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SENT BY EMAIL

Ms. Kirsten Walli, Board Secretary
Ontario Energy Board
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Dear Ms. Walli:

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 (EB-2010-0184)

Please find enclosed an electronic copy of the written submissions of Ontario Energy Board Staff. A hard copy with our book of authorities will follow by overnight courier.

Yours very truly,

Mjamal.

Mahmud Jamal

MJ:gg

c: Geoffrey Grove (*Osler, Hoskin & Harcourt LLP*)
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Ian Mondrow (*Lawyers for the Industrial Gas Users Association*)
Fred Cass (*Lawyers for Enbridge Gas Distribution Inc.*)
Michael Janigan (*Lawyers for Vulnerable Energy Consumers Coalition*)
Michael Millar (*Ontario Energy Board*)

File No. EB-2010-0184

ONTARIO ENERGY BOARD

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

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

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AND TO: **Intervenors of Record**

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PART I – OVERVIEW

1. As part of its green energy initiative, the Ontario government added ss. 26.1 and 26.2 to the *Ontario Energy Board Act, 1998* and adopted Regulation 66/10 thereunder. These measures required the Ontario Energy Board to impose on distributors of electricity and the Independent Electricity System Operator ("IESO") a "special purpose" assessment in proportion to the amount of electricity they distribute, the revenue from which is to be used to fund energy conservation and renewable energy programs. The principal question on this motion is whether these assessments are an indirect tax and hence *ultra vires* the province of Ontario under the *Constitution Act, 1867*, or whether they are valid as regulatory charges. A secondary question is whether the assessments are a "rate" which required an order of the Board pursuant to s. 78 of the *Ontario Energy Board Act, 1998*.

2. The Ontario Energy Board Staff submits that the assessments are likely *intra vires* the Province of Ontario as a valid provincial regulatory charge. First, the charges likely meet the four established criteria for a regulatory scheme: (1) there is a complete, complex, and detailed code of regulation in the web of energy statutes and regulations in Ontario; (2) there is a regulatory purpose to affect behaviour through the Home Energy Savings Program ("HESP") and the Ontario Solar Thermal Heating Incentive ("OSTHI"), the two programs funded by the assessments; (3) there are actual or properly estimated costs of regulation, since Ontario has estimated and capped the assessments at $53.7 million; and (4) there is a relationship between the regulation and the person regulated, since suppliers and consumers of electricity both benefit from and create the need for the conservation initiatives. Second, there is likely a nexus between the special purpose charges and the regulatory scheme, since Ontario has made a reasonable attempt to match the revenues from the charges with the costs of the regulatory scheme.

3. Board Staff further submits that the assessments are not a "rate" for the transmission of electricity within the meaning of s. 78, but rather are charges in respect of expenses associated with energy conservation programs relating to electricity. The Board has no jurisdiction with respect to whether to impose the assessments: it is required to do so by law, pursuant to special provisions of the Act and regulations governing the assessments. As such, the Board was not required to hold a hearing to establish "just and reasonable rates" under s. 78 of the Act.

PART II – LEGISLATIVE AND BACKGROUND FACTS

A. The legal framework for the impugned assessments

4. In May 2009, the *Green Energy and Green Economy Act, 2009*[1] amended the *Ontario Energy Board Act, 1998*[2] and broadened the objectives that the Board must consider in discharging its mandate. In relation to electricity, the Board must now be guided by the following additional objectives: "to promote 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"; "to facilitate the implementation of a smart grid in Ontario"; and "to promote the use and generation of electricity from renewable energy sources in a manner consistent with the policies of the Government of Ontario, including the timely expansion or reinforcement of transmission systems and distribution systems to accommodate the connection of renewable energy generation facilities."[3]

5. Section 26.1 was also added to the *OEB Act* to require the Board to assess, as prescribed by regulation, amounts "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"[4] provided for under the *OEB Act*, the *Green Energy Act, 2009*,[5] the *Ministry of Energy and Infrastructure Act*,[6] or any other Act. The Board is directed to impose the assessments on gas distributors and licensed distributors of electricity (in respect of consumers in their service areas), the Independent Electricity System Operator (the "IESO") established under the *Electricity Act, 1998*, and any other person prescribed by regulation.[7] Section 26.2 states that, for the purpose of the *Financial Administration Act*, all amounts

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1 Bill 150, *Green Energy and Green Economy Act*, enacted as S.O. 2009, c. 12, Sched. D, amending the *Ontario Energy Board Act, 1998*.

