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By e-mail and by courier

April 12, 2011

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

Dear Ms Walli,

**Motion by Consumers Council of Canada (“CCC”)
in relation to section 26.1 of the *Ontario Energy Board Act, 1998* and
Ontario Regulation 66/10 (“O.Reg.66/10”)
Board File No.: EB-2010-0184
Our File No.: 339583-000072**

We enclose the Factum of Canadian Manufacturers & Exporters (“CME”) supporting the relief requested by Consumers Council of Canada and Aubrey LeBlanc (collectively “CCC”) in their Factum circulated on or about April 7, 2011.

We are circulating CME’s supporting Factum in advance of the April 14, 2011 deadline in order to provide the Attorney General with an opportunity to respond to points therein that supplement those made in CCC’s Factum.

Our Authorities Brief will be circulated shortly.

Yours very truly,

A handwritten signature in black ink, appearing to read 'P. Thompson', with a stylized flourish at the end.

Peter C.P. Thompson, Q.C.

PCT\slc
enclosure

c Ministry of the Attorney General
Ministry of Energy and Infrastructure
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G. Vegh
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Paul Clipsham (CME)
Greg Gilhooly (BLG)

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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
CANADIAN MANUFACTURERS & EXPORTERS (“CME”)
(Motion by Consumers Council of Canada (“CCC”)
to compel the production of unredacted documents
and to compel re-attendance for examination)**

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AND TO: The Attorney General of Ontario
Attention: Arif Virani
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Toronto, ON M5G 2K1

AND TO: Ministry of Energy and Infrastructure
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I. OVERVIEW

1. CME supports the position that is taken by counsel for the Consumers Council of Canada and Audrey LeBlanc (collectively, “CCC”) as set out in his Factum.
2. The submissions in this Factum are intended to embellish and supplement those set out in CCC’s Factum.

II. THE FACTS

3. Subject to broadening the position taken in paragraph 12 of CCC’s Factum, we adopt the statement of facts presented therein.
4. We do take issue with redactions allegedly made by the Attorney General (“AG”) on the basis of solicitor-client privilege, referenced in paragraph 12 of CCC’s Factum, because the AG has neither adduced any evidence, nor provided counsel for opposing parties with confidential access to the unredacted documents to facilitate an objective evaluation of the appropriateness of the solicitor-client privilege claim.

III. POINTS OF ARGUMENT AND THE LAW

Issues

5. We adopt the issues framework counsel for CCC presents in paragraph 16 of his Factum.

Guiding Principles

6. The following paragraphs are intended to support and supplement the Guiding Principles expressed in paragraphs 18 to 25 of CCC’s Factum.

(i) **A Document Which Is Relevant Must Be Produced In Its Entirety**

7. It is a well established principle of law that a party producing a document must produce the entirety of the document, if any portion of the document is relevant to the proceedings, unless the producing party can demonstrate that it would suffer significant harm in producing the portions of the document objected to.

References: *McGee v. London Life Insurance Co.*, [2010] O.J. No. 898 at para. 9 (S.C.J.) (“*McGee*”)
North American Trust Co. v. Mercer International Inc., [1999] B.C.J. No. 2107 at para. 13 (S.C.) (“*Mercer*”)
Glaxo Group Ltd. v. Novopharm Ltd., [1996] F.C.J. No. 1423 at para. 17 (T.D.) (“*Novopharm*”)

(ii) **Relevance Is Given A Broad Interpretation In A Constitutional Challenge**

8. The jurisprudence establishes that a broad analysis of relevance should be taken in cases dealing with a constitutional challenge.

Reference: *British Columbia Teachers’ Federation v. British Columbia (Attorney General)*, [2008] B.C.J. No. 2414 at para. 76 (S.C.) (“*BCTF*”)

9. A document is relevant if it either directly or indirectly advances a party’s case or damages that of its adversary or may fairly lead to a “train of inquiry” that may have either of these two consequences.

References: *Apotex Inc. v. Canada*, [2005] F.C.J. No. 1021 at paras. 15-16 (C.A.) (“*Apotex*”)
BCTF, supra, para. 41

10. In this proceeding, the Board is required to determine whether the Special Purpose Charge (“SPC”) levied pursuant to section 26.1 of the *Ontario Energy Board Act* amounts to unconstitutional taxation or a constitutionally valid regulatory charge.

11. By its very nature, a determination of the constitutional validity of an alleged regulatory charge requires an assessment of a broad range of factors, including the circumstances surrounding the government's decision to implement such a charge.

