



Suite 3000
79 Wellington St. W.
Box 270, TD Centre
Toronto, Ontario
M5K 1N2 Canada
Tel 416.865.0040
Fax 416.865.7380

www.torys.com

September 27, 2010

RESS, EMAIL & COURIER

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

Attention: Ms. Kirsten Walli

Dear Ms. Walli:

**Re: EB-2010-0008 - Ontario Power Generation Inc. ("OPG")
2011-2012 Payment Amounts for Prescribed Facilities**

Please find attached the submissions of Ontario Power Generation Inc. in response to the motions brought by CCC and CME, along with the affidavit of Andrew Barrett.

Yours truly,

Crawford Smith

Tel 416.865.7512
Fax 416.865.7380
ckeizer@torys.com

cc: All Intervenors

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.;

AND IN THE MATTER OF Rules 8 and 29.3 of the Rules of Practice and Procedure of the Ontario Energy Board.

SUBMISSIONS OF ONTARIO POWER GENERATION INC.
(On motion returnable September 30, 2010)

TORYS LLP

Suite 3000, 79 Wellington Street West
Box 270, TD Centre
Toronto, Ontario M5K 1N2

Charles Keizer

Tel: 416-865-7512

Crawford Smith

Tel: 416-865-8209

Fax: 416-865-7380

Counsel for Ontario Power Generation Inc.

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.;

AND IN THE MATTER OF Rules 8 and 29.3 of the Rules of Practice and Procedure of the Ontario Energy Board.

**SUBMISSIONS OF ONTARIO POWER GENERATION INC.
(on motion returnable September 30, 2010)**

PART I - OVERVIEW

1. It is the position of Ontario Power Generation Inc. (“OPG”) that these motions by the Consumers Council of Canada (“CCC”) and Canadian Manufacturers and Exporters (“CME”) should be dismissed.
2. The motions seek all presentations or reports made to the OPG Board of Directors between April 1, 2010 and May 26, 2010 regarding OPG’s application. The dominant purpose of the documents was to prepare for this litigation: specifically, to seek the Board’s approval of management’s strategic decision to submit a revised application to the Ontario Energy Board (the “OEB”), and to delegate certain authority in respect of that application to the CEO. Approval was not sought to change the hydroelectric and nuclear business plans. These plans, which form the basis of OPG’s application (initial and revised), had already been approved by OPG’s Board of Directors and have been produced.
3. The documents sought by CCC and CME on the motions are subject to litigation privilege and were prepared for the dominant purpose of litigating OPG’s application. The OEB is like other courts and administration tribunals in Canada: it has no jurisdiction to compel the disclosure of privileged documents. In addition, the documents sought by CCC and CME are not

relevant to the OEB's deliberations in determining just and reasonable rates based on the application as filed.

PART II - FACTS

The Privileged Documents

4. During May 2010, two relevant meetings were held. On May 19, 2010, the Audit/Risk Committee of OPG's Board (the "Committee") met to consider a proposed revised application for payment amounts for the 2011-2012 test period.¹
5. Prior to the meeting, the Committee was provided with:
 - (a) a presentation describing the revised application and the related financial impacts of that application;
 - (b) a Report for Submission to the Committee dated May 19, 2010 signed by the CFO, the Senior Vice President Corporate Affairs and the CEO; and
 - (c) an update to that submission recommending the revised application for approval dated May 20, 2010, also signed by the CFO, the Senior Vice President Corporate Affairs and the CEO.²
6. The proposed revised application described in the documents is the application now before the OEB.³
7. The documents were first reviewed and approved by OPG's Executive Management Team. Members of that team include OPG's General Counsel and other members of senior management.⁴
8. The purpose of the documents was specifically litigation related. At issue was OPG's strategy in these current proceedings before the OEB. The documents were prepared for the purpose of seeking the Committee's endorsement of management's strategy in the form of the

¹ Affidavit of Andrew Barrett, sworn September 27, 2010 ("Barrett Affidavit"), para. 6

