McCarthy Tétrault LLP
Box 48, Suite 5300
Toronto Dominion Bank Tower
Toronto ON M5K 1E6
Canada
Tel: 416-362-1812
Fax: 416-868-0673

George Vegh
Direct Line: 416 601-7709
Direct Fax: 416 868-0673
Email: gmacarth@mccarthy.ca

mccarthy tétrault

September 6, 2011

Ontario Energy Board
2300 Yonge Street
P.O. Box 2319
Suite 2700
Toronto ON M4P 1E4

Attention: Ms. Kirsten Walli
Board Secretary

Dear Ms. Walli:

Re: Motion by the Consumers Council of Canada in relation to section 26.1 of the *Ontario Energy Board Act, 1998* and Ontario Regulation 66/10

Board File: EB-2010-0184

Attached please find Submissions of Union Gas Limited.

Sincerely,

Signed in the original

George Vegh
c: Intervenors on file
10702739

EB-2010-0184

IN THE MATTER OF the *Ontario Energy Board Act, 1998* S.O. 1998, c. 15 (Schedule B) (the "**OEB Act**");

AND IN THE MATTER OF a motion by the Consumers Council of Canada in relation to section 26.1 of the *Ontario Energy Board Act, 1998* and Ontario Regulation 66/10

SUBMISSIONS OF UNION GAS LIMITED

Neil Finkelstein

(416) 601-7611
nfinkelstein@mccarthy.ca

George Vegh

(416) 601-7709
gvegh@mccarthy.ca

McCarthy Tétrault LLP
Toronto Dominion Bank Tower
Suite 5300, Box 48
Toronto, ON M5K 1E6

Counsel for Union Gas Limited

Part I – Introduction and Summary

1. This application seeks an Order from the Ontario Energy Board (the "OEB" or the "Board") cancelling the Assessment issued by the Board under s. 26.1 of the Ontario *Energy Board Act, 1998* (The "Conservation and Renewable Energy Assessment" or "CREA") on the grounds that s. 26.1 is unconstitutional in that it purports to authorize an indirect tax contrary to s. 92 (2) of the *Constitution Act, 1867*, which restricts provincial taxing authority to direct taxation.

2. The Attorney General of Ontario ("AGO") claims that the CREA is not inconsistent with s. 92(2) because the SPC is a regulatory charge, not a tax.

3. Union Gas Limited ("Union") submits that the CREA is a tax, and not a regulatory charge because it is not part of a regulatory scheme. While there are regulatory schemes in Ontario that address conservation (such as those run by the OEB, the Ontario Power Authority ("OPA") and gas and electricity distributors), the CREA plays no part in any of them. Rather, the CREA is simply a funding mechanism that is used to contribute to the cost of programs relating to conservation or renewable power. The position of the Government in this case amounts to the claim that *any* expenditure of money on conservation or renewable power qualifies as a regulatory scheme for constitutional purposes. That clearly cannot be the case.

4. Further, s. 26.1 is unconstitutional because, apart from the existing programs funded by the CREA, s. 26.1 contains a broad and general taxing power which, on its terms, would be available for future assessments. With respect to this general taxing power, there is no detailed regulatory code, only a list of programs, purposes and policies and the persons who pay the assessed levies (electricity and gas consumers) are not uniquely impacted by the programs underlying the assessments in the sense that, when compared to the general public, they do not uniquely cause the need for these programs or benefit from them.

Part II – Factual Context

The Statutory Basis for the SPC

5. Section 26.1 of the *Ontario Energy Board Act, 1998* provides the Lieutenant Governor in Council ("LGIC") with jurisdiction to make regulations requiring the OEB to assess gas distributors, electricity distributors, the Independent Electricity System Operator (the "IESO") and other persons prescribed by regulation. The assessments – the CREAs - will be used to pay for Ministry of Energy and Infrastructure ("MEI") programs for conservation and renewable power.

6. The CREAs may be passed on by the payers (gas and electricity distributors and the IESO) to consumers and IESO market participants. Amounts assessed are payable to the Minister of Finance, and deemed to be paid for the following "special purposes" (which are defined in these submissions as "Conservation and Renewable Energy Purposes"):[1]

> 1. To fund conservation or renewable energy programs aimed at decreasing the consumption of two or more of the following fuels:
>
> i. natural gas,
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> ii. electricity,
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> iii. propane,
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> iv. oil,
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> v. coal, and
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> vi. wood.
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> 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.

