

By electronic filing and by e-mail

September 23, 2010

Kirsten Walli
Board Secretary
Ontario Energy Board
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Toronto, ON M4P 1E4

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Dear Ms Walli,

**Ontario Power Generation Inc. ("OPG")
2011-2012 Payment Amounts Application
Board File No.: EB-2010-0008
Our File No.: 339583-000064**

As solicitors for Canadian Manufacturers & Exporters ("CME"), we enclose our Motion Record seeking relief with respect to the failure by Ontario Power Generation Inc. ("OPG") to provide the information requested in CME Interrogatory Numbers 10(a) and 10(c). For the most part, this motion seeks the same relief requested by the Consumers Council of Canada ("CCC") in its Notice of Motion dated September 17, 2010.

For this reason, we have assumed that this motion will be heard together with CCC's motion on September 30, 2010, at 1:00 p.m. and have made the motion returnable at that time.

Materials filed with the Board in confidence and upon which we will be relying to support the relief requested by CCC and CME are excluded from the Motion Record.

We respectfully request that, for use by members of the Board hearing the motion next Thursday, September 30, counsel for Board Staff make three (3) hard copies of the confidential materials listed in CME's motion from documents the Board has in its files.

We assume that other process participants who have signed the Confidentiality Undertakings in this case and in Hydro One's case EB-2010-00002 will bring hard copies of these confidential materials to the hearing of the motions.

Please contact me if any further information is required.

Yours very truly,



Peter C.P. Thompson, Q.C.

PCT\slc
enclosure

c. Barbara Reuber (OPG)
Intervenors EB-2010-0008
Paul Clipsham (CME)

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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 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.

**MOTION RECORD OF
CANADIAN MANUFACTURERS & EXPORTERS (“CME”)**

I N D E X	Tab #
Notice of Motion dated September 23, 2010	A
Rules 30.04 (6) and 30.06 of the <i>Rules of Civil Procedure</i>	B
OPG’s response to CME Interrogatory Number 10	1
OPG’s response to CCC Interrogatory Number 1	2
OPG’s planning process evidence, Exhibit A2, Tab 2, Schedule 1	3
Memorandum of Agreement, Exhibit A1, Tab 4, Schedule 1, Attachment 2	4
Presentations made to OPG Directors on or about November 19, 2009, marked as Exhibit F2, Tab 1, Schedule 1, Attachment 1 (Confidential)	5
OPG Press Release dated March 29, 2010	6
Globe & Mail article dated May 6, 2010, entitled “Ontario utilities told not to bother with requests for rate increases”	7
OPG Press Release dated May 26, 2010	8
Toronto Star article dated May 26, 2010, entitled “OPG trims proposed hydro rate increase by 32%”	9
Technical Conference transcript dated August 26, 2010, pages 144 to 149, and Exhibits KT1.1 and JT1.10	10
Board Decision in proceeding EB-2010-0002 at Transcript Volume 1, September 20, 2010, at pages 41 to 42	11
Documents produced, in confidence, by Hydro One in proceedings before the Board, including the following Exhibits from the following proceedings:	12

- (a) Exhibit EB-2008-0187, 2009 Distribution IRM Rates Application, decided May 13, 2009, Confidential Exhibits K1.6, K1.7 and K1.8
- (b) EB-2009-0272, 2009 and 2010 Transmission Revenue Requirement and Rates, decided May 28, 2009, Confidential Exhibits K3.4 and K3.5
- (c) EB-2009-0096, 2010-2011 Distribution Rates, decided April 9, 2010, Confidential Exhibits H1, Tab 9, Schedule 4; H1, Tab 9, Schedule 44; and H1, Tab 13, Schedule 1
- (d) EB-2010-0002, 2011-2012 Transmission Rates, Exhibits KX1.2, KX1.3, KX1.4 and KX2.6
- (e) The presentation made by Hydro One management to its Board of Directors on May 13, 2010, filed in EB-2010-0002 as Exhibit I, Tab 3, Schedule 1

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 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.

NOTICE OF MOTION

The Canadian Manufacturers & Exporters ("CME") will make a motion to the Ontario Energy Board (the "Board") at 2300 Yonge Street, Toronto, Ontario, on Thursday, September 30, 2010, at 1:00 p.m. to be heard together with the motion brought by the Consumers Council of Canada ("CCC").

PROPOSED METHOD OF HEARING:

CME proposes that the motion be dealt with orally.