Reference: *Westbank First Nation v. British Columbia Hydro & Power Authority*, [1999] 3 S.C.R. 134 at paras. 43-44 ("*Westbank*")

12. Where a determination of the validity of a course of conduct requires the assessment of the circumstances surrounding the decision to implement the outcome of that course of conduct, it is not appropriate to take a "narrow, highly technical approach to the issue of relevance". Instead, there should be a generous approach to production.

Reference: *McGee*, *supra* at para. 7

(iii) An Allegation Of Irrelevance Alone Is An Improper Basis On Which To Redact Documents

13. It is a well established principle of law that a bare assertion of irrelevance is, without more, an insufficient basis for the unilateral redaction of documents by a producing party.

Reference: *McGee*, *supra* para. 13

14. A party seeking to redact information on the basis of irrelevance must show:

- (a) that the information redacted is clearly irrelevant to the issues in the proceeding;
and
- (b) that there is a good reason why the redacted portions of the document should not be disclosed. [emphasis added]

References: *Mercer*, *supra* para. 15.

McDermott v. Rebuck, [2008] B.C.J. No. 1092 at para. 15 (S.C.) ("*McDermott*")

15. Claims of confidentiality by the government have the effect of withholding from the factual record evidence relating to available governmental options and thus compromise the ability of courts to properly evaluate the constitutionality of governmental actions.

Reference: *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199 at para. 101 (per Lamer C.J.C.) (“**RJR**”)

16. In cases of public interest constitutional litigation, the government should remain non-adversarial and make full disclosure: otherwise, the decision maker will be constrained to decide the constitutionality of government actions without full information.

Reference: *RJR, supra*, para. 186 (per Iacobucci J.)

17. Where the government produces documents that have been unilaterally redacted, one is hard-pressed not to inter that the information which is redacted must undercut the government’s claims.

Reference: *RJR, supra*, para. 166 (per McLachlin J.)

18. A production of documents which have been unilaterally redacted on the basis of irrelevance begs the question “What information is the party hiding in the expurgated portion of a document?”

Reference: *Novopharm, supra* para. 16

(iv) The Attorney General Has Not Laid An Evidentiary Basis For A Claim Of Solicitor-Client Privilege

19. The AG baldly asserts that some of the redactions which it has made are on the basis of solicitor-client privilege.
20. The specific portions of the documents which are redacted on the basis of solicitor-client privilege are neither identified, nor is any underlying factual basis to justify the redactions given.

21. A party alleging solicitor-client privilege as a basis for redacting documents must lay a proper evidentiary foundation in order for the trier of law to assess the validity of the allegation.

Reference: *Environmental Defence Canada v. Canada (Minister of Fisheries & Oceans)*, [2009] F.C.J. No. 182 at paras. 14-24 (T.D.) (“*Environmental Defence*”)

22. The trier of law cannot abdicate its responsibility to determine whether privilege exists by relying on mere assertions by the party producing the documents as being conclusive of the issue.

Reference: *Environmental Defence*, *supra*, para. 21

23. A finding of solicitor-client privilege is based on the following three criteria:

- (a) a communication between solicitor and client;
- (b) which entails the seeking or giving of legal advice; and
- (c) which is intended to be confidential by the parties.

Reference: *Solosky v. The Queen*, [1980] 1 S.C.R. 821 at 837 (“*Solosky*”)

24. Solicitor-client privilege may also attach to communications to and from an in-house counsel, such as those between a government lawyer and other government employees.

Reference: *R. v. Campbell*, [1999] 1 S.C.R. 565 (“*Campbell*”)

25. A determination of whether or not an in-house communication is protected by solicitor-client privilege requires an assessment of the following three criteria:

- (a) the nature of the relationship between the person giving the advice and the person receiving the advice;
- (b) the subject matter of the advice; and

- (c) the circumstances in which the advice is sought and rendered.

Reference: *Campbell, supra* para. 50

26. In determining whether or not solicitor-client privilege attaches to communications involving an in-house or government lawyer, it is important to bear in mind that only communications related to the giving of legal advice are protected by the privilege. Communications for other purposes, such as the giving of business or policy advice, do not attract the protection of solicitor-client privilege.

Reference: *Telus Communications Inc. v. Canada (Attorney General)*, [2004] F.C.J. No. 1918 at para. 10 (C.A.) (“*Telus*”)

27. The AG has not met the requirements for establishing the existence of solicitor-client privilege over the redacted portions of the documents. Absent confidential access to the unredacted documents and evidence establishing its foundation, redactions on the grounds of solicitor-client privilege are not permitted.