[1] See *OEB Act*, ss. 26.1 and 26.2. Under s. 7 of the *Financial Administration Act*, R.S.O. 1990, c. F.12, money received in a special purpose fund "may, subject to any Act applicable thereto, be paid out of the Consolidated Revenue Fund for that purpose." As a consequence, amounts collected under the CREA may be used with respect to MEI conservation and renewable energy programs and paid out with respect to the purposes listed above.

3. To fund conservation or renewable energy programs aimed at conserving 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.

7. Although the current CREAs are designed to collect approximately $53.7 million to fund two specific programs, both the amount that could be charged under CREAs and the types of programs identified under s. 26.1 and the "special purposes" for authorized expenditures are almost unrestricted.

8. They include programs aimed at reducing the consumption of fuels, including fuels that are not delivered by assessed parties, such as propane, oil, coal and wood; switching these fuels among each other; decreasing peak electricity demand while increasing or decreasing the consumption of any other type of fuel; research and development aimed at fuel conservation or efficiency; and funding conservation or renewable energy programs aimed at a specific geographical, social, income or other sector of Ontario.

9. Combined, these provisions describe the types of programs which may be funded by the CREA. However, it is not possible to identify a discrete regulatory institutional enterprise that is enabled or furthered by the CREA. This may be contrasted to the funding of conservation regulatory schemes undertaken by the OEB, the OPA and the LDCs. The lack of relationship between the CREA and Ontario's conservation regulatory schemes is set out below.

Ontario's Conservation Regulatory Schemes

10. The Attorney General's evidence states that the CREA is part of a "Complete, Complex and Detailed Code of Regulation."[2] That "Detailed Code" is said to consist of the following regulatory enterprises:

    - integrated planning to be conducted by the OPA;[3]
    - the authority to designate goods, services and technologies for promoting conservation[4]
    - the OEB's licencing authorities and licencing requirements;[5]
    - the OPA's procurement of supply and conservation resources;[6]
    - IESO market rules;[7] and
    - The regulatory activities of a "network of agencies and industry participants (OEB, OPA, Local Distribution Companies ("LDCs"), gas utilities, the IESO and others) which themselves carry out conservation initiatives, and often maintain their own rules and programs to achieve conservation."[8]

11. It may well be true that all of the above regulatory enterprises can be considered to be components of one or more regulatory scheme respecting conservation and renewable power. However, none of them are connected in any way to the CREA.

12. The CREA cannot contribute to the costs of any of these regulatory enterprises and the programs funded by the CREA are not integrated with these enterprises.[9]

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[2] Affidavit of Barry Beale, Sworn November 5, 2010 ("Beale Affidavit"), p. 5.
[3] Beale Affidavit, paragraph 9.
[4] Beale Affidavit, paragraph 10(1).
[5] Beale Affidavit, paragraph 10(2).
[6] Beale Affidavit, paragraph 10(3).
[7] Beale Affidavit, paragraph 11.
[8] Beale Affidavit, paragraph 12.
[9] Transcript of Technical Conference, November 16, 2010 ("Transcript"), pp. 4-10.

13. The CREA is currently used to fund two discrete programs: the Home Energy Savings Program ("HESP") and the Ontario Solar Thermal Heating Incentive ("OSTHI") (collectively, the "Programs"). The Programs are not integrated with any provincial regulatory scheme.

14. First of all, the "entire apparatus"[10] of the programs were designed and funded by the federal government, starting in 2007.[11] In this regard, the federal government sets the terms and conditions of the programs, including:

    - the criteria for which home owners and properties are eligible for the programs;[12]
    - the technology measures for the programs;[13]
    - evaluating retrofits under the programs;[14]
    - program extensions and re-entry;[15]and
    - licencing and qualifications for program auditors[16]

15. The federal government pays for these programs through general revenues. The provincial government began contributing to the costs of these programs in 2007, but played no real regulatory or policy role respecting these programs.