THE MOTION IS FOR:

1. An Order requiring Ontario Power Generation Inc. ("OPG") to produce the documents requested in CME Interrogatory number 10(a) and to provide a response to CME Interrogatory number 10(c)
2. An Order prior to the argument of this motion, and for the limited purpose of considering matters pertaining OPG's claim that the documents requested in CME Interrogatory Number 10(a) are inadmissible on the grounds of litigation privilege, requiring that the documents be provided to Board members hearing the motion for inspection; and
3. Such further and other relief as CME may request and the Board may grant.

THE GROUNDS FOR THE MOTION ARE:

1. OPG unjustifiably refuses to produce the documents on the grounds that they are irrelevant; or in the alternative, privileged; or in the further alternative, inadmissible because their prejudicial effect outweighs their probative value.
2. The documents are relevant for the following reasons:
 - (a) To support its requested increases in revenue requirement and payment amounts, OPG presents budgets for 2011 and 2012 derived from its planning process over a five year planning horizon;
 - (b) Presentation to OPG's Board of Directors of its Business Plans and approvals thereof are integral to OPG's planning process;
 - (c) The requested documents were prepared by OPG in response to informal directives received from its owners asking OPG to respond to the public concern over electricity price increases;
 - (d) The documents were prepared to outline and obtain approval of the application that forms the subject matter of this proceeding from OPG's Directors;
 - (e) The documents are relevant to an examination of OPG's witnesses with respect to the criteria applied and the adequacy of OPG's response to public concerns over electricity price increases;
 - (f) The documents are relevant to a consideration of OPG's revised Business Plans provided to the Minister of Energy and the Minister of Finance pursuant to the Memorandum of Agreement;
 - (g) The documents requested are analogous to business plan documents already produced by OPG in these proceedings in confidence;
 - (h) The documents requested are analogous to documents produced by Hydro One Networks Inc. ("Hydro One") in prior cases and recently ordered to be produced

in the Hydro One proceeding EB-2010-0002 currently being heard by the Board;
and

- (i) Such further and other reasons as counsel may advise and the Board permits.
3. The documents should be produced to Board Panel members for inspection prior to hearing argument with respect to OPG's claim that the documents are inadmissible on the grounds of litigation privilege for the following reasons:
- (a) The reasons listed in paragraphs 2(a) to (i) inclusive of this Notice of Motion;
 - (b) Production of the requested documents for inspection prior to the argument of matters pertaining to litigation privilege is required to enable the parties opposite in interest to OPG to have a fair opportunity to rebut the assertions OPG makes about the privileged nature of the documents it seeks to exclude;
 - (c) There are inconsistencies between OPG's characterization of the documents it seeks to exclude on the grounds of litigation privilege and responses provided by OPG during the course of the Technical Conference;
 - (d) Rules 30.04 (6) and 30.06 of the *Rules of Civil Procedure*; and
 - (e) Such further and other reasons as counsel may advise and the Board permits.
4. The documents are not privileged for the following reasons:
- (a) Principles with respect to litigation privilege do not apply to presentations made to OPG's Directors that are integral to the approval of business plans from which OPG's application is derived;
 - (b) Documents directly related to OPG's pre-filed evidence cannot be excluded because they may have a prejudicial effect on OPG; and
 - (c) Such further and other grounds as counsel may advise and the Board permits.
5. OPG's refusal to produce documents is not responsive to CME Interrogatory Number 10(c) requesting a complete description of the criteria that were applied by OPG's Board

of Directors to conclude that a portion of the amount reflected in the application that was to have been filed in mid-April 2010 should not be claimed.

6. Such further and other grounds as counsel may advise and the Board permits.

THE FOLLOWING DOCUMENTARY MATERIAL AND EVIDENCE WILL BE RELIED UPON AT THE HEARING OF THE MOTION:

1. OPG's response to CME Interrogatory Number 10;
2. OPG's response to CCC Interrogatory Number 1;
3. OPG's planning process evidence, Exhibit A2, Tab 2, Schedule 1;
4. Memorandum of Agreement, Exhibit A1, Tab 4, Schedule 1, Attachment 2;
5. Presentations made to OPG Directors on or about November 19, 2009, marked as Exhibit F2, Tab 1, Schedule 1, Attachment 1 (Confidential);
6. OPG Press Release dated March 29, 2010;
7. Globe & Mail article dated May 6, 2010, entitled "Ontario utilities told not to bother with requests for rate increases";
8. OPG Press Release dated May 26, 2010;
9. Toronto Star article dated May 26, 2010, entitled "OPG trims proposed hydro rate increase by 32%";
10. Technical Conference transcript dated August 26, 2010, pages 144 to 149, and Exhibits KT1.1 and JT1.10;
11. Board Decision in proceeding EB-2010-0002 at Transcript Volume 1, September 20, 2010, at pages 41 to 42;
12. Documents produced, in confidence, by Hydro One in proceedings before the Board, including the following Exhibits from the following proceedings:
 - (a) Exhibit EB-2008-0187, 2009 Distribution IRM Rates Application, decided May 13, 2009, Confidential Exhibits K1.6, K1.7 and K1.8;

