File No. 2010-0184

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 a motion by the Consumers Council of Canada and Aubrey LeBlanc in relation to section 26.1 of the *Ontario Energy Board Act, 1998* and Ontario Regulation 66/10.

FACTUM OF THE INTERVENOR, THE ATTORNEY GENERAL OF ONTARIO, ON THE MOTION FOR PRODUCTION OF DOCUMENTS

(Returnable April 21, 2011)

MINISTRY OF THE ATTORNEY GENERAL
Constitutional Law Branch
720 Bay Street, 4th Floor
Toronto, Ontario
M7A 2S9

Robert E. Charney (LSUC # 23652S)
Tel: 416-326-4452
Robert.Charney@ontario.ca

Arif Virani (LSUC # 44463H)
Tel: 416-326-0131
Arif.Virani@ontario.ca

Fax: 416-326-4015

Counsel for the Intervenor,
The Attorney General of Ontario

TO:

Ontario Energy Board
Attention: **Kirsten Walli, Board Secretary**
Suite 2701 – 2300 Yonge Street
Toronto, Ontario
M4P 1E4

Fax: 416-440-7656

AND TO:

WeirFoulds LLP
Barristers & Solicitors
Suite 1600, Exchange Tower
130 King Street West
Toronto, ON M5X 1J5

Robert B. Warren

Tel: 416-365-1110
Fax: 416-365-1876

Solicitor for the Moving Parties

AND TO:

Intervenors of Record

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A. OVERVIEW

1. In the proceeding on the merits, the moving parties, Audrey LeBlanc and the Consumers Council of Canada ["CCC"], challenge the constitutionality of s. 26.1 of the *Ontario Energy Board Act, 1998* ["*OEBA*"] and Ontario Regulation 66/10 ["O. Reg. 66/10"] thereunder, which establish a levy to recover the costs of conservation programs established by the Ministry of Energy. The CCC alleges that the impugned cost-recovery levy amounts to an indirect tax, *ultra vires* the province's constitutional jurisdiction under s. 92 of the *Constitution Act, 1867*. The Attorney General's position is that this levy is a valid regulatory charge, *intra vires* the province.

2. On this interlocutory motion, the moving parties seek disclosure, in unredacted form, of Cabinet and Minister-level documents provided in response to questions taken under advisement during the cross-examination of the Attorney General's witness, Mr. Barry Beale on November 16, 2010. The moving parties also seek the re-attendance of the Attorney General's witness for additional cross-examination respecting the redacted information.

3. The Attorney General has disclosed all relevant portions of the Cabinet and Minister-level documents requested. The redacted portions of these documents should not be disclosed, as they are not relevant to any issue in this proceeding, or contain information that is subject to solicitor-client privilege. As the Supreme Court stated in *Carey v. Ontario*, where documents relate to high-level government decision-making, the "[c]ourts must proceed with caution in having them produced." It is appropriate in these circumstances to permit the Crown to redact the documents so that "only the particular facts relating to the case are revealed." (*Carey*, paras. 79-80).

4. The Attorney General consents to the re-attendance of his witness for further cross-examination, but solely in relation to answers already provided to questions taken under advisement. Additional cross-examination respecting irrelevant and privileged material is unwarranted.

5. Documents that are relevant to this proceeding are those that provide information related to whether s. 26.1 of the *OEBA*, and O. Reg. 66/10 thereunder, establish an *ultra vires* indirect tax as opposed to a regulatory charge within provincial jurisdiction. This Board's inquiry is framed by the well-established test set out by the Supreme Court in

Westbank and refined in *620 Connaught*. Under this test, an *intra vires* regulatory charge exists where the government establishes: (1) the existence of a regulatory scheme, and (2) a relationship in which revenues are tied to the costs of the regulation.

6. This legal test is applied to the impugned legislation itself. Information pertaining to other Regulations and Orders in Council not challenged by the moving parties are not relevant to this proceeding and should not be disclosed.

7. This Board's analysis is necessarily governed by the ultimate cost-recovery program reflected in the actual text of s.26.1 of the *OEBA* and O. Reg. 66/10 thereto. Program options considered but never implemented by the Government, including the possibility of recovering against natural gas utilities and ratepayers, and recovering costs for programs other than the Home Energy Savings Program ["HESP"] and the Ontario Solar Thermal Heating Initiative ["OSTHI"], are entirely irrelevant to the validity of the impugned provision and therefore not producible.

8. Policy issues respecting the impugned levy, including observations about stakeholder interests and the identification of implementation issues, are a routine consideration for Government when exercising its lawmaking function. Such considerations, however, have no bearing on the legal test presently before this Board as to whether the levy constitutes an indirect tax *ultra vires* the province, and as such do not warrant disclosure.

9. The moving parties concede that solicitor-client privileged information cannot be disclosed and may be redacted from any documents that are produced. Communications

for the purpose of seeking and obtaining legal advice must be protected in the interests of the administration of justice. Furthermore, the *Statutory Powers Procedure Act* limits the authority of this Board to order disclosure of privileged material.

10. The moving parties bear the onus of demonstrating that the redacted portions are relevant to the legal issues in this case. They have not met this onus, and have failed to articulate a legal theory, supported by law, upon which these redacted portions would be relevant to the legal issues in this proceeding. The moving parties seek to engage in a "fishing expedition", which is an inappropriate use of the Board's resources and should be denied.

11. The Attorney General does not object to providing the Board, on a confidential basis, an unredacted version of the documents in question for the limited purpose of resolving the present motion. Provision of unredacted material for this purpose does not constitute waiver of the Attorney General's claims respecting relevance or solicitor-client privilege. While the Board has the authority to review the unredacted documents, and must review them before it orders disclosure, the Board may permit the redactions without inspecting the documents.

B. FACTS

12. Pursuant to Procedural Order No. 6, the Attorney General served and filed the affidavit of Barry Beale on November 5, 2010. The Attorney General's witness was

cross-examined by the moving parties and intervenors on this affidavit at a Board technical conference on November 16, 2010.

13. During the cross-examination, counsel for the Attorney General provided undertakings, and took certain questions under advisement. In addition to written responses, in total thirty-two documents were disclosed in answer to fifteen questions. Twenty-three such documents were disclosed in their entirety. Two documents, in response to question JT 1.4 taken under advisement, were disclosed with redactions of third-party identifying information only. The moving parties do not seek access to this third-party information in the instant motion, as their written submission does not reference JT 1.4.

Affidavit of C. Bitonti, sworn January 31, 2011, Moving Parties' Motion Record, Tab 2, p. 8, para. 2, and Exhibits A-D, pp. 13-66

Moving Parties' Factum, Motion for Production, paras. 13-15

14. The present motion therefore relates to only seven remaining documents, provided in redacted form, in answer to questions, numbered JT 1.5, 1.5B, 1.6 and 1.7, taken under advisement. Each of the documents at issue contains confidential material prepared for the Minister of Energy and/or the Cabinet of the Government of Ontario.

Moving Parties' Factum, Motion for Production, paras. 13-15

15. A summary list of all the material provided in response to the Attorney General's undertakings and questions taken under advisement is attached as Schedule "1" to this factum.

C. ISSUES

16. The issues on the present interlocutory motion are whether the Board should:

(i) Order disclosure of the material redacted for irrelevance?

(ii) Order disclosure of the material redacted for solicitor-client privilege?

(iii) Compel the Attorney General's witness to re-attend to answer further questions arising from the production of the unredacted documents?

17. The relief sought under parts (i) and (ii) should be denied. The material redacted is not producible as it is irrelevant and/or solicitor-client privileged. Where information that is not producible is contained in the same document as relevant, producible material, redactions are appropriate.

18. The Attorney General opposes in part the request, under part (iii) above, for the Government's witness to re-attend to answer further questions. Further cross-examination of the witness is only warranted in relation to answers already provided to undertakings and questions taken under advisement. Additional cross-examination respecting irrelevant and privileged redacted material should not be permitted by the Board.

D. ARGUMENT

I. RELEVANCE

(a) The moving party bears the onus of establishing relevance

19. The onus is on the party seeking disclosure to demonstrate that the evidence they seek is relevant. As Abella J.A. (as she then was) held in *Ontario Federation of Anglers & Hunters*:

> The onus is on the party seeking to conduct the examination to show on a reasonable evidentiary basis that the examination would be conducted on issues relevant to the pending application and that the proposed witness was in a position to offer relevant evidence
>
> ***Ontario Federation of Anglers & Hunters v. Ontario (Ministry of Natural Resources)* (2002), 211 D.L.R. (4th) 741 (Ont. C.A.) at para. 30 ["*Ontario Federation of Anglers & Hunters*"]**
>
> ***Cholakis v. Cholakis*, [2000] M.J. No. 6 (Q.B.) at para. 22**
>
> ***Agnew v. New Brunswick Telephone Co.*, [2002] N.B.R. (2d) (Supp.) No. 53 (Q.B.) at paras. 66, 73**

20. As in the process of civil discovery, the Board's process relies on the duty of counsel to ensure that their client discloses all relevant information in answer to an undertaking. In the absence of a reasonable evidentiary basis establishing that the redacted material is relevant, the Board should assume good faith on the part of counsel in responding to undertakings, and not "go behind" the redactions.

> **Law Society of Upper Canada, *Rules of Professional Conduct*, Rule 4.01(4)**
>
> ***Lazin v. Ciba-Geigy Canada Ltd., Jacobs and McClure,* [1976] 3 W.W.R. 460 (Alta. C.A.) at para. 9**
>
> ***Westminster Airways Ltd. v. Kuwait Oil Co.*, [1951] 1 K.B. 134, [1950] 2 All E.R. 596 at 603 (C.A.), per Jenkins LJ**

***Cholakis v. Cholakis*, *supra* at paras. 17-18**

***Agnew v. New Brunswick Telephone Co.*, *supra* at paras. 64, 67-68, 75**

21. If the moving parties fail to meet their burden of establishing that the redacted material is relevant, ordering disclosure of this material would amount to sanctioning a fishing expedition. A moving party may not use the present motion to " 'fish' for material to support a case which he has not set up."

***McKergow v. Comstock*, [1906] O.J. No. 320 (Div. Ct.) at para. 22**

***Ontario Federation of Anglers & Hunters*, *supra* at para. 59**

***Hoyt v. Insurance Corp. of British Columbia* (2001), 89 B.C.L.R. (3d) 44 (C.A.) at paras. 28, 33, 37, 41**

***Agnew v. New Brunswick Telephone Co.*, *supra* at paras. 59, 69-72**

(b) Relevance is determined by the issues in the proceeding

22. In a civil proceeding, relevance is determined by the pleadings, in this case the moving parties' Amended Notice of Motion on the merits, dated May 27, 2010, and their Notice of Constitutional Question, dated April 26, 2010. The issue here is whether the levy assessed pursuant to s. 26.1 of the *OEBA* and O. Reg. 66/10 thereunder is an indirect tax, and therefore *ultra vires* the province. If this levy is held to be unconstitutional, the moving parties seek an order cancelling the assessment and the associated variance account.

***Sopinka, Lederman and Bryant: the Law of Evidence in Canada*, 3rd ed. (Markham, ON: LexisNexis Canada, 2009) at s. 2.40**

***Hopps-King Estate v. Miller*, [1998] O. J. No. 5556 (Ont. Master) at para. 8**

***Apotex Inc. v. Canada*, [2005] F.C.J. No. 1021 (C.A.) at paras. 19-22, 39**

Amended Notice of Motion, Consumer's Council of Canada, dated May 27, 2010, paras. 13-14, p. 4

Notice of Constitutional Question, Consumer's Council of Canada, dated April 26, 2010, paras. 1-11, pp. 1-3

***Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sch. B, s. 26**

O. Reg. 66/10

23. The moving parties' motion on the merits seeks relief in relation to the assessments ordered pursuant to s. 26.1 of the *OEBA* and O. Reg. 66/10 thereunder on April 9, 2010. No relief is sought in relation to any other Regulation, Order in Council, provision of the *OEBA*, or any other Act.

24. In this respect, the Attorney General has adduced evidence regarding two programs, the electricity-related costs of which are funded through the assessments authorized by s. 26.1 of the OEBA and O. Reg. 66/10. These programs, HESP and OSTHI, are relevant to this proceeding as they inform the total recovery amount identified in O. Reg. 66/10, s.4.