16. The initial contributions of the provincial government respecting these programs came from general revenues. The programs are now paid for partly by general revenues and partly through the CREA, but the government acknowledges that nothing about these

[10] Transcript, p. 16
[11] Transcript, p. 11.
[12] Transcript, p. 14.
[13] Transcript, p. 15.
[14] Transcript, p. 16.
[15] Transcript, p. 17.
[16] Transcript, p. 17.

programs have changed as a result of the CREA, other than the funding. The programs are delivered the same way as they were when paid for entirely by general revenues.[17]

17. The province's affidavit evidence makes various claims for the conservation brought about by the regulatory scheme, such as the reduction of peak demand, the enhancement of grid reliability, the reduction of green house gases and reduced system costs. However, on cross-examination, the government conceded that it had no evidence that measured any of these alleged benefits and certainly could not tie any of these benefits to the programs funded by the CREA. Instead, the government's witness simply asserted the general claim that "electricity conservation, generally, big or small" brings about these benefits.[18]

18. Further, neither utilities nor energy consumers uniquely benefit from activities funded by the CREA. The government's witness conceded that "all Ontarians benefit from a cleaner supply mix, not just electricity consumers."[19]

19. If the government's claim that CREAs are used to fund a regulatory scheme is accepted then any expenditure on conservation and/or renewable power *by that fact alone* qualifies as part of a regulatory scheme. As will be addressed in Part II below, this claim is unsupported in law and, if given credence to by this Board, will effectively grant the government a virtually unprecedented and unlimited indirect taxing power with the only condition being that the taxed money be spent on conservation and/or renewable power.

PART III LEGAL SUBMISSIONS

20. Union's legal submissions respecting the characterization of the CREA as a tax and not a regulatory charge are summarized as follows:

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[17] Transcript, p. 18 (see also pp. 21-22).
[18] Transcript, p. 139.
[19] Transcript, p. 40.

- The general tendency of the CREA is to be passed on from the initial payers (electricity distributors) to consumers. The incidence of the CREA is therefore "indirect" for constitutional purposes.

- As a result of the general tendency of the assessments to be passed on, and thus be indirect, the constitutional validity of the CREA turns on whether it is a "tax" or a "regulatory charge". If it is a tax, and it is submitted that it is, then the CREA is inconsistent with the constitutional restriction in s. 92(2) of the *Constitution Act, 1867* that limits provincial legislatures to direct taxes. By contrast, if the CREA is a regulatory charge, then it is not subject to the requirement of directness and would therefore be constitutional.

- The CREA could only be saved if it were a "regulatory charge" rather than a "tax", because the former can be indirect and still valid. To qualify as a regulatory charge, the CREA must be related to a "regulatory scheme", either as a method of financing that scheme or of motivating behaviour that furthers the goals of the scheme. The indicators of a regulatory scheme have been held to include, among other things, "a complete and detailed code of regulation."[20] In this case, the list of purposes or objectives for which the CREA may be expended in s. 26.1 of the Act, and the more general objective described by the government's witness as "electricity conservation generally" do not constitute a discrete and identifiable "legislative scheme".

A more detailed analysis is provided below.

ANALYSIS

Approach to the Indirect Tax Issue

21. In *Allard Contractors*,[21] the Supreme Court of Canada set out several steps for assessing constitutional jurisdiction respecting taxation. The first step is to determine whether the "general tendency" of the levy is direct or indirect. If the tendency of the levy is indirect, it is then necessary to determine whether the levy is a tax, on the one hand, or a regulatory charge, on the other.

General Tendency of the CREA

[20] See: *Westbank First Nation* v. *British Columbia Hydro and Power Authority*, [1999] 3 S.C.R. 134 at para. 24 ("*Westbank*") and *620 Connaught Ltd. v. Canada* [2008] 1 S.C.R. 131 at paras. 17-20 ("*Connaught*").

[21] *Allard Contractors Ltd. v. Coquitlam (District)*, [1993] 4 S.C.R. 371 (Lexum) ("*Allard Contractors*")

22. Section 92(2) of the *Constitution Act, 1867* provides that provincial legislatures may only impose direct taxes, as opposed to indirect taxes. The conventional definition of a direct tax for constitutional purposes is the formulation provided by John Stuart Mill: [22]

> "Taxes are either direct or indirect. A direct tax is one which is demanded from the very persons who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another…"

23. In this case, the general tendency of the CREA is indirect. It is levied on electric distributors and the expectation is express in s. 26.1(2) and (3) that it will be passed on to consumers and market participants and thereby be recouped. This is also the standard practice with other assessments levied by the OEB.[23]

Is the CREA a Tax or a Regulatory Charge?

24. The indirect tendency of the CREA means that, if it is a tax rather than a regulatory charge, it cannot be supported pursuant to s. 92(2) of the Constitution Act, 1867.[24] Although a tax and a regulatory charge share a number of common characteristics, the distinguishing features are whether the levy is (i) "connected to a regulatory scheme;" and, if so, (ii) whether the levy is designed to defray the costs of the regulatory scheme (as opposed to contribute to general provincial revenues). If both of these conditions are met, the levy is a regulatory charge and thus valid whether or not it is direct. If not, it is a tax and invalid if indirect within the meaning of s. 92(2) of the Constitution Act, 1867. Each issue will be addressed in turn.