² Barrett Affidavit, para. 7

³ Barrett Affidavit, para. 9

⁴ Barrett Affidavit, para. 10

Committee's recommendation that the full Board of Directors approve for submission to the OEB the revised application, as well as the Committee's recommendation that certain authority in respect of these proceedings be delegated to the CEO. Following discussion, this recommendation was given.⁵

9. Discussion of the revised application was treated as privileged and confidential by the members of the Committee. Committee members asked a number of questions in relation to the application including as to the regulatory risk to OPG presented by the application and the likely prospect of success before the OEB.⁶

10. The full Board of Directors met on May 20, 2010 to consider the revised application. The Board had before it the same information that was given to the Committee, along with a covering memorandum from the CEO dated May 11, 2010, describing the approval of the revised application as one of the key Board decisions to be made at the May 20, 2010 meeting. In addition, the Board had earlier received, on April 14, 2010, an email from the CEO advising the Board of management's strategic decision to revise the previously approved application prior to filing with the OEB and setting out management's initial thoughts as to the nature of the revisions and the likely prospects of success at the OEB.⁷

11. In all cases, the essential purpose of the documents remained the same: to seek approval of the Board of management's strategic decision to submit an application to the OEB based on the revised proposal and to delegate certain authority in respect of that application to the CEO.⁸

12. Approval to modify the business plans prepared by the nuclear and hydroelectric business units was not sought. Nor were changes made to OPG's planned budgets. These business plans and budgets, including the assumptions regarding work requirements, work programs, resource requirements and performance objectives, form the basis of OPG's application (initial and

⁵ Barrett Affidavit, para. 11

⁶ Barrett Affidavit, para. 12

⁷ Barrett Affidavit, para. 13

⁸ Barrett Affidavit, para. 14

revised). They were approved by OPG's Board of Directors in November 2009 and have been produced.⁹

13. The one change that was made was to OPG's revenue forecast to reflect the change in proposed rates.¹⁰

14. After discussion, the revised application was approved for filing with the OEB, and certain authority in respect of these proceedings was delegated to the CEO.¹¹

Procedural Background

15. By Notice of Application dated May 26, 2010, OPG commenced this application for payment amounts for its prescribed generating facilities beginning March 1, 2011.

16. On June 29, 2010, the OEB issued Procedural Order No. 1 in his matter providing for, among other things, interrogatories to OPG.

The Interrogatories at Issue

17. CCC and CME both asked interrogatories of OPG. At issue on this motion are CCC # 1 (Ex. L, Tab 4, Schedule 001) and CME #10(a) and (c) (Ex. L, Tab 5, Schedule 010 (a) and (b)). In essence, these interrogatories seek all presentations or reports made to the OPG Board of Directors between April 1, 2010 and May 26, 2010 regarding OPG's application. For example, CME #10 (a) asks OPG to produce:

All documents and other information presented to OPG's Board of Directors, including any information provided to OPG by its shareholder, that led to the decision to revise the application OPG intended to file in mid-April.

18. OPG responded to these interrogatories by indicating that the requested materials were privileged and, in any event, not relevant to the OEB's determination of just and reasonable rates.

⁹ Barrett Affidavit, para. 15

¹⁰ Barrett Affidavit, para. 16

¹¹ Barrett Affidavit, para. 17

PART III - LAW AND ARGUMENT

The Nature and Purpose of Litigation Privilege

19. Litigation privilege operates as an exception to standard disclosure obligations by protecting from disclosure those documents or communications made in relation to pending or apprehended litigation. Litigation privilege creates a “zone of privacy” around such documents and communications for the litigant.

Blank v. Canada (Department of Justice), [2006] 2 S.C.R. 319 at para. 34 (“*Blank*”)

20. Litigation privilege applies to all documents made in confidence for the dominant purpose of preparing for litigation, including opinions, strategies and conclusions with respect to the litigation, as well as statements or documents obtained or created for use in litigation.

Davies v. American Home Assurance Co. (2002), 60 O.R. (3d) 512 at para. 34

21. Unlike solicitor-client privilege, litigation privilege is not limited to documents or communications generated by or with legal counsel. It also applies to documents or communications generated by individuals or companies for the purpose of obtaining advice or information with respect to litigation.