2 *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sched. B ("*OEB Act*").

3 *OEB Act*, ss. 1(1)3, 1(1)4, 1(1)5, respectively.

4 *Id*., s. 26.1.

5 *Green Energy Act, 2009*, S.O. 2009, c. 12, Sched. A.

6 *Ministry of Energy and Infrastructure Act*, R.S.O. 1990, c. M.23.

7 *Electricity Act, 1998*, S.O. 1998, c. 15, Sched. A.

collected under s. 26.1 are deemed to be paid to Ontario for certain "special purposes" listed in s. 26.2(2), namely:

(a) to fund conservation or renewable energy programs aimed at decreasing the consumption of two or more of the following fuels: natural gas, electricity, propane, oil, coal, and wood;

(b) to fund conservation or renewable energy programs aimed at causing consumers of fuel to change from one or more of the fuels listed above to any other fuel or fuels listed above;

(c) to fund conservation or renewable energy programs aimed at decreasing peak electricity demand, while increasing or decreasing the consumption of another type of fuel;

(d) to fund research and development or other engineering or scientific activities aimed at furthering the conservation or the efficient use of fuels;

(e) to fund conservation or renewable energy programs aimed at a specific geographical, social, income or other sector of Ontario;

(f) to reimburse the Province for expenditures it incurs for any of the above purposes.

6. Section 26.2(3) of the *OEB Act* requires the Minister of Finance to maintain in the Public Accounts an account to be known as the "Ministry of Energy and Infrastructure Special Purpose Conservation and Renewable Energy Fund" in which shall be recorded all receipts and disbursements of public money under s. 26.1.

7. The assessments to be imposed on licensed electricity distributors and the IESO are detailed in Regulation 66/10, "Assessments for Ministry of Energy and Infrastructure Conversation and Renewable Energy Program Costs" (filed and in force as of March 12, 2010), which was adopted pursuant to s. 26.1 of the *OEB Act*.[8] The Board is required to impose

[8] Ontario Regulation 66/10.

assessments in a total amount of $53,695,310,[9] in proportion to the volume of electricity distributed by licensed distributors and the IESO and in accordance with a formula in the Regulation.[10] The Board has no discretion in this regard.

8. Although s. 26.1(1) of the *OEB Act* contemplates that gas distributors may be assessed, presently Regulation 66/10 provides that assessments may only be imposed on licensed electricity distributors.

9. Section 6 of Regulation 66/10 provides that each person assessed shall remit the assessed amount to the Minister of Finance on or before July 30, 2010. Significantly, s. 26.1(2) of the *OEB Act* and s. 7 of Regulation 66/10 ("Recovery of funds") provide that licensed electricity distributors may collect from consumers the amounts assessed under s. 26.1(1). These amounts are to be collected over a one-year period (Regulation 66/10, s. 9). The practical effect of these provisions is that electricity consumers, rather than electricity distributors, ultimately bear the burden of the assessments.

10. Section 8 of Regulation 66/10 provides that distributors are to track in a "variance account" authorized by the Board the difference between amounts remitted to the Board and amounts recovered from consumers. Section 8 also provides that distributors may apply to the Board by no later than April 15, 2012 for an order authorizing them to clear any debit or credit balance in such a variance account.

