

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, 1998 and Ontario
Regulation 66/10;

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

FACTUM OF THE MOVING PARTIES
(MOTION TO COMPEL THE PRODUCTION OF UNREDACTED DOCUMENTS
AND COMPEL RE-ATTENDANCE FOR EXAMINATION)

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PART 1 - OVERVIEW

1. There are only two questions before the Board on this Motion:
 - (a) Whether the Moving Parties (the Consumers Council of Canada and Aubrey LeBlanc, together “CCC”) are entitled to the production of complete and unredacted copies of the documents provided in response to questions taken under advisement during the examination of Barry Beale, witness on behalf of the Attorney General, within the context of a motion brought by CCC with respect to the constitutionality of section 26.1 of the *Ontario Energy Board Act, 1998* (the “Constitutional Motion” and the “OEB Act”, respectively); and
 - (b) Whether Mr. Beale should re-attend to be examined on the contents of the documents described in subparagraph (a).
2. The CCC submits that the answer to these questions is “yes”.
3. The Attorney General seeks to limit the full disclosure of the documents it has agreed to produce, on the basis of its view of relevance; this is improper. It is not permissible to redact documents on the basis of one party’s view of relevance. The Attorney General is not, and cannot be, the sole arbiter of what is relevant. To permit the Attorney General to play that role would preclude the Board from determining relevance and would impede the ability of the Moving Parties to make a full argument on their Constitutional Motion.
4. In the circumstances, fairness and the administration of justice require that the Attorney General be ordered to produce complete and unredacted copies of the documents already provided in response to the questions taken under advisement during Mr. Beale’s examination, and that Mr. Beale be compelled to re-attend to be examined on the content of these documents.

PART II – FACTS

5. On May 27, 2010, the CCC served an Amended Notice of Motion challenging the constitutionality of the assessments issued by the Board pursuant to section 26.1 of the OEB Act. This is the motion referred to above as the “Constitutional Motion”.

6. To date, the Board has made several procedural orders in relation to the Constitutional Motion. Procedural Order No. 1, dated May 11, 2010, set out a number of preliminary questions arising from the Constitutional Motion and, in particular, whether the Board could and should hear and decide the Constitutional Motion.

7. On July 13, 2010, the Board held an oral hearing to address the preliminary questions contained in Procedural Order No. 1. On August 5, 2010, the Board decided that it had the jurisdiction to hear and decide the Constitutional Motion, and would proceed to do so.

8. On October 22, 2010, the Board issued Procedural Order No. 6. That Order provided, amongst other things, that the Attorney General had to file its evidence on the constitutional issue by November 5, 2010, and make a witness available to answer questions regarding that evidence on November 16, 2010.

9. The witness tendered by the Attorney General was Barry Beale. On November 16, 2010, Mr. Beale was cross-examined on the contents of his Affidavit dated November 5, 2010.

(i) Affidavit of Christopher Bitonti, sworn January 31, 2011 (“Bitonti Affidavit”), para. 2, Motion Record, Tab 2

10. During the course of the cross-examination of Mr. Beale by counsel for the CCC, a number of questions were taken under advisement by counsel for the Attorney General. The questions taken under advisement were given undertaking numbers.

11. Responses to the questions taken under advisement were delivered in three tranches, the first dated November 26, 2010. The responses provided in this first tranche are not relevant to this motion. On December 20, 2010, the Attorney General responded to undertakings

JT 1.4, 1.5 and 1.5B. On December 23, 2010, the Attorney General responded to undertakings JT 1.6 and 1.7.

(i) Bitonti Affidavit, para. 2, Motion Record, Tab 2

12. As detailed below, the documents delivered by the Attorney General in response to the questions taken under advisement were redacted to a significant extent. The Attorney General stated that these redactions related to solicitor-client privilege and relevance. The CCC takes no issue with respect to those redactions made on the basis of privilege, provided that this basis is justified.