O. Reg. 66/10, s. 4

25. Any relief for the moving parties is predicated on a determination that the levy established by s. 26.1 of the *OEBA* and O. Reg. 66/10 thereunder is an indirect tax, *ultra vires* Ontario, as opposed to a valid regulatory charge. The constitutional characterization of this levy is governed by the framework established by the Supreme Court of Canada in *Westbank First Nation v. British Columbia Hydro and Power*

Authority and *620 Connaught Ltd. v. Canada*, which requires that the government demonstrate that the levy is connected to a valid regulatory scheme, and is thus within provincial jurisdiction under the division of powers.

> ***Westbank First Nation v. British Columbia Hydro and Power Authority*, [1999] 3 S.C.R. 134 at paras. 24, 43-44 ["*Westbank*"]**
>
> ***620 Connaught Ltd. v. Canada (Attorney General)*, [2008] 1 S.C.R. 131 at paras. 24-28 ["*620 Connaught*"]**
>
> ***Confédération des Syndicats Nationaux v. Canada (Attorney General)*, [2008] 3 S.C.R. 511 at para. 72**

26. In determining whether a levy is connected to a regulatory scheme, the Supreme Court has established a two-step test. The first step is to identify the existence of a relevant regulatory scheme, which involves looking for the presence of some or all of the following *indicia*, (some, but not all, of which are noted by the moving parties in their factum at paragraph 28): (1) a complete, complex and detailed code of regulation; (2) a specific regulatory purpose which seeks to affect the behaviour of individuals; (3) the existence of actual or properly estimated costs of the regulation; and (4) a relationship between the regulation and the person being regulated, where the person being regulated either benefits from, or causes the need for, the regulation.

> ***Westbank*, *supra* at paras. 24, 44**
>
> ***620 Connaught*, *supra* at paras. 25-26**
>
> ***Confédération des Syndicats Nationaux v. Canada (Attorney General)*, *supra* at para. 72**
>
> **Moving Parties' Factum, Motion for Production at para. 28**

27. The Supreme Court has emphasized that not all *indicia* need be present to find a regulatory scheme, and that "[a]lthough this list of factors provides a useful guide, it is not to be treated as if the factors were prescribed by statute." The critical component is that there must be a regulatory scheme and it must be relevant to the person being regulated.

> ***620 Connaught, supra* at para. 26**
>
> ***Westbank, supra* at para. 24**
>
> ***Confédération des Syndicats Nationaux v. Canada (Attorney General), supra* at para. 72**

28. The second step of the test, absent from the moving parties' written submission, is to find a relationship between the charge and the scheme itself. This relationship will exist "when the revenues are tied to the costs of the regulatory scheme, or where the charges themselves have a regulatory purpose, such as the regulation of certain behaviour". In this case, where the charge is intended to defray regulatory costs, the fee revenues must be tied to the costs of the regulatory scheme.

> ***Westbank, supra* at para. 44**
>
> ***620 Connaught, supra* at paras. 27, 45-47**
>
> ***Eurig Estate (Re)*, [1998] 2 S.C.R. 565 at paras. 21-22**

29. In assessing relevance on the instant motion for production of redacted materials, this Board must determine whether a nexus exists between the material in question and the jurisprudential test articulated above. The following categories of information will

not assist this Board in determining whether the impugned levy satisfies the Supreme Court's criteria, and are therefore not relevant to this proceeding:

- Information regarding other legislation not comprising part of the constitutional challenge commenced by the moving parties. In particular, O. Reg. 275/04 which addresses the manner of bill presentation to ratepayers, and the Order in Council enacted to bring into force certain provisions of the *Green Energy and Green Economy Act, 2009*, ["GEGEA"] are not relevant.

- Program options considered but never implemented, that do not reflect the cost recovery mechanism ultimately enacted by Government now before this Board. In particular, the following program options are not relevant:

  - Cost recovery contemplated for programs other than HESP or OSTHI, such as the PowerHouse program.
  - Hypothetical cost recovery against natural gas utilities and ratepayers, or the hypothetical option of avoiding cost recovery altogether.
  - Funding options other than the volumetric methodology ultimately enacted for recovering costs against electricity utilities and ratepayers.
  - Speculative cost recovery for program expenses outside of O. Reg. 66/10.

- Other considerations in relation to the levy. In the process of lawmaking, government routinely considers economic, social or partisan considerations. Such considerations have no bearing upon the interpretation and application of the legal test regarding whether the impugned levy constitutes an *ultra vires* indirect tax. In particular, the following considerations are irrelevant to the instant inquiry before this Board:

  - Observations regarding stakeholder views and preferences; communications management and planning; discussions re disclosure; discussions re timing and manner of collection; cash flow considerations of affected parties; practice in other jurisdictions, and; regulatory design considerations including proposed cost-benefit analyses never undertaken and regulation timing.

i. Only the Impugned Legislation is Relevant

30. Information that does not relate to s. 26.1 of the *OEBA*, O. Reg. 66/10 thereto, or the HESP and OSTHI programs funded by the impugned levy, is irrelevant and not producible in this proceeding.

- O. Reg. 275/04 pertains to the presentation of the electricity bills received by ratepayers. The manner of bill presentation has not been challenged by the moving parties in this proceeding. Neither the content of this Regulation nor the policy discussion related to it has any bearing on the constitutional characterization of the impugned levy under O. Reg. 66/10 as an indirect tax. Redactions of the discussion of this regulation has been made in the following places:

  - JT 1.5B: Exhibit 1, "Slide Deck to Update Minister" at pp. 47, 47A, 54, 55, 56, 57, [**Moving Parties' Motion Record, Tab 2B, pp. 32, 33, 40, 41, 42, 43]**

  - JT 1.6/1.7: Exhibit 2, "Ministry of Energy and Infrastructure, MB20 for MEI's Conservation Cost Recovery From Electricity Utilities and the IESO" at pp. 4, 5 **[Moving Parties' Motion Record, Tab 2C, pp. 51, 52]**

  - JT 1.6/1.7: Exhibit 3, "Legislation and Regulations Committee: Ministry Approval Form" at pp. 1, 3, 5 **[Moving Parties' Motion Record, Tab 2C, pp. 53, 55, 57]**

- An Order in Council was required to bring into force certain provisions of the GEGEA. The validity of this Order in Council does not form part of the constitutional challenge presently before this Board. Neither the Order in Council nor any discussion thereon has any impact on the legal question as to whether the cost recovery mechanism entrenched in O. Reg. 66/10 is *ultra vires* the province. As such, redactions of the discussion of the need for an Order in Council were made in the following places:

  - JT 1.6/1.7: Exhibit 3, "Legislation and Regulations Committee: Ministry Approval Form" at pp. 1, 3 **[Moving Parties' Motion Record, Tab 2C, pp. 53, 55]**

ii. Program Options Considered but never Implemented are Irrelevant

31. The moving parties allege that the Government's cost recovery levy amounts to an indirect tax, *ultra vires* the province's constitutional jurisdiction under s. 92 of the *Constitution Act, 1867*. While program alternatives may be germane to a constitutional challenge under the *Canadian Charter of Rights and Freedoms*, they are not relevant to

the present analysis under the division of powers. Unlike a s. 1 *Charter* analysis, in which the court considers whether less-intrusive options can achieve the government objective, alternative program options have no bearing on the "pith and substance" of a statute or regulation, and are therefore irrelevant to a division of powers inquiry. The only issue is whether the option ultimately chosen falls within provincial jurisdiction under s. 92 of the *Constitution Act, 1867* -- the existence of other policy options that may also have been within provincial jurisdiction is irrelevant where a reviewing court considers a federalism challenge.

> ***Reference Re Firearms Act (Can.),* [2000] 1 S.C.R. 783 at para. 57:**
>
> The efficacy of a law, or lack thereof, is not relevant to Parliament's ability to enact it under the division of powers analysis.
>
> ***Alberta v. Hutterian Brethren of Wilson Colony*, [2009] 2 S.C.R. 567 at para. 53**
>
> ***R. v. Oakes*, [1986] 1 S.C.R. 103 at 139**
>
> ***Club Pro Adult Entertainment Inc. v. Ontario* (2008), 233 O.A.C. 355 at paras. 8-11, 21**
>
> **See contra: *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199**

32. The moving parties' contention that resolution of the present constitutional question "requires an examination of the characteristics of [the special purpose] charge as compared with, among other things, the programs and charges that the government determined would not be permissible regulatory charges" is incorrect on its face and unsupported by any jurisprudential authority. No court has ever considered alternative policy options as part of its analysis in a division of powers case. The consideration of

such policy options cannot assist the moving parties in advancing their constitutional challenge.

Moving Parties' Factum, Motion for Production at para. 30

33. The framework established by the Supreme Court in *Westbank* and *620 Connaught* involves no comparison between the impugned levy and other program options considered but never implemented. Rather, the legal analysis relates solely to the proper characterization of the actual levy imposed and its connection to the regulatory scheme.

***Westbank*, *supra* at paras. 24, 43-44**

***620 Connaught*, *supra* at paras. 24-28**

34. As the Quebec Superior Court noted in *Le Syndicat national des employés*, it is not the role of a court or tribunal reviewing an impugned levy under the division of powers to question the wisdom of the chosen policy against its alternatives. These are questions for the legislature and for the electorate, not for the courts.

> Quoique ce soit là les constatations qui se dégagent de la preuve, il n'appartient pas au Tribunal, sous réserve de la légalité des taux de cotisation qui permettent de générer ces surplus et qu'on ne soulève pas ici, de juger ces choix politiques qui relèvent du gouvernement, ni d'arbitrer les débats ou points de vue divergents qui peuvent en découler. À ce chapitre, les électeurs sont les juges ultimes de ces choix.
>
> [Unofficial translation: Whatever debates may emerge from the evidence, it is not for the Court, in reviewing the legality of the contribution rates that permit the generation of these surpluses and that are not being raised here, to adjudicate these policy choices of the government or arbitrate the debates or divergent points of view that may result therefrom. Voters are the ultimate judges of these choices.]

***Le Syndicat national des employés de l'aluminium d'Arvida inc. c. Le Procureur général du Canada*, [2003] J.Q. no 15801 (Sup. Ct.) at para. 329**

(appeal allowed, in part, on other grounds: see *Confédération des Syndicats Nationaux v. Canada (Attorney General), supra* at para. 70)

35. In the result, information related to proposed cost recovery programs, potential additional levies or draft alternative funding models, none of which were ever implemented, are irrelevant to this Board's inquiry. The moving parties unsupported assertion, at paragraph 29 of their factum, that disposing of the constitutional question on the merits "must certainly encompass the examination of the factors, and programs, considered – *and rejected* – by the government" [emphasis added] is untenable, has not been substantiated with reference to any authority, and lacks any foundation in Canadian constitutional law.

Moving Parties' Factum, Motion for Production at para. 29

36. In the instant case this Board must determine the constitutionality of the impugned levy with regard to the actual assessment established in O. Reg. 66/10. Speculation and other discussions as to what O. Reg. 66/10 *may have* included are unrelated to the instant proceeding, and inapposite the Board's inquiry under the division of powers. In the result, the following information has been redacted on the basis of irrelevance:

- PowerHouse: This energy conservation program was undertaken as a pilot project, but never renewed. Discussions related to the possibility of assessing the costs of the PowerHouse program through a special purpose charge are irrelevant to this proceeding, as the program was discontinued and no cost recovery assessment was ever made respecting PowerHouse under O. Reg. 66/10. Discussions of the PowerHouse program were therefore redacted in the following documents:

- JT 1.5: Exhibit 3, "Program Cost Recovery 2009-04-27+PK's comments" at pp. 32, 35, 37, 38 [**Moving Parties' Motion Record, Tab 2A, pp. 22, 25, 27, 28**]
- JT 1.5B: Exhibit 1, "Slide Deck to Update Minister" at p. 47 [**Moving Parties' Motion Record, Tab 2B, p. 32**]

- Assessments against natural gas utilities and ratepayers: Preliminary discussions were undertaken respecting the possibility of assessing the natural gas-related costs of the HESP and OSTHI programs against natural gas utilities and ratepayers. Ultimately, the impugned levy under O. Reg. 66/10 did not assess natural gas-related costs, nor did it apply to natural gas utilities or ratepayers. These preliminary policy discussions therefore have no bearing on the constitutionality of the impugned charge which was levied solely against the electricity-related costs of conservation programs undertaken in the 2009-10 Fiscal Year. As such, discussions of recovery against natural gas were redacted in the following documents:

  - JT 1.5: Exhibit 1, "Copy of GEA Rational for Reallocation of MEI Program Costs to Ratepayers" at pp. 7, 8 [**Moving Parties' Motion Record, Tab 2A, pp. 14, 15**]

  - JT 1.5: Exhibit 2, "Copy Program Cost Recovery Outline – Original" at p. 10 [**Moving Parties' Motion Record, Tab 2A, p. 18**]