B. Ontario's evidence

11. Ontario's evidence in this proceeding consists of the affidavit of Mr. Barry Beale, Director of the Ministry of Energy's Energy Efficiency and Innovative Technology Branch, Renewables and Energy Efficiency, which explains how revenue from the assessments will be used.[11] Mr. Beale states that the assessments will be used "solely to recoup the direct incentive costs incurred by the province" in providing two programs: the Home Energy Savings Program

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9 *Id*., s. 4.

10 *Id*., s. 5.

11 Affidavit of Barry Beale sworn November 5, 2010 ("Beale Affidavit").

(the "HESP"), and the Ontario Solar Thermal Heating Incentive (the "OSTHI").[12] As Mr. Beale explained:

> Ontario has adopted conservation as the accepted strategy for improving the reliability of the electricity system, and as a means of reducing the costs associated with energy generation. The province's approach to energy conservation is multi-faceted, and includes a number of programs within a broad regulatory scheme. Two components of Ontario's regulatory scheme include the Home Energy Savings Program (HESP) and the Ontario Solar Thermal Heating Incentive (OSTHI). ***In this case, the charge assessed by the Ontario Energy Board is intended solely to recoup the direct incentive costs incurred by the province in providing the HESP and OSTHI programs. This regulatory charge is based solely on cost-recovery – it is neither intended or designed to generate revenue for the Government.***[13]

12. Both the HESP and the OSTHI originated with, and are administered under, a Memorandum of Understanding by Natural Resources Canada ("NR Can") pursuant to the federal government's ecoEnergy-Homes program, and ecoEnergy-Renewable Heat program, respectively. Under HESP and OSTHI, Ontario matches federal payments to qualified applicants. NR Can submits approved applications to Ontario for processing, and Ontario then sends to qualified applicants incentive cheques that match payments made by the federal government.[14] The HESP and OSTHI programs have operated since June 2007. Before the introduction of Regulation 66/10 in March 2010, the Ontario government funded both programs from its general revenues. Both federal and provincial funding for the ecoEnergy-Homes and ecoEnergy-Renewable Heat programs ended as of March 31, 2011.[15]

13. ***Home Energy Savings Program.*** The HESP provides an incentive to residential homeowners to reduce their use of electricity and other fuels. It subsidizes 50% of the cost of a home energy audit, up to a maximum of $150, and then provides additional subsidies to homeowners who implement improvements recommended by the audit, based on a list of

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12 *Id.*, ¶5.

13 *Id.*, ¶5 (emphasis added).

14 *Id.*, ¶14.

15 *Id.*, ¶15.

prescribed conservation measures and their available incentives.[16] As of August, 2010, Ontario homeowners had completed approximately 380,000 home energy audits under the HESP.[17]

14. ***Ontario Solar Thermal Heating Incentive.*** The OSTHI provides a rebate to commercial, industrial or institutional organizations that install a qualifying solar air or solar water thermal heating system, thereby reducing their demand for electricity and other fuels. The OSTHI program matches rebates provided by the federal government's ecoEnergy-Renewable Heat program, up to a maximum of $400,000 per solar thermal water installation and $80,000 per solar thermal air installation, with a corporate maximum of $2 million.[18]

15. Ontario's evidence is that the objective of the HESP and OSTHI programs "is to alter the behaviour of consumers by providing incentives to reduce energy consumption." Ontario states that through the use of these financial rebate regimes, "the Government of Ontario provides a monetary inducement to consumers to reduce their reliance on non-renewable energy sources, and stimulates energy conservation."[19]

16. The HESP and OSTHI programs provide incentives to reduce demand for electricity as well as for other fuels. However, the impugned assessments in this case may be imposed only on electricity distributors, and, according to Ontario's evidence, will be used only for the electricity component of the HESP and OSTHI programs. Ontario's evidence breaks down the estimated and actual costs for "electricity" and "other fuel" categories of the HESP and OSTHI programs. Ontario has estimated that, for the 2009/2010 fiscal year, the total cost for the HESP and OSTHI programs for all fuel categories is $184,510,113 (consisting of $181,335,709 for the HESP and $3,174,404 for the OSTHI).[20] Over the same time period, for electricity alone, the estimated allocation is $53,695,310 (consisting of $53,266,344 for the HESP and $428,965 for

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16 *Id*., ¶16.

