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By electronic filing

September 7, 2011

Kirsten Walli
Board Secretary
Ontario Energy Board
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Dear Ms Walli,

Motion by Consumers Council of Canada ("CCC")
Board File No.: EB-2010-0184
Our File No.: 339583-000072

Please find enclosed the Submissions of Canadian Manufacturers & Exporters ("CME") in the above-noted proceeding.

Yours very truly,

Peter C.P. Thompson, Q.C.

PCT\slc
enclosure
c Robert Warren (for the Applicants)
Arif Virani and Robert Charney (for Attorney General of Ontario)
John Whitehead (for Ministry of Energy and Infrastructure)
Mahmud Jamal and Geoffrey Grove (for Energy Board Staff)
George Vegh (for Union Gas Limited)
Elisabeth DeMarco (for Association of Power Producers of Ontario)
Ian Mondrow (for Industrial Gas Users Association)
Fred Cass (for Enbridge Gas Distribution Inc.)
Michael Janigan (for Vulnerable Energy Consumers Coalition)
Nancy Coulas (CME)

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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 Ontario Regulation 66/10;

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

SUBMISSIONS OF CANADIAN MANUFACTURERS & EXPORTERS ("CME")

September 7, 2011

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INDEX

I. OVERVIEW

1. These submissions are made on behalf of Canadian Manufacturers & Exporters ("CME"). They are intended to supplement, rather than duplicate, the comprehensive submissions already made on behalf of Consumers Council of Canada ("CCC") and Aubrey LeBlanc (collectively, "the Applicants") and Union Gas Limited ("Union").

2. The focus of these submissions is facts and evidence that undermine the contention of the Attorney General for Ontario (the "AG") that the legislation and regulation pursuant to which the Lieutenant Governor-in-Council ("LGIC") issued the $53,695,310 Assessment, that forms the subject matter of these proceedings, are constitutionally invalid because the Assessment is a regulatory charge.

3. CME adopts and attempts to refrain from repeating submissions already made by the Applicants and Union pertaining to the legal framework and principles that apply to the Board's consideration and determination of the constitutional question. We agree with the Applicants and Union that the general tendency of the Assessment is indirect; with the result that the legislation empowering the LGIC to issue the Assessment and the ensuing Ontario Regulation 66/10 (the "Regulation") are constitutionally invalid unless the AG can discharge the onus of establishing that the Assessment is a regulatory charge. CME submits that the evidence falls far short of supporting the AG's characterization of the Assessment as a regulatory charge. As a result, the Assessment is a constitutionally invalid tax.

II. RELEVANT FACTS AND EVIDENCE

4. Facts already summarized by the Applicants and Union, that we adopt without further elaboration, include their factual summaries pertaining to the following:

(a) The Statutory Background to the Assessment,[1]

(b) The Assessment,[2]

(c) The Variance Account,[3]

(d) The Programs to which the Assessment relates,[4] and

(e) Ontario's Conservation Regulatory Schemes[5].

5. Additional facts that we submit discredit the AG's regulatory charge thesis include those summarized below.

A. HESP and OSTHI Programs

6. The Home Energy Savings Program ("HESP") was created in the spring of 2007. It was described as a government funded program to provide grants to homeowners to help them save money and fight climate change.[6]

7. The Ontario Solar Thermal Heating Initiative ("OSTHI") was created in June of 2007, shortly after the creation of the HESP. It was described as a government funded program providing incentives to Ontario organizations in the Industrial, Commercial and Institutional sectors ("ICI"), which install a qualifying solar water or solar air hearing system.[7]

8. Each of these programs were companions to similar federal programs that were funded out of the federal government's consolidated revenues.[8]

9. There is nothing in any of the material pertaining to the creation and administration of these incentive programs[9] that indicates that they were part of the complex, detailed and multi-part regulatory scheme that the AG postulated in response to the challenge that the

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[1] Applicants' Factum, paras.10 to 15; Union's Submissions, paras.5 to 9.
[2] Applicants' Factum, paras.16 and 17.
[3] Applicants' Factum, paras.18 to 22.
[4] Applicants' Factum, paras.23 to 29.
[5] Union's Submissions, paras.10 to 19.
[6] Exhibit KT1.8, Tab 14.
[7] Affidavit of Barry Beale sworn November 5, 2010 ("Beale Affidavit"), Exhibit C.
[8] Applicants' Factum, para.25.
[9] Exhibit KT1.1, pages 12 to 46; Exhibit KT1.3; Exhibit KT1.8, Tabs H, I, J. U and V.

