

**THE 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** Assessments issued by the Ontario Energy Board pursuant to section 26.1 of the Ontario Energy Board Act and Ontario Regulation 66/10;

**AND IN THE MATTER OF** Rule 42 of the Rules of Practice and Procedure of the Ontario Energy Board.

**NOTICE OF MOTION**

The Consumers Council of Canada and Aubrey LeBlanc (together, “**CCC**”) will make a motion to the Ontario Energy Board (the “**Board**”) at its offices at 2300 Yonge Street, Toronto, on a date and at a time to be fixed by the Board.

**THE MOTION IS FOR:**

1. An Order for the production of complete and unredacted copies of the documents provided in response to questions taken under advisement during the examination of Barry Beale on November 16, 2010, unredacted;
2. An Order compelling the re-attendance of Mr. Beale to answer further questions arising from the production of the unredacted documents referred to in paragraph 1; and
3. Such other and further relief as the CCC may request and the Board may grant.

## THE GROUNDS FOR THE MOTION ARE:

### (a) Background

1. On May 27, 2010, the CCC served an Amended Notice of Motion regarding the constitutionality of the assessments issued by the Board pursuant to section 26.1 of the *Ontario Energy Board Act, 1998* (the “**Constitutional Motion**”).
2. To date, the Board has made several procedural orders in relation to CCC’s Constitutional Motion. On May 11, 2010, the Board issued Procedural Order No. 1, which sets out a number of preliminary questions arising from the Constitutional Motion.
3. On July 13, 2010, the Board held an oral hearing to address the preliminary questions set out in Procedural Order No. 1. On August 5, 2010, the Board issued its Decision with Reasons on the preliminary issues. Amongst other things, the Board held that it had the jurisdiction to hear the Constitutional Motion, and would proceed to do so.
4. On October 22, 2010, the Board issued Procedural Order No. 6, which sets out the timelines that would apply to the Constitutional Motion, including the dates on which the Attorney General of Ontario (the “**Attorney General**”) had to file its evidence on the constitutional issue, and provide a witness to answer questions regarding that evidence.
5. On November 5, 2010, in accordance with Procedural Order No. 6, the Attorney General served the affidavit of Mr. Beale.
6. On November 16, 2010, also in accordance with Procedural Order No. 6, Mr. Beale was examined by counsel for CCC, as well as by counsel for some of the intervenors participating in the Constitutional Motion.
7. During the course of the examination of Mr. Beale by counsel for the CCC, a number of questions were taken under advisement by the Attorney General. The questions taken under advisement were given undertaking numbers.
8. On December 20, 2010, the Attorney General responded to undertakings JT 1.4, 1.5 and 1.5B. As part of this response, the Attorney General included a number of documents, significant portions of which have been redacted.

9. On December 23, 2010, the Attorney General responded to undertakings JT 1.6 and 1.7. As part of this response, the Attorney General included a number of documents, significant portions of which have been redacted.

**(b) The Attorney General must produce unredacted documents**

10. In the responses to the questions taken under advisement, the Attorney General has provided only what it deems “relevant”. In the responses to some of the questions taken under advisement, the Attorney General has stated that the documents provided were redacted for the following reasons: “to exclude: material irrelevant to the constitutional challenge to s. 26.1 and 26.2 of the OEBA, and O. Reg. 66/10 thereto; material irrelevant to the jurisprudential test relating to whether a levy constitutes an *intra vires* regulatory charge, and; material covered under solicitor-client privilege.”

11. It is unclear, from the Attorney General’s response and from the documents provided, whether the redactions were made for relevance or on the basis of a claim of solicitor-client privilege.

12. It is impermissible for a party to redact portions of a relevant document simply on the basis of its assertion that those portions are not relevant. The whole of a document is relevant and producible if any of its contents are relevant.

13. It is incumbent upon the Attorney General to produce unredacted copies of the documents provided on December 20 and 23, 2010. Where the redactions relate to claims of privilege, it is incumbent on the Attorney General to have copies of the unredacted documents available for inspection to allow the Board to properly determine any claim of privilege.

14. In any event, the information sought by the CCC in its questions to Mr. Beale is relevant to the resolution of the issues raised by the Constitutional Motion.

**(c) Mr. Beale must re-attend to be examined on the questions arising from the unredacted documents produced in response to the questions taken under advisement**

15. The volume of documentation provided in response to the questions taken under advisement is substantial. The documents contain information which requires explanation.

16. Had Mr. Beale answered the questions when posed by counsel for the CCC, the answers provided in the Attorney General's correspondence dated December 20 and 23, 2010, would have been given under oath, and counsel would have been entitled to ask appropriate follow up questions.

17. The re-examination of Mr. Beale will ensure the full and fair disclosure of information that is solely in the possession of the Attorney General, and which is relevant to the resolution of the issues raised by the Constitutional Motion.

18. The Board has the authority to compel the production of unredacted versions of all documents and to compel the re-attendance of Mr. Beale to be examined to answer questions arising from full and unredacted answers given in response to undertakings JT 1.4, 1.5, 1.5B, 1.6, and 1.7.

**(d) Other grounds**

1. Section 19 of the *Ontario Energy Board Act, 1998*.
2. Rules 2 and 8 of the Board's *Rules of Practice and Procedure*.
3. Such further and other grounds as counsel may advise and the Board may permit.

**THE FOLLOWING DOCUMENTARY EVIDENCE WILL BE USED AT THE HEARING OF THE MOTION:**

1. The Affidavit of Christopher Bitonti sworn January 31, 2011.
2. Such further and other documents as counsel may advise and the Board may permit.

January 31, 2011

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