  - JT 1.5: Exhibit 3, "Program Cost Recovery 2009-04-27+PK's comments" at pp. 33, 35, 36 [**Moving Parties' Motion Record, Tab 2A, pp. 23, 25, 26**]

  - JT 1.5B: Exhibit 1, "Slide Deck to Update Minister" at pp. 47, 47A, 48, 49, 50, 54, 55, 57 [**Moving Parties' Motion Record, Tab 2B, pp. 32, 33, 34, 35, 36, 40, 41, 43**]

  - JT 1.6/1.7: Exhibit 1, "Application and Report to Treasury Board/Management Board of Cabinet" at p. 1 [**Moving Parties' Motion Record, Tab 2C, p. 46**]

  - JT 1.6/1.7: Exhibit 2, "Ministry of Energy and Infrastructure, MB20 for MEI's Conservation Cost Recovery From Electricity Utilities and the IESO" at pp. 1, 2, 3, 4, 5 [**Moving Parties' Motion Record, Tab 2C, pp. 48, 49, 50, 51, 52**]

- JT 1.6/1.7: Exhibit 3, "Legislation and Regulations Committee: Ministry Approval Form" at pp. 2, 4 **[Moving Parties' Motion Record, Tab 2C, pp. 54, 56]**

- Proposed funding options: The Government considered several options respecting the HESP and OSTHI programs, including avoiding cost recovery altogether, pursuing cost recovery from natural gas utilities and ratepayers, and recovering selected costs outside the regulation. None of these options were ultimately enacted, and they are not reflected in O. Reg. 66/10 currently before the Board. These hypothetical options do not inform the Board's characterization of the impugned levy under the test set out in *Westbank* and *620 Connaught*. Redactions of discussions of proposed funding options that were never implemented have subsequently been made in the following places:

  - JT 1.5: Exhibit 2, "Copy Program Cost Recovery Outline – Original" at p. 10 **[Moving Parties' Motion Record, Tab 2A, p. 18]**

  - JT 1.5B: Exhibit 1, "Slide Deck to Update Minister" at pp. 49, 50, 57 **[Moving Parties' Motion Record, Tab 2B, pp. 35, 36, 43]**

  - JT 1.6/1.7: Exhibit 2, "Ministry of Energy and Infrastructure, MB20 for MEI's Conservation Cost Recovery From Electricity Utilities and the IESO" at pp. 3, 4, 5 **[Moving Parties' Motion Record, Tab 2C, pp. 50, 51, 52]**

  - JT 1.6/1.7: Exhibit 3, "Legislation and Regulations Committee: Ministry Approval Form" at p. 4 **[Moving Parties' Motion Record, Tab 2C, p. 56]**

37. The moving parties have failed to discharge their legal onus. Their written submission does not articulate a legal theory, supported by law, upon which the redacted material they seek is relevant to the legal question before the Board: whether the impugned levy amounts to an indirect tax, *ultra vires* the province, pursuant to the division of powers under the *Constitution Act, 1867.*

***Ontario Federation of Anglers & Hunters*, *supra* at para. 30**

***Domus Architects v. Ontario (Ministry of Municipal Affairs and Housing),* [2001] OJ No. 3597 (Sup. Ct.) at para. 29**

Moving Parties' Factum, Motion for Production at paras. 29-30

iii. Other considerations are not Relevant

38. Concerns respecting items such as stakeholder interests, communication plans, disclosure, collection, cash flow of affected parties, practices in other jurisdictions and regulatory design, are routine matters that governments consider as part of their lawmaking function. Such considerations have no bearing on the legal analysis under the Supreme Court test in *Westbank* and *620 Connaught* and cannot assist this Board in determining the constitutional validity of the impugned levy under the division of powers. As Abella J.A. (as she then was) noted in *Ontario Federation of Anglers & Hunters*,

> There is nothing inappropriate, let alone unlawful, about the government consulting with and considering the public's reaction to a policy measure. To be politically expedient is to be politically responsive to selected and discrete public concerns. *That is what governments do.*

***Ontario Federation of Anglers & Hunters, supra* at para. 50 [emphasis added]**

> ...[I]t is irrelevant whether the Premier and/or the Minister were influenced by political expediency, this being a consideration which is an accepted, expected, and legitimate aspect of the political process....

> Governments are motivated to make regulations by political, economic, social or partisan considerations. These motives, even when known, are irrelevant to whether the regulation is valid.

***Ontario Federation of Anglers & Hunters, supra* at paras. 51, 53**

> In my view, the authorities support a broad analysis of relevance in constitutional cases. However, there is no reason to depart in this case from the general rule that extrinsic evidence pertaining to government deliberations, in order to be admissible, must relate to legislative purpose and the intent of the Legislature as a whole.

> In considering whether such evidence is admissible, *it is essential to avoid politicizing the judicial process. The courts must not become a secondary forum for debating the merits of government decisions. Cross-examining politicians on their motivations for introducing legislation is unlikely to aid in examining the purpose of the legislation.*
>
> ***British Columbia Teachers' Federation v. British Columbia (Attorney General)*, [2008] B.C.J. No. 2414 (Sup. Ct.) at paras. 76-77 [emphasis added] (see also paras. 58-59, 69, 78- 80)**
>
> Counsel for the appellants was critical of the failure of the Federal Court of Appeal to examine and weigh the evidence for the purpose of determining whether the Governor in Council had been motivated by improper motives in passing the impugned Order in Council. We were invited to undertake such an examination but I think that with all due respect, we must decline. It is neither our duty nor our right to investigate the motives which impelled the federal Cabinet to pass the Order in Council…
>
> Governments do not publish reasons for their decisions; governments may be moved by any number of political, economic, social or partisan considerations.
>
> ***Thorne's Hardware Ltd. v. The Queen*, [1983] 1 S.C.R. 106 at 112-113**
>
> ***Ontario Black Bear/Ontario Sportsmen and Resource Users Assn. v. Ontario*, [2000] O.J. No. 263 (Sup. Ct.) at paras. 46-47**

39. As these considerations are not relevant to the constitutional validity of the impugned levy, the Board should not order disclosure of redacted discussions. The Board must be cautious of "the risk of turning the court process into an extended battleground for extracting information pertaining to the ongoing *political debate* over the targeted legislation – as opposed to being a process for determining the *Charter* and other legal parameters within which governments must act."

> ***Ontario Teachers' Federation v. Ontario (Attorney General)* (1998), 39 O.R. (3d) 140 (Gen. Div.) at 146, 148**

40. Discussions of such considerations, including the impact of the levy on stakeholders, public communications plans, disclosure, the timing and manner of

collection, cash flow concerns of affected parties, practice in other jurisdictions and regulatory design, contained in advice to the Minister and in Cabinet documents, do not assist the Board in determining the proper characterization of the impugned levy. These considerations are not relevant to the legal inquiry presently before the Board. As such, information relating to these considerations has been redacted from the following documents:

- Regarding stakeholder issues and interests:
  - JT 1.5B: Exhibit 1, "Slide Deck to Update Minister" at pp. 47A, 49, 50, 52 **[Moving Parties' Motion Record, Tab 2B, pp. 33, 35, 36, 38]**
  - JT 1.6/1.7: Exhibit 1, "Application and Report to Treasury Board/Management Board of Cabinet" at p. 1 **[Moving Parties' Motion Record, Tab 2C, p. 46]**
  - JT 1.6/1.7: Exhibit 2, "Ministry of Energy and Infrastructure, MB20 for MEI's Conservation Cost Recovery From Electricity Utilities and the IESO" at pp. 3, 4, 5 **[Moving Parties' Motion Record, Tab 2C, pp. 50, 51, 52]**
  - JT 1.6/1.7: Exhibit 3, "Legislation and Regulations Committee: Ministry Approval Form" at pp. 1, 5 **[Moving Parties' Motion Record, Tab 2C, pp. 53, 57]**

- Relating to communications:
  - JT 1.5B: Exhibit 1, "Slide Deck to Update Minister" at p. 57 **[Moving Parties' Motion Record, Tab 2B, p. 43]**
  - JT 1.6/1.7: Exhibit 2, "Ministry of Energy and Infrastructure, MB20 for MEI's Conservation Cost Recovery From Electricity Utilities and the IESO" at p. 3 **[Moving Parties' Motion Record, Tab 2C, p. 50]**
  - JT 1.6/1.7: Exhibit 3, "Legislation and Regulations Committee: Ministry Approval Form" at p. 6 **[Moving Parties' Motion Record, Tab 2C, p. 58]**

- Respecting disclosure options:
  - JT 1.5: Exhibit 1, "Copy of GEA Rational for Reallocation of MEI Program Costs to Ratepayers" at p. 9 **[Moving Parties' Motion Record, Tab 2A, p. 17]**

- Relating to the timing and manner of collection:
  - JT 1.5: Exhibit 3, "Program Cost Recovery 2009-04-27+PK's comments" at p. 33 [**Moving Parties' Motion Record, Tab 2A, p. 23**]
  - JT 1.5B: Exhibit 1, "Slide Deck to Update Minister" at pp. 52, 53, 57 [**Moving Parties' Motion Record, Tab 2B, pp. 38, 39, 43**]
  - JT 1.6/1.7: Exhibit 3, "Legislation and Regulations Committee: Ministry Approval Form" at p. 5 [**Moving Parties' Motion Record, Tab 2C, p. 57**]

- Regarding cash flow considerations of affected parties:
  - JT 1.5B: Exhibit 1, "Slide Deck to Update Minister" at pp. 47A, 52, 53, 57 [**Moving Parties' Motion Record, Tab 2B, pp. 33, 38, 39, 43**]
  - JT 1.6/1.7: Exhibit 3, "Legislation and Regulations Committee: Ministry Approval Form" at p. 5 [**Moving Parties' Motion Record, Tab 2C, p. 57**]

- Respecting practice in other jurisdictions:
  - JT 1.6/1.7: Exhibit 3, "Legislation and Regulations Committee: Ministry Approval Form" at p. 6 [**Moving Parties' Motion Record, Tab 2C, p. 58**]

- Regarding regulatory design considerations, including proposed cost-benefit analyses and regulation timing:
  - JT 1.5: Exhibit 1, "Copy of GEA Rational for Reallocation of MEI Program Costs to Ratepayers" at pp. 8, 9 [**Moving Parties' Motion Record, Tab 2A, pp. 15, 17**]
  - JT 1.5: Exhibit 2, "Copy Program Cost Recovery Outline – Original" at p. 10 [**Moving Parties' Motion Record, Tab 2A, p. 18**]
  - JT 1.5B: Exhibit 1, "Slide Deck to Update Minister" at pp. 57, 58 [**Moving Parties' Motion Record, Tab 2B, pp. 43, 44**]
  - JT 1.6/1.7: Exhibit 2, "Ministry of Energy and Infrastructure, MB20 for MEI's Conservation Cost Recovery From Electricity Utilities and the IESO" at p. 4 [**Moving Parties' Motion Record, Tab 2C, p. 51**]

(c) Irrelevant information should be redacted

41. Information that is not relevant to a proceeding need not be disclosed. Contrary to the assertion of the moving parties, where both relevant and irrelevant information are contained within the same document, it is appropriate to redact the irrelevant information from that document.

> ***Manufacturer's Life Insurance Co. v. Dofasco Inc.*, [1989] O.J. No. 1456 (H.C.) at 4-6 [QL]**
>
> **Moving Parties' Notice of Motion, dated January 31, 2011 at para. 12**
>
> **Moving Parties' Factum, Motion for Production at paras. 18ff**

42. In the context of civil disclosure, numerous courts have upheld redactions of irrelevant information from documentary disclosure.

> ***O'Neill v. Canada (Attorney General)*, [2006] O.J. No. 106 (Sup. Ct.) at paras. 2, 3, 21**
>
> ***Cholakis v. Cholakis*, *supra* at paras. 6, 17-19, 23, 24**
>
> ***John Labatt Ltd. v. Molson Breweries*, [1994] 1 F.C. 801 (T.D.) at para. 6**
>
> ***Agnew v. New Brunswick Telephone Co.*, *supra* at paras. 76-77, 80-81**
>
> ***Nova Scotia (Attorney General) v. Royal & Sun Alliance Insurance Co. of Canada*, [2000] N.S.J. No. 404 (Sup. Ct.) at paras. 33, 36-39**

43. In other contexts, criminal courts and administrative tribunals have similarly upheld the legitimacy of redacting irrelevant information from documentary disclosure.