13. One of the questions taken under advisement by counsel for the Attorney General was the production of copies of any studies or analyses of the cost recovery implications of sections 26.1 and 26.2 of the OEB Act (undertaking JT 1.5). The response of the Attorney General was as follows:

Relevant analysis/advice enclosed. See Exhibits 1, 2, and 3 attached.

Relevant material includes documents pertaining to the ultimate decision taken by Government which is the subject of the constitutional challenge. Policy options, including the option of recovering costs against natural gas utilities/ratepayers and recovering costs for programs other than HESP or OSTHI, considered but never implemented by the Government, are not relevant.

Policy options are only germane to a s. 1 analysis when a constitutional challenge is initiated under the *Charter*, as opposed to the instant challenge brought under the division of powers. When determining whether a levy constitutes a regulatory charge *intra vires* the province, or an unconstitutional indirect tax, the legal inquiry is framed by the jurisprudential test set out by the Supreme Court in *Westbank* [1999] 2 S.C.R. 134 and refined in *620 Connaught* [2008] 1 S.C.R. 131. The criteria in the legal test are measured against the levy entrenched in the legislative scheme itself-an examination of the policy options considered but never implemented in the legislation is neither relevant nor appropriate to the reviewing court's analysis: *Confederation des syndicats nationaux* [2008] 3 S.C.R. 511.

The enclosed documents have been redacted 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.

Exhibit 1 (Note)

Rationale for the Reallocation of MEL Multi-Fuel conservation program costs to Electricity Ratepayers

Exhibit 2 (Note)

Program Cost Recovery Outline

Exhibit 3 (Slide Deck)

Program Cost Recovery 2009-04-27 + PK's comments.

(i) Bitonti Affidavit, para. 4, Motion Record, Tab 2

14. Mr. Beale was also asked to provide any reports or analyses that underlay the creation and implementation of Ontario Regulation 66/10. This was given undertaking number JT 1.5b. The response of the Attorney General was as follows:

Relevant document enclosed. See Exhibit 1 (Slide Deck) attached.
(For an explanation of relevance, and the basis for redactions made, please see the Response to Under Advisement JT 1.5, above.)

The enclosed document has been redacted to exclude: material irrelevant to the constitutional challenge to s.26.1 and 26.2 of the OEBA, and O. Reg. 66/10 thereto, and; material irrelevant to the jurisprudential test relating to whether a levy constitutes an *intra vires* regulatory charge.

(i) Bitonti Affidavit, para. 6, Motion Record, Tab 2

15. Mr. Beale was also asked to provide any written proxy for a business case underlying Ontario Regulation 66/10, as well as a regulatory impact assessment or proxy prepared in connection with the same regulation. These requests were given undertaking numbers JT 1.6 and JT 1.7, respectively. The Attorney General's response was as follows:

Relevant material enclosed. See Exhibits 1, 2 and 3.

Relevant material includes documents pertaining to the ultimate decision taken by Government which is the subject of the constitutional challenge. Policy options, including the option of recovering costs against natural gas utilities/ratepayers and recovering costs for programs other than HESP or OSTHI, considered but never implemented by the Government, are not relevant.

Policy options are only germane to a s. 1 analysis when a constitutional challenge is initiated under the *Charter*, as opposed to the instant challenge brought under the division of powers. When determining whether a levy constitutes a regulatory charge *intra vires* the province, or an unconstitutional indirect tax, the legal inquiry is framed by the jurisprudential test set out by the Supreme Court in *Westbank* [1999] 2 S.C.R. 134 and refined in *620 Connaught* [2008] 1 S.C.R. 131. The criteria in the legal test are measured against the levy entrenched in the legislative scheme itself-an examination of the policy options considered but never implemented in the legislation is neither relevant nor appropriate to the reviewing court's analysis: *Confederation des syndicats nationaux* [2008] 3 S.C.R. 511.

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Exhibit 1 (Form)

Application and Report to Treasury Board/Management Board of Cabinet

Exhibit 2 (Note)

Ministry of Energy and Infrastructure: MB 20 for MEL's Conservation Cost Recovery from Electricity Utilities and the IESO.

Exhibit 3 (Form)

Legislation and Regulations Committee: Ministry Approval Form.

