EB-2010-0184

THE ONTARIO ENERGY BOARD

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

AND IN THE MATTER OF Assessments issued by the Ontario Energy Board pursuant to section 26.1 of the *Ontario Energy Board Act, 1998*, and O.R. 66/10;

AND IN THE MATTER OF Rule 42 of the Rules of Practice and Procedure of the Ontario Energy Board.

FACTUM OF THE MOVING PARTIES

THE CONSUMERS COUNCIL OF CANADA AND AUBREY LEBLANC

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I N D E X

PART 1 - OVERVIEW

1. This is an Application by the Consumers Council of Canada ("CCC") and Aubrey Leblanc ("Leblanc"), (collectively, the "Applicants"), arising out of the issuance, by the Ontario Energy Board (the "Board") of an Assessment (as hereinafter defined) and the authorization of a Variance Account,pursuant to section 26.1 of the *Ontario Energy Board Act, 1998* (the "OEB Act") and Ontario Regulation 66/10 ("O.R. 66/10").

2. The Applicants seek a determination that section 26.1 of the OEB Act, and O.R. 66/10 are unconstitutional, and that the Assessment and Variance Account pursuant to them are invalid.

3. Section 26.1 of the OEB Act and O.R. 66/10 made pursuant to it are unconstitutional in that they mandate the Board to issue the Assessment against local distribution companies ("LDCs"), which Assessment will ultimately be paid by the ratepayers, for the purpose of raising revenue to fund two programs of the Ontario government. The Assessment amounts to an indirect tax, which is not within the constitutional competence of the Ontario government to levy.

4. Section 26.1 of the OEB Act and O.R. 66/10 will only be saved from a finding of unconstitutionality if they create a regulatory charge, that is if the Assessment forms part of a regulatory scheme. This is the central issue to be determined in the Application.

5. The Assessment bears none of the characteristics of a regulatory charge: it is unrelated to a set of rules and does not prescribe behaviour for the purposes of protecting the public. In particular, it is unrelated to the relevant regulatory scheme, which is established by the OEB Act.

6. The Applicants submit that the defining characteristic of the relevant regulatory scheme is the exercise of discretion by the Board to approve the recovery, from ratepayers, of spending by transmitters and distributors of electricity. This is not what the Assessment does:

the only relationship of the Assessment to the regulatory scheme is the happenstance that it uses a regulatory accounting mechanism to recover funds spent by the Province, without the exercise of any discretion by the Board and wholly unrelated to the purpose for which that discretion is to be exercised.

7. While the Assessment may be connected to a broader set of government policies, there is no relationship between those policies, the Assessment, and the relevant regulatory scheme. The Assessment is merely an attempt by the Ontario government to recover funds paid out as subsidies to people who voluntarily make expenditures that are unrelated to any regulatory rules.

8. Given that the Assessment is invalid, the funds recovered from ratepayers should be returned to them.

9. The Application as filed challenges the constitutionality of Section 26.1 of the OEB Act and O.R. 66/10. With the filing of the evidence from the Attorney General, discussed below, it became apparent that the Assessment issued pursuant to Section 26.1 and O.R. 66/10 was in relation to only two programs. The submissions herein focus on the constitutionality of those provisions as they relate to the Assessment for those two programs. It is the position of the Applicants, however, that Section 26.1 is unconstitutional, even without regard to the two programs for the reasons more fully described in the submissions on behalf of Union Gas Limited.

PART 2 - THE FACTS

1. The Statutory Background to the Assessment

10. Section 26.1(1) of the OEB Act requires the Board to assess LDCs 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".

11. Section 26.1(2) of the OEB Act authorizes LDCs to collect amounts assessed under section 26.1(1) from consumers or classes of consumers as prescribed by regulation and in the manner prescribed by regulation.

12. Section 26.1(6) of the OEB Act provides that, if a person fails to pay an Assessment, the Board may, without a hearing, order the person to pay the Assessment.

13. Section 26.2 of the OEB Act sets out the "special purposes" for which amounts collected under section 26.1 relating to assessments are paid to Ontario. They are:

> 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.

14. Section 7 of O.R. 66/10, passed pursuant to section 26.1 of the OEB Act, sets out the formula for the determination of the amounts to be assessed from each LDC and the formula

by which each LDC can recover the amounts assessed from the consumers to whom it distributes electricity.

15. Section 8 of O.R. 66/10, passed pursuant to section 26.1 of the OEB Act, sets out the process by which LDCs shall apply to the Board for an order authorizing the LDC in question to clear the credit or debit balance in any variance account authorized by the Board to track the difference between the amounts remitted by the LDC pursuant to the Assessment and the amounts recovered by the LDC pursuant to section 7 of O.R. 66/10.