> **See e.g.: *R. v. Ahmad*, [2009] O.J. No. 6156 (Sup. Ct.) at paras. 29-31, 93, 164, 200, 203**
>
> ***Mannesman Dematic Rapistan Ltd.*, [2001] O.L.R.D. No. 2821 (L.R.B.) at para. 11**
>
> ***Bakhtiyari v. British Columbia Institute of Technology*, 2006 BCHRT 494 at paras. 23, 52**

44. In *North American Trust Co. v. Mercer International Inc.*, Lowry J. of the B.C. Supreme Court reviewed decisions from Ontario, Alberta, the Federal Courts and the United Kingdom, in which those courts held that "litigants have not been required to disclose some parts of documents that are clearly irrelevant".

> ***North American Trust Co. v. Mercer International Inc.* (1999), 71 B.C.L.R. (3d) 72 (Sup. Ct.) at paras. 5-8 ["*North American Trust*"]**

45. In *McGee*, the authority relied upon by the moving parties, the Ontario Superior Court adopted the standard set out in *North American Trust* that litigants need not disclose the whole of a document, where the part withheld is "clearly not relevant to the issues, *and*, because of its nature, there has been good reason why that part should not be disclosed." The redacted portions of the document need not be privileged to benefit from this principle.

> ***North American Trust, supra* at paras. 11, 14-15**
>
> ***McGee v. London Life Insurance Co.*, [2010] O.J. No. 898 (Sup. Ct.) at paras. 9, 11 ["*McGee*"]**

46. *McGee*, and subsequent jurisprudence applying it, clearly acknowledges that there is no absolute prohibition on redacting irrelevant material. To the contrary, the Court in *McGee* noted that redactions have been permitted in a number of instances, including where the irrelevant information includes minutes of the meetings of directors or shareholders of a corporation, patent or trade secrets, commercially sensitive financial information, personal income tax information, sensitive medical information or personal records such as diaries and letters. If such confidential information is not relevant to the

litigation it may be redacted. None of these examples relate to privileged documents or information – if these redacted portions were relevant they would have to be disclosed.

***McGee, supra* at paras. 13-15, 20**

***Araujo v. Jews for Jesus*, [2010] O.J. No. 4739 (Sup. Ct.) at para. 24**

47. The moving parties contend that because the material at issue in this proceeding does not directly fit within any of the aforementioned categories, redactions are not permitted. This position fails to appreciate that the list of categories provided by Strathy J. in *McGee* is not exhaustive. Second, and more importantly, the moving parties' contention disregards the principal components of the legal test when a reviewing court or tribunal is charged with determining the validity of redactions---namely whether the material is "clearly irrelevant", and whether, due to the "nature" of the material, there is "good reason" why it ought not to be disclosed.

***McGee, supra* at paras. 11, 13-15, 20**

Moving Parties' Factum, Motion for Production at para. 22

48. The material at issue is "clearly irrelevant" to the legal question regarding the constitutional division of powers before the Board, as set out above at paragraphs 22-40.

49. In addition, because of the nature of this information, there is "good reason" why disclosure is not merited. The material at issue in this proceeding contains sensitive information that is consistently treated in a confidential manner and would otherwise not be available to the public. This material includes policy advice for the Minister, as well as Cabinet material.

See e.g.: *Hopps-King Estate v. Miller*, *supra* at para. 18

See contra: *McDermott v. Rebuck*, [2008] B.C.J. No. 1092 (S.C.) at paras. 14-16 (withholding income information to prevent the plaintiff from determining the defendant's resources to retain counsel is not "good reason" to resist disclosure)

50. Courts have long acknowledged the public importance of promoting full, frank and candid policy advice and discussion within government and have recognized "the general regime of secrecy that surrounds high level government documents". Significantly, courts have recognized that in some circumstances, the importance of maintaining confidentiality within government, especially at Cabinet, can justify refusing disclosure of *relevant* information.

***Carey v. Ontario*, [1986] 2 S.C.R. 637 at para. 80**

51. Describing this interest, the Supreme Court in *Carey* recognised that disclosure of this type of information could "lead to a decrease in completeness, in candour and in frankness of such documents if it were known that they could be produced in litigation and this in turn would detrimentally affect government policy and the public interest." As La Forest J. explained, on behalf of a unanimous Court:

> the business of government is sufficiently difficult that those charged with the responsibility for running the country should not be put in a position where they might be subject to harassment making Cabinet government unmanageable.

***Carey v. Ontario, supra* at paras. 50, 44**

See also: *Babcock v. Canada (Attorney General)*, [2002] 3 S.C.R. 3 at para. 18

52. This concern is so fundamental that it has informed the recognition of a unique ground of privilege, namely public interest immunity, that applies in certain circumstances to Minister and Cabinet-level information. Where public interest immunity applies, even documents or portions of documents that are relevant to the litigation may be kept confidential.

***Carey v. Ontario*, *supra* at para. 38**

53. In this proceeding, the Attorney General is not claiming that the redacted portions are subject to public interest immunity privilege; if the redacted portions were relevant the Crown would disclose them, just as it has already disclosed relevant portions of the same documents. The Attorney General's position is that it is unnecessary to assert privilege, other than solicitor-client privilege, because the redacted portions of the documents at issue are not relevant to the legal inquiry before the Board, and may be redacted in accordance with the principles set out in *North American Trust* and *McGee*, *supra*. However, the fact that public interest immunity has not been formally claimed does not fundamentally alter the "nature" of these Cabinet-level documents or the important public interest considerations that provide "good reason" to resist disclosure.

cf. Moving Parties' Factum, Motion for Production, para. 22

***Nova Scotia (Attorney General) v. Royal & Sun Alliance Insurance Co. of Canada*, *supra* at para. 46**

54. The confidential nature of Minister and Cabinet-level documents is given further recognition in the *Freedom of Information and Protection of Privacy Act,* which prevents disclosure of policy advice from public servants as well as Cabinet documents. The

purpose of the exemption for policy advice from civil servants was described by Privacy Commissioner Cropley in *Order PO-2034 (Ministry of Community and Social Services)* as protecting "the free-flow of advice and recommendations within the deliberative process of government decision-making and policy-making" to ensure that "persons employed in the public service are able to advise and make recommendations freely and frankly, and to preserve the head [of the department]'s ability to take actions and make decisions without unfair pressure."

> ***Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, s. 12(1), 13(1)**
>
> ***Order PO-2034 (Ministry of Community and Social Services)*, [2002] O.I.P.C. No. 119 at paras. 53-54; aff'd in *Ontario (Ministry of Community and Social Services) v. Ontario (Information and Privacy Commissioner)* (2004), 70 O.R. (3d) 680 (Div. Ct.) at para. 12**

55. Statutory exclusion of Cabinet documents from access to information was recommended by the Commission on Freedom of Information and Individual Privacy in order to preserve full and frank discussions at Cabinet, and to preserve the collective responsibility of Cabinet.

> [i]f Cabinet discussions were to become a matter of public record, individual ministers would be inhibited from expressing their frank opinions for fear of later being identified as dissidents. Moreover, if government policy were presented as a series of opposing views, the ability of members of the public and of the legislature to hold all ministers responsible for government policy would be diminished.
>
> ...
>
> The preservation of the confidentiality of Cabinet discussions would appear to be a necessary feature of a freedom of information scheme "compatible with the parliamentary traditions of the Government of Ontario."
>
> ***Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy*, vol. 2 (Toronto: Queen's Printer of Ontario, 1980) at 85**

56. In this case, where the information redacted is "clearly irrelevant" to the legal inquiry before the Board, and there are "good reasons" why the redacted material should not be disclosed, the interests of justice will not be served by ordering production.

i. Inspection by the Board

57. The moving parties contend that it is necessary that the Board inspect the redacted material, for the purpose of disposing of the motion. In the Attorney General's submission while inspection is within the Board's authority, the Board may permit the redaction without inspecting the material at issue. In other instances where a party has unsuccessfully challenged non-disclosure, Ontario courts and tribunals have deemed it unnecessary to review Cabinet and Minister-level documents to confirm the important public interests at stake. In such instances, the moving party's lack of access to materials in question did not impede the Court's resolution of the dispute.

> **See e.g. *Masse et al. v. Ontario* (November 8, 1995), Court File No. 590/95 (Div. Ct.)**
>
> ***Domus Architects v. Ontario (Ministry of Municipal Affairs and Housing), supra* at paras. 48-49**
>
> ***Ontario (Management Board of Cabinet),* [1998] O.L.R.D. No. 1598 (L.R.B.) at paras. 8. 46, 47, 52**
>
> **See also: *Westminster Airways Ltd. v. Kuwait Oil Co., supra* at 603-604, per Singleton LJ and Jenkins LJ**
>
> ***Cholakis v. Cholakis, supra* at para. 20**
>
> **Moving Parties' Factum, Motion for Production at para. 23**

58. Conversely, the Court or tribunal may not order disclosure of Cabinet and Minister-level material unless it has reviewed the material and satisfied itself that the

redacted material is relevant to the legal issues in the case. Such an inspection will permit the Tribunal

> to make certain that no disclosure is made that unnecessarily interferes with confidential government communications. Given the deference owing to the executive branch of government, Cabinet documents ought not to be disclosed without a preliminary judicial inspection to balance the competing interests of government confidentiality and the proper administration of justice.
>
> ***Carey v. Ontario*, *supra* at para. 86**
>
> ***Ontario (Management Board of Cabinet)*, *supra* at para. 53**

59. In undertaking this balancing, a reviewing body must proceed "with caution", given the fact that these documents relate to high-level government decision-making. Significantly, the Supreme Court has eschewed blanket orders of production:

> In doing this, it is well to remember that *only the particular facts relating to the case are revealed.* This is not a serious departure from the general regime of secrecy that surrounds high level government decisions.
>
> ***Carey v. Ontario*, *supra* at paras. 79-80 [emphasis added]**
>
> **See also: *Lazin v. Ciba-Geigy Canada Ltd., Jacobs and McClure*, *supra* at para. 8**

60. As Strathy J. noted in *McGee*, the Court has a duty to ensure that only relevant information is produced, "and also to ensure that the process is not being used for oppressive or collateral purposes."

> ***McGee*, *supra* at para. 20**

II. SOLICITOR-CLIENT PRIVILEGE

61. The moving parties do not contest the Attorney General's assertion of solicitor-client privilege. Their written submission states that the moving parties take "no issue with respect to those redactions made on the basis of privilege, provided that this basis justified." The basis for the Attorney General's assertion of solicitor-client privilege is outlined below, at paragraph 64ff.

Moving Parties' Factum, Motion for Production at para. 12

62. The intervenor Canadian Manufacturers and Exporters ["CME"], by contrast, challenge the Attorney General's claim of solicitor-client privilege and have filed a written submission providing argumentation in this regard. This is inappropriate for several reasons. First, the CME's submission impermissibly expands the scope of the instant motion commenced by the Consumers Council of Canada ["CCC"] and Aubrey Leblanc. The CME is not one of the moving parties on this motion—the productions sought relate solely to questions taken under advisement from the cross-examination of the Government's witness by counsel for the CCC. None of the responses provided to the CME on cross-examination have been challenged.

Transcript, Cross-Examination of Mr. Barry Beale, Nov. 16, 2010 (OEB Technical Conference), pp. 88-127

Moving Parties' Factum, Motion for Production at paras. 13-15

***Bedford v. Canada (Attorney General),* 2011 ONCA 209 at paras. 5-8, 10, 16**

63. Second, the CME's submission violates the intent of Procedural Order No. 9, which lays out a schedule for the receipt of materials to facilitate the Board's consideration of the legal questions at issue on this motion. Procedural Order No. 9 contemplates the receipt of materials "responding" to the instant motion by April 14, 2011. The CME's factum cannot be construed as a "responding" submission. On its face it is a supplementary submission in support of the moving parties' request for relief, which requires a response from the Attorney General, as the CME's cover letter dated April 12, 2011 acknowledges. Serving such a submission at 4:46pm two days prior to the deadline for the delivery of the Attorney General's materials prejudices the Crown's ability to respond in a timely manner and precludes complete consideration of the issues by this Board aided by comprehensive written submissions.

Procedural Order No. 9, OEB, File No. EB-2010-0184

CME Factum, Motion for Production at paras. 1-2

(a) Legal advice

64. Solicitor-client privilege extends to all confidential communications for the purpose of seeking or providing legal advice. In *General Accident Assurance Co. v. Chrusz*, Doherty J.A. recognized that the protection of these communications serves several significant purposes:

> [P]romoting frank communications between client and solicitor where legal advice is being sought or given, facilitating access to justice, recognizing the inherent value of personal autonomy and affirming the efficacy of the adversarial process. Each of these purposes should guide the application of the established criteria when determining the existence of client-solicitor privilege in specific fact situations.