Applicants subsequently made to the constitutionality of the Assessment. What this evidence indicates is that the HESP and OSTHI programs were established as stand-alone features of the government's policy of promoting conservation.

B. Initial Operation of the HESP and OSTHI Plans

10. The Ministry of Energy's (the "Ministry") spending under the auspices of these programs commenced in the fiscal year ending March 31, 2008. The Ministry's provision of grants from its budgeted allocation of consolidated revenues was made pursuant to government policy to increase energy conservation.

11. For about two (2) years, the HESP and OSTHI program spending was supported by the Ministry's budgeted allocation of consolidated revenues. Neither the Ministry's Annual Reports, nor the province's budget materials make any mention of its provision of grants and incentives under the HESP and OSTHI programs as being pursuant to a pre-determined complex regulatory scheme of the type the AG now postulates.[10]

12. In their creation and initial operation, the HESP and OSTHI programs were clearly taxpayer funded conservation policy initiatives. The taxpayer funded characterization of the programs was confirmed by statements made by the Premier in the Legislature on April 22, 2009, as follows:

> *"But here's the good news. You can earn up to $10,000 in savings and in refunds, both from the province of Ontario and the federal government, if you choose to pursue an energy audit and renovate your home. I think that's an important financial contribution being made by Canadian taxpayers and Ontario taxpayers to incent Ontario families into pursuing energy conservation policies."*[11] (emphasis added)

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[10] Exhibit KT1.8, Tabs L, M, O, P and Q; November 16, 2010 Transcript of Cross-Examination of Barry Beale ("November 16, 2010 Transcript"), at pages 101 to 105.

[11] Exhibit KT1.8, Tab K; November 16, 2010 Transcript, page 105, line 22 to page 106, line 11.

C. Ministry's Plan to Empower the LGIC to issue Assessments

13. It was only in the last quarter of 2008 or early 2009, and after the HESP and OSTHI programs had been operating for some time, that Ministry officials began considering legislation to empower the LGIC to impose assessments to recover amounts expended on HESP and OSTHI programs. In one of the initial planning memoranda prepared by Ministry officials, the initiative is not characterized as a matter of costs being incurred as part of a complex regulatory scheme. Rather, the initiative is entitled as:

> *"... THE REALLOCATION OF MEI MULTI-FUEL CONSERVATION PROGRAM COSTS TO ELECTRICITY AND NATURAL GAS RATEPAYERS."*.[12] (emphasis added)

14. The only plan pertaining to the justification for the Assessment that the evidence discloses is a plan to empower the LGIC to reallocate program costs to ratepayers. There is no evidence bearing a date prior to the enactment of the legislation that describes the complex "regulatory scheme" upon which the AG relies to attempt to justify the Assessment as a regulatory charge.

15. The event that prompted Ministry officials to consider empowering the LGIC to reallocate program costs to ratepayers was not costs associated with a complex multi-part regulatory scheme, of the type postulated by the AG, but the fact that "Ministry's multi-fuel conservation programs have been more successful than anticipated in terms of levels of participation and are placing increasing pressures on the treasury".[13]

16. It was program spending overruns compared to budget that prompted the initiative to empower the LGIC to reallocate program costs to ratepayers.

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[12] Exhibit JT1.5, Exhibit 1, and July 25, 2011 Transcript of Cross-Examination of Barry Beale ("July 25, 2011 Transcript") at page 20, lines 5 to 12, and page 22, line 12 to page 23, line 16.
[13] Exhibit JT1.5, Exhibit 1, and July 25, 2011 Transcript, page 23, line 17 to page 27, line 14.