(v) The Unilateral Redactions By The Attorney General Are An Attempt To Usurp The Jurisdiction Of The Board

28. In exercising its jurisdiction, the Board has authority to hear and determine all questions of law.

Reference: *Ontario Energy Board Act, 1998*, s. 15, Sch. B, s. 19

29. The issues of relevance and solicitor-client privilege are questions of law.

Reference: *Leadbeater v. Ontario*, [2004] O.J. No. 1228 at para. 29 (S.C.J.) (“*Leadbeater*”)

Further Questioning of Mr. Beale

30. We adopt and support the positions described in paragraphs 26 to 36 inclusive of the Factum of counsel for CCC pertaining to the appropriateness of a further examination for Mr. Beale on the complete and unredacted documents yet to be produced.

31. There is a “train of inquiry”, linked to the complete and unredacted versions of the documents, that will be germane to a consideration of the criteria that are to be applied when determining whether the SPC imposed on electricity distributors and their ratepayers is a regulatory charge related to a regulatory scheme, as the AG contends, or an unconstitutional tax, as CCC, CME and others contend.
32. One aspect of this “train of inquiry” that is of particular interest to CME is the AG’s assertion, in this case, that the electricity-only SPC of \$53.7M is but one part of a complete, complex and detailed regulatory scheme conceived by its planners as early as 1998.

Reference: Affidavit of Barry Beale dated November 5, 2010 (the “Beale Affidavit”), paras. 10 to 12

33. The meaning of the word “scheme” is relevant to this particular line of inquiry. The Oxford Dictionary definition of “scheme” is “a systematic plan or arrangement for attaining some particular object”. In other words, a “scheme” is a prospective plan for achieving a particular objective. Post-planning and retroactive changes to elements of a previously conceived plan do not and cannot constitute a “scheme”.
34. Production of the unredacted documents and follow-up questions of Mr. Beale thereon from counsel for CME will be relevant to a consideration of this particular issue. Production of and questions on the documents will be relevant to a consideration of whether the legislation and regulations pertaining to the electricity-only SPC of about \$53.7M are but one component of a complete, complex and detailed regulatory scheme conceived many years ago, or whether they are merely the result of a post-planning, self-serving and retroactive re-classification by the government of energy conservation program costs, already funded or financed by taxpayers, for the purpose of transferring

the financial burden of these particular program costs from taxpayers at large to electricity distributors and their customers.

IV. ORDER REQUESTED

35. The terms of the Order should be as proposed by counsel for CCC in paragraph 37 of his Factum.

All of which is respectfully submitted this 12th day of April, 2011.



Peter C.P. Thompson, Q.C.
Greg Gilhooly (Student-at-law)
BORDEN LADNER GERVAIS LLP

SCHEDULE A

LIST OF AUTHORITIES

1. *Apotex Inc. v. Canada*, 2005 FCA 217, 337 N.R. 225 (“**Apotex**”)
2. *British Columbia Teachers’ Federation v. British Columbia (Attorney General)* (2008), 91 B.C.L.R. (4th) 345, 304 D.L.R. (4th) 588 (S.C.) (“**BCTF**”)
3. *Environmental Defence Canada v. Canada (Minister of Fisheries & Oceans)*, 2009 FC 131, [2009] F.C.J. No. 182 (“**Environmental Defence**”)
4. *Glaxo Group Ltd. v. Novopharm Ltd.* (1996), 122 F.T.R. 192, 70 C.P.R. (3d) 300 (“**Novopharm**”)
5. *Leadbeater v. Ontario*, [2004] O.J. No. 1228, 70 O.R. (3d) 224 (S.C.J.) (“**Leadbeater**”)
6. *McDermott v. Rebeck*, 2008 BCSC 766, 71 C.L.R. (3d) 297 (“**McDermott**”)
7. *McGee v. London Life Insurance Co.*, 2010 ONSC 1408, 86 C.P.C. (6th) 381 (S.C.J.) (“**McGee**”)
8. *North American Trust Co. v. Mercer International Inc.* (1999), 71 B.C.L.R. (3d) 72, 36 C.P.C. (4th) 395 (“**Mercer**”)
9. *R. v. Campbell*, [1999] 1 S.C.R. 565, [1999] S.C.J. No. 16 (“**Campbell**”)
10. *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, [1995] S.C.J. No. 68 (“**RJR**”)
11. *Solosky v. The Queen*, [1980] 1 S.C.R. 821 (“**Solosky**”)
12. *Telus Communications Inc. v. Canada (Attorney General)*, 2004 FCA 380, 329 N.R. 96 (“**Telus**”)
13. *Westbank First Nation v. British Columbia Hydro & Power Authority*, [1999] 3 S.C.R. 134, [1999] S.C.J. No. 38 (“**Westbank**”)