

**CAVALLUZZO HAYES SHILTON  
McINTYRE & CORNISH LLP  
Barristers & Solicitors**

---

474 Bathurst Street, Suite 300  
Toronto, ON M5T 2S6  
Telephone: 416-964-1115  
Facsimile: 416-964-5895

Our Ref: 110765

**FACSIMILE TRANSMISSION**

**Date:** April 8, 2011

**TO:**

**NAME:** Mary Anne Aldred, General Counsel  
**FIRM:** ONTARIO ENERGY BOARD  
**FAX #:** (416) 440-7656

**NAME:** Carlton Mathias, Senior Counsel  
**FIRM:** ONTARIO POWER GENERATION INC.  
**FAX #:** (416) 592-1466

**FROM:** Jo-Anne Pickel

**RE:** **Society of Energy Professionals v. The  
Ontario Energy Board and Ontario  
Power Generation Inc.**

Total Number of Pages Being Transmitted (including cover page): 10

If transmittal is not complete, please call (416) 964-1115 and ask to speak with  
**Melissa O'Connor**. Thank you.

**THE ORIGINAL:** Will not follow.

**COMMENTS:**

**CONFIDENTIALITY NOTE**

The information contained in this facsimile message is legally privileged and confidential information that is exempt from disclosure under applicable law and is intended only for use of the individual or entity to which it is addressed. If the reader of this message is not the intended recipient, or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone (call collect at the telephone number above), and return the original to us by postal service at the address noted above. Thank you for your co-operation.

CAVALLUZZO HAYES SHILTON  
McINTYRE & CORNISH LLP  
BARRISTERS SOLICITORS

474 Bathurst Street  
Suite 300  
Toronto, Ontario M5T 2S6  
Telephone: 416-964-1115  
Facsimile: 416-964-5895  
Email: [contactus@cavalluzzo.com](mailto:contactus@cavalluzzo.com)  
Website: [www.cavalluzzo.com](http://www.cavalluzzo.com)

**In Association with Patrice F. Band**

**Please refer to:**

Direct Line:  
Email:  
Assistant:  
File No.:

**Jo-Anne Pickel**

(416) 964-5537  
[jpickel@cavalluzzo.com](mailto:jpickel@cavalluzzo.com)  
[fdasilva@cavalluzzo.com](mailto:fdasilva@cavalluzzo.com)  
110765

April 8, 2011

**VIA FAX**

Mary Anne Aldred, General Counsel  
ONTARIO ENERGY BOARD  
P.O. Box 2319, Floor 27  
2300 Yonge Street  
Toronto, ON M4P 1E4

Carlton Mathias, Senior Counsel  
ONTARIO POWER GENERATION INC.  
H18A18-700 University Ave.  
Toronto, ON M5G 1X6

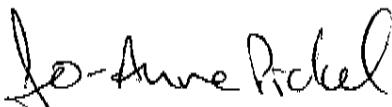
Counsel:

**Re: Society of Energy Professionals v. The Ontario Energy Board and Ontario Power Generation Inc.**

Please find enclosed the Notice of Appeal, which is being served upon you pursuant to the *Rules of Civil Procedure*.

Yours very truly,

**CAVALLUZZO HAYES SHILTON  
McINTYRE & CORNISH LLP**



Jo-Anne Pickel  
JP:mo  
encl.

Court File No.

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(DIVISIONAL COURT)**

**BETWEEN:**

**SOCIETY OF ENERGY PROFESSIONALS**

Appellant

- and -

**THE ONTARIO ENERGY BOARD and  
ONTARIO POWER GENERATION INC.**

Respondents

**APPEAL MADE UNDER the  
Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Sched. B, s. 33**

---

**NOTICE OF APPEAL**

---

**THE APPELLANT**, Society of Energy Professionals ("Society") appeals to the Divisional Court from the decision with reasons ("Decision") of the Ontario Energy Board dated March 10, 2011 in Board proceeding EB-2010-0008 made at Toronto, Ontario.

**THE APPELLANT ASKS** that the Decision be set aside and a judgment be granted as follows:

1. An order that the Board's determination regarding Ontario Power Generation Inc.'s ("OPG") allowance for nuclear compensation costs for 2011 and 2012 be set aside, and that the matter be remitted to a differently constituted panel of the Board for a

new hearing with respect to these issues, with such directions as the Court considers just;

2. In the alternative, an order that the Decision be set aside in its entirety and that the matter be remitted to a differently constituted panel of the Board for a new hearing, with such directions as the Court considers just.
3. Costs to the Appellant on the appeal; and
4. Such further and other relief as this Honourable Court may deem just.

**THE GROUNDS OF APPEAL** are as follows:

1. In EB-2010-0008, OPG applied to the Board for orders pursuant to section 78.1 of the *Ontario Energy Board Act, 1998* for just and reasonable payment amounts for OPG's prescribed generation facilities for the test period January 1, 2011 through December 31, 2012.
2. In such an application, the applicant is entitled to recover, and the Board is required to approve the applicant's prudently incurred costs. The failure to permit an applicant's prudently incurred costs is a legal error.
3. OPG applied for a total revenue requirement of \$6 909.6 million and deferral and variance account recovery of \$373.1 million for the two year test period, resulting in an average payment increase of 6.2%. The Board held that it lacked the data

## 3

necessary to establish the final revenue requirement but that it anticipated that it would approve only a small upward adjustment in the range of less than 1%.