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[22] *Allard Contractors*, at 24, quoting *Bank of Toronto* v. *Lambe* (1887), 12 A.C. 575 at 582 (emphasis added).

[23] The OEB also assesses regulated utilities to cover the costs of its own expenses and expenditures and specifically permits the recovery of these assessments from consumers. See: *OEB Act,* s. 26.

[24] As Professor Hogg notes in his treatise on constitutional law, "Not every impost levied by a province has to satisfy the requirement of being 'direct'":

> "If the charge is not 'taxation' within the meaning of s. 92(2), and is constitutionally justified under some other provincial power, then it is no objection that the charge is indirect…
>
> They are not taxes if they can be supported as regulatory charges imposed under one the province's regulatory powers such as natural resources (s. 92A(1)), municipal institutions in the province (s. 92(8), local works and undertakings (s. 92(10)), property and civil rights in the province (s. 92(13)), or matters of a merely local or private nature in the province (s. 92(16))": Peter Hogg, *Constitutional Law of Canada*, looseleaf 5th ed. (Toronto: Carswell, 2007) at s. 31.10.

(i) Is the Levy Connected to a Regulatory Scheme?

25. The first issue is to identify a "regulatory scheme". The Supreme Court of Canada has articulated the factors to consider in the determination of that issue as follows:[25]

> "It goes without saying that in order for charges to be imposed for regulatory purposes or to otherwise be 'necessarily incidental to a broader regulatory scheme', one must first identify a 'regulatory scheme'. Certain indicia have been present when this Court has found a 'regulatory scheme'. The factors to consider when identifying a regulatory scheme include the presence of: (1) a complete and detailed code of regulation; (2) a specific regulatory purpose which seeks to affect the behaviour of individuals; (3) 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 causes the need for the regulation, or benefits from it. This is only a list of factors to consider; not all of these factors must be present to find a regulatory scheme. Nor is this list of factors exhaustive."

Each of the foregoing factors will be addressed in turn.

Factor 1: Complete and Detailed Code of Regulation

26. The first indictor of the presence of a "regulatory scheme" is a "complete and detailed code of regulation."

27. In *Allard*, the Supreme Court of Canada held that the impugned fees were part of, and aimed at funding, a "complete and detailed code for the regulation of the gravel and soil extraction and removal trade."[26] This holding was informed by related provisions which granted municipalities the power to: "lay out, construct and maintain highways"; "regulate extraordinary traffic"; "maintain and improve roads"; and "establish and alter routes to be taken by carriers of persons or chattels". The by-laws that were passed in accordance with these powers were described by the Supreme Court of Canada as follows:[27]

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[25] *Westbank*, at para. 24; quoting *Reference re Proposed Federal Tax on Exported Natural Gas*, [1982] 1 S.C.R. 1004 at 1070 ("*Re Exported Natural Gas Tax*") (emphasis added).

[26] *Allard Contractors*, at 32.

[27] *Allard Contractors*, at 31-32 (emphasis added).

"Maple Ridge By-law No. 4109-1988 is the clearer example of an overall scheme to regulate both gravel removal and roads. Certain of its provisions address the question of who can remove soil: in s. 3 there is a general prohibition against removal; in s. 4, that prohibition is made subject to removal by permit under s. 4; s. 8 sets out exceptions to the permit requirement. Other provisions incorporate the regulatory regime of another provincial statute: in s. 15, the requirement for a mines permit is found; s. 25 requires the filing of a mine working plan. A number of provisions prescribe certain terms to govern the removal of soil: in s. 6, removal on Sundays and statutory holidays is prohibited, and in s. 7, hours of operation are prescribed; noise level is regulated by s. 29, which can be related to the definition of a "berm" in s. 2 (a soil embankment acting as a noise buffer); drainage requirements are noted in s. 31. The fee provisions are located in s. 17 -- which establishes the volumetric fee -- and ss. 18 to 23, which deal with its calculation. Compliance provisions can also be noted: permit applicants are required by s. 24 to post security for their compliance with the by-law; in s. 33, permit holders are required to repair damage caused to adjacent properties; and, finally, s. 34 establishes an offence for violation.