17 *Id*., ¶18.

18 *Id*., ¶19.

19 *Id.*, ¶22.

20 *Id*., Appendix, Table 2.

the OSTHI),[21] while the actual cost for electricity alone is $51,253,901 (consisting of $51,153,859 for HESP and $100,042 for OSTHI).[22]

C. Evidence of the moving parties and intervenors

1. Consumers Council of Canada and Aubrey LeBlanc

17. The evidence of the moving parties, Consumers Council of Canada and Aubrey LeBlanc, essentially consists of two letters from the Board to Licensed Electricity Distributors: (a) a letter dated April 9, 2010, advising them that the Board was imposing assessments (which the Board referred to as "Special Purpose Charge Assessments") pursuant to ss. 26.1 and 26.2 of the *OEB Act* and Ontario Regulation 66/10, enclosing an invoice for the amount assessed against the particular distributor, and providing instructions relating to the payment of the assessment to the Ministry of Finance and to recovery of the assessed amounts from customers;[23] and (b) a letter dated April 23, 2010, advising them that the Board had established a "Special Purpose Charge Assessment Variance Account", in which each distributor would record any difference between the amount remitted to the Minister of Finance for the distributor's assessment, and the amounts recovered from customers on account of the assessment.[24]

2. Association of Power Producers of Ontario

18. The Association of Power Producers of Ontario ("APPrO"), an intervenor, filed an affidavit claiming that its members would be prejudiced if Ontario were to extend the assessments to gas-fired power generators ("Generators"). In particular, APPrO's evidence claims that: (1) the potential expansion of the assessments to Generators may result in very significant charges being assessed against them;[25] (2) in certain cases, the assessments may not be passed through to end-use customers, and Generators may therefore face an additional,

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21 *Id.*, Appendix, Table 3.

22 *Id.*, Appendix, Table 4.

23 OEB letter dated April 9, 2010 to Licensed Electricity Distributors: *Amended Motion Record*, pp. 14-16.

24 OEB letter dated April 23, 2010 to Licensed Electricity Distributors: *Amended Motion Record*, pp. 18-19.

25 Affidavit of John Wolnik sworn November 15, 2010 ("Wolnik Affidavit"), ¶¶5(a), 11.

unmitigated financial burden as a result of the assessments;[26] and (3) the assessments may ultimately be imposed on Generators, even though Generators are claimed to have no relationship with the HESP and OSTHI programs and to neither cause the need for nor benefit from the HESP and OSTHI programs or the resulting assessments.[27] APPrO's evidence is that the assessments "would negatively and significantly impact both Generators and the Ontario electricity sector."[28]

19. While s. 26.1(1) of the *OEB Act* would provide statutory authority for such an extension to Generators, it would require either a new regulation or an amendment to Regulation 66/10, which currently provides authority to impose assessments only on licensed electricity distributors and the IESO, and not on the Generators.[29] APPrO's evidence does not otherwise appear to relate to the constitutionality of the impugned assessments, which have been imposed under s. 26.1 of the *OEB Act* and Regulation 66/10.

3. Canadian Manufacturers and Exporters

20. The evidence of Canadian Manufacturers and Exporters ("CME"), another intervenor, consists of several documents that are said to relate to Mr. Beale's affidavit filed on Ontario's behalf.[30] The CME's documents include Hansard extracts, news releases, budget excerpts, and various other briefs and reports in respect of Ontario's climate change, energy conservation and renewable energy initiatives.

PART III – ISSUES

21. The Amended Notice of Motion of CCC and Aubrey LeBlanc requests seven specific determinations from the Board,[31] but these appear to boil down to two legal questions: first, are

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26 *Id*., ¶¶5(b), 17.