- (i) Bitonti Affidavit, para. 9, Motion Record, Tab 2

PART III – ISSUES AND THE LAW

- 16. There are only two issues before the Board on this Motion:
 - (a) Whether the CCC is entitled to the production of complete and unredacted copies of the documents provided in response to questions taken under advisement during the examination of Mr. Beale; and
 - (b) Whether Mr. Beale should be compelled to re-attend to be examined on the contents of the documents referred to in subparagraph a).
- 17. The resolution of these issues does not require an inquiry into the merits of the Constitutional Motion. That is for another day. The resolution of these issues requires only the

application of well-established principles of law related to the production of documents. Those principles are:

- (a) a party may not unilaterally redact documents on the basis of relevance;
- (b) redactions will only be permitted in narrowly prescribed circumstances;
- (c) redactions based on relevance will only be permitted where, after a review by the parties and the Court, the Court determines that the redacted materials are clearly not relevant;
- (d) where a document or materials are otherwise relevant, the portions that are arguably not relevant will be produced and be subject to arguments about weight.

1. The Application of the Principles

(a) It is improper for a party to unilaterally redact documents on the basis of relevance

18. The CCC is entitled to the production of documents in a complete and unredacted form. It is improper for the Attorney General, after it has already agreed to produce the documents, to redact them on the basis of its view of relevance. If there are portions of these documents that are irrelevant, which the CCC disputes, this will go to the weight given to the evidence by the Board.

19. It is a well-established principle that it is impermissible for a party to redact portions of a relevant document simply on the basis of the assertion that those portions are not relevant. Strathy, J. stated the principle succinctly, as follows:

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.

- (i) *McGee v. London Life Insurance Co.*, [2010] O.J. No. 898 (S.C.J.), para. 8

(b) Redactions will only be permitted in narrowly prescribed circumstances

20. An exception will be made where the disclosure of irrelevant information in an otherwise relevant document would cause significant harm to the producing party or would infringe public interest deserving of protection:

- (a) where the documents are subject to solicitor-client privilege;
- (b) where the parties are business competitors and the information which is not relevant may be sensitive in nature;
- (c) where the information involves patents or trade secrets;
- (d) where the documents involve personal tax information; and
- (e) where the records contain information of a purely private and personal nature and not relevant to the issues, for example sensitive medical information.
 - (i) *Bouchard Paradis Inc. v. Markel Insurance Co. of Canada*, [2000] O.J. No. 5210 (S.C.J.), para. 4
 - (ii) *McGee, supra*, paras. 9 and 13

21. Establishing that one or more of these circumstances exist creates a high threshold for the redaction of documents.

- (i) *McGee, supra*, para. 9

22. The Attorney General has not identified any portion of the documents redacted as requiring special protection on the grounds set out in paragraph 21 above. Nor has the Attorney General asserted that serious harm would accrue to the public interest should the documents be produced in unredacted form. To the contrary, the Attorney General has stated that he is not making a claim that the documents are protected by public interest immunity.

- (c) **Redactions based on relevance will only be permitted where, after a review by the parties and the Court, the Court determines that the redacted materials are clearly irrelevant**

23. It is the Board, and not the parties, which must decide whether the material is relevant. The Attorney General must, at a minimum, provide full and unredacted copies of the materials to the Board. Doing so would allow the Board to assess relevance. As matters now stand, the Board has no basis on which it can exercise its authority to assess relevance.

“The trier of law determines if the evidence is relevant. The trier of fact determines what, if any, weight is to be given to it. Obviously, where the judge is the trier of both fact and law the distinction becomes blurred and the weight to be given the evidence becomes the paramount consideration.” *The Law of Evidence in Canada, Third Edition*, p. 57 [Sopinka]

24. It puts the CCC at a material disadvantage, in arguing this motion, to not have unredacted copies of the materials.

(i) *McGee, supra*, para. 5

- (d) **where a document or materials are otherwise relevant, the portions that are arguably not relevant will be produced and be subject to arguments about weight**

25. The question of relevance must be distinguished from the question of weight. If there are portions of the documents that are arguably irrelevant, this will go to the weight to be given to those portions by the Board.