Although Coquitlam By-law No. 1914, 1988 is less extensive, that it nonetheless provides for a regulatory scheme can be demonstrated by a number of provisions similar to those found in the Maple Ridge by-law. A general prohibition against removal subject to removal by permit is found in s. 4. Section 20 provides for inspection. Section 3 requires the by-law to be interpreted in a manner consistent with the Mines Act, S.B.C. 1980, c. 28, and s. 5(e) and (f) require proof of approved mining systems and reclamation plans. The volumetric fee is set out in s. 13(a) and calculation provisions are located in ss. 14 to 18. Section 23 establishes an offence for violation."

28. Similarly, in Ontario Home Builders Association,[28] the majority decision of the Supreme Court of Canada held that the impugned levy – development charges to pay for the costs of new school construction caused by residential development – were "part of a comprehensive and integrated regulatory scheme, namely, the entirety of planning, zoning, sub-division and development of land in the province." [29]

29. As well, in Connaught, Rothstein J., for the Supreme Court of Canada, held that business licence fees imposed on businesses selling liquor in Jasper National Park were part of an

[28] *Ontario Home Builders' Association v. York Region Board of Education*, [1996] 2 S.C.R. 929 ("*Ontario Home Builders' Association*")

[29] *Ontario Home Builders' Association*, at para. 57.

> "overarching statutory scheme which includes the National Parks Act and the Parks Agency Act, together with the regulations…Read in conjunction with the two Acts, these regulations establish how services, rights and privileges are obtained, what is prohibited with the parks and to whom authority is delegated. Together, these statutes and the regulations form a complete and detailed scheme of how Jasper National Park should operate."[30]

30. Perhaps the broadest use of the term "regulatory scheme" was applied by the Federal Court of Appeal in Canadian Association of Broadcasters v. Canada.[31] There, the Court of Appeal held that licence fees issued by the CRTC were part of a regulatory scheme that consisted of the operating expenditures of the CRTC, the costs incurred by Industry Canada with respect to its "management of the broadcasting spectrum,"[32] and the operations of the Canadian Broadcasting Corporation. All of these components were held to constitute a single scheme "which provide[s] for the regulation and supervision of the entire broadcasting system."[33]

31. In this case, it is submitted that the CREA is too broad to be "necessarily incidental" to a discrete and identifiable "regulatory scheme" within the meaning of the case law reviewed above.

32. Clearly, the CREA is not "necessarily incidental" to the province's regulatory enterprises identified at paragraph 10 of these submissions because the CREA cannot fund those enterprises and has no connection to those enterprises.

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[30] *Connaught*, at para. 30.

[31] [2009] 1 F.C.R 3 (F.C.A.) ("*CAB v. Canada*").

[32] *CAB v. Canada*, at paras. 23-24.

[33] *CAB v. Canada*, at para. 54

33. As also indicated, the Conservation and Renewable Energy Purposes on which the CREA may be expended are extremely broad. They include programs aimed at reducing the consumption of fuels, including fuels that are not delivered by assessed parties, such as propane, oil, coal and wood; switching these fuels among each other; decreasing peak electricity demand while increasing or decreasing the consumption of any other type of fuel; research and development aimed at fuel conservation or efficiency; and funding conservation or renewable energy programs aimed at a specific geographical, social, income or other sector of Ontario.

34. The CREA thus funds a list of purposes and potential programs, not a regulatory scheme: it is simply not possible to identify a discrete regulatory institutional enterprise that is enabled or furthered by the CREA.

35. It is helpful to contrast this general identification of program types in s. 26.1 with the detailed regulatory scheme that underlies analogous OEB assessments under s. 26 that are used to fund the costs of the OEB to carry out its responsibilities under the OEB Act and any other Act.

36. The OEB's powers under the OEB Act and other Acts clearly constitute a detailed regulatory scheme for the Ontario energy sector. As the Divisional Court stated in describing the OEB's role in the gas sector: [34]

> "all matters relating to or incidental to the production, distribution, transmission or storage of natural gas, including the setting of rates, location or lines and appurtenances, expropriation of necessary lands and easements, are under the exclusive jurisdiction of the Ontario Energy Board..."

[34] *Union Gas .v Township of Dawn* (1977), 15 OR (2d) 722 at 731 (Div. Ct.).

37. Thus, there is a clear and discrete regulatory scheme that underlies the OEB's activities that are funded through its general industry assessments.