27 *Id*., ¶¶5(c), 18-20.

28 *Id*., ¶21.

29 Ontario Regulation 66/10, s. 3.

30 Affidavit of Jack Hughes sworn November 12, 2010 ("Hughes Affidavit"), ¶2.

31 Amended Notice of Motion of Consumers Council of Canada and Aubrey LeBlanc dated May 27, 2010: *Amended Motion Record*, pp. 1-2.

the assessments an unconstitutional indirect tax, or are they instead a valid provincial regulatory charge?; second, do the assessments constitute a "rate" within the meaning of s. 78 of the *OEB Act*, which the Board has imposed without having previously made an order under the Act? While the parties' and intervenors' submissions do not appear to address the second question, in what follows we will address both questions.

PART IV – LAW

A. Are The Assessments An Unconstitutional Indirect Tax Or A Valid Provincial Regulatory Charge?

(a) Two preliminary comments

22. Board Staff have two preliminary comments. First, the legislation challenged before the Board benefits from a "presumption of constitutionality," which means that any party challenging a law under the division of powers bears the onus of showing that the law does not fall within the legislative jurisdiction of that level of government.[32] The presumption also provides that when faced with two equally plausible characterizations of a law, a court or tribunal "should normally choose that which supports the law's constitutional validity."[33]

23. Second, the Supreme Court has directed that a court or tribunal faced with a challenge to legislation under the division of powers must not judge the wisdom or efficacy of the challenged law.[34] It is constitutionally irrelevant whether the means chosen by a legislature are imperfect;[35] whether the law will achieve the legislature's goals, whether it is effective, or whether it could have been designed better;[36] whether the legislature should have engaged in more consultation before enacting the law;[37] or whether the law is too expensive.[38] Within their

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32 *Reference re Firearms Act (Can.)*, [2000] 1 S.C.R. 783, ¶25.

33 *Siemens v. Manitoba (Attorney General)*, [2003] 1 S.C.R. 6, ¶33.

34 *Ward v. Canada (Attorney General)*, [2002] 1 S.C.R. 569, ¶¶18, 22, 26; *Reference re Firearms Act*, above, note 32, ¶¶18, 57; P.W. Hogg, *Constitutional Law of Canada*, loose-leaf, 1997+, vol. 1, pp. 15-18 to 15-19.

35 *Ward, id.*, ¶22.

36 *Siemens*, above, note 33, ¶15; *Ward, id.*, ¶¶18, 26-27; *Reference re Firearms Act*, above, note 32, ¶¶56-57.

37 *Reference re Firearms Act, id.*, ¶56.

respective constitutional spheres, Parliament and the provincial legislatures are the only judges of whether a measure is likely to achieve its intended purpose.[39] In sum, the wisdom of the policy underlying the law is a matter solely for the legislature, not the courts.

(b) The distinction between taxes and regulatory charges

24. ***Four indicia of a tax.*** The Supreme Court has noted that a levy or fee will generally be considered a tax if it has the four *indicia* identified in the seminal decision of *Lawson v. Interior Tree Fruit and Vegetable Committee of Direction*, namely, if it is: (1) enforceable by law; (2) imposed under the authority of a legislature; (3) levied by a public body; and (4) intended for a public purpose.[40]

25. ***Direct vs. indirect taxes.*** Under the *Constitution Act, 1867*, the provincial legislatures are limited to direct taxation within the province (s. 92(2)), whereas Parliament has authority to enact both direct and indirect taxes (s. 91(3)). Canadian courts have accepted John Stuart Mill's definition of the distinction between direct and indirect taxes:

> A direct tax is one which is demanded from the very person who 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.[41]

26. ***Regulatory charges.*** The Supreme Court has recognized that provinces can enact a levy that might otherwise qualify as an indirect tax, if the levy is incidental or ancillary to a scheme

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38 *Id.*, ¶57.

39 *Id.*, ¶18.