2. The Assessment

16. By letter dated April 9, 2010 (the "Assessment Letter"), the Board issued the Assessment to LDCs, pursuant to Section 26.1 of the OEB Act. Attached to the Board's letter was an invoice setting out the amount the LDC receiving the letter was being assessed for the Special Purpose Charge ("SPC").

17. In the Assessment Letter, the Board explained that the Assessment was made pursuant to Sections 26.1 and 26.2 of the OEB Act, as well as O.R. 66/10. The Board also went on to provide instructions relating to the recovery of the assessed amount from the LDCs' customers, as reproduced below:

> **Recovery of your SPC Assessment**
>
> Section 26.1 of the Act and the SPC Regulation authorize each licensed electricity distributor to recover the amount of its SPC assessment from its customers, other than embedded licensed distributors, based on the volume of electricity distributed to the customer. Recovery is to be done using the formula set out in section 7 of the SPC Regulation. In accordance with section 9 of the SPC Regulation, recovery is to be spread over a one-year period, starting from the date on which you begin billing to recover your assessment. The amount that may be collected to recover the SPC assessment is not a rate, and it may be collected under the authority of the Act and the SPC Regulation. No rate order is required, and none will be issued.

3. The Variance Account

18. On April 23, 2010, the Board wrote to the LDCs (the "Variance Account Letter") advising that it had authorized Account 1521, Special Purpose Charge Assessment Variance Account (the "Variance Account").

19. The Board explained, in the Variance Account Letter, that O.R. 66/10 contemplates that each LDC will record in a variance account any differences between: (a) the amount remitted to the Minister of Finance for the LDCs' Assessment; and (b) the amounts recovered from consumers on account of the Assessment (the "Variance Amounts"). The Board also provided instructions for recording the Variance Amounts in the Variance Account.

20. In the Variance Account Letter, the Board advised the LDCs that in accordance with section 8 of O.R. 66/10, the LDCs were required to apply to the Board no later than April 15, 2012 for an order authorizing [the LDC] to clear any debit or credit balance in "Sub-account 2010 SPC Variance".

21. The Board further advised that it expected that requests for disposition of the balance in the Variance Account would be addressed as part of the proceedings to set rates for the 2012 rate year, except in cases where this approach would result in non-compliance with the timeline set out in section 8 of O.R. 66/10.

22. As long as the LDC has followed the prescribed formula, in calculating the amounts to be charged to its ratepayers and included in the Variance Account, the Board will approve the clearing of the Variance Account. In so doing, the Board will make no determination as to the prudence of the expenditures or whether the recovery of the amounts from ratepayers constitutes a just and reasonable rate.

4. The Programs

23. Section 4 of O.R. 66/10 states that the total amount of costs to be recovered by the assessment is $53,695,310.00. This figure represents the cost, in the Province's 2009/2010 fiscal year, of the provincial portion of two energy efficiency programs offered by the federal government. Neither of the programs are designed or operated by the LDCs.

24. The two programs are the Home Energy Savings Program ("HESP") and the Ontario Solar Thermal Heating Initiative ("OSTHI"). The HESP pays for certain building retrofits undertaken by homeowners. The OSHTI provides incentives to large commercial and industrial entities for solar installations.

25. The two programs have the following characteristics:

(i) They were designed by the federal government;

Reference: Ontario Energy Board Technical Conference Transcript ("TC Transcript"), July 25, 2011, p. 7

(ii) The federal government established the eligibility criteria;

Reference: TC Transcript, November 16, 2010, pp.14-15

(iii) The federal government determined what measures were eligible for payment;

Reference: TC Transcript, November 16, 2010, p. 15

(iv) The terms and conditions of the programs were developed by the federal government;

Reference: TC Transcript, November 16, 2010, p. 21

(v) The auditors who determined compliance with the programs were licenced by the federal government;

Reference: TC Transcript, July 25, 2011, p. 8

(vi) Compliance with the programs was assessed by the federal government; and

Reference: TC Transcript, November 16, 2010, p. 16

(vii) The province paid matching funds once the federal government determined that the eligibility criteria had been met. Ontario's role was to contribute to the funding of the program.

Reference: TC Transcript, November 16, 2010, p. 21

26. The LDCs did not design or implement either program. They expended no money on the programs. The cost of the programs was not subject to any review or approval by the Board, or anyone else. The LDCs' role was limited to receiving, and paying, the Assessment. The LDCs were then authorized to recover the amount of the Assessment from their ratepayers.

