



PUBLIC INTEREST ADVOCACY CENTRE
LE CENTRE POUR LA DEFENSE DE L'INTERET PUBLIC

ONE Nicholas Street, Suite 1204, Ottawa, Ontario, Canada K1N 7B7

Tel: (613) 562-4002. Fax: (613) 562-0007. e-mail: piac@piac.ca. <http://www.piac.ca>

April 14, 2011

Ms. Kristen Walli
Board Secretary
Ontario Energy Board
2300 Yonge St., 27th floor
Toronto, ON
M4P 1E4

Dear Ms. Walli:

Re: EB 2010-0184 - Special Purposes Fund – Factum of the Moving Parties on the Motion to Compel Production of Un-redacted Documents and Re-Attendance for Examination

The Vulnerable Energy Consumers Coalition (VECC) is writing this letter in support of the position advanced by the Consumers Council of Canada and Aubrey Leblanc, and by the Canadian Manufacturers & Exporters. Specifically, it is incumbent upon the Attorney General (AG) to produce un-redacted copies of the documents provided on December 20 and 23, 2010 and all documents still in the possession of the AG and its client which relate to all matters at issue in this proceeding.

In VECC's submission, the AG has neglected to properly claim privilege and relevance in accordance with established principles of law, OEB Rules of Practice, and the OEB *Practice Direction on Confidential Filings*.

Regarding solicitor-client privilege, VECC notes that the AG failed to identify the privileged portions of the documents, and failed to provide evidence to establish that the redacted portions met the threshold for solicitor-client privilege: that they (a) were between solicitor and client (which requires an examination of the nature of the relationship between the person giving the advice and the person receiving the advice), (b) entailed the seeking or giving of legal advice (which requires an examination of the subject matter of the advice), and (c) were intended to be confidential (which requires an examination of the circumstances in which the advice is sought and given). By not properly claiming solicitor-client privilege over specific redacted portions and not adducing an evidentiary basis for this privilege, the AG has frustrated the truth-seeking function of the hearing, frustrated all parties' ability to make full arguments, and impeded the Board's ability to make proper determination of the issues.

...2

Regarding relevance, VECC further submits that it is impermissible for a party to redact portions of a relevant document on the bare assertion of irrelevance. The AG failed to prove that the redacted portions were clearly irrelevant to the issues in the proceeding, and that there was good reason not to disclose the redacted portions. While it is impossible to prove the relevance of information one has no access to, the CCC must infer that the redacted information is relevant because it includes cost recovery options, timelines, policy options considered by government, decisions and steps in the process of creating and implementing the fee, information pertaining to revenue shortfalls and decisions to recover amounts from ratepayers, all of which are relevant to determining the pith and substance of the fee. As such, the redacted information must be taken to not only (a) touch upon the legal test for the constitutionality of the fee, but also (b) advance the moving party's case and (c) touch upon "trains of inquiry" particularly germane to this hearing. This information must be produced to all parties, or at a minimum, to the Board to determine both relevance and the weight to be given the redacted portions.

While the OEB Rules of Practice and Procedure and the *Practice Direction on Confidential Filings* do not expressly address claims of "relevance," to ensure openness, transparency, accessibility and consistency in the treatment of information, claims of relevance should be assessed in the same way and according to the same procedures as claims of confidentiality. Specifically, relevance must be assessed in accordance with Rule 10 of the OEB Rules of Practice and Procedure, and the *Practice Direction on Confidential Filings*. VECC points out two important obligations contained in the *Practice Direction*. First, the procedures set out in the Practice Direction are to be followed by *all* participants. Second, the party claiming confidentiality bears the onus of demonstrating to the satisfaction of the Board that confidential treatment is warranted in any given case.

In summary, VECC submits that the AG has not discharged its onus of proving confidentiality is warranted. It offends natural justice and procedural fairness for a party to unilaterally dictate relevance to a decision maker and to other parties in a proceeding. Production is related to the ability of an administrator and all parties, to have sufficient information and to have the materials to be relied upon by the administrator in rendering the decision. Without production of the redacted information, neither the parties in this proceeding nor the Board have sufficient information to rely upon when considering the constitutionality of the fee. Full production is particularly important in the instant case, which involves public interest constitutional litigation, and which would be reviewed upon a standard of correctness. Full production is therefore critical for the Board in order to make full, informed determination of the matters at issue.

Yours truly,



Michael Janigan
Counsel for VECC

CC: All Registered Intervenors