4. Compensation costs make up a significant component of OPG's total operating costs. Ninety percent of the staff in OPG's regulated business are unionized. OPG's collective agreement with the Society expired on December 31, 2010 and its agreement with the Power Workers Union expires on March 31, 2012. OPG's forecasted wage increase for each test year was 3% for management and 3% for both unions. OPG also forecasted an additional 1% increase to account for step progressions and promotions of staff within unions.
5. In its Decision, the Board made significant reductions in the allowance for the compensation of employees in OPG's nuclear facilities. The Board reduced the allowance for nuclear compensation costs by \$55 million in 2011 and \$90 million in 2012. It based this reduction, *inter alia*, on its finding that the compensation benchmark for nuclear employees should be set at the 50<sup>th</sup> percentile of a study that compared compensation data among a variety of employers in Canada. It also based the reduction on its finding that OPG had an excess of staff in a number of positions, including OPG's Radiation Protection Function.
6. In doing so, the Board committed the following errors:
  - a. The Board erred in law by failing to permit OPG to recover its prudently incurred compensation costs. In particular, the Board acted arbitrarily, failed

## 4

to take into relevant considerations and took into account irrelevant considerations in reducing OPG's allowance for the compensation of employees in OPG's nuclear facilities. Among other errors:

- i. The Board failed to accord sufficient weight and deference to the reasonableness of the results of the collective bargaining and interest arbitration processes. The legislative policy of Ontario is that these processes generally achieve just and reasonable compensation levels in light of surrounding market forces and other relevant factors. These processes also strike an intricate and complex balance between various terms and conditions of employment in a unionized workplace. As such, in the absence of factors indicating otherwise, the outcome of these processes should be presumed to be fair and reasonable in light of this legislative policy.
- ii. Not only did the Board fail to accord sufficient weight and deference to the collective bargaining process, but its decision in fact undermines this process. By doing so, the Board's decision undermines employees' rights under both the *Labour Relations Act* and s. 2(d) of the *Canadian Charter of Rights and Freedoms*.
- iii. The Board failed to defer to the expertise of OPG in relation to nuclear safety. In particular, the Board failed to accord sufficient

5

weight and deference to OPG's determination in respect of the number of employees required to prudently staff various positions, especially safety-sensitive positions such as those dedicated to Radiation Protection.

- iv. The Board failed to adequately take into account OPG's safety and security obligations under federal statutes and associated regulations that specifically govern the nuclear industry. Under this regulatory regime, OPG is responsible to the public for the safety of its nuclear facilities.
  
- b. The Board failed to provide adequate, transparent, and justifiable reasons for the reductions it ordered to the allowance for OPG's nuclear compensation costs. The Board also failed to provide adequate reasons as to why it considered that OPG's determinations relating to staffing levels were not fair and reasonable. Likewise, it failed to provide adequate reasons as to why it determined that the results of collective bargaining did not satisfy the just and reasonable standard.
  
- c. Such further grounds as counsel may advise and this Court may deem just.

**THE BASIS OF THE APPELLATE COURT'S JURISDICTION IS:**

1. The *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sched. B, s. 33 provides a

6

right of appeal to the Divisional Court from any Order of the Board on questions of law or jurisdiction.

2. The decision appealed from is final; and
3. Leave to appeal is not required under s. 33 of the *Ontario Energy Board Act, 1998*.

The appellant requests that this appeal be heard at Toronto, Ontario.

April 8, 2011

**CAVALLUZZO HAYES SHILTON  
McINTYRE & CORNISH LLP**  
Barristers & Solicitors  
474 Bathurst Street, Suite 300  
Toronto, ON M5T 2S6

**Paul J.J. Cavalluzzo - LSUC #13446V  
Jo-Anne Pickel - LSUC # 42919K**

Tel: (416) 964-1115  
Fax: (416) 964-5895

Lawyers for the Appellant

**TO: ONTARIO ENERGY BOARD**  
P.O. Box 2319, Floor 27  
2300 Yonge Street  
Toronto, ON M4P 1E4

Attn: Mary Anne Aldred, General Counsel

Tel: (416) 440-7735  
Fax: (416) 440-7656



7

**AND TO: ONTARIO POWER GENERATION INC.**  
H18A18-700 University Ave.  
Toronto, ON M5G 1X6

Attn: Carlton Mathias, Senior Counsel

Tel: (416) 592-4964

Fax: (416) 592-1466

**SOCIETY OF ENERGY PROFESSIONALS**

**THE ONTARIO ENERGY BOARD and  
ONTARIO POWER GENERATION INC.**

- and -

Appellant

Respondents

Court File No.:

---

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(DIVISIONAL COURT)**

Proceedings commenced at Toronto

---

**NOTICE OF APPEAL**

---

**CAVALLUZZO HAYES SHILTON  
MCINTYRE & CORNISH LLP**  
Barristers & Solicitors  
474 Bathurst Street, Suite 300  
Toronto, ON M5T 2S6

**Paul J.J. Cavalluzzo - LSUC #13446V  
Jo-Anne Pickel - LSUC # 42919K**

Tel: (416) 964-1115  
Fax: (416) 964-5895

Counsel for the Appellant