Reference: TC Transcript, July 25, 2011, pp. 20-21

27. Participation in the programs was voluntary. Participants were not required to take part in the programs in order to engage in an otherwise proscribed activity. Participation in the programs did not result in the participant having a licence or other form of authorization that would permit, and set the rules for, any form of behaviour. Participation in the program resulted in only the return of a portion of the money expended by the participants.

28. In other words, the programs did not provide a set of rights, obligations, and consequences related to a particular type of behaviour. In addition, neither of the programs was subject to any screening tests to determine whether, or to what extent, they resulted in the conservation of energy.

Reference: TC Transcript, November 16, 2010, p. 50 and
TC Transcript, July 25, 2011, p. 16

29. From the outset, the Province's intention was that the programs would not be subject to Board oversight and approval. The Board's role was only to calculate the amount of the Assessment to be levied on individual LDCs and then issue the Assessment based on that calculation.

Reference: TC Transcript, July 25, 2011, p. 15

PART 3 - ISSUES AND LAW

30. The provincial government may not enact indirect taxes; it may, however, levy charges that are properly tied to regulatory schemes. Therefore, the central issue for the Board is whether the two programs, in respect of which the Board was told to levy the Assessment, are part of a regulatory scheme for which the Assessment is a regulatory charge.

31. In order to determine the central issue, the Board must answer two questions: (1) whether section 26.1 of the OEB Act has the attributes of an indirect tax, based on the evidence provided by the Applicants; and (2) whether section 26.1 of the OEB Act, and in particular the two programs in respect of which the assessment was levied constitute a regulatory charge, based on the evidence adduced by the Attorney General.

Reference: *620 Connaught Ltd. v. Canada (Attorney General),* [2008] S.C.R. 131, ("*Connaught*"), para. 28

32. The Applicants submit that it is clear based on the language of the statute that section 26.1 of the OEB Act is an indirect tax, and that the Attorney General has not discharged its burden to demonstrate that the Assessment is a regulatory charge. As such, the Assessment, and the associated Variance Account, were created pursuant to unconstitutional legislation, and are invalid.

1. Section 26.1, on its face, is an unconstitutional indirect tax

33. On its face, section 26.1 of the OEB Act is unconstitutional. It mandates the Board to issue the Assessment against LDCs, which Assessment will ultimately be paid by the ratepayers. It amounts to an indirect tax, which is not within the constitutional competence of the provincial government to levy.

34. The Province of Ontario derives its taxation power from s. 92(2) of the *Constitution Act, 1867*, which is as follows:

> **92.** In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, -
>
> **2.** Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.

Reference: *Constitution Act, 1867*, (U.K.) 30 & 31 Vict., c.3, reprinted in R.S.C. 1985, App.11, No. 5 ("*Constitution Act, 1867*"), s. 92

35. The Province does not have the constitutional jurisdiction to enact or authorize the imposition of an indirect tax, unless it can properly be qualified as a regulatory charge imposed under one of the Province's heads of power under the *Constitution Act, 1867*.

Reference: Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. supp., looseleaf (Toronto: Thomson Reuters Canada Ltd., 2007) ("Hogg"), at p. 31-19

Re Exported Natural Gas Tax, [1982] 1 S.C.R. 1004

36. The first step, therefore, is to determine whether the general tendency of a charge is direct or indirect. If the charge is indirect, the Board must then determine whether it bears the attributes of a tax.

37. The determination of whether a tax is direct or indirect depends on the general tendencies of the tax and the common understanding as to those tendencies. A tax is direct if it is intended to be paid by the very person taxed. An indirect tax is one with "the general tendency…for the tax to be paid by someone else".

Reference: Hogg, at p. 31-7

38. Thus, if a tax can be "passed on" to the market as an element of the good or service, it is an indirect tax. In *C.P.R. v. A.-G. Sask.*, Justice Rand provided a useful description of a tax that can be passed on:

> If the tax is related or relatable, directly or indirectly, to a unit of the commodity or its price, imposed when the commodity is in course of being manufactured or marketed, then the tax tends to cling as a burden to the unit or the transaction presented to the market.

Reference: *C.P.R. v. A.-G. Sask*, [1952] 2 S.C.R. 231, at paras. 251-252

39. In determining whether a particular charge is a tax, the Court must answer the following questions in the affirmative:

(i) Is the charge compulsory and enforceable by law?

(ii) Is the charge imposed under the authority of the legislature?

(iii) Is the charge levied by a public body?