38. By contrast, the CREA supports MEI programs respecting conservation and renewable power. If this is sufficient to support an indirect charge, then virtually any government program could be characterized as part of a regulatory scheme, and therefore funded by indirect taxation, by listing thematically related programs in legislation. This would seriously threaten to render meaningless the requirement of a regulatory scheme.[35]

Factor 2: A Specific Regulatory Purpose

39. The second indicator of the presence of a regulatory scheme is a specific regulatory purpose which seeks to affect the behaviour of individuals. In *Re Exported Natural Gas Tax*, the majority of the Supreme Court of Canada held that a gas tax did not constitute a regulatory scheme because the tax did not seek to regulate behaviour:[36]

> "The Shorter Oxford English Dictionary, 3rd ed., (1944 revised with corrections 1973) defines 'to regulate' as 'To control, govern or direct by rule or regulations; to subject to guidance or restrictions...To adjust, in respect of time, quantity, etc., with reference to some standard or purpose'. In relation to 'regulation of trade and commerce', this definition and common sense would suggest a restraint upon or channelling of economic behaviour in pursuit of policy goals. The proposed tax in this case, when viewed in light of other legislation touching upon the natural gas industry, has no such regulatory effect on behaviour. By its very comprehensiveness, the tax belies any purpose of modifying or directing the allocation of gas to particular markets. Nor does the tax purport to regulate who distributes gas, how the distribution may occur, or where the transactions may occur."

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[35] The Supreme Court of Canada has recognized the need to have some boundaries when interpreting constitutional heads of power. For example, when interpreting Parliament's jurisdiction to pass laws for the peace order and good government of Canada, the Court has emphasized the need to interpret a head of power in such a manner as to maintain its "singleness, distinctiveness and indivisibility." See: *R. v. Crown Zellerbach*, [1988] 1 S.C.R. 401 at para. 33

[36] *Re Exported Natural Gas Tax*, at 1074-1075.

40. In this case, even leaving aside the issue of whether there is a "scheme", there is no discrete animating purpose behind the programs and policies listed in ss. 26.1 and 26.2 of the OEB Act. Instead, there is a compendious "purpose" of increasing conservation and the use of renewable power. This is also reflected in Mr. Beal's evidence that the CREA should be considered part of a regulatory scheme simply by the fact that the funds it collects can be used to fund "electricity conservation, generally, big or small".[37]

Factor 3: Proper Estimates of the Cost of Regulation

41. The third indicator of a regulatory scheme is whether there is an actual or properly estimated cost of the regulation. The purpose of this indicator is to determine whether the amounts recovered reasonably reflect the costs of the regulatory scheme. Although the courts grant "reasonable leeway"[38] in matching costs and expenses, there are constraints.

42. Thus, for example, in *Confederation des syndicates nationaux v. Canada (Attorney General)*, the Supreme Court of Canada held that amendments to the Employment Insurance Act that removed the requirement to ensure that premiums reflect the costs of benefits resulted in characterization of those premiums as a tax. The effect of those amendments was to delegate the power to set rates to Cabinet "but the legal framework for exercising that power was eliminated." From that point on, the revenues from premiums largely exceeded the costs of the program and "confirms that the relationship between the CREA and the regulatory scheme disappeared and that premiums has been transformed into a kind of payroll tax."[39]

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[37] Transcript, p. 139.

[38] *Allard Contractors*, at 33.

[39] [2008] 3 S.C.R. 511 at para. 75.

43. In this case, the CREA has only been used to offset provincial contributions to two specific federal programs. However, if the constitutionality of s. 26.1 is upheld, then the expenditures are essentially unconstrained. This is evidence of the fact that there is no underlying discrete regulatory scheme which the CREA is designed to fund – it is an open-ended tax used to bring about general provincial benefits. Furthermore, the fact that the CREA is used only for the broad purposes specified in s. 26.1 of the *Ontario Energy Board Act* is clearly not determinative of this issue. As La Forest J. observed in his dissenting opinion in the Ontario Home Builders' Association decision,

> "I emphasize the fact that the Ontario Legislature specifically provided for the use that was to be made of the funds levied through the EDC and that the amount of money that could be levied and the way it could be spent were carefully restricted to that purpose, is not, in itself, determinative in characterizing the matter of the scheme."