40 *620 Connaught Ltd. v. Canada (Attorney General)*, [2008] 1 S.C.R. 131, ¶22, citing *Lawson v. Interior Tree Fruit and Vegetable Committee of Direction*, [1931] S.C.R. 357, pp. 362-63 and *Eurig Estate (Re)*, [1998] 2 S.C.R. 565, ¶15.

41 J.S. Mill, *Principles of Political Economy* (1848), Book V, ch. 3, cited in Hogg, above, note 34, p. 31-6. Hogg notes that Canadian courts have accepted Mill's distinction as "authoritative" for purposes of the *Constitution Act, 1867*.

of provincial regulation.[42] Such levies are characterized as "regulatory charges." Regulatory charges are charges used to finance a regulatory scheme or to alter individual behaviour.[43]

27. In recognition of the distinct nature of regulatory charges, a fifth indicator has been added to the four traditional *indicia* of a tax. A government levy will be treated as a tax if meets the four traditional criteria of a tax and, in addition, is "unconnected to any form of a regulatory scheme."[44] The Supreme Court has stated that "[t]his fifth consideration provides that even if the levy has all the other *indicia* of a tax, it will be a regulatory charge if it is connected to a regulatory scheme."[45] As the Federal Court of Appeal recently explained, "a charge that meets the first four characteristics of a tax [...] will, nonetheless, escape characterization as a tax if that charge is connected to a regulatory scheme and accordingly is, in pith and substance, a regulatory charge."[46]

28. ***Distinguishing regulatory charges from taxes.*** Courts and tribunals determine whether a levy is a regulatory charge or instead a tax by evaluating the levy's "pith and substance," that is, "its dominant or most important characteristic," as opposed to its incidental features.[47] Since a levy may have the characteristics of ***both*** a tax and a regulatory charge, the tribunal must ascertain which characteristics are dominant and which are incidental.[48] The Supreme Court has said that "it is the ***primary purpose*** that is determinative. Although the law may have incidental effects, its primary purpose will determine whether it is a tax or a regulatory fee."[49] In making this determination, courts are guided by the following principles:

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42 *Re Eurig*, above, note 40, ¶14; *Allard Contractors Ltd. v. Coquitlam (District)*, [1993] 4 S.C.R. 371, p. 412; *Ontario Home Builders' Association v. York Region Board of Education*, [1996] 2 S.C.R. 929, ¶50.

43 *620 Connaught*, above, note 40, ¶¶19-20.

44 *Id.*, ¶24 citing *Westbank First Nation v. British Columbia Hydro and Power Authority*, [1999] 3 S.C.R. 134, ¶43.

45 *Id.*, ¶24.

46 *Canadian Association of Broadcasters v. Canada*, [2009] 1 F.C.R. 3, ¶52 (C.A.).

47 *Id.*, ¶16.

48 *Id.*

49 *Id.*, ¶17 (emphasis in original).

> In all cases, a court should identify the primary aspect of the impugned levy…. Although in today's regulatory environment, many charges will have elements of taxation and elements of regulation, the central task for the court is to determine whether the levy's primary purpose is, in pith and substance: (1) to tax, i.e., to raise revenue for general purposes; (2) to finance a regulatory scheme, i.e., to be a regulatory charge or to be ancillary or adhesive to a regulatory scheme; or (3) to charge for services directly rendered, i.e., to be a user fee.[50]

29. ***The test: Two relevant questions.*** The Court has distilled the above considerations for distinguishing a regulatory charge from a tax by stating that a tribunal should ask two questions: (1) does the levy have the attributes of a tax? To answer this question, the tribunal must look to the four traditional *indicia* of a tax from *Lawson*, noted above; and (2) has the government established that the levy is connected to a regulatory scheme? To answer the second question, the Court has ruled that a tribunal should apply a two-stage analysis from the *Westbank First Nation* case. The first step is to identify the existence of a relevant legislative scheme, based on the presence of some or all of the following *indicia*:

> (1) a complete, complex and detailed code of regulation; (2) a regulatory purpose which seeks to affect some behaviour; (3) the presence of actual or properly estimated costs of the regulation; (4) 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.[51]

30. The Court has noted that "[t]he first three considerations establish the existence of a regulatory scheme. The fourth consideration establishes that the regulatory scheme is relevant to the person being regulated."[52] These four factors are intended to be a "useful guide" rather than exhaustive, and not all the factors need to be present to find a regulatory scheme.[53]

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[50] *Id.*, ¶17, citing *Westbank First Nation*, above, note 44, ¶30.