(iv) Is the charge intended for a public purpose? and

(v) Is the charge unconnected to any form of a regulatory scheme?

Reference: *Westbank First Nation v. British Columbia Hydro and Power Authority*, [1999] 3 S.C.R. 134 ("*Westbank*"), para. 43

40. The general tendency of the Assessment is that of an indirect charge: it is levied against the LDCs, who in turn recover the costs of the Assessment from ratepayers, pursuant to O.R. 66/10. The intention of the Ontario government was that the Assessment would be demanded of the LDCs, but paid by the ratepayers.

Reference: *Ontario Home Builders' Association v. York Region School Board* [1996] 2 S.C.R. 929 ("*York Region*"), para. 35

41. Section 26.1 of the OEB Act, on its face, constitutes a tax:

(i) It is compulsory and enforceable under the OEB Act;

(ii) It is imposed by the provincial government; and

(iii) It is intended to fund special purposes related to the demand for energy; and

(iv) The Assessment is not connected to a regulatory scheme. As explained below, the Attorney General has failed to establish that the Assessment is part of a regulatory scheme at all.

42. Accordingly, the Assessment (and associated Variance Account) is unconstitutional, unless the Attorney General can demonstrate that it is saved as a proper regulatory charge.

2. The Assessment is not a regulatory charge and is not connected to any form of regulatory scheme

(i) Summary of position of the Attorney General and Applicants

43. The Attorney General takes the position that the programs are part of a regulatory scheme, which encompasses: integrated planning to be conducted by the Ontario Power Authority; the authority to designate goods, services and technologies for promoting conservation; the Board's licensing authority and licensing requirements; the OPA's procurement of supply and conservation resources; the IESO market rules; and the regulatory activities of a network of agencies and industry participants which themselves carry out conservation initiatives and often maintain their own rules and programs to achieve conservation.

Reference: Affidavit of Barry Beale, sworn November 5, 2010 ("Beale Affidavit"), paras. 9 to 12

44. This cannot be right. The effect of defining the concept of "regulatory scheme" so broadly is to devoid it of meaning completely, thereby enabling the government to raise revenue by means of an indirect tax with respect to any policy initiative, without constraint. It effectively nullifies the constitutional distinction between direct and indirect taxes, and significantly expands the Provinces taxing authority, far beyond what was intended by the Constitution.

45. The Applicants submit that the programs do not form part of the relevant regulatory scheme. The relevant regulatory scheme in this case is contained in the OEB Act, which sets out the Board's powers and jurisdiction. The programs, which resulted in the Assessment, are wholly unrelated to it.

46. Rather, the programs are part of a loosely connected set of general government policies which do not create rights, obligations, or consequences. They do not control, direct or limit the behaviour of the persons against which the charge is levied.

(ii) Defining a regulatory scheme

47. In order to find a regulatory charge, a court must look for the presence of the indicia of a regulatory scheme:

(i) a complete, complex and detailed code of regulation;

(ii) a regulatory purpose which seeks to affect some behaviour;

(iii) the presence of actual or properly estimated costs of the regulation; and

(iv) a relationship between the person being regulated and the regulation, where the person being regulated either benefits from, or causes the need for, the regulation.

Reference: *Westbank*, at paras. 44-45

48. The indicia of a regulatory scheme, as set out in *Westbank*, are not and were not intended to be, final or comprehensive. What constitutes a regulatory scheme must be determined on the particular facts of each case.

49. While what constitutes the relevant regulatory scheme must be determined on the particular facts of each case, there are certain defining characteristics of a "regulatory" scheme.

50. In *Connaught*, the Supreme Court of Canada noted that "regulatory charges are not imposed for the provision of specific services or facilities. They are normally imposed in relation to rights or privileges awarded or granted by the government. The funds collected under the regulatory scheme are used to finance the scheme or to alter individual behaviour. The fee may be set simply to defray the costs of the regulatory scheme. Or the fee may be set at a level designed to proscribe, prohibit or lend preference to a behaviour."

Reference: *Connaught,* para. 20

51. In that case, business owners who operated businesses that sold alcoholic beverages in Jasper National Park challenged fees levied by the federal government pursuant to the National Parks Act as *ultra vires*. The Supreme Court of Canada found that the fees had the attributes of an indirect tax: they were compulsory and enforced by law, imposed under the

authority of Parliament, levied by the Minister, and intended for the operation of Jasper National Park – a public purpose. However, the Court held that the fees were part of a regulatory scheme, and as such they amounted to a valid regulatory charge, and *intra vires* Parliament.