***General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321(C.A.) at 348 (Doherty JA, dissenting, but not on this point)**

***Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, [2008] 2 S.C.R 574 at para. 9**

65. Solicitor-client privilege attaches to communications within government for the purpose of providing information to legal advisors and communicating legal advice.

> Many barristers and solicitors are employed as legal advisers, whole time, by a single employer. Sometimes the employer is a great commercial concern. At other times it is a government department or a local authority. It may even be the government itself, like the Treasury Solicitor and his staff. In every case these legal advisers do legal work for their employer and for no one else. They are paid, not by fees for each piece of work, but by a fixed annual salary. They are, no doubt, servants or agents of the employer. For that reason the judge thought that they were in a different position from other legal advisers who are in private practice. *I do not think this is correct. They are regarded by the law as in every respect in the same position as those who practise on their own account. The only difference is that they act for one client only, and not for several clients. They must uphold the same standards of honour and of etiquette. They are subject to the same duties to their client and to the court. They must respect the same confidences. They and their clients have the same privileges.... I have always proceeded on the footing that the communications between the legal advisers and their employer (who is their client) are the subject of legal professional privilege; and I have never known it questioned.*

***R. v. Campbell*, [1999] 1 S.C.R. 565 at para. 50 [emphasis added] (citing *Crompton (Alfred) Amusement Machines Ltd. v. Comrs. Of Customs and Excise (No. 2)*, [1972] All E.R. 353 (C.A.), per Lord Denning MR at p. 376)**

***Telus Communications Inc. v. Canada (Attorney General)*, 2004 FCA 380 at paras. 8-9**

See also: *Quebec (Attorney General) v. Canada (Attorney General)*, [2001] F.C.J. No. 198 (C.A.) at paras. 144-45, 148-49, 154, 158-59

66. Documents provided to Cabinet regularly include legal advice deemed to be privileged.

***Nova Scotia (Attorney General) v. Royal & Sun Alliance Insurance Co. of Canada, supra* at paras. 65, 67**

***Quebec (Attorney General) v. Canada (Attorney General), supra* at paras. 146-47, 163-65**

67. Contrary to the position of CME, the Ontario Superior Court of Justice has held "there is no obligation when claiming privilege that one file an affidavit or produce the impugned documents for scrutiny by the Court." In the normal course, the assertion of privilege is made by counsel, in his or her capacity as an officer of the court.

***Xentel DM Inv. v. Schroder Ventures US Fund L.P. 1,* [2008] O.J. No. 1788 at para. 6 (Sup. Ct.), leave to appeal ref'd, [2008] O.J. No. 4044 (Div. Ct.)**

CME Factum, Motion for Production at para. 21

68. In the present case, information within certain documents provided in response to questions taken under advisement, numbered JT 1.5B, 1.6 and 1.7, meet the legal test for the assertion of solicitor-client privilege. These documents include: a) communications between solicitors and their clients, namely the Minister of Energy or Cabinet (or the passing on of such communications by an agent); b) that entail the provision of legal advice regarding the cost recovery program at issue; c) which, as communication at high levels of government, is plainly intended to be kept confidential.

***Canada v. Solosky*, [1980] 1 S.C.R. 821 at p. 13 of 17 [QL]**

***Telus Communications Inc. v. Canada (Attorney General), supra* at paras. 16, 19-20**

***General Accident Assurance Co. v. Chrusz, supra* at 351**

***Sopinka, Lederman and Bryant: the Law of Evidence in Canada*, 3rd ed. (Markham, ON: LexisNexis Canada, 2009) at s. 14.101**

69. In the result legal advice, and in one case communications setting out the scope of such legal advice, has been redacted in the three documents set out below. In no instance do the redactions asserted under solicitor-client privilege contain communications for other purposes, such as the provision of business or policy advice:

- JT 1.5B: Exhibit 1, "Slide Deck to Update Minister" at pp. 49, 50; [**Moving Parties' Motion Record, Tab 2B, pp. 35, 36]**

  - Passing on confidential advice from solicitors in Constitutional Law Branch to the Minister of Energy, re the constitutionality of proposed methods of funding cost recovery against natural gas. (Note: recovery against natural gas was never implemented and is therefore also irrelevant.)

- JT 1.6 and 1.7: Exhibit 2 "Ministry of Energy and Infrastructure: MB 20 for MEI's Conservation Cost Recovery From Utilities and the IESO" at pp. 2, 3, 4; **[Moving Parties' Motion Record, Tab 2C, pp. 49, 50, 51]**

  - Passing on confidential advice (and the scope of such advice) from solicitors in Constitutional Law Branch to Cabinet, re the constitutionality of proposed methods of funding cost recovery against electricity and natural gas, including avoiding cost recovery altogether. (Note: recovery against natural gas was never implemented and is therefore also irrelevant.)

- JT 1.6 and 1.7: Exhibit 3 "Legislation and Regulations Committee: Ministry Approval Form" at pp. 3, 5. **[Moving Parties' Motion Record, Tab 2C, pp. 55, 57]**

  - Confidential advice from Ministry of the Attorney General solicitors to Cabinet, re legal process requirements: Order in Council to bring into force certain provisions of the GEGEA. (Note: this Order in Council is not impugned in present constitutional challenge and is therefore also irrelevant.)

  - Passing on confidential advice from solicitors in Constitutional Law Branch to Cabinet, re the constitutionality of cost recovery against electricity.

***Telus Communications Inc. v. Canada (Attorney General)*, *supra* at para. 10**

(b) The *Statutory Powers Procedures Act* prevents the Board from ordering disclosure of privileged material

70. The Board's authority to make orders regarding disclosure does not extend to orders for disclosure of privileged materials. Section 5.4 of the *Statutory Powers Procedure Act* authorizes the Board to make orders for the exchange of documents, the examination of a witness, or any other form of disclosure, but under s. 5.4(2) "does not authorize the making of an order requiring disclosure of privileged information."

> ***Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, s. 3 (Application), s. 5.4 (Disclosure), s.25.1 (Rules)**
>
> ***OEBA*, *supra*, s. 4.2(3) (Rules of Practice and Procedure)**
>
> ***Hopps-King Estate v. Miller*, *supra* at paras. 16-17**
>
> ***Sopinka, Lederman and Bryant: the Law of Evidence in Canada*, 3rd ed. (Markham, ON: LexisNexis Canada, 2009) at s. 14.47**

71. Even where a grant of statutory authority permits an official to conduct general investigations, including the production of documents, the Supreme Court has not sanctioned piercing the important privilege over solicitor-client communications. As Binnie J. held in *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*:

> Courts will decline to review solicitor-client documents to adjudicate the existence of privilege unless evidence or argument establishing the necessity of doing so to fairly decide the issue.
>
> ***Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, *supra* at para. 17 (see also, paras. 2, 9-11, 21)**

72. The excerpts noted above at paragraph 69 have been redacted on the basis of solicitor-client privilege, in order to safeguard the public interest in the free flow of legal

advice. As the Board does not have the authority to order their disclosure, the redactions should be permitted.

> ***Canada (Privacy Commissioner) v. Blood Tribe Department of Health, supra* at para. 9**

III. WITNESS RE-ATTENDANCE

73. The moving parties seek the re-attendance of the Attorney General's witness to answer further questions arising from the production of the unredacted documents.

> **cf. Moving Parties' Factum, Motion for Production at paras. 32ff**

74. The Attorney General opposes this request in part. Further cross-examination of the witness is only justified in relation to answers already provided to undertakings and questions taken under advisement. Additional cross-examination respecting irrelevant and privileged redacted material is not required in order to provide full and fair disclosure and would unduly lengthen the proceedings.

IV. OTHER ISSUES

75. The moving parties contend that where documents include both relevant and irrelevant information, such documents should be produced in full, and the inquiry can shift to the weight attributed to this material by the Board. This position conflates the issue currently before this Tribunal. The question on this motion is whether to order production of materials redacted primarily on the basis of relevance. Simply stating that all redacted materials ought to be produced, and that the Board may exercise its balancing

in assessing the weight assigned to the various information, denies the Board any material role to play in determining the instant motion. Moreover, it also presupposes the admissibility of the very information at issue at the eventual hearing on the merits of the constitutional challenge.

Moving Parties' Factum, Motion for Production at para. 25

76. The issue of weight need only be addressed if the material in question is deemed admissible. Evidence is not admissible unless it is relevant. As indicated in the complete passage from *The Law of Evidence* relied upon by the moving parties at paragraphs 23 and 25 of their factum, "[w]ithout relevance the evidence can have no weight."

> 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. *Without relevance the evidence can have no weight.*
>
> ***Sopinka, Lederman and Bryant: the Law of Evidence in Canada*, 3rd ed. (Markham, ON: LexisNexis Canada, 2009) at s.2.49, 2.33 [emphasis added]**
>
> **Moving Parties' Factum, Motion for Production at paras. 23, 25**

77. Notwithstanding the moving parties' assertions to the contrary, the determination of relevance remains the focus of this Board's inquiry, and serves as an important limit on wide-ranging and needless disclosure:

> The threshold test of relevance plays, as it does in many other contexts, an important gatekeeping role in the prevention of fishing expeditions.
>
> ***Globe and Mail v. Canada (Attorney General),* [2010] 2 S.C.R. 592 at para. 56**

E. ORDER SOUGHT

78. The Attorney General requests that the motion be denied in part. Disclosure, in unredacted form, of documents provided in response to questions taken under advisement during the cross examination of the Attorney General's witness, should be denied.

79. The re-attendance of the Attorney General's witness ought to be allowed, but only in respect of answers already provided to the undertakings and questions taken under advisement. Questioning the witness in relation to irrelevant and privileged redacted material is unmerited and should not be permitted by the Board.

F. COSTS

80. The Attorney General does not seek his costs in this proceeding.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

April 14, 2011

Robert E. Charney

Arif Virani

Counsel, Attorney General of Ontario,
Constitutional Law Branch

Schedule "1"

No.	Undertaking/Under Advisement	Response	Date
JT 1.1	To advise if there are any changes between contents of the Affidavit of Barry Beale, Exhibit A, to the grant table amounts located at exhibit KT 1.1, p. 12	Letter response, outlining differences	Nov. 26, 2010
JT 1.2	To provide analysis of the Peak Demand reductions brought about by the HESP and OSTHI programs	Letter response, indicating peak demand reductions and calculation methodology	Nov. 26, 2010
JT 1.3	To make best efforts to advise if written estimates exist for the program funding allocation for HESP and OSTHI	Letter response, no written estimates provided	Nov. 26, 2010
JT 1.4	To take under advisement whether to produce any written recommendations or analysis provided to the Minister for the increase in OSTHI funding levels	Documents provided to Minister's Staff: **1.** Briefing Note (Mar 22, 2009): NR Can Increases Maximum Per-Project Payment for Solar Hot Water Systems under the Eco-Energy for Renewable Heat Program **2.** Briefing Note (undated): NR Can Increases Maximum Per-Project Payment for Solar Hot Water Systems under the Eco-Energy for Renewable Heat Program **[REDACTED-3RD PARTY IDENTIFYING INFORMATION]** **3.** Briefing Note (Aug 26, 2009): NR Can Increases Maximum Per-Project Payment for Solar Hot Water Systems under the Eco-Energy for Renewable Heat Program **[REDACTED-3RD**	Dec. 20, 2010

		PARTY IDENTIFYING INFORMATION]	
JT 1.5A	To confirm why O. Reg. 66/10 was not published in the Environmental Registry for comment	Answered during Cross-Examination	Nov. 26, 2010
JT 1.5	To take under advisement whether to produce any analysis/advice given to the Minister respecting the content of ss. 26.1 and 26.2 of the *OEBA*, at the time of the development of the Green Energy and Green Economy Act	Documents provided to the Minister of Energy: **1.** Copy of GEA Rational for Reallocation of MEI Program Costs to Ratepayers **[REDACTED-RELEVANCE]** **2.** Copy Program Cost Recover Outline Original **[REDACTED-RELEVANCE]** **3.** Program Cost Recover 2009-04-27+PK's Comments **[REDACTED-RELEVANCE]**	Dec. 20, 2010
JT 1.5B	To take under advisement whether to provide any Ministry reports or analyses that support the creation and implementation of O. Reg. 66/10	Document provided to the Minister of Energy: **1.** Slide Deck to Update Minister **[REDACTED-RELEVANCE; SOLICITOR-CLIENT PRIVILEGE]**	Dec. 20, 2010
JT 1.6	To take under advisement whether to provide any written proxy for a business case underlying O. Reg. 66/10	Document provided to Cabinet: **1.** Application and Report to Treasury Board/Management Board of Cabinet **[REDACTED-RELEVANCE]** **2.** Ministry of Energy and Infrastructure: MB 20 for MEI's Conservation Cost	Dec. 23, 2010