44. By contrast to the CREA, identifying the costs of constitutionally valid regulatory schemes is fairly straight-forward. Thus, for example, one can identify the OEB's costs recovered through its general assessments to pay for "all expenses incurred and expenditures made by the Board in the exercise of any powers or duties under this or any other Act"[40] with relative certainty. These costs are stated in a budget that is presented to the Ministry of Energy and Infrastructure for approval.[41] Its financial statements are audited by an OEB appointed auditor and subject to audit by the Provincial Auditor General.[42] The assessments are calculated to fund the Board's annual expenditures, including an operating reserve equal to 15% of the Board's annual operating requirements. If the accumulated operating reserve exceeds the 15% reserve cap,

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[40] *OEB Act*, s. 26(1).
[41] *OEB Act*, s. 4.9(1).
[42] *OEB Act*, s. 4.8(3),(4).

accumulated surpluses from under spending and the operating reserve assessment will be used to reduce payments under future assessments.[43]

45. Similarly, examples from the case law are straight-forward, e.g., the costs of road repair (in *Allard Contractors*), school construction attributable to development (in *Ontario Home Builders' Association*), and operating Jasper National Park (*Connaught*). By contrast, there does not appear to be any public information that identifies what the MEI's costs are projected to be under its "regulatory scheme".

46. There is also no principled basis upon which the costs of this "scheme" are to be apportioned among gas distributors, electricity distributors and the IESO. Again, this may be contrasted with the approach for OEB assessments where the Board has had very extensive public consultation to derive a methodology for allocating its direct and indirect costs to and among the companies it regulates.[44]

Factor 4: Whether the Persons Regulated Benefit from or Cause the Need for the Scheme

47. The fourth indicator of a regulatory scheme is the need for a relationship between the regulation and the person being regulated in order to demonstrate that the person being regulated either causes the need for the regulation, or benefits from it.

48. Identifying the persons who benefit from or cause the need for regulation is difficult here where the purpose of the underlying programs is as broad as that considered here (encouraging energy conservation and renewable power). As Rothstein J. put it in Connaught:[45]

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[43] Report on the OEB Cost Assessment Model Development and Consultation Process, March 14, 2005, at 8.

[44] See, for example, EES Consulting, Regulatory Cost Allocation Survey and Recommendations, January, 2006 at 18.

[45] *Connaught*, at paras. 35-36 (emphasis added).

"However, where a regulatory scheme is very broad, the scheme may not be sufficiently related to the person being regulated either because the regulation does not benefit those persons, or because those persons do not cause the need for the regulation, except in a very indirect manner. In such as case, the fees may be found to be a tax. Evans J.A. recognized the need for a sufficient relationship in his reasons at paras. 44-45:

> The fees in the present case were not attributed to the operations of the Department of Canadian Heritage at large nor even, more specifically, to the administration of the entire system of national parks. The licence fees paid by the appellants were attributed to the operating budget of the very park, Jasper, in which the appellants conducted their businesses. Any aspect of the operation of Jasper National Park which makes it more attractive to visitors, including on-site heritage presentations, visitor services and through highways, increases the appellants' potential customer base.
>
> In contrast, the appellants obtain only a very indirect benefit at best from the operation of other national parks and from the central administration of the responsible Department and the Parks Canada Agency. In my opinion, the analogies would be more persuasive if the Crown were arguing that the relevant regulatory scheme was the operation and administration of the national parks system as a whole.

The safeguard against an insufficient relationship can be found in this Westbank criterion: '[The] relationship between the person being regulated and the regulation, where the person being regulated either benefits from, or causes the need for, the regulation.' Here, there is a close relationship between the appellants' businesses and the regulation of Jasper National Park."

49. Union submits that the sufficiency of the relationship factor is not present here. Electricity and gas distributors and the IESO do not benefit from or cause the need for the CREA. Gas and electricity distributors provide distribution services, and pass on their costs, including the CREA, to their customers in the form of rates. Similarly, the IESO operates the electricity grid, and collects the costs of doing so from market participants. The payers are simply middlemen in the CREA scheme. They are tax collectors for the Government. There is no relationship between the functions of any of these companies and MEI's conservation and renewable power programs. Again, this may be contrasted

with the assessments that all of these companies pay to the OEB, where the payers' own activities drive the need for regulation.

50. Similarly, at the level of gas and electricity consumers, it is difficult to characterize them as a discrete class of "persons being regulated." While it is possible to say that energy consumption, as an activity, causes the need for energy conservation and renewable power, this activity is common to everyone in the province and is not likely to be impacted by the CREA. The environmental benefits that motivate the CREA are also shared by everyone in the province, regardless of which types of energy they consume. As the government's witness in this case acknowledged. "all Ontarians benefit from a cleaner supply mix, not just electricity consumers."[46]
51. Gas and electricity consumers therefore do not constitute persons who are uniquely impacted by the programs underlying the CREA. Put another way, the "interest" being served by the Government's conservation and renewable programs is the "public interest" generally, and not the interests of those consumers alone who are subject to the CREA. This again supports the conclusion that the CREA is a tax for provincial purposes generally, and not part of a discrete regulatory scheme.