Reference: *Connaught*, paras. 24-29

52. In recognising the existence of a regulatory scheme, the Court noted that the *Canada National Parks Act* and the *Parks Canada Agency Act*, and the regulations enacted pursuant to those acts, created a complete, complex and detailed code detailing how Jasper National Park should operate. The Court also found that the statutes were aimed at affecting individual behaviour, provided for a proper estimation of the costs of the operation of the park, and that the business owners benefited from the application of the regulations.

53. In *York Region*, at issue was an Educational Development Charge ("EDC"), which was levied by the provincial government against builders in order to fund the construction of new schools. The EDC was then passed on by builders to purchasers. The Supreme Court of Canada found that the EDC was part of a system of taxes associated with land use planning and the educational system constituted a regulatory scheme. The Court found that, while the EDC was on its face an indirect tax, it was permissible as a regulatory charge. The Court held that the EDC was part of a comprehensive and integrated regulatory scheme, namely the entirety of planning, zoning, subdivision and development of land in the Province.

54. In that case, the Court also found that the need for the charge arose from the activities of the developers and eventual homeowners themselves: it was because of the increase in population that new schools were required, and the funds collected by the levy were collected and segregated specifically for that purpose. In addition, the "construction cost and cost of site figures used in calculating [the charge] were to be approved by the Minister of Education." The scheme, according to the Court, was limited in scope, and operated only to defray the costs of regulation.

Reference: *York Region*, para. 55

55. Amongst other things, the regulatory schemes recognised by the Court in *York Region Board of Education* and *Connaught* have the following elements in common:

(i) Both involved the exercise of discretion by adjudicators or regulators: in one case, by the Ontario Municipal Board in determining the appropriateness of a particular land use, pursuant to the *Planning Act*, and by the Minister of Education in approving the costs of construction of a new school, for which the charges were to be collected; in the other, by the federal officials administering the *Parks Agency Act* in determining the appropriateness of issuing a business license to operate and sell alcoholic beverages in Jasper National Park;

Reference: *York Region*, paras. 55 and 65; *Connaught*, paras. 15 and 34

(ii) In both instances, those against whom the charge was levied benefited from the regulation that imposed the charge: in one case, the presence of adequate school facilities clearly contributed to the marketability of new homes; in the other, businesses benefited from the increased volume of business resulting from a well-maintained park, as well as from limited competition;

Reference: *York Region*, para. 66; *Connaught*, para. 34

(iii) In both cases, those against whom the charge was levied operated a business which required them to abide by a complex set of rules, which gave them rights, but also gave rise to obligations, and consequences for the failure to meet those obligations: in one case, amongst others, the *Building Code*, and in the other, again amongst others, the *National Parks Act* and the *Parks Agency Act*, which established "how services, rights, and privileges are obtained, what is prohibited within the parks, and to whom authority is delegated."

Reference: *York Region*, para. 55; *Connaught*, para. 30

(iv) In both cases, the Court found that the levies were proper estimates of the cost of regulation.

Reference: *York Region*, para. 55; *Connaught*, para. 32

56. From these leading authorities, it is understood that a regulatory scheme is, broadly speaking, a set of rules, prescribed by government, that govern an activity. They may prohibit certain activities, for example, workplace safety rules. They may require a licence to

engage in a business, the terms of the licence describing the way in which a business is carried on. An example is a requirement that a distributor or transmitter of electricity obtain a licence, under the OEB Act, authorizing it to conduct its business according to the rules in the licence.

(iii) The relevant regulatory scheme is established by the OEB Act

57. Having regard for the concept of regulatory scheme as defined by the Supreme Court of Canada set out above, the relevant regulatory scheme in this case is contained in the OEB Act, which sets out the powers and jurisdiction of the Board and, amongst other things, imposes obligations and consequences upon those subject to the jurisdiction of the Board.

58. The programs that gave rise to the Assessment and Variance Account are not part of that regulatory scheme, or, as is set out below, part of any regulatory scheme at all.

59. The regulatory scheme established by the OEB Act includes the following components:

(i) The requirement that persons who own or operate a transmission system, or own or operate a distribution system, generate electricity, or retail electricity, among other things, obtain a licence from the Board;

Reference: OEB Act, s. 57

(ii) The authority for the Board to prescribe conditions in the licences it issues, in addition to the conditions prescribed by the OEB Act itself;

Reference: OEB Act, s. 70

(iii) The authority for the Board to issue Codes, prescribing the behaviour of licencees;

Reference: OEB Act, s. 70.1

(iv) The authority of the Board to approve the rates charged by distributors and transmitters of electricity.

