed from the public record. The Board also sent an email to the parties that had been copied with the

interrogatories, instructing them to delete the file and destroy any copies that had been made.

In correspondence dated July 30, 2010, OPG suggested that the Board should be guided by the remedy it imposed in a recent Hydro One Networks Inc. case (EB-2009-0096), where a similar disclosure of confidential materials had occurred. In that case, the Board determined that the appropriate remedy was to revoke the Undertaking pertaining to confidential materials that had been signed by the individual in question. OPG also requested that the Board order all parties who had received the confidential information to destroy any written and electronic copies and to file a certificate of destruction with the Board.

Counsel for SEC (Mr. Shepherd) wrote to the Board on August 3, 2010 to apologize for the inadvertent disclosure of the confidential information. He asked that the Board not impose the same sanction it imposed in the Hydro One case as the error was a mechanical error, and that as SEC has only one counsel, revoking Mr. Shepherd's permission to access confidential materials would deprive SEC of its ability to be represented with respect to issues related to those materials.

On August 6, 2010, the Board wrote to all parties stating that it was considering what sanction, if any, was appropriate for this breach of the Undertaking. The Board made provisions for submissions on the matter from Board staff, OPG and SEC.

### **Submissions**

Board staff identified two possibilities for the Board to consider: to revoke the Undertaking thereby rescinding Mr. Shepherd's right to have access to or make reference to confidential materials in the proceeding, or to impose a costs remedy. Staff submitted that the Board could either require Mr. Shepherd to pay a portion of OPG's costs (presumably its costs relating to the breach of the Undertaking), or reduce the level of Mr. Shepherd's cost recovery in this proceeding on account of the breach.

OPG accepted as sincere Mr. Shepherd's explanation for the breach of the Undertaking. OPG noted that the use of technology and associated software in dealing with confidential information has raised the standard of vigilance. OPG submitted that a sanction of SEC counsel is appropriate. OPG considered it appropriate that the sanction be personal to Mr. Shepherd, and not apply to SEC, as the breach was solely Mr. Shepherd's. OPG submitted that the Board should order Mr. Shepherd to pay \$5,000 towards the Board's costs in this proceeding. Further, OPG submitted that Mr.

Shepherd should not be permitted to make any request for costs relating to this particular matter. OPG noted that it had discussed the matter with Mr. Shepherd and that he was in agreement.

OPG also requested that the Board issue an order requesting that all persons who received the confidential information in question and who have not executed an Undertaking, destroy all copies of that information, be prohibited from publishing and disseminating the information, be prohibited from using the information for any purpose and deliver a certificate to the Board certifying destruction of the information.

On August 11, 2010, Mr. Shepherd filed a letter in his individual capacity and as counsel to SEC identifying three principles that he urged the Board to confirm as the appropriate principles upon which to base a sanction. The principles are:

1. Release of confidential information, however inadvertent, is a very serious matter. The Board's actions in response must be a strong signal, not only to Mr. Shepherd and his client, but also to other parties and other stakeholders within the industry, that the Board has no tolerance for any failure to protect confidential information.
2. Any sanction should not be structured to give a benefit to the Applicant, or provide some tactical advantage. The point of the sanction is to reflect the seriousness of the confidentiality obligation, not to change the dynamics of the underlying proceeding.
3. The person who should be sanctioned is the individual, in this case Mr. Shepherd, who personally accepted the obligation to keep certain information confidential. The sanction should not be directed at the person's client, in this case SEC, since it is not its undertaking.

Mr. Shepherd agreed with the personal payment of \$5,000 towards the Board's costs, as proposed by OPG. He also agreed that the time spent on this matter is not eligible for cost awards.

### **Board Findings**

The Board accepts that the disclosure of the confidential information was inadvertent, and that Mr. Shepherd genuinely regrets that it occurred. However, the disclosure of confidential materials is a very serious matter, and on this point the Board concurs with Mr. Shepherd's first principle. The Board also concurs with OPG that the use of technology and associated software in dealing with confidential information has raised the standard of vigilance required to ensure that inadvertent disclosure does not occur.

To continue to allow electronic dissemination of confidential material in its proceedings, the Board and parties who file confidential material must be able to rely on all parties to meet this standard. The Board has concluded that a sanction is warranted in the circumstances.

OPG has proposed that the Board order Mr. Shepherd to personally pay \$5,000 towards the Board's costs in this proceeding and that SEC not claim costs associated with any aspect of this matter. Mr. Shepherd accepts this proposal. The Board expects breaches of confidentiality to be rare and therefore concludes that each case must be considered on the individual circumstances. The Board is prepared to accept this approach of an order of costs against Mr. Shepherd in the particular circumstances of this case and because this is acceptable to OPG. However, the Board has determined that the level of costs to be paid by Mr. Shepherd shall be \$10,000. The Board concludes that this level of assessment is required to signal to Mr. Shepherd, and all parties, the seriousness with which the Board views such breaches, however inadvertent.

The Board notes that 17 persons who have not signed an Undertaking received the confidential information. The Board's correspondence of July 30 instructed all parties who received the confidential information in error to delete the document and destroy hard copies, but did not require the filing of certificates of destruction. The Board accepts OPG's original request of July 30, that it would be appropriate for all persons who received the confidential information to file certificates of destruction, and will so order. Parties will use the Form of Certificate and Destruction which can be found at Appendix E of the Board's [Practice Direction on Confidential Filings](#).

#### **THE BOARD ORDERS THAT:**

1. Mr. Shepherd shall make a personal payment of \$10,000 towards the Board's costs in this proceeding. That payment shall be made by August 30, 2010.
2. All persons who received the confidential information on July 30, 2010, shall destroy any electronic and hard copies of the document containing the confidential information and file a certificate of destruction by August 20, 2010.

All filings to the Board must quote file number EB-2010-0008, be made through the Board's web portal at [www.errr.oeb.gov.on.ca](http://www.errr.oeb.gov.on.ca), and consist of two paper copies and one

electronic copy in searchable / unrestricted PDF format. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Parties shall use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at [www.oeb.gov.on.ca](http://www.oeb.gov.on.ca). If the web portal is not available, parties may email their documents to the address below. Those who do not have internet access are required to submit all filings on a CD in PDF format, along with two paper copies. Those who do not have computer access are required to file 7 paper copies.

All communications should be directed to the attention of the Board Secretary at the address below, and be received no later than 4:45 p.m. on the required date.

### **ADDRESS**

Ontario Energy Board  
P.O. Box 2319  
2300 Yonge Street, 27th Floor  
Toronto ON M4P 1E4  
Attention: Board Secretary

E-mail: [Boardsec@oeb.gov.on.ca](mailto:Boardsec@oeb.gov.on.ca)  
Tel: 1-888-632-6273 (toll free)  
Fax: 416-440-7656

**ISSUED** at Toronto, August 16, 2010

ONTARIO ENERGY BOARD

*Original signed by*

Kirsten Walli  
Board Secretary