

September 21, 2010

BY E-MAIL

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

Dear Ms. Walli:

**Re: EB-2010-0008
Motion by Consumers Council of Canada**

We are counsel to Ontario Power Generation Inc. ("OPG") in the above-noted matter. We are writing in relation to the notice of motion served by the Consumers Council of Canada ("CCC") on September 17, 2010.

In its motion, CCC seeks an order requiring the production from OPG of certain privileged materials for use at the oral hearing. CCC further seeks an interim order requiring production of those materials on a confidential basis to counsel for CCC, and to the Board, in advance of the hearing of the motion. This letter concerns the second of CCC's two requests; the claim for interim relief. For the reasons that follow, OPG submits that this claim should be denied.

Where there is a dispute as to the production of a document, the proper procedure is well-established. The motion must be decided based upon the evidence filed as to the nature of the document but the document itself is not produced unless and until an order has been made that it is relevant and not privileged. Fairness to the moving party is ensured by requiring that the responding party describe the document with sufficient particularity. CCC cannot avoid this procedure simply by asserting that the requested documents are relevant and that OPG is not entitled to claim privilege.

The Board's jurisdiction to order the production of privileged or irrelevant materials is limited. For example, pursuant to sections 5.04(2) and 15(2) of the *Statutory Power Procedures Act* ("SPPA"), the Board cannot order the production of privileged information. Nothing in the SPPA, the Board's *Rules of Practice* or the *Rules of Civil Procedure* authorize the production of disputed material to CCC in advance of a final order on a confidential basis, or otherwise. At

most, if, on the return of CCC's motion, the Board were in doubt whether a document was relevant and not privileged, it could inspect the document on a confidential basis.¹

In the circumstances, OPG asks that the Board deny CCC's request for interim relief and issue a procedural order providing OPG with an opportunity to respond to CCC's motion on the merits.

Yours truly,



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c: Charles Keizer
Andrew Barrett/Barbara Reuber (OPG)
Intervenors

¹ Rules 30.04(6) and 30.06 of the *Rules of Civil Procedure* both authorize the Court to inspect a document to determine the validity of a claim for privilege (see also *Ansell Canada Inc. v. Ions World Corp.* (1998) 28 C.P.C. (4th) 60 (Ont. Gen. Div.)).