(i) *Sopinka, supra*, p. 57

2. The Issue of Relevance

26. All of the information sought by the CCC in its questions to Mr. Beale is relevant to the issues raised by the Constitutional Motion.

27. The Constitutional Motion requires the Board to consider whether the Special Purpose Charge levied pursuant to section 26.1 of the OEB Act amounts to an indirect tax and is unconstitutional.

28. This will require the Board to consider several questions regarding the nature of the Special Purpose Charge, including:

- (a) whether the Special Purpose Charge is intended for a public purpose;
- (b) whether the Special Purpose Charge is connected to a regulatory scheme;
- (c) whether the Special Purpose Charge seeks to affect some behaviour;
- (d) the presence of actual or properly estimated costs of the regulation; and
- (e) whether there is a relationship between the person being regulated and the regulation.

- (i) *Westbank First Nation v. British Columbia Hydro and Power Authority*, [1993] 2 S.C.R. 134, pp. 43-45

29. These questions regarding the nature of the Special Purpose Charge are broad, and must certainly encompass the examination of the factors, and programs, considered – and rejected – by the government in selecting the programs intended to be funded by the Special Purpose Charge.

30. The Attorney General's claim that the Special Purpose Charge is a permissible regulatory charge requires an examination of the characteristics of that charge as compared with, among other things, the programs and charges that the government determined would not be permissible regulatory charges.

31. The Attorney General is, in effect, arguing that its view of the Constitutional issue is correct, and that it will only produce materials which support that view. The Attorney General thus seeks to limit the scope of the parties' and the Board's analysis. That is simply not permissible.

3. The Re-Attendance of Mr. Beale

32. The documents produced by the Attorney General in response to the questions taken under advisement during the cross-examination of Mr. Beale arguably contain more

redactions than actual information. These documents, in their unredacted form, will require explanation by Mr. Beale.

33. 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.

34. The information which is sought by the CCC is necessary and relevant to the resolution of the issues raised by the Constitutional Motion, and is in the sole possession of the Attorney General.

35. Full and fair disclosure of the evidence, which is the very purpose of Mr. Beale's cross-examination, will only be achieved by having Mr. Beale re-attend to be examined.

(i) *Ratana-Rueangsri v. Shorrock*, [2009] O.J. No. 900, para. 34

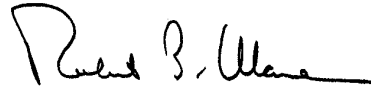
36. If Mr. Beale is not ordered to re-attend to be examined to answer questions raised by the documents produced to questions taken under advisement, the Attorney General will have effectively impeded the CCC's ability to prosecute the Constitutional Motion, first by refusing to answer proper questions; and, second, by resisting the full disclosure of relevant evidence. This is wrong.

PART IV – ORDER REQUESTED

37. The CCC respectfully requests an Order:

- (a) For the production of documents provided in response to undertakings JT 1.5, JT 1.5b, JT 1.6, and JT 1.7 in complete and unredacted form;
- (b) Compelling the re-attendance of Barry Beale to be examined with respect to the documents referred to in subparagraph (a).

ALL OF WHICH IS RESPECTFULLY SUBMITTED

A handwritten signature in black ink, appearing to read "Robert B. Warren". The signature is fluid and cursive, with a large initial "R" and a long, sweeping underline.

Robert B. Warren

SCHEDULE "A"

1. *McGee v. London Life Insurance Co.*, [2010] O.J. No. 898 (S.C.J.)
2. *Bouchard Paradis Inc. v. Markel Insurance Co. of Canda*, [2000] O.J. No. 5210 (S.C.J.)
3. *The Law of Evidence in Canada*, Third Edition, [Sopinka]
4. *Westbank First Nation v. British Columbia Hydro and Power Authority*, [1999] 3 S.C.R. 134
5. *Ratana-Rueangsri v. Shorrocks*, [2009] O.J. No. 900