17. The Ministry's budget overrun of program spending during its fiscal year ending March 31, 2009, was about $19M.[14] In the fiscal year ending 2010, there would have been a significant budgeted shortfall in the order of $140M, absent a reallocation of some $140M of HESP and OSTHI program spending to electricity and natural gas ratepayers.[15]

D. The Legislation

18. The *OEB Act* was amended with the passage of the *Green Energy Act* (the *"GEA"*) in the spring of 2009. Sections 26.1 and 26.2 were added to the *OEB Act* to empower the LGIC to impose Assessments by regulation. The relevant provisions of the legislation are reproduced in the Factums of the Applicants and Union.[16]

19. In their submissions, the Applicants and Union emphasize that the provisions of the legislation contain a broad and open-ended description of the types of Ministry program spending that could form the subject matter of an assessment. As counsel for the Applicants and Union have noted, the language in the legislation is so broad that it could conceivably encompass most, if not all, of the Ministry's entire spending on conservation programs and other related measures.[17] The legislation contemplates that the funds can be used to replenish the Ministry's budget overruns on spending of such programs. The wording of the legislation does not disclose the existence of any complex regulatory scheme to which its provisions relate.

E. The Assessment

20. The LGIC issued the Assessment that forms the subject matter of this proceeding by the Regulation on or about March 27, 2010. The amount of the Assessment was $53,695,310. The LGIC mandated the Ontario Energy Board (the "Board" or "OEB") to mechanically

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[14] July 25, 2011 Transcript, page 24, lines 19 to 26.
[15] Exhibit JT1.5B, Exhibit 1.
[16] Applicants' Factum, para.13; Union's Submissions, paras.5 and 6.
[17] Applicants' Factum, paras.43 to 46 and 88; and Union's Submissions, paras.31 to 38.

allocate the amount of the Assessment to its regulated electricity distributors.[18] The Ministry initially contemplated an Assessment against OEB regulated electricity and natural gas utilities in an amount of about $148M.[19] The need for an Assessment in this amount was determined at a time when, without a recovery of that amount, the Ministry would be forecasting a budget overrun of program spending in an amount of about $140M.

21. In the end, the Assessment amount was reduced to about $53.7M with its imposition to be limited to electricity distribution utilities only. The decision to reduce the Assessment amount and confine it to electricity distribution utilities was based on updated Ministry forecasts that indicated that the initially anticipated budget overrun would be substantially less.[20] This evidence pertaining to the derivation of the amount of the Assessment confirms that its purpose is to reduce budgeted overruns of program spending. There is little, if any evidence, to establish that the amount of the Assessment was determined on the basis of a consideration of factors that need to be evaluated to justify a regulatory charge.

F. OEB's Allocation of the Assessment to Electricity Distributors

22. By letter dated April 9, 2010, the Board fulfilled its mechanical obligations under the Regulation and notified distributors of their allocated share of the Assessment.

23. The Board exercises no regulatory function in allocating the Assessments to electricity distributors. It merely follows the directives contained in the Regulation.

24. The regulatory scheme that the Board applies in its regulation of electricity distributors does not apply to the Assessments. The costs that distributors are permitted to recover in

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[18] O.Reg.66/10
[19] Exhibit JT1.6 and JT1.7, Exhibit 2, page 1.
[20] Exhibit JT1.6 and JT1.7, Exhibit 2, pages 3 to 5, and July 25, 2011 Transcript, page 32, line 22, where the witness stated that the reduced assessment would produce a $14.9M over-recovery compared to budget.

rates for amounts they pay for conservation programs are part of their costs of doing business. These costs are subject to scrutiny by the OEB and, if found to be reasonable, then they are included in an approved regulatory charge defined under the *OEB Act* as a "rate".

25. By contrast, the legislation empowering the LGIC to require the OEB to allocate an Assessment to utilities the Board regulates bypasses, in its entirety, the OEB administered regulatory scheme that applies to expenditures made by electricity distributors to support the conservation aspects of their business. The evidence indicates that the Regulation was specifically designed to preclude any regulatory review.[21] The regulatory scheme that the OEB administers is not the regulatory scheme that relates to a determination of whether the Assessment made by the LGIC is or is not a regulatory charge. If there is a regulatory scheme that supports the Assessment, then it is a regulatory scheme other than that applied by the OEB in its regulation of utility rates.