		Recovery from Electricity Utilities and the IESO **[REDACTED-RELEVANCE; SOLICITOR-CLIENT PRIVILEGE]** **3.** Legislation and Regulations Committee: Ministry Approval Form **[REDACTED-RELEVANCE; SOLICITOR-CLIENT PRIVILEGE]**	
JT 1.7	To take under advisement whether to provide a regulatory impact assessment or proxy prepared in connection with O. Reg. 66/10	See Response to JT 1.6	Dec. 23, 2010
JT 1.8	To make best efforts to provide the number of megawatts saved from the HESP program	Letter Response, indicating HESP savings, and calculation methodology	Nov. 26, 2010
JT 1.9	To make best efforts to provide the number of megawatts saved from the OSTHI program	Letter Response, indicating OSTHI savings, and calculation methodology	Nov. 26, 2010
JT 1.10	To provide a calculation of anticipated quantified greenhouse gas emissions reduction associated with HESP and OSTHI	Letter Response, indicating reductions, and calculation methodology	Nov. 26, 2010
JT 1.11(1)	To provide cost estimates for the incentive costs under each of the HESP and OSTHI programs	Answered during Cross-Examination	Nov. 26, 2010
JT 1.11(2)	To provide a date for the year-end estimates of incentive costs, for Fiscal Year 2010-11	Letter Response, re timing of estimates	Nov. 26, 2010
JT 1.12	To take under advisement whether to provide details of the legislative context relied on in making recommendations on how to define the special purposes in s. 26.2 of the *OEBA*	Letter Response, indicating material reviewed but not relied upon Documents: 22 Contemporary Exhibits from the U.S. Database of State Incentives for Renewables and Efficiency	Nov. 26, 2010

SCHEDULE "A"

1. *Ontario Federation of Anglers & Hunters v. Ontario (Ministry of Natural Resources)* (2002), 211 D.L.R. (4th) 741 (Ont. C.A.)
2. *Cholakis v. Cholakis,* [2000] M.J. No. 6 (Q.B.)
3. *Agnew v. New Brunswick Telephone Co.,* [2002] N.B.R. (2d) (Supp.) No. 53 (Q.B.)
4. *Lazin v. Ciba-Geigy Canada Ltd., Jacobs and McClure,* [1976] 3 W.W.R. 460 (Alta. C.A.)
5. *Westminster Airways Ltd. v. Kuwait Oil Co.*, [1951] 1 K.B. 134, [1950] 2 All E.R. 596 (C.A.)
6. *McKergow v. Comstock*, [1906] O.J. No. 320 (Div. Ct.)
7. *Hoyt v. Insurance Corp. of British Columbia* (2001), 89 B.C.L.R. (3d) 44 (C.A.)
8. *Sopinka, Lederman and Bryant: the Law of Evidence in Canada*, 3rd ed. (Markham, ON: LexisNexis Canada, 2009)
9. *Hopps-King Estate v. Miller*, [1998] O. J. No. 5556 (Ont. Master)
10. *Apotex Inc. v. Canada*, [2005] F.C.J. No. 1021 (C.A.)
11. *Westbank First Nation v. British Columbia Hydro and Power Authority*, [1999] 3 S.C.R. 134
12. *620 Connaught Ltd. v. Canada (Attorney General)*, [2008] 1 S.C.R. 131
13. *Confédération des Syndicats Nationaux v. Canada (Attorney General)*, [2008] 3 S.C.R. 511
14. *Eurig Estate (Re)*, [1998] 2 S.C.R. 565
15. *Reference Re Firearms Act (Can.),* [2000] 1 S.C.R. 783
16. *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] 2 S.C.R. 567
17. *R. v. Oakes*, [1986] 1 S.C.R. 103
18. *Club Pro Adult Entertainment Inc. v. Ontario* (2008), 233 O.A.C. 355
19. *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199
20. *Le Syndicat national des employés de l'aluminium d'Arvida inc. c. Le Procureur général du Canada*, [2003] J.Q. no 15801 (Sup. Ct.)
21. *Domus Architects v. Ontario (Ministry of Municipal Affairs and Housing),* [2001] OJ No. 3597 (Sup. Ct.)
22. *British Columbia Teachers' Federation v. British Columbia (Attorney General)*, [2008] B.C.J. No. 2414 (Sup. Ct.)

23. *Thorne's Hardware Ltd. v. The Queen*, [1983] 1 S.C.R. 106

24. *Ontario Black Bear/Ontario Sportsmen and Resource Users Assn. v. Ontario*, [2000] O.J. No. 263 (Sup. Ct.)

25. *Ontario Teachers' Federation v. Ontario (Attorney General)* (1998), 39 O.R. (3d) 140 (Gen. Div.)

26. *Manufacturer's Life Insurance Co. v. Dofasco Inc.*, [1989] O.J. No. 1456 (H.C.) [QL]

27. *O'Neill v. Canada (Attorney General)*, [2006] O.J. No. 106 (Sup. Ct.)

28. *John Labatt Ltd. v. Molson Breweries*, [1994] 1 F.C. 801 (T.D.)

29. *Nova Scotia (Attorney General) v. Royal & Sun Alliance Insurance Co. of Canada*, [2000] N.S.J. No. 404 (Sup. Ct.)

30. *R. v. Ahmad*, [2009] O.J. No. 6156 (Sup. Ct.)

31. *Mannesman Dematic Rapistan Ltd.*, [2001] O.L.R.D. No. 2821 (L.R.B.)

32. *Bakhtiyari v. British Columbia Institute of Technology*, 2006 BCHRT 494

33. *North American Trust Co. v. Mercer International Inc.* (1999), 71 B.C.L.R. (3d) 72 (Sup. Ct.)

34. *McGee v. London Life Insurance Co.*, [2010] O.J. No. 898 (Sup. Ct.)

35. *Araujo v. Jews for Jesus*, [2010] O.J. No. 4739 (Sup. Ct.)

36. *McDermott v. Rebuck*, [2008] B.C.J. No. 1092 (S.C.)

37. *Carey v. Ontario*, [1986] 2 S.C.R. 637

38. *Babcock v. Canada (Attorney General)*, [2002] 3 S.C.R. 3

39. *Order PO-2034 (Ministry of Community and Social Services)*, [2002] O.I.P.C. No. 119; aff'd in *Ontario (Ministry of Community and Social Services) v. Ontario (Information and Privacy Commissioner)* (2004), 70 O.R. (3d) 680 (Div. Ct.)

40. *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy*, vol. 2 (Toronto: Queen's Printer of Ontario, 1980)

41. *Masse et al. v. Ontario* (November 8, 1995), Court File No. 590/95 (Div. Ct.)

42. *Ontario (Management Board of Cabinet),* [1998] O.L.R.D. No. 1598 (L.R.B.)

43. *Bedford v. Canada (Attorney General),* 2011 ONCA 209

44. *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321(C.A.)

45. *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, [2008] 2 S.C.R 574

46. *R. v. Campbell,* [1999] 1 S.C.R. 565

47. *Telus Communications Inc. v. Canada (Attorney General)*, 2004 FCA 380

48. *Quebec (Attorney General) v. Canada (Attorney General)*, [2001] F.C.J. No. 198 (C.A.)

49. *Xentel DM Inv. v. Schroder Ventures US Fund L.P. 1,* [2008] O.J. No. 1788 (Sup. Ct.), leave to appeal ref'd, [2008] O.J. No. 4044 (Div. Ct.)

50. *Canada v. Solosky*, [1980] 1 S.C.R. 821

51. *Globe and Mail v. Canada (Attorney General),* [2010] 2 S.C.R. 592

SCHEDULE "B"

1. Law Society of Upper Canada, *Rules of Professional Conduct*, Rule 4.01

2. *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sch. B, s. 4.2 (Rules of Practice and Procedure), s. 26

3. O. Reg. 66/10

4. *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, ss. 12-13

5. *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, s. 3 (Application), s. 5.4 (Disclosure), s.25.1 (Rules)

The Law Society of Upper Canada | Barreau du Haut-Canada

Rules of Professional Conduct

~Effective November 1, 2000~

Adopted by Convocation June 22, 2000
Amendments Current to November 25, 2010

Admissions made by the accused to a lawyer may impose strict limitations on the conduct of the defence, and the accused should be made aware of this. For example, if the accused clearly admits to the lawyer the factual and mental elements necessary to constitute the offence, the lawyer, if convinced that the admissions are true and voluntary, may properly take objection to the jurisdiction of the court, or to the form of the indictment, or to the admissibility or sufficiency of the evidence, but must not suggest that some other person committed the offence or call any evidence which, by reason of the admissions, the lawyer believes to be false. Nor may the lawyer set up an affirmative case inconsistent with such admissions, for example, by calling evidence in support of an alibi intended to show that the accused could not have done or, in fact, has not done the act. Such admissions will also impose a limit on the extent to which the lawyer may attack the evidence for the prosecution. The lawyer is entitled to test the evidence given by each individual witness for the prosecution and argue that the evidence taken as a whole is insufficient to amount to proof that the accused is guilty of the offence charged, but the lawyer should go no further than that.

The lawyer should never waive or abandon the client's legal rights, for example, an available defence under a statute of limitations, without the client's informed consent.

In civil matters, it is desirable that the lawyer should avoid and discourage the client from resorting to frivolous or vexatious objections, or from attempts to gain advantage from slips or oversights not going to the merits, or from tactics that will merely delay or harass the other side. Such practices can readily bring the administration of justice and the legal profession into disrepute.

In civil proceedings, the lawyer has a duty not to mislead the tribunal about the position of the client in the adversary process. Thus, a lawyer representing a party to litigation who has made an agreement or is party to an agreement made before or during the trial by which a plaintiff is guaranteed recovery by one or more parties notwithstanding the judgment of the court, should immediately reveal the existence and particulars of the agreement to the court and to all parties to the proceedings.

(2) When acting as an advocate, a lawyer shall not

(a) abuse the process of the tribunal by instituting or prosecuting proceedings which, although legal in themselves, are clearly motivated by malice on the part of the client and are brought solely for the purpose of injuring the other party,

(b) knowingly assist or permit the client to do anything that the lawyer considers to be dishonest or dishonourable,

(c) appear before a judicial officer when the lawyer, the lawyer's associates or the client have business or personal relationships with the officer that give rise to or might reasonably appear to give rise to pressure, influence, or inducement affecting the impartiality of the officer,

(d) endeavour or allow anyone else to endeavour, directly or indirectly, to influence the decision or action of a tribunal or any of its officials in any case or matter by any means other than open persuasion as an advocate,

(e) knowingly attempt to deceive a tribunal or influence the course of justice by offering false evidence, misstating facts or law, presenting or relying upon a false or deceptive affidavit, suppressing what ought to be disclosed, or otherwise assisting in any fraud, crime, or illegal conduct,

(f) knowingly misstate the contents of a document, the testimony of a witness, the substance of an argument, or the provisions of a statute or like authority,

(g) knowingly assert as true a fact when its truth cannot reasonably be supported by the evidence or as a matter of which notice may be taken by the tribunal,

(h) deliberately refrain from informing the tribunal of any binding authority that the lawyer considers to be directly on point and that has not been mentioned by an opponent,

(i) dissuade a witness from giving evidence or advise a witness to be absent,

(j) knowingly permit a witness or party to be presented in a false or misleading way or to impersonate another,

(k) needlessly abuse, hector, or harass a witness,

(l) when representing a complainant or potential complainant, attempt to gain a benefit for the complainant by threatening the laying of a criminal charge or by offering to seek or to procure the withdrawal of a criminal charge, and

(m) needlessly inconvenience a witness.

Commentary

A lawyer representing an accused or potential accused may communicate with a complainant or potential complainant, for example, to obtain factual information, to arrange for restitution or an apology from the accused, or to defend or settle any civil claims between the accused and the complainant. However, where the complainant or potential complaint is vulnerable, the lawyer must take care not to take unfair or improper advantage of the circumstances. Where the complainant or potential complainant is unrepresented, the lawyer should be governed by the rules about unrepresented persons and make it clear that the lawyer is acting exclusively in the interests of the accused or potential accused and, accordingly, the lawyer's comments may be partisan. When communicating with an unrepresented complainant or potential complainant, it is prudent to have a witness present.

Duty as Prosecutor

(3) When acting as a prosecutor, a lawyer shall act for the public and the administration of justice resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy, and respect.