Reference: OEB Act, s. 78

60. These provisions reflect the general characteristics of a regulatory scheme, namely the provision of rules which must be complied with in order to obtain the authority to carry on a business by which the business must be conducted.

61. In particular, the Applicants submit that the relevant regulatory scheme, described broadly, is the set of arrangements by which rates for the transmission and distribution of electricity, by LDCs, are approved by the Board.

62. The Board's core function, with respect to electricity, is that described in subsections 78(1), (2) and (3) of the OEB Act. Those subsections provide as follows:

> **78.** (1) No transmitter shall charge for the transmission of electricity except in accordance with an order of the Board, which is not bound by the terms of any contract.
>
> (2) No distributor shall charge for the distribution of electricity or for meeting its obligations under section 29 of the *Electricity Act, 1998* except in accordance with an order of the Board, which is not bound by the terms of any contract.
>
> (3) The Board may make orders approving or fixing just and reasonable rates for the transmitting or distributing of electricity or such other activity as may be prescribed and for the retailing of electricity in order to meet a distributor's obligations under section 29 of the *Electricity Act, 1998*.

Reference: OEB Act, s. 78

63. The transmission and distribution of electricity is a monopoly service. The provision of that service must be overseen, or controlled, by the Board in order to protect consumers from the abuse of monopoly power.

64. The essential function of a regulatory scheme was described by the Supreme Court of Canada in *ATCO Gas and Pipelines Ltd. v. Alberta Energy & Utilities Board*, as follows:

> The utility regulations exist to protect the public from monopolistic behaviour and the consequent inelasticity of demand while ensuring the continued quality of an essential service.

Reference: *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006] 1 S.C.R. 140, 2006 SCC 4, at para.3

65. In carrying out its statutory mandate, the Board must be sensitive to provincial government policy. But being sensitive to provincial government policy does not change the essential characteristics of the regulatory scheme, namely the independent exercise of Board distraction to approve the recovery of costs incurred by LDCs in order to protect the interests of ratepayers.

66. Section 1 of the OEB Act sets out the objectives which the Board, in carrying out its responsibilities under the OEB Act or any other Act in relation to electricity, must be guided by. Included in those objectives is the promotion of "electricity conservation and demand management in a manner consistent with the policies of the Government of Ontario, including having regard to the consumer's economic circumstances."

Reference: OEB Act, s. 1

67. The significant feature of section 1 is that is does not derogate from the discretion of the Board. The Board must take into consideration the objectives, but it is not bound to apply them in any particular way.

68. The Board has, since the early 1990s, approved expenditures by LDCs for demand side management ("DSM") or, as they are now called, conservation and demand management ("CDM") programs. These programs have taken a variety of forms, including paying subsidies for building retrofits. In all cases, the programs were designed and implemented by LDCs. Before the costs of those programs could be recovered from ratepayers, the Board had to determine that they were prudent. Before the Board would find them to be prudent, the Board had to be satisfied that they passed prescribed screening tests, for example, the Total Resource Cost list. Because the cost of CDM programs was to be recovered from ratepayers, the Board's consideration of, and approval of, LDCs' CDM programs was undertaken pursuant to its authority under Section 78 of the OEB Act.

69. Sections 27.1 and 27.2 of the OEB Act authorize the Minister, in a Directive, to require the Board to take steps to, among other things, promote energy conservation and to

specify, as a condition of a licence, the conservation targets to be achieved by LDCs and other licencees.

Reference: OEB Act, ss. 27.1 and 27.2

70. Pursuant to sections 27.1 and 27.2 of the OEB Act, the Ministry of Energy and Infrastructure issued a Directive to the Board, dated March 31, 2010 ("the CDM Directive"). In that Directive, the Minister did the following:

(i) required the Board to take certain steps in order to establish CDM targets to be met by licenced electricity distributors;

(ii) required to the Board to issue a code that included rules relating to the reporting requirements and performance incentives associated with CDM Programs and to the planning, design, approval, implementation and evaluation, measurement and verification of Board-Approved CDM Programs;

(iii) set out the rules the Board was to follow in developing the objectives; and

(iv) required the Board, in approving the CDM programs, to "continue to have regard to its statutory objectives, including protecting the interests of consumers with respect to prices".

Reference: *The Minister's Directive*, dated March 31, 2010

71. The CDM Directive did not derogate from the Board's power to set just and reasonable rates. On the contrary, it reinforced the central feature of the regulatory scheme, namely the exercise of the Board's discretion to approve, for the recovery from ratepayers, the costs of LDCs' Board-Approved CDM programs.