G. Absence of Any Regulatory Aspects Related to the Assessment

26. In their written submissions, the Applicants and Union emphasize that for a charge to have a "regulatory" effect, the behaviour of the person upon whom the charge is being imposed needs to be influenced or controlled in a way that differs from the behaviour that the imposition of a tax imposes on persons assessed.[22] The imposition of an indirect tax calls for the person assessed to remit the assessed amount to the taxing authority and to collect the amount assessed from third parties. The only behaviour that the imposition of an indirect tax prompts in the third parties is the payment of the amount assessed.

27. The imposition of the Assessment on electricity distributors has exactly the same impact. It requires them to remit the amount assessed to the government and to collect the

[21] Exhibit JT1.5, Exhibit 2
[22] Applicants' Factum, para.56, and Union's Submissions, para.39.

assessed amount from utility ratepayers. The ratepayers' response to the Assessment is identical to third party response to the imposition of an indirect tax; they merely pay the amount to the middleman.

28. We submit that the conclusion that the recovery of the assessed amounts from ratepayers is an indirect tax is obvious when one considers what ratepayers would have concluded had the LGIC imposed Assessments on them by means of a separate government invoice sent directly to ratepayers, rather than imposing the Assessments on distributors for collection from them as part of a utility bill. Had the LGIC proceeded directly to assess ratepayers by means of a separately invoiced amount of their "Assessment", rather than indirectly through electricity distributors and the OEB in an amount included in the utility bill, then anyone, acting reasonably, would quickly characterize the amounts assessed by the LGIC as a tax rather than a regulatory charge.

29. Ratepayers would have considered such Assessments to be indistinguishable from the Assessments they receive in relation to property taxes. For consumers, an "Assessment" from the government in and of itself denotes a tax rather than a regulatory charge.

30. There is no evidence to support a conclusion that the Assessment imposes any behavioural requirements on the persons assessed other than collection and remittance of funds to the government. The evidence supports the conclusion that the amounts assessed are a tax and not a regulatory charge.

H. <u>Assessed Persons Did Not Cause HESP and OSTHI Costs to be Incurred</u>

31. There is no causal connection between the actions of persons assessed and the Ministry's incurrence of HESP and OSTHI costs in excess of program spending budgets. HESP and OSTHI program spending overruns are the combined result of the government's policy to foster conservation, and a greater than anticipated response to the incentive programs.

Neither distributors, upon whom the Assessment was imposed, nor their electricity utility ratepayers from whom the Assessment was collected, did anything to cause the government's program spending on conservation initiatives. The assessed persons did not cause the costs to be incurred.

I. Assessed Persons Derive No Benefit Incremental to the Overall Public Interest Benefit Associated with Conservation

32. The fact that neither distributors, nor consumers enjoy any benefits from the Assessment that are incremental to the overall public interest benefit associated with conservation is emphasized by Union in its submissions.[23] This reality was recognized in the Ministry's presentation to the Legislation and Regulation Committee seeking approval for the passage of the legislation and regulations thereunder. In the presentation to the Legislation and Regulation Committee describing the "Profile of the Items for Review", it was stated as follows:

> ***"Profile at a Glance***
> *New Costs/Burdens: Yes for Stakeholders / No for Government*
> *New Savings/Opportunities: No for Stakeholders / Yes for Government"*
> (emphasis added)

This is a clear acknowledgement that neither distributors nor consumers benefit from the amounts being recovered through the Assessment. That the Assessment produces no benefits to the persons assessed was also acknowledged by the witness for the AG when he agreed that the persons who receive the HESP and OSTHI grants are the primary beneficiaries thereof and that no additional benefits accrue to anyone as a result of the subsequent payment of the amounts assessed.[24]

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[23] Union Submissions, para.50.
[24] November 16, 2010 Transcript, page 118, line 21 to page 123, line 15.