Conclusion on whether the CREA is Part of a Regulatory Scheme

52. In conclusion on this point, it is submitted that, there is no "regulatory scheme" within the meaning of the caselaw of which the CREA forms a part. There is no detailed regulatory code, only a list of programs, purposes and policies and the persons who pay the CREA (gas and electricity consumers) are not uniquely impacted by the programs

[46] Transcript, p. 40.

underlying the CREA in the sense that, when compared to the general public, they uniquely cause the need for these programs or benefit from them.

(ii) Is the CREA Designed to Defray the Costs of the Regulatory Scheme?

53. The foregoing submissions to the effect that there is no "regulatory scheme" are sufficient to support the conclusion that the CREA is an invalid indirect provincial tax. For the sake of completeness, however, the Board need also consider whether, if there is a regulatory scheme (and Union's position is that there is not), the CREA is reasonably related to and designed to defray the costs of that scheme. In Union's submission, it is not.

54. The requirement here is that a regulatory charge, unlike a tax, is designed to defray the costs of the regulatory scheme it supports, as opposed to raising revenues for general purposes. In this case, the statutory provisions restrict the purposes for which the CREA may be spent to Conservation and Renewable Energy Purposes. However, while this "earmarking" of moneys is a necessary condition for characterizing a levy as a regulatory charge as opposed to a tax, it is not a sufficient condition. If it were sufficient, then a provincial legislature could avoid the restrictions on indirect taxation by simply using the contrivance of a special fund under the *Financial Administration Act.* La Forest J's comments quoted above are apposite here as well:

> "I emphasize the fact that the Ontario Legislature specifically provided for the use that was to be made of the funds levied through the EDC and that the amount of money that could be levied and the way it could be spent were carefully restricted to that purpose, is not, *in itself,* determinative in characterizing the matter of the scheme."[47]

[47] *Ontario Home Builders' Association*, at para. 121 (emphasis in the original).

55. Further, given that the Province has only made use of a fraction of its purported taxing power it is not possible to quantify all of the revenues that the CREA will ultimately seek to recover.

56. The relevance of the open-endedness of the potential revenues to be collected is not just that rate-payers will be exposed to a virtually unlimited indirect tax "grab", it goes to the inability to characterize the CREA as being designed to only defray the costs of a regulatory scheme. The reason why it should be possible to determine whether a levy will only recover the costs of a scheme is because it should be fairly straight forward to identify the boundaries of a regulatory scheme – where it starts and where it stops. The fact that it is not possible to identify an upper boundary of the costs that the CREA are meant to defray demonstrates that there is no discreet regulatory scheme, only a list of programs, purposes and policies.

Conclusion

57. In conclusion, Union submits that the CREA is a tax, and not a regulatory charge because it is not part of a regulatory scheme. While there are regulatory schemes in Ontario that address conservation (such as those run by the OEB, the OPA, and gas and electric LDCs, the CREA plays no part in any of them. Rather, the CREA is simply a funding mechanism that is used to contribute to the cost of programs relating to conservation or renewable power. The position of the Government in this case amounts to the claim that *any* expenditure of money on conservation or renewable power qualifies as a regulatory scheme for constitutional purposes. That clearly cannot be the case.

58. Further, s. 26.1 is unconstitutional because, apart from the existing programs funded by the CREA, s. 26.1 contains a broad and general taxing power which, on its terms, would be available for future assessments. With respect to this general taxing power, there is no detailed regulatory code, only a list of programs, purposes and policies and the persons

who pay the assessed levies (electricity and gas consumers) are not uniquely impacted by the programs underlying the assessments in the sense that, when compared to the general public, they do not uniquely cause the need for these programs or benefit from them.

All of Which is Respectfully Submitted

Date: September 6, 2011

Neil Finkelstein

(416) 601-7611
nfinkelstein@mccarthy.ca

George Vegh

(416) 601-7709
gvegh@mccarthy.ca

McCarthy Tétrault LLP
Toronto Dominion Bank Tower
Suite 5300, Box 48
Toronto, ON M5K 1E6

Counsel for Union Gas Limited