- (b) EB-2009-0272, 2009 and 2010 Transmission Revenue Requirement and Rates, decided May 28, 2009, Confidential Exhibits K3.4 and K3.5;
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- (d) EB-2010-0002, 2011-2012 Transmission Rates, Exhibits KX1.2, KX1.3, KX1.4 and KX2.6; and
- (e) The presentation made by Hydro One management to its Board of Directors on May 13, 2010, filed in EB-2010-0002 as Exhibit I, Tab 3, Schedule 1.

13. Such further and other material as counsel may advise and the Board permits.

September 23, 2010

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AND TO: Ontario Power Generation Inc.
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AND TO: All Parties of Record

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**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.

ONTARIO ENERGY BOARD

**NOTICE OF MOTION OF
CANADIAN MANUFACTURERS & EXPORTERS
("CME")**

(Motion returnable September 30, 2010)

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Brampton Engineering Inc. v. Alros Products Ltd. (1986), 8 C.P.C. (2d) 48 (Ont. Master)

Documents for which privilege is claimed should be described sufficiently to identify them but no details need be given which would enable the opposite party to discover indirectly the contents. The court required separate descriptions for each category of document with identification of the persons creating the documents and information about the dates of the documents.

Grossman v. Toronto Gen. Hosp. (1983), 41 O.R. (2d) 457, 35 C.P.C. 11, 146 D.L.R. (3d) 280 (H.C.)

An affidavit of documents must describe documents for which privilege is claimed and give information supporting the claim for privilege.

Miscellaneous

Cole v. Hamilton (City) (1999), 35 C.P.C. (4th) 321, 45 O.R. (3d) 235, 1999 Carswell-Ont 1443, [1999] O.J. No. 1783 (Gen. Div.)

A defendant who intends to move for summary judgment is nevertheless required to serve an affidavit of documents.

Elguindy v. Prince (2000), 129 O.A.C. 136, 43 C.P.C. (4th) 243, 2000 CarswellOnt 21 (Div. Ct.)

The Divisional Court reversed a decision deferring production of certain documents until after examination for discovery.

Atwater v. Gupta (1986), 12 C.P.C. (2d) 293 (Ont. Master)

There is no jurisdiction to order the deletion of documents from an affidavit of documents on the grounds of relevance.

C.I.B.C. v. Molony (1986), 8 C.P.C. (2d) 53 (Ont. H.C.)

The court refused to order production of documents referred to in the defendant's affidavit of documents where a supplementary affidavit was delivered pursuant to rule 30.07 indicating the documents were not in the defendant's possession, control or power.

Kap v. Sands (1980), 30 O.R. (2d) 125, (sub nom. *Zoltac v. Ross*) 22 C.P.C. 32 at 36; affirmed 22 C.P.C. 32 at 61 (H.C.)

Medical and hospital records regarding the plaintiffs or deceased persons for whose deaths the actions were brought are within the plaintiffs' power and should be listed in the affidavit of documents. It should not be necessary to move for an order requiring the hospitals and doctors to produce the documents.

INSPECTION OF DOCUMENTS

Request to Inspect

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30.04 (1) A party who serves on another party a request to inspect documents (Form 30C) is entitled to inspect any document that is not privileged and that is referred to in the other party's affidavit of documents as being in that party's possession, control or power.

(2) A request to inspect documents may also be used to obtain the inspection of any document in another party's possession, control or power that is referred to in the originating process, pleadings or an affidavit served by the other party.

(3) A party on whom a request to inspect documents is served shall forthwith inform the party making the request of a date within five days after the service of the request to inspect documents and of a time between 9:30 a.m. and 4:30 p.m. when the documents may be inspected at the office of the lawyer

of the party served, or at some other convenient place, and shall at the time and place named make the documents available for inspection.

Documents to be Taken to Examination and Trial

(4) Unless the parties agree otherwise, all documents listed in a party's affidavit of documents that are not privileged and all documents previously produced for inspection by the party shall, without notice, summons or order, be taken to and produced at,

- (a) the examination for discovery of the party or of a person on behalf or in place of or in addition to the party; and
- (b) the trial of the action.

Court may Order Production

(5) The court may at any time order production for inspection of documents that are not privileged and that are in the possession, control or power of a party.

Court may Inspect to Determine Claim of Privilege

(6) Where privilege is claimed for a document, the court may inspect the document to determine the validity of the claim.