J. AG's "Regulatory Scheme" Response to the Constitutionality Challenge

33. As already noted, the Ministry documents relating to the conception of the plan to empower the LGIC to impose assessments on certain third parties, including electricity distributors, to recover amounts previously spent by the Ministry on its incentive programs, make no reference to the existence of a complex regulatory scheme of the type now postulated by the AG, being a regulatory scheme that included, as minor component parts, the HESP and the OSTHI programs.[25]

34. A description of the complex regulatory scheme upon which the AG relies to support its contention that the Assessment is a regulatory charge first surfaced in this proceeding in response to the constitutional validity challenge. The first description of the alleged regulatory scheme to which the Assessment supposedly relates was contained in the AG's Factum dated June 23, 2010, pertaining to the preliminary matters argued on July 13, 2010. That description contained in paragraph 10 of the AG's Written Argument was subsequently supplemented by the Affidavit of Mr. Beale dated November 5, 2010.

35. Elements of the description of the regulatory scheme the AG postulates are informative in that the allegedly complex pre-existing scheme embodies different legislative enactments dating back to 1998. According to Mr. Beale, the alleged regulatory multi-year scheme includes the following components:

(a) *The Electricity Act, 1998*,

(b) *The Ontario Energy Board Act, 1998*,

(c) *The Electricity Re-Structuring Act, 2004*,

(d) The Transmission System Code,

(e) The Distribution System Code,

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[25] See para.9 of this Factum.

(f) The Retail Settlement Code,

(g) The IESO Market Rules, and

(h) *The Green Energy Act, 2009*.

The HESP and the OSTHI programs are said to be two (2) minor components of the alleged regulatory scheme reflected in all of the foregoing.[26]

36. The AG appears to concede that, by themselves, the HESP and OSTHI programs do not evidence the existence of any regulatory scheme.[27] Accordingly, if there is any evidence to establish the existence of the complex regulatory scheme the AG postulates, then it must be found elsewhere than in a description of the HESP and OSTHI programs, the costs of which the LGIC can allegedly assess against distributors and others as regulatory charges.

III. ANALYSIS

37. The legal framework for considering whether the evidence supports the AG's characterization of the Assessment as a regulatory charge is described in the submissions of the Applicants and Union.[28]

38. For the Assessment to be found to be a regulatory charge, the evidence must establish that it is connected to a regulatory scheme. In their submissions, the Applicants and Union have provided the list of criteria that the Courts have determined should be considered when analyzing whether or not a regulatory scheme exists.[29]

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[26] Beale Affidavit, paras.6 to 12, November 16, 2010 Transcript, page 91, line 21 to page 98, line 20.
[27] November 16, 2010 Transcript, page 92, lines 1 to 6, where the AG witness stated that the programs were "... two small elements, two small programs, among others, also within a broad regulatory treatment."
[28] Applicants' Factum, paras.43 to 56; and Union's Submissions, paras.24 to 52.
[29] Applicants' Factum, para.47; and Union's Submissions, para.25.

39. In considering whether or not the evidence establishes the existence of a regulatory scheme, the threshold question we invite the Board to consider is: "What is a scheme?"[30]

40. The definition of the word "scheme" is informative when considering that threshold question. The word "scheme" is defined as follows:

> *"A systematic plan or arrangement for obtaining some particular object or putting a particular idea into effect."*

41. A scheme is a plan. Planning is prospective in nature. For a scheme of many parts to exist, it needs to be established that someone planned the entire scheme before any of its subsequent parts emerged. The existence of a scheme cannot be established by hindsight.[31]

42. For a plan to constitute a scheme, it needs to have limits when it is created. A policy to promote conservation is not a scheme.

43. Further, where a scheme of many parts is alleged, the existence of the scheme should be reasonably apparent from the documents and materials asserted to be component parts thereof. Where the existence of a multi-part complex scheme is contradicted by the documents related to its component parts, then evidence supporting the existence of the alleged scheme is lacking.

44. Moreover, as already noted, the use of the word "regulatory" to modify "scheme" connotes a plan that is designed to influence, to some degree, the behaviour of the person being regulated. We reiterate that the only function that the imposition of the Assessment imposes on electricity distributors is a collection and remittance function. An indirect tax

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[30] See November 16, 2010 Transcript, page 89, line 28 to page 91, line 20, where the AG's witness was not prepared to be cross-examined on the meaning he attributed to the word "scheme" appearing in para.5 of his Affidavit.