Commentary

When engaged as a prosecutor, the lawyer's prime duty is not to seek to convict but to see that justice is done through a fair trial on the merits. The prosecutor exercises a public function involving much discretion and power and must act fairly and dispassionately. The prosecutor should not do anything that might prevent the accused from being represented by counsel or communicating with counsel and, to the extent required by law and accepted practice, should make timely disclosure to defence counsel or directly to an unrepresented accused of all relevant and known facts and witnesses, whether tending to show guilt or innocence.

Discovery Obligations

(4) Where the rules of a tribunal require the parties to produce documents or attend on examinations for discovery, a lawyer, when acting as an advocate

(a) shall explain to his or her client

(i) the necessity of making full disclosure of all documents relating to any matter in issue, and

(ii) the duty to answer to the best of his or her knowledge, information, and belief, any proper question relating to any issue in the action or made discoverable by the rules of court or the rules of the tribunal,

(b) shall assist the client in fulfilling his or her obligations to make full disclosure, and

(c) shall not make frivolous requests for the production of documents or make frivolous demands for information at the examination for discovery.

Disclosure of Error or Omission

(5) A lawyer who has unknowingly done or failed to do something that if done or omitted knowingly would have been in breach of this rule and who discovers it, shall, subject to rule 2.03 (Confidentiality), disclose the error or omission and do all that can reasonably be done in the circumstances to rectify it.

Commentary

If the client desires that a course be taken that would involve a breach of this rule, the lawyer must refuse and do everything reasonably possible to prevent it. If that cannot be done the lawyer should, subject to rule 2.09 (Withdrawal from Representation), withdraw or seek leave to do so.

Courtesy

(6) A lawyer shall be courteous, civil, and act in good faith to the tribunal and with all persons with whom the lawyer has dealings in the course of litigation.

> Commentary
>
> Legal contempt of court and the professional obligation outlined here are not identical, and a consistent pattern of rude, provocative, or disruptive conduct by the lawyer, even though unpunished as contempt, might well merit discipline.

Undertakings

(7) A lawyer shall strictly and scrupulously carry out an undertaking given to the tribunal or to another legal practitioner in the course of litigation.

[Amended – June 2009]

> Commentary
>
> Unless clearly qualified, the lawyer's undertaking is a personal promise and responsibility.

Agreement on Guilty Plea

(8) Before a charge is laid or at any time after a charge is laid, a lawyer for an accused or potential accused may discuss with the prosecutor the possible disposition of the case, unless the client instructs otherwise.

(9) Where, following investigation,

(a) a lawyer for an accused or potential accused advises his or her client about the prospects for an acquittal or finding of guilt,

(b) the lawyer advises the client of the implications and possible consequences of a guilty plea and particularly of the sentencing authority and discretion of the court, including the fact that the court is not bound by any agreement about a guilty plea,

(c) the client voluntarily is prepared to admit the necessary factual and mental elements of the offence charged, and

(d) the client voluntarily instructs the lawyer to enter into an agreement as to a guilty plea,

the lawyer may enter into an agreement with the prosecutor about a guilty plea.

Commentary

The public interest in the proper administration of justice should not be sacrificed in the interest of expediency.

4.02 THE LAWYER AS WITNESS

Submission of Affidavit

4.02 (1) Subject to any contrary provisions of the law or the discretion of the tribunal before which a lawyer is appearing, a lawyer who appears as advocate shall not submit his or her own affidavit to the tribunal.

Submission of Testimony

(2) Subject to any contrary provisions of the law or the discretion of the tribunal before which a lawyer is appearing, a lawyer who appears as advocate shall not testify before the tribunal unless permitted to do so by the rules of court or the rules of procedure of the tribunal, or unless the matter is purely formal or uncontroverted.

Commentary

A lawyer should not express personal opinions or beliefs or assert as a fact anything that is properly subject to legal proof, cross-examination, or challenge. The lawyer should not in effect appear as an unsworn witness or put the lawyer's own credibility in issue. The lawyer who is a necessary witness should testify and entrust the conduct of the case to another lawyer. There are no restrictions on the advocate's right to cross-examine another lawyer, however, and the lawyer who does appear as a witness should not expect to receive special treatment because of professional status.

Appeals

(3) A lawyer who is a witness in proceedings shall not appear as advocate in any appeal from the decision in those proceedings.

4.03 INTERVIEWING WITNESSES

Interviewing Witnesses

4.03 Subject to the rules on communication with a represented party set out in subrules 6.03(7),(8) and (9), a lawyer may seek information from any potential witness, whether under subpoena or not, but the lawyer shall disclose the lawyer's interest and take care not to subvert or suppress any evidence or procure the witness to stay out of the way.

[Amended – November 2007]

Ontario Energy Board Act, 1998

S.O. 1998, CHAPTER 15
SCHEDULE B

Consolidation Period: From March 30, 2011 to the e-Laws currency date.

Last amendment: 2011, c. 1, Sched. 4.

Management committee

4.2 (1) The Board shall have a management committee composed of the chair and the vice-chairs. 2003, c. 3, s. 7.

Duties

(2) The management committee shall manage the activities of the Board, including the Board's budgeting and the allocation of the Board's resources, and shall perform such other duties as are assigned to the management committee under this Act. 2003, c. 3, s. 7.

Rules of practice and procedure

(3) The Board's authority to make rules governing practice and procedure under section 25.1 of the *Statutory Powers Procedure Act* shall be exercised by the management committee on behalf of the Board. 2003, c. 3, s. 7.

Quorum

(4) Subject to the by-laws made under section 4.10, two members of the management committee constitute a quorum. 2003, c. 3, s. 7.

Presiding officer

(5) The chair shall preside over management committee meetings. 2003, c. 3, s. 7.

Delegation

(6) The management committee shall not delegate any of its powers or duties under the following provisions:

1. Sections 4.8 to 4.10.
2. Subsection 6 (1).
3. Section 26.

3.1 Section 26.1.

4. Any other provision prescribed by the regulations. 2003, c. 3, s. 7; 2009, c. 12, Sched. D, s. 4.

Same

(7) Subject to subsection (6), the management committee may delegate its powers and duties, but only to a member of the management committee. 2003, c. 3, s. 7.

Conditions and restrictions

(8) A delegation under subsection (7) is subject to such conditions and restrictions as the management committee may specify in writing. 2003, c. 3, s. 7.

…

Assessment, Ministry conservation programs, etc.

26.1 (1) Subject to the regulations, the Board shall assess the following persons or classes of persons, as prescribed by regulation, with respect to the expenses incurred and expenditures made by the Ministry of Energy and Infrastructure in respect of its energy conservation programs or renewable energy programs provided under this Act, the *Green Energy Act, 2009*, the *Ministry of Energy and Infrastructure Act* or any other Act:

1. In respect of consumers in their service areas, gas distributors and licensed distributors.
2. The IESO.
3. Any other person prescribed by regulation. 2009, c. 12, Sched. D, s. 6.

Assessments, collection by gas distributors and licensed distributors

(2) Gas distributors and licensed distributors may collect the amounts assessed under subsection (1) from the consumers or classes of consumers as are prescribed by regulation and in the manner prescribed by regulation. 2009, c. 12, Sched. D, s. 6.

Assessments, IESO

(3) The IESO may collect the amounts assessed under subsection (1) from market participants or classes of market participants as are prescribed by regulation and in the manner prescribed by regulation. 2009, c. 12, Sched. D, s. 6.

Assessment, amount and timing

(4) For the purposes of subsection (1), the Board shall assess the amount prescribed by regulation within the time prescribed by regulation in accordance with the methods or rules prescribed by regulation. 2009, c. 12, Sched. D, s. 6.

Assessment, obligation to pay

(5) Every person assessed under subsection (1) shall pay the amount assessed in accordance with the Board's assessment by remitting the amount to the Minister of Finance. 2009, c. 12, Sched. D, s. 6.

Failure to pay

(6) If a person fails to pay an assessment made under subsection (1), the Board may, without a hearing, order the person to pay the assessment. 2009, c. 12, Sched. D, s. 6.

Reporting

(7) Persons referred to in subsection (1) shall report such information in such manner and at such times to the Board or to the Minister as is prescribed by regulation. 2009, c. 12, Sched. D, s. 6.

Regulations

(8) The Lieutenant Governor in Council may make regulations,

(a) governing assessments under this section, including,

(i) prescribing the amount to be assessed or the amounts to be assessed against each person, or class of person liable to pay an assessment or the method of calculating the amount or amounts, and

(ii) prescribing the time within which the assessments must occur;

(b) prescribing persons or classes of persons liable to pay an assessment under subsection (1);

(c) prescribing the frequency of the assessments;

(d) respecting the manner by which an assessment under this section is carried out;

(e) prescribing the proportion of the assessment for which each person or class of persons is liable or a method of determining the proportion;

(f) with respect to subsection (7), prescribing the time at which such reports must be made or submitted, the manner by which such reports must be made or submitted, and governing the information to be provided, including the manner in which such information is presented or provided;

(g) prescribing such other matters relating to the carrying out of an assessment as the Lieutenant Governor in Council considers appropriate. 2009, c. 12, Sched. D, s. 6.

Special purposes

26.2 (1) For the purpose of the *Financial Administration Act*, all amounts collected under section 26.1 relating to assessments paid shall be deemed to be money paid to Ontario for the special purposes set out in subsection (2). 2009, c. 12, Sched. D, s. 6.

Same

(2) The following are the special purposes for which amounts collected under section 26.1 relating to assessments are paid to Ontario:

1. To fund conservation or renewable energy programs aimed at decreasing the consumption of two or more of the following fuels:

i. natural gas,

ii. electricity,

iii. propane,

iv. oil,

v. coal, and

vi. wood.

2. To fund conservation or renewable energy programs aimed at causing consumers of fuel to change from one or more of the fuels listed in paragraph 1 to any other fuel or fuels listed in that paragraph.

3. To fund conservation or renewable energy programs aimed at decreasing peak electricity demand, while increasing or decreasing the consumption of another type of fuel.

4. To fund research and development or other engineering or scientific activities aimed at furthering the conservation or the efficient use of fuels.

5. To fund conservation or renewable energy programs aimed at a specific geographical, social, income or other sector of Ontario.

6. To reimburse the Province for expenditures it incurs for any of the above purposes. 2009, c. 12, Sched. D, s. 6.

Special Purpose Conservation and Renewable Energy Conservation Fund

(3) The Minister of Finance shall maintain in the Public Accounts an account to be known as the Ministry of Energy and Infrastructure Special Purpose Conservation and Renewable Energy Fund in which shall be recorded all receipts and disbursements of public money under this section. 2009, c. 12, Sched. D, s. 6.

Non-interest bearing account

(4) The balances from time to time in the account do not bear interest. 2009, c. 12, Sched. D, s. 6.

Interpretation

(5) For the purposes of this section, the terms used in it that are not defined in this Act but that are defined in section 1 of the *Financial Administration Act* have the meanings provided in that Act. 2009, c. 12, Sched. D, s. 6.

Ontario

ServiceOntario
e-Laws

Ontario Energy Board Act, 1998
Loi de 1998 sur la Commission de l'énergie de l'Ontario

ONTARIO REGULATION 66/10

ASSESSMENTS FOR MINISTRY OF ENERGY AND INFRASTRUCTURE CONSERVATION AND RENEWABLE ENERGY PROGRAM COSTS

Consolidation Period: From March 12, 2010 to the e-Laws currency date.

No amendments.

This Regulation is made in English only.

Definitions

1. (1) In this Regulation,

"IESO-controlled grid" means the IESO-controlled grid as defined in the *Electricity Act, 1998*;

"market participant" has the same meaning as in section 56 of the Act;

"Ministry" means the Ministry of Energy and Infrastructure;

"net distributor volume" means the sum of the amount of electricity withdrawn from the IESO-controlled grid by a distributor licensed under Part V of the Act, the amount of electricity purchased from any host distributor and the amount of electricity supplied by qualified embedded generators, less the amount of electricity supplied to qualified embedded distributors;

"qualified embedded distributor" means a distributor that is licensed under Part V of the Act that is provided electricity by another licensed distributor;

"qualified embedded generator" means a generator who is connected to a distributor's distribution system;

"qualified host distributor" means a distributor licensed under Part V of the Act that distributes electricity to another distributor;

"Retail Settlement Code" has the same meaning as in section 56 of the Act. O. Reg. 66/10, s. 1 (1).

(2) In this Regulation, a reference to a volume of electricity distributed by or to a licensed distributor includes the volume for total losses, as defined in the Retail Settlement Code. O. Reg. 66/10, s. 1 (2).