Copying of Documents

(7) Where a document is produced for inspection, the party inspecting the document is entitled to make a copy of it at the party's own expense, if it can be reproduced, unless the person having possession or control of or power over the document agrees to make a copy, in which case the person shall be reimbursed for the cost of making the copy.

Divided Disclosure or Production

(8) Where a document may become relevant only after the determination of an issue in the action and disclosure or production for inspection of the document before the issue is determined would seriously prejudice a party, the court on the party's motion may grant leave to withhold disclosure or production until after the issue has been determined.

O. Reg. 575/07, s. 1, item 13

Case Law

Production of Documents Referred to in Pleadings, Affidavit, etc. — rule 30.04(2)

Timminco Ltd. v. Asensio (March 4, 2009), Doc. CV-08-00354021, 2009 CarswellOnt 1135 (S.C.J.)

A party may not avoid producing a document mentioned in a pleading by amending the pleading to delete the reference.

Vaughan v. Ontario (Minister of Health) (1996), 49 C.P.C. (3d) 119, 2 O.T.C. 241 (Gen. Div.)

Where the plaintiff referred to his own medical records in his statement of claim, the court held that he had impliedly consented to their disclosure and ordered the mental health facility holding the records to produce them.

293818 Ont. Ltd. v. Forest Glen Shopping Centre Ltd. (1981), 22 C.P.C. 291 (Ont. Div. Ct.)

Where the plaintiff never had the document referred to in its pleading, its action was not dismissed because it could not produce it.

Risi Stone Ltd. v. Burloak Concrete Products Ltd. (1987), 24 C.P.C. (2d) 34, 17 C.I.P.R. 166, 19 C.P.R. (3d) 90 (Ont. H.C.)

The court ordered divided production and discovery in this action for infringement of copyright and passing off. Production and discovery on the issues of damages and profits would prejudice the defendants.

L.C.D.H. Audio Visual Ltd. v. I.S.T.S. Verbatim Ltd. (1986), 54 O.R. (2d) 425, 8 C.P.C. (2d) 141 (H.C.)

The court applied the following principles in deciding whether to divide discovery: (1) the decision is a discretionary one; (2) the modern philosophy is that all issues should be resolved in one trial; (3) discovery should be divided only in the clearest cases; (4) discovery should not be divided if the issues are not clearly severable; (5) if the issues are severable and serious prejudice would result to the moving party the court must then consider whether to exercise its discretion to divide discovery; and (6) the discretion must be exercised judicially.

Diamond v. Kaufman (1985), 1 C.P.C. (2d) 1 (Ont. Master)

The court ordered divided production and discovery where the defendants operated a computer software business and the plaintiff sought an accounting of the business's receipts and disbursements. The accounting would become necessary only if the plaintiff succeeded on the issue of liability. Disclosure of the information could result in serious prejudice to the defendants.

Can. Valve Ltd. v. Sweet (1985), 49 C.P.C. 178 (Ont. Master)

The court ordered divided discovery where the issues of liability and damages were distinct, there was some question as to the strength of the plaintiff's case and production of documents regarding damages would result in economic disadvantage to the defendants.

Re Machan and Machan (1979), 26 O.R. (2d) 473, 12 R.F.L. (2d) 247 (H.C.)

The court refused to stay delivery of a statement of property pending determination of the applicability of a separation agreement.

Blake v. Great Northern Financial Corp. (1978), 18 O.R. (2d) 744 (H.C.)

In an action for an accounting the court refused to postpone production of voluminous documentation until the question of entitlement to an accounting was determined.

Respirex of Can. Ltd. v. Flynn (1974), 5 O.R. (2d) 380 (Master)

Discovery relating to damages was postponed until it was established that there was a binding contract between the parties on which to base liability.

DISCLOSURE OR PRODUCTION NOT ADMISSION OF RELEVANCE

30.05 The disclosure or production of a document for inspection shall not be taken as an admission of its relevance or admissibility.

Case Law

Air Canada v. WestJet Airlines Ltd. (2006), 30 C.P.C. (6th) 321, 2006 CarswellOnt 2823, 267 D.L.R. (4th) 483, 81 O.R. (3d) 48 (S.C.J.)

In this case involving thousands of documents being produced electronically, the court refused the plaintiff's motion of an order confirming that if privileged documents were inadvertently produced, such productions would not constitute waiver of privilege or admission of relevance.

WHERE AFFIDAVIT INCOMPLETE OR PRIVILEGE IMPROPERLY CLAIMED

30.06 Where the court is satisfied by any evidence that a relevant document in a party's possession, control or power may have been omitted from