[51] *620 Connaught*, above, note 40, ¶25, citing *Westbank First Nation*, above, note 44, ¶44.

[52] *Id.*, ¶25

[53] *Id.*, ¶26.

31. If a tribunal finds a regulatory scheme, the "second step is to find a relationship between the charge and the scheme itself."[54] This relationship "will exist when the revenues are tied to the costs of the regulatory scheme, or where the charges themselves have a regulatory purpose, such as the regulation of certain behaviour."[55]

(c) The Supreme Court of Canada cases on the nature of a regulatory charge

32. Before applying the above test to the assessments in the present case, it may useful to consider how the Supreme Court has distinguished between a tax and a regulatory charge in concrete situations. Over the past twenty years, the Court has addressed this issue in six cases.

33. In the first case, *Allard Contractors v. Coquitlam*,[56] the Court had to decide whether municipal by-laws that regulated the removal of sand and gravel and imposed variable fees based on the amount of gravel removed were *ultra vires* the province. The Court held that *prima facie* the fees were indirect taxes, but found that they were ancillary to a valid provincial regulatory scheme (and hence *intra vires* as a provincial regulatory charge) because it accepted that the gravel removal fees would fund repairs of municipal roads used by the sand and gravel businesses. Professor Hogg has described this ruling as 'surprising',[57] because there was no statutory connection between the fees charged and road repairs. Yet the Court inferred such a connection from the testimony of municipal officials who claimed that they had fixed the fees imposed by reference to the cost of repairing the roads used by the gravel and sand trucks.

34. In the second case, *Ontario Home Builders' Association v. York Region Board of Education*,[58] the Court had to decide whether "educational development charges" ("EDCs") levied by school boards on property developers were regulatory charges. The impugned legislation permitted school boards to impose EDCs on developers when they applied for building permits, in order to raise money for new school construction on land undergoing

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54 *Id.*, ¶27.

55 *Id.*, citing *Westbank First Nation*, above, note 44, ¶44.

56 *Allard*, above, note 42.

57 Hogg, above, note 34, at p. 31-20.

58 *Ontario Home Builders*, above, note 42.

residential and non-residential development. A 5-4 majority of the Court found that *prima facie* the EDCs were an indirect tax, but then went on to uphold them as a regulatory charge incidental or ancillary to a regulatory scheme. Iacobucci J. for the majority held that the EDCs were part of a "comprehensive and integrated regulatory scheme, namely, the entirety of planning, zoning, subdivision and development of land in the province."[59]

35. In the third case, *Re Eurig Estate*,[60] the Court had to decide whether probate fees imposed by provincial legislation were a regulatory charge or a tax. The fees were based on the value of the estate administered, and used to defray the general costs of court administration rather than simply to cover the costs of probating a particular estate. The Court noted that one "factor that generally distinguishes a fee from a tax is that a nexus must exist between the quantum charged and the cost of the service provided in order for a levy to be considered constitutionally valid."[61] Importantly, the Court added that "[i]n determining whether that nexus exists, courts will not insist that fees correspond precisely to the cost of the relevant service. ***As long as a reasonable connection is shown between the cost of the service provided and the amount charged, that will suffice***."[62] The Court found that the probate fee was not a charge for a government service (probate), but was rather a tax, because the cost of issuing letters probate was small, and the fees generated a large surplus that was applied towards the costs of general court administration.

36. In the fourth case, *Westbank First