Board assessments re energy conservation or renewable energy programs

2. The Board shall, with respect to the expenses incurred and expenditures made by the Ministry in respect of its energy conservation programs or renewable energy programs,

(a) assess the persons and members of classes of persons referred to in section 3 for the amounts set out in section 4;

(b) apportion the amount in accordance with section 5; and

(c) issue the assessment on or before April 15, 2010. O. Reg. 66/10, s. 2.

Persons and classes of persons to be assessed

3. The following are the persons and classes of persons to be assessed for the purposes of subsection 26.1 (1) of the Act:

1. Distributors licensed under Part V of the Act.

2. The IESO. O. Reg. 66/10, s. 3.

Assessed amount

4. For the purposes of section 2, the total amount to be assessed by the Board in respect of persons and classes of persons referred to in paragraphs 1 and 2 of section 3 is $53,695,310. O. Reg. 66/10, s. 4.

Rules re apportioning assessments

5. (1) For the purposes of this Regulation, the Board shall calculate a quotient based on the following formula:

$$A \div (C + D)$$

where,

"A" is the amount prescribed under section 4,

"C" is the total amount of electricity withdrawn from the IESO-controlled grid by all persons referred to in subsection 7 (3), as determined in accordance with the market rules, for use in Ontario for the most recent 12-month period for which the information is available for the person, and

"D" is the sum of the net distributor volumes of all distributors licensed under Part V of the Act for the 12-month period ending December 31, 2008 or for the most recent 12-month period ending before December 31, 2008 for which the information is available for each distributor.

O. Reg. 66/10, s. 5 (1).

(2) The Board shall publish the quotient referred to in subsection (1) on its website as soon as is practical after the Board calculates it. O. Reg. 66/10, s. 5 (2).

(3) For the purposes of section 2, the Board shall calculate the amount of the assessment for each distributor licensed under Part V of the Act according to the following formula:

$$Q \times B$$

where,

"Q" is the quotient calculated under subsection (1), and

"B" is the net distributor volume for each distributor licensed under Part V of the Act for the 12-month period ending December 31, 2008 or for the most recent 12-month period ending before December 31, 2008 for which the information is available for the distributor as used in the calculation of "D" in subsection (1).

O. Reg. 66/10, s. 5 (3).

(4) For the purposes of section 2, the Board shall calculate the amount of the assessment of the IESO according to the following formula:

$$Q \times C$$

where,

"Q" is the quotient calculated under subsection (1), and

"C" has the same meaning as in subsection (1).

O. Reg. 66/10, s. 5 (4).

Payment of assessment

6. On or before July 30, 2010, each person or member of a class of persons assessed under section 2 shall remit the assessed amount, together with such identifying information as may be specified by the Board, to the Minister of Finance in accordance with the instructions issued by the Board. O. Reg. 66/10, s. 6.

Recovery of funds

7. (1) A distributor licensed under Part V of the Act may recover from persons to whom it distributes electricity in its service area, other than persons who are distributors licensed under Part V of the Act, amounts calculated using the following formula:

$$Q \times E$$

where,

"Q" is the quotient published by the Board and referred to in subsection 5 (2), and

"E" is the volume of electricity distributed to the person during the current billing period in each bill referred to in section 9.

O. Reg. 66/10, s. 7 (1).

(2) The IESO may recover from the persons who are market participants and are referred to in subsection (3) the amount calculated under subsection 5 (4) using the following formula:

$$H \times (I \div J)$$

where,

"H" is the amount assessed under subsection 5 (4),

"I" is the volume of electricity withdrawn by the market participant from the IESO-controlled grid, as determined in accordance with the market rules, for use in Ontario over the most recent 12-month period for which information is available for the market participant, and

"J" is the sum of all volumes of electricity withdrawn from the IESO-controlled grid, as determined in accordance with the market rules, for use in Ontario by market participants from which the IESO may recover in accordance with subsection (3), over the most recent 12-month period for which information is available for the market participant.

O. Reg. 66/10, s. 7 (2).

(3) The IESO may recover the amount assessed under subsection 5 (4) from persons,

(a) who are market participants as of the date when the IESO calculates the amounts to recover under subsection (2) and who are not distributors licensed under Part V of the Act; and

(b) who are not licensed under Part V of the Act as a generator, unless their primary business activity is not the generation of electricity. O. Reg. 66/10, s. 7 (3).

Variance accounts

8. (1) Every distributor licensed under Part V of the Act shall apply to the Board by no later than April 15, 2012 for an order authorizing it to clear any debit or credit balance in any variance account established by the distributor and authorized by the Board to track the difference between the amounts remitted by the distributor pursuant to the assessment under subsection 5 (3) and the amounts recovered by the distributor under subsection 7 (1). O. Reg. 66/10, s. 8 (1).

(2) The IESO shall add any variance between the assessment referred to in subsection 5 (4) of this Regulation and the recovery referred to in subsection 7 (2) of this Regulation to the amount it may recover with respect to any future assessment under section 26.1 (1) of the Act. O. Reg. 66/10, s. 8 (2).

Customer billing, distributors

9. A distributor licensed under Part V of the Act shall bill the persons referred to in subsection 7 (1) of this Regulation the amounts calculated in that subsection in each bill issued during the one-year period starting on the date the distributor begins the billing. O. Reg. 66/10, s. 9.

Information

10. (1) Every person assessed under section 2 shall provide the Board with the information, in the manner and at the times set out by the Board, that the Board requires to implement and administer the assessments. O. Reg. 66/10, s. 10 (1).

(2) The Ministry and the Board may share any invoicing and payment information that each may require from the other. O. Reg. 66/10, s. 10 (2).

11. Omitted (provides for coming into force of provisions of this Regulation). O. Reg. 66/10, s. 11.

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Freedom of Information and Protection of Privacy Act

R.S.O. 1990, CHAPTER F.31

Consolidation Period: From December 8, 2010 to the e-Laws currency date.

Last amendment: 2010, c. 25, s. 24.

EXEMPTIONS

Cabinet records

12. (1) A head shall refuse to disclose a record where the disclosure would reveal the substance of deliberations of the Executive Council or its committees, including,

(a) an agenda, minute or other record of the deliberations or decisions of the Executive Council or its committees;

(b) a record containing policy options or recommendations submitted, or prepared for submission, to the Executive Council or its committees;

(c) a record that does not contain policy options or recommendations referred to in clause (b) and that does contain background explanations or analyses of problems submitted, or prepared for submission, to the Executive Council or its committees for their consideration in making decisions, before those decisions are made and implemented;

(d) a record used for or reflecting consultation among ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;

(e) a record prepared to brief a minister of the Crown in relation to matters that are before or are proposed to be brought before the Executive Council or its committees, or are the subject of consultations among ministers relating to government decisions or the formulation of government policy; and

(f) draft legislation or regulations. R.S.O. 1990, c. F.31, s. 12 (1).

Exception

(2) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record where,

(a) the record is more than twenty years old; or

(b) the Executive Council for which, or in respect of which, the record has been prepared consents to access being given. R.S.O. 1990, c. F.31, s. 12 (2).

Advice to government

13. (1) A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution. R.S.O. 1990, c. F.31, s. 13 (1).

Exception

(2) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,

(a) factual material;

(b) a statistical survey;

(c) a report by a valuator, whether or not the valuator is an officer of the institution;

(d) an environmental impact statement or similar record;

(e) a report of a test carried out on a product for the purpose of government equipment testing or a consumer test report;

(f) a report or study on the performance or efficiency of an institution, whether the report or study is of a general nature or is in respect of a particular program or policy;

(g) a feasibility study or other technical study, including a cost estimate, relating to a government policy or project;

(h) a report containing the results of field research undertaken before the formulation of a policy proposal;

(i) a final plan or proposal to change a program of an institution, or for the establishment of a new program, including a budgetary estimate for the program, whether or not the plan or proposal is subject to approval, unless the plan or proposal is to be submitted to the Executive Council or its committees;

(j) a report of an interdepartmental committee task force or similar body, or of a committee or task force within an institution, which has been established for the purpose of preparing a report on a particular topic, unless the report is to be submitted to the Executive Council or its committees;

(k) a report of a committee, council or other body which is attached to an institution and which has been established for the purpose of undertaking inquiries and making reports or recommendations to the institution;

(l) the reasons for a final decision, order or ruling of an officer of the institution made during or at the conclusion of the exercise of

discretionary power conferred by or under an enactment or scheme administered by the institution, whether or not the enactment or scheme allows an appeal to be taken against the decision, order or ruling, whether or not the reasons,

(i) are contained in an internal memorandum of the institution or in a letter addressed by an officer or employee of the institution to a named person, or

(ii) were given by the officer who made the decision, order or ruling or were incorporated by reference into the decision, order or ruling. R.S.O. 1990, c. F.31, s. 13 (2).

Idem

(3) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record where the record is more than twenty years old or where the head has publicly cited the record as the basis for making a decision or formulating a policy. R.S.O. 1990, c. F.31, s. 13 (3).

Statutory Powers Procedure Act

R.S.O. 1990, CHAPTER S.22

Consolidation Period: From December 15, 2009 to the e-Laws currency date.

Last amendment: 2009, c. 33, Sched. 6, s. 87.

Application of Act

3. (1) Subject to subsection (2), this Act applies to a proceeding by a tribunal in the exercise of a statutory power of decision conferred by or under an Act of the Legislature, where the tribunal is required by or under such Act or otherwise by law to hold or to afford to the parties to the proceeding an opportunity for a hearing before making a decision. R.S.O. 1990, c. S.22, s. 3 (1); 1994, c. 27, s. 56 (5).

Where Act does not apply

(2) This Act does not apply to a proceeding,

(a) before the Assembly or any committee of the Assembly;

(b) in or before,

(i) the Court of Appeal,

(ii) the Superior Court of Justice,

(iii) the Ontario Court of Justice,

(iv) the Family Court of the Superior Court of Justice,

(v) the Small Claims Court, or

(vi) a justice of the peace;

(c) to which the Rules of Civil Procedure apply;

(d) before an arbitrator to which the *Arbitrations Act* or the *Labour Relations Act* applies;

(e) at a coroner's inquest;

(f) of a commission appointed under the *Public Inquiries Act*;

Note: On a day to be named by proclamation of the Lieutenant Governor, clause (f) is amended by striking out "*Public Inquiries Act*" and substituting "*Public Inquiries Act, 2009*". See: 2009, c. 33, Sched. 6, ss. 87, 92.

(g) of one or more persons required to make an investigation and to make a report, with or without recommendations, where the report is for the information or

advice of the person to whom it is made and does not in any way legally bind or limit that person in any decision he or she may have power to make; or

(h) of a tribunal empowered to make regulations, rules or by-laws in so far as its power to make regulations, rules or by-laws is concerned. R.S.O. 1990, c. S.22, s. 3 (2); 1994, c. 27, s. 56 (6); 2006, c. 19, Sched. C, s. 1 (1, 2, 4).

…

Disclosure

5.4(1)If the tribunal's rules made under section 25.1 deal with disclosure, the tribunal may, at any stage of the proceeding before all hearings are complete, make orders for,

(a) the exchange of documents;

(b) the oral or written examination of a party;

(c) the exchange of witness statements and reports of expert witnesses;

(d) the provision of particulars;

(e) any other form of disclosure. 1994, c. 27, s. 56 (12); 1997, c. 23, s. 13 (11).

Other Acts and regulations

(1.1)The tribunal's power to make orders for disclosure is subject to any other Act or regulation that applies to the proceeding. 1997, c. 23, s. 13 (12).

Exception, privileged information

(2)Subsection (1) does not authorize the making of an order requiring disclosure of privileged information. 1994, c. 27, s. 56 (12).

…

Rules

25.1 (1) A tribunal may make rules governing the practice and procedure before it. 1994, c. 27, s. 56 (38).

Application

(2) The rules may be of general or particular application. 1994, c. 27, s. 56 (38).

Consistency with Acts

(3) The rules shall be consistent with this Act and with the other Acts to which they relate. 1994, c. 27, s. 56 (38).

Public access

(4) The tribunal shall make the rules available to the public in English and in French. 1994, c. 27, s. 56 (38).

***Legislation Act, 2006*, Part III**

(5) Rules adopted under this section are not regulations as defined in Part III (Regulations) of the *Legislation Act, 2006*. 1994, c. 27, s. 56 (38); 2006, c. 21, Sched. F, s. 136 (1).

Additional power

(6) The power conferred by this section is in addition to any power to adopt rules that the tribunal may have under another Act. 1994, c. 27, s. 56 (38).