72. Pursuant to the CDM Directive, the Board issued, on September 16, 2010, the "Conservation and Demand Management Code for Electricity Distributors" (the "Code"). Among other things, the Code does the following:

(i) Prescribes the contents of the CDM Strategy that each LDC is required to file;

Reference: *Conservation and Demand Management Code for Electricity*

Distributors, Ontario Energy Board, September 16, 2010 ("Code") s. 2.1

(ii) Prescribes the contents of the Annual Report, on the performance of the LCD's CDM programs, which each LDC is required to file;

Reference: Code, s. 2.2

(iii) Prescribes the contents of the application each LDC must file for approval of the Board-Approved CDM Programs;

Reference: Code, s. 3.1.4

(iv) Prescribes that each CDM program must meet certain cost-effectiveness tests;

Reference: Code, s. 4.1

(v) Prescribes the accounting policies and procedures which the LDCs must use for all of their Board-Approved CDM activities;

Reference: Code, s. 5

(vi) Prescribes the contents of and means for calculating the allowable CDM incentive programs; and

Reference: Code, s. 7.1

(vii) Provides that, in considering whether to approve applied for Board-Approved CDM programs, the Board may "make any determination that it considers appropriate".

Reference: Code, s. 3.4.1

73. The exercise of the power given to the Board by the CDM Directive and the Code is reflected in a recent decision by the Board on the application by Toronto Hydro-Electric System Limited for approval of its Board-Approved CDM programs (the "THESL Decision").

Reference: *Decision and Order, EB-2011-0011*, Ontario Energy Board, July 12, 2011

74. The nature and extent of the Board's powers described in the CDM Code, and as reflected by how those powers are exercised in the THESL Decision, are in stark contrast to the

role of the Board in the two programs in respect of which the Assessment was issued. In the former case, the Board is dealing with programs that are part of a regulatory scheme. In the latter, it quite clearly is dealing with programs that form no part of any regulatory scheme.

75. It is, the Applicants submit, particularly noteworthy to distinguish between the Board's powers, with respect to the incentive programs contained within Board-Approved CDM Programs, and the two incentive programs, the cost of which the Assessment seeks to recover. As noted above, the CDM Code prescribes the contents of, and the methods of calculation for, allowable CDM incentive programs. In addition, those incentive programs must be approved by the Board. By contrast, the Board had no role in determining the content of the two incentive programs, or in approving the programs, or in determining whether the cost of those programs was reasonable or in determining whether the recovery of the cost of the programs from ratepayers represented just and reasonable rates.

76. The Directive and the Code have all of the characteristics of the relevant regulatory scheme. They prescribe rules that must be followed before a distributor can engage in an activity. The Board determines whether a distributor has complied with the rules. Finally, the Board determines whether, or to what extent, a distributor may recover the cost of its CDM programs from ratepayers. This is in contrast to the programs, which have none of these characteristics.

(iv) The programs that resulted in the Assessment and Variance Account are not part of the relevant regulatory scheme, or any regulatory scheme at all

77. The Assessment and Variance Account are not part of the regulatory scheme embodied in the OEB Act.

78. Although the programs, the cost of which the Assessment seeks to recover, are ostensibly designed to conserve energy use, they bear none of the characteristics of the CDM programs which have historically been approved by the Board, or the Board-Approved CDM Programs created pursuant to the Directive and the CDM Code.

79. The programs do not deal with the activities of the LDCs. The costs being recovered by the Assessment are not the costs of the LDCs. There is no approval of the terms of

the programs, no approval of the costs as prudent, by the Board, or anyone else. Indeed, the programs were specifically designed to avoid regulatory oversight. There is no consideration, by the Board or anyone else, of whether the recovery of the costs would result in just and reasonable rates.

Reference: TC Transcript, July 25, 2011, pages 20-21

80. The programs, section 26.1 of the OEB Act, and O.R. 66/10 made pursuant to it, are fundamentally different, in every respect, from the regulatory scheme created by the OEB Act. The programs in question are not related in any respect to the activities of distributors, transmitters or licencees under the OEB Act. The Board did not prescribe the rules for participation in the programs. The Board had no role in determining whether the expenditure is prudent, or how much, if any, of the expenditure should be recovered from ratepayers. The Board's function is purely a mechanical one, namely calculating how much of the Assessment should be paid by the LDCs and the IESO, and by applying the formula, set out in O.R. 66/10, determining how much of the assessment should be recovered from individual ratepayers.

81. Reduced to its essence, O.R. 66/10 uses the Board as a means of distributing invoices to the IESO and the LDCs. The Board exercises no discretion, and in particular it makes no determination of whether the amounts to be paid by the LDCs, and in turn by the ratepayers, are just and reasonable. The Board's function is entirely outside of the regulatory scheme contained in the OEB Act.

82. The programs which are said to have triggered the Assessment have none of the characteristics associated with the relevant regulatory scheme, or indeed any regulatory scheme at all:

(i) there are no rules requiring a licence, or otherwise limiting or prescribing behaviour;

(ii) there are only guidelines that must be followed in order to receive a subsidy;

(iii) participation in the programs is voluntary, and no one is required to participate;

(iv) participation in the programs does not licence or authorize any activity;

(v) participation in the programs does not require the participants, thereafter, to follow rules or standards of behaviour; and

(vi) ratepayers are liable to pay for the charge, whether they participate in the programs or not.

83. The programs (and the Assessment and Variance Account they triggered) merely reflect a segment of government policy regarding energy efficiency and demand management, which do not regulate behaviour in any way, and are only indirectly and loosely connected to those who are liable to pay for their costs. They are not part of any regulatory scheme, and therefore the Assessment does not constitute a regulatory charge.

84. If a regulatory scheme were so broadly defined as to encompass a segment of government policy, the concept would be rendered meaningless.

85. This is conclusion is reinforced by the fact that section 26.2 of the OEB Act, which is related to section 26.1 and defines "special purpose", is excessively broad, and not targeted to a specific behaviour, or class of ratepayers. "Where a regulatory scheme is very broad, the scheme may not be sufficiently related to the persons 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 a case, the fees may be found to be a tax." This is exactly the case with respect to sections 26.1 and 26.2 of the OEB Act.

Reference: *Connaught*, para. 35

(v) The Assessment and Variance Account, do not meet the test for "Regulatory Charge" set out in Westbank

86. Applying the test set out by the Supreme Court of Canada in *Westbank* leads to the same conclusion as that set out above: the Assessment is not a regulatory charge, because the programs giving rise to it are not part of a regulatory scheme:

(i) **There is no complex or detailed code of regulation**: the programs are merely manifestations of government policy. The programs were created specifically to avoid regulatory oversight. The programs do not create rules or obligations.

(ii) **There is no specific regulatory purpose**: the programs do not attempt to affect behaviour. They are voluntary. In addition, there is no assessment as to the extent to which, or if at all, they influence energy conservation.

(iii) **There are no proper estimates of the cost of regulation**: there is no regulation surrounding the programs, and as such their costs are related to the reimbursement of subsidies. The Assessment has been calculated to offset only the costs of the programs. However, no such constraint is found in section 26.1 of the OEB Act.

(iv) **The ratepayers against whom the charge is ultimately levied do not benefit or cause the need for the programs or Assessment**: the purposes of the programs and resulting Assessment are so broadly defined by the Attorney General as to benefit the entire population – not only the ratepayers liable to pay the charge. Moreover, ratepayers are liable to pay for the charge regardless of their participation in the programs.

87. If section 26.1 of the OEB Act carries some of the indicia of a regulatory charge, which is denied, it nevertheless remains that these indicia are incidental to the Assessment and Variance Account, and not determinative. As noted by the Court in *Connaught*, it is the primary purpose of the law that is determinative; the tribunal must determine which aspect of the charge are dominant, and which are incidental. The Applicants submit that the dominant attributes of the Assessment are those of an indirect tax and not of a regulatory charge arising from a regulatory scheme.

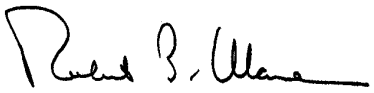
Reference: *Connaught*, paras. 16, 17

88. Were the Board to conclude that the Assessment was a regulatory charge, related to a regulatory scheme, it would be defining the notion of a regulatory scheme so broadly as to rob the term of any meaning.

PART 4 - RELIEF REQUESTED

89. The Applicants ask that the Board find that the Assessment is invalid in that it is authorized by legislative provisions, and a regulation, which are unconstitutional. Given that the Assessment is invalid, the amounts paid by ratepayers should be returned.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.



Robert B. Warren

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

AND IN THE MATTER OF Assessments issued by the Ontario Energy Board pursuant to section 26.1 of the *Ontario Energy Board Act, 1998* and Ontario Regulation 66/10;

AND IN THE MATTER OF Rule 42 of the Rules of Practice and Procedure of the Ontario Energy Board.

EB-2010-0184

ONTARIO ENERGY BOARD

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