[31] See November 16, 2010 Transcript, page 91, line 21 to page 97, line 23, where the AG's witness, in describing what his counsel described at page 97, line 12 as "a multi-part scheme as it stands today", indicated that the elements he had listed in his Affidavit "... were those that came to mind". (emphasis added) This exchange demonstrates that the scheme postulated by the AG's witness in his Affidavit was the result of an exercise of hindsight.

imposes a revenue collection and remittance function to benefit the government. Such behaviour is of no assistance in establishing that the Assessment imposed is a regulatory charge. Rather, the absence of the imposition of any behavioural requirements on the persons assessed, other than revenue collection and remittance, supports the opposite conclusion, namely, that the amount assessed is not a "regulatory" charge; it is a tax. There is no regulatory aspect to the plan to reallocate program spending to ratepayers. Rather, the persons being assessed are being mandated to be government tax collectors.

45. There is no evidence capable of supporting a finding that a complex multi-part scheme of the type postulated by the AG was conceived by anyone in 1998, which is the date when the AG's witness said the first part of his scheme came into existence; or at any time thereafter. As previously noted, none of the documented materials related to the components of the AG's multi-part complex scheme refer to its existence. The scheme the AG postulates does not exist. Accordingly, his contention that the Assessment is a regulatory charge is without merit.

46. The only plan disclosed in the evidence related to the Assessment is the Ministry's plan to empower the LGIC to reallocate Ministry program spending to ratepayers. This is not a regulatory plan but a plan to raise funds to replenish program spending overruns for which taxpayers are responsible.

47. Moreover, as counsel for the Applicants and Union have demonstrated, the other essentials of a regulatory scheme are lacking. The costs that form the subject matter of the Assessment have nothing to do with the regulation of behaviour.

48. The parameters of the alleged scheme do not delineate the amounts of program spending that might form the subject matter of an assessment. In its initial iteration, costs of the alleged multi-part complex regulatory scheme apparently included costs of program

spending related to natural gas consumption, but not costs of program spending related to oil or propane consumption. However, costs related to natural gas consumption were eventually excluded from costs associated with the alleged scheme and, like amounts related to propane and oil, now fall outside the ambit of the alleged scheme. This evidence reveals that the parameters of the alleged scheme are a variable work-in-progress and corroborates the conclusion that the plan to reallocate program spending to ratepayers is not a regulatory plan, but a plan to raise funds to replenish program spending overruns. Its alleged costs are but a portion of the program spending amounts and the amount of the Assessment is linked to the extent of the program spending overrun.

49. The absence of any pre-determined boundaries to the breadth of costs that fall within the ambit of the alleged scheme establishes the absence of, rather than the presence of, a "regulatory scheme" that is necessary to support a finding that the assessments are regulatory charges rather than taxes.

50. Moreover, the persons assessed neither benefit from nor cause the need for the program spending to support the government's conservation policy and, in particular, the spending overruns compared to budget that are the rationale for the Assessment. There is no causal relationship between the costs being recovered in the Assessment and the persons assessed.

IV. CONCLUSION

51. A careful analysis of the evidence reveals that there is no credible evidence to support a finding that the complex multi-part scheme postulated by the AG exists.

52. An affidavit asserting the existence of a multi-part regulatory scheme that is unsupported by and is incompatible with the documentary materials that allegedly form the component

parts of the alleged scheme lacks credibility and fails to establish the existence of a scheme.

53. The only plan disclosed in the evidence to which the Assessment relates is the plan to reallocate project spending budget overruns to ratepayers. The plan has no regulatory aspects to it and all other pre-requisite essentials to the establishment of the existence of a regulatory scheme are lacking.

54. The AG has failed to discharge the onus of establishing that the Assessment is a regulatory charge. The legislation empowering the LGIC to issue the Assessment and the Regulation based thereon are constitutionally invalid.

55. The relief the Applicants request should be granted.

V. COSTS

56. CME requests that it be awarded 100% of its reasonably incurred costs of participating in this proceeding.

All of which is respectfully submitted this 7th day of September, 2011.

Peter C.P. Thompson, Q.C.
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