Blank, supra, at paras. 27-28

This Application Constitutes “Litigation”

22. The nature and purpose of litigation privilege define the scope of the proceedings in which it should be applied. Because the purpose of litigation privilege is to allow a party to freely prepare its case, and to override otherwise applicable disclosure requirements, “litigation” should be understood to encompass all proceedings in which those concerns are live, that is, where a party is otherwise subject to full disclosure without such protection.

Alberta (Treasury Branches) v. Ghermezian (1999), 242 A.R. 326 at paras. 18, 19 (“*Ghermezian*”)

23. For litigation privilege to attach to documents prepared in contemplation of a proceeding other than traditional civil litigation, including proceedings before an administrative tribunal, a party must demonstrate that an opposing party has a right to access material prepared in contemplation of that proceeding.

Ghermezian at para. 19

24. Put simply, for the purposes of the applicability of “litigation privilege”, the term “litigation” refers to any proceeding in which one party is required to make prior disclosure of its documents to the other party or parties.

Sanagan’s Encyclopedia of Words and Phrases Legal Maxims, John D. Gardner and Karen M. Gardner, eds., loose-leaf, Toronto: Thomson Reuters Canada Limited, 2005 at p. L-95

25. Proceedings before the OEB are subject to very broad disclosure obligations. Parties who come before the OEB must comply with OEB orders, including those made pursuant to the OEB’s broad power to compel evidence, as well as pursuant to the Board’s *Rules of Practice and Procedure*:

The Board may at any time on its own motion and without a hearing give directions or require the preparation of evidence incidental to the exercise of the powers conferred upon the Board by this or any other Act.

Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Sch. B, s. 21(1)

Ontario Energy Board, *Rules of Practice and Procedure*, r. 28, 29

Statutory Powers Procedure Act, R.S.O. 1990, c. S.22, s. 25.01

26. Where, as in this proceeding, the OEB has ordered that interrogatories form a part of the proceeding, the applicant also is required to provide “a full and adequate response” to every request for clarification of its evidence, and every request for documents or other information relevant to the proceeding. In effect, these requirements entitle parties to the same “all relevant document” disclosure standard that applies in civil proceedings.

28.02 Interrogatories shall:... (d) contain specific requests for clarification of a party's evidence, documents or other information in the possession of the party and relevant to the proceeding...

29.01 Subject to Rule 29.02, where interrogatories have been directed and served on a party, that party shall: (a) provide a full and adequate response to each interrogatory...

Ontario Energy Board, *Rules of Practice and Procedure*, r. 28.02, 29.01 (emphasis added)

27. Unlike in some cases, it cannot be said here that OPG is “able to choose which information it disclosed to the [other parties] and to the Board”. On the contrary, subject to privilege, concern for prejudice and the availability of information, OPG is obligated to provide relevant information and produce relevant documents requested by the opposing parties.

28. The OEB, itself, has recognized the significant breadth of its power to order documentary disclosure, and the fact that this leads to very broad, sometimes irrelevant, interrogatories. The OEB has, at the same time, also recognized the increasing role of intervenors in OEB proceedings, whose role it is to advocate positions that may be in conflict with those of the applicant.

A Report with Respect to Decision-Making Processes at the OEB,
September 2006, pp. 29, 33

29. These two recognitions, especially when taken together and in conjunction with the disclosure obligations, establish the existence of litigation privilege before the OEB. Particularly in light of the increasingly adversarial context which intervenor-intensive proceedings generate, a carve-out from the otherwise very broad disclosure requirements is necessary to allow applicants to strategize and prepare for hearings before the OEB.

30. The OEB is a quasijudicial statutory tribunal which, within its jurisdiction, has all the powers of a court. The *Statutory Powers Procedure Act* (the “SPPA”), which applies to proceedings before the OEB, specifically excludes privileged information from the jurisdiction of tribunals to deal with disclosure of documents and admissibility of evidence:

5.4 (1) If the tribunal's rules made under section 25.1 deal with disclosure, the tribunal may, at any stage of the proceeding before all hearings are complete, make orders...

(2) Subsection (1) does not authorize the making of an order requiring disclosure of privileged information.

...

15.(1) Subject to subsections (2) and (3), a tribunal may admit as evidence at a hearing, whether or not given or proven under oath or affirmation or admissible as evidence in a court,

(a) any oral testimony; and

(b) any document or other thing,

relevant to the subject-matter of the proceeding and may act on such evidence, but the tribunal may exclude anything unduly repetitious.

(2) Nothing is admissible in evidence at a hearing,

(a) that would be inadmissible in a court by reason of any privilege under the law of evidence;... (Emphasis added.)

Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Sch. B, s. 19

Statutory Powers Procedure Act, R.S.O. 1990, c. S.22, ss. 5.4, 15

31. The Ontario Financial Services Commission has interpreted these provisions of the SPPA as prohibiting it from admitting litigation privileged information into evidence.

In my view, both [solicitor-client and litigation] privileges are recognized by section 15(2) of the *Statutory Powers Procedure Act*.

Miller v. Optimum Insurance Co., 2008 CarswellOnt 4392 at para. 35 (O.F.S.C.) ("Miller")

The Test for Litigation Privilege Is Met

32. In order to qualify for litigation privilege, the communication or document in issue must have been made for the dominant purpose of assisting in connection with existing or contemplated litigation.

Blank, supra, at paras. 59-60

General Accident Assurance Co. v. Chrusz (1999), 180 D.L.R. (4th) 241
(Ont. C.A.)

The Documents Were Prepared for the Dominant Purpose of Litigation

33. The documents in question in this proceeding were all prepared for the dominant purpose of litigation. Their purpose was to resolve the ultimate strategic litigation question: should an application be commenced and, if so, on what basis?

34. Specifically, the documents were prepared in order to seek OPG's Board of Directors' approval of management's strategic litigation decision to file the application now before the OEB and in respect of which OPG informs and instructs its counsel.

35. In its notice of motion, CME asserts that litigation privilege does not apply to presentations made to OPG's Board of Directors that are integral to the approval of business plans from which OPG's application is derived. Along the same line, CME asserts that the presentations are analogous to other documents OPG has already produced.

36. There is no merit to CME's submissions. Fundamentally, CME confuses the presentations made in respect of the business plans of OPG's various business units (nuclear and hydroelectric) with the documents at issue on the motion. These documents are not the same, or precursors to, the business plans which have been produced. Indeed, neither of the business plans were revised as a result of management's decision to come forward with the revised application.

37. For its part, SEC incorrectly states the law relating to privilege. First, SEC improperly confuses legal advice privilege (i.e. solicitor and client privilege), which is not at issue, and litigation privilege, which is. Second, SEC suggests that privilege does not apply to proceedings before the OEB. This position cannot be sustained. The law of privilege applies to adversarial proceedings in courts and administrative tribunal across the country. Moreover, if, as SEC describes, no privilege existed before this OEB, then intervenors would not be entitled to claim common interest privilege (i.e. privilege protecting communications among parties with a common interest in the proceedings), and positions and strategies, including internal client

communications and between collaborating counsel, would be producible by all parties and not just the applicant.

38. The standard applicable in this proceeding is an objective one - just and reasonable rates. Contrary to SEC's stated view, in the application of any objective standard, there is the potential for significant debate as to what the standard means and how it should be applied. Parties are entitled to substantive and procedural fairness, which includes disclosure, but also includes litigation privilege to enable the applicant to formulate its application and its position on what constitutes just and reasonable rates.

This Proceedings Was Reasonably Anticipated At Least As Early As March 29, 2010

39. In this case, there can be no real dispute that litigation was contemplated at the time that the documents in question were generated. At least as of March 29, 2010, when OPG announced that it was bringing an application before the OEB, the prospect of this proceeding was known.

Disclosing the Documents Confidentially Does Not Protect Litigation Privilege Interest

40. The purpose of litigation privilege is to create a "zone of privacy" around a party's strategy and preparation for litigation, including around decisions made with respect to whether and how to commence a proceeding. Disclosing documents to other parties to the proceeding destroys, rather than respects, these goals and ordering such disclosure would undermine OPG's ability to prepare and advocate its application effectively. Disclosure being made on confidential basis does nothing to lessen these harms.

No Restriction on OPG's Right to Defend its Privilege

41. In its submission, SEC argues that OPG should not be entitled to defend its position that the documents in question are subject to litigation privilege. SEC asserts that an independent reviewer should be empowered to make redactions to the documents and that OPG should not be permitted to make submissions to that reviewer.

42. SEC's position is ill-founded. As illustrated by the Supreme Court's decision in *Blank* and the other authorities referred to above, there is no restriction at law on a party's ability to

defend its claims to privilege. Moreover, there is no need for the OEB to review the documents, let alone a need for an independent reviewer.

In Any Event, the Documents Are Not Relevant to the OEB's Determination

43. Even if litigation privilege did not apply in the circumstances, the documents in question are not producible. The documents are not relevant and the prejudicial effect of production far outweighs any probative value.

44. The OEB has an obligation to establish just and reasonable rates in accordance with the traditional regulatory compact. The costs sought to be recovered by OPG are before the OEB in OPG's application. Those are the facts that are relevant to the OEB's determination. The view of OPG's Board of Directors at the time authorization was given to commence the application is not relevant to determining the reasonableness and prudence of costs currently before the OEB or the resulting just and reasonable rates.

45. As the OEB stated *In the Matter of Hydro One Networks Inc.*:

“While the genesis of an application is of general interest to the Board, it is not determinative of the substantive aspects of the application. Once filed in accordance with the provisions of the legislation, applications are reviewed on their merit. The particulars surrounding the levels of approvals before a distributor makes an application, is a matter that is internal to the company itself.”

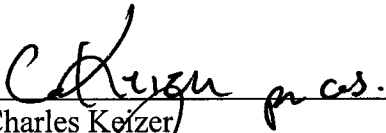
In the Matter of Hydro One Networks Inc., EB-2008-0187, Decision dated May 13, 2009, p. 6

46. Production, even on a confidential basis, would be prejudicial to OPG and the regulatory process in general. Production would impact the ability of management to candidly discuss the application with the OPG Board of Directors, undermine the OPG Board in carrying out its important governance and oversight roles, and effectively compromise OPG's ability to litigate the application. This would be an undesirable outcome.

PART IV - CONCLUSION

47. The OEB has no jurisdiction to order the disclosure of information that is subject to litigation privilege. The documents sought by CCC and CME in the interrogatories which are the subject of these motions are protected by litigation privilege and need not be disclosed. In addition, the documents sought by CCC and CME are not relevant to the OEB's deliberations in determining just and reasonable rates based on the application as filed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED



Charles Keizer



Crawford Smith

Counsel for Ontario Power Generation Inc.

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;

AND IN THE MATTER OF Rules 8 and 29.3 of the Rules of Practice and Procedure of the Ontario Energy Board.

AFFIDAVIT

I, Andrew Barrett, of the City of Oakville, in the Province of Ontario, MAKE OATH

AND SAY:

1. I am the Vice-President, Regulatory Affairs and Corporate Strategy of the Applicant, Ontario Power Generation Inc. ("OPG"), and, as such, have knowledge of the matters to which I depose.
2. My relevant personal background and qualifications may be summarized as follows:
 - 1986: I graduated from the University of Waterloo with a Bachelor of Applied Sciences (Civil Engineering);
 - 1995: I graduated from McMaster University with a Masters in Business Administration (Finance/Accounting); and
 - 1998-present: I have been employed by Ontario Power Generation or its predecessor since 1998 and I am currently the Vice-President of Regulatory Affairs and Corporate Strategy.

3. As the Vice-President, Regulatory Affairs and Corporate Strategy, my principal responsibility is the development and execution of OPG's regulatory strategy. This includes consideration of matters related to OPG's strategy for litigating this application including in relation to settlement, issue analysis, regulatory risks and anticipated positions of other parties.

4. I also have responsibility for directing OPG's interaction with OPG's various economic regulators and reliability organizations in Canada and the United States including the OEB, the Market Surveillance Panel, the National Energy Board, the Independent Electricity System Operator, the Ontario Power Authority and the Federal Energy Regulatory Commission.

5. These motions by the Consumer Council of Canada ("CCC") and Canadian Manufacturers Exporters ("CME") seek all presentations or reports made to the OPG Board of Directors between April 1, 2010 and May 26, 2010 regarding OPG's application. As discussed further below, I was the principal author of the presentations and memoranda which were given to the Board during this period. I also attended the meeting of the Audit/Risk Committee of the Board of Directors (the "Committee") at which the documents were first presented.

The Privileged Materials

6. During May 2010, two relevant meetings were held. On May 19, 2010, the Committee met to consider a proposed revised application for payment amounts for the 2011-2012 test period.

7. Prior to the meeting, the Committee was provided with:

- (a) a presentation describing the revised application and the related financial impacts of that application;
- (b) a Report for Submission to the Committee dated May 19, 2010 signed by the CFO, the Senior Vice President Corporate Affairs and the CEO; and
- (c) an update to that submission recommending the revised application for approval dated May 20, 2010, also signed by the CFO, the Senior Vice President Corporate Affairs and the CEO.

8. I was the principal author of the above documents, with input from others. I also assisted in giving the presentation to the Committee.

9. The proposed revised application described in the documents is the application now before the OEB.

10. The documents were first reviewed and approved by OPG's Executive Management Team. Members of that team include OPG's General Counsel and other members of senior management.

11. The purpose of the documents was to seek the Committee's endorsement of management's strategy in the form of the Committee's recommendation that the full Board of Directors approve for submission to the OEB the revised application, as well as the Committee's recommendation that certain authority in respect of these proceedings be delegated to the CEO. Following discussion, this recommendation was given.

12. Discussion of the revised application was treated as privileged and confidential by the members of the Committee. Committee members asked a number of questions in relation to the application including as to the regulatory risk to OPG presented by the application and the likely prospect of success before the OEB.

13. The full Board of Directors met on May 20, 2010 to consider the revised application. Based on my review of the Corporate Secretary's file in respect of the two May 2010 meetings, I understand that the Board had before it the same information that was given to the Committee, along with a covering memorandum from the CEO dated May 11, 2010, describing the approval of the revised application as one of the key Board decisions to be made at the May 20, 2010 meeting. In addition, the Board had earlier received, on April 14, 2010, an email from the CEO advising the Board of management's strategic decision to revise the previously approved application prior to filing with the OEB and setting out management's initial thoughts as to the nature of the revisions and the likely prospects of success at the OEB.

14. In all cases, the essential purpose of the documents remained the same: to seek the Board's approval of management's strategic decision to submit an application to the OEB based

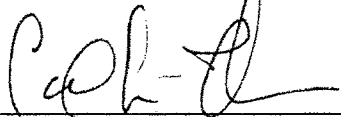
on the revised proposal and to delegate certain authority in respect of that application to the CEO.

15. Approval to modify the business plans prepared by the nuclear and hydroelectric business units was not sought. Nor were changes made to OPG's planned budgets. These business plans and budgets, including the assumptions regarding work requirements, work programs, resource requirements and performance objectives, form the basis of OPG's application (initial and revised). They were approved by OPG's Board of Directors in November 2009 and have been produced.

16. The one change that was made was to OPG's revenue forecast to reflect the change in proposed rates.

17. After discussion, the revised application was approved for filing with the OEB, and certain authority in respect of these proceedings was delegated to the CEO.

SWORN BEFORE ME at the City of
Pickering, in the Province of Ontario
this 27th day of September, 2010



Commissioner for Taking Affidavits
(or as may be)

CARLTON MATHIAS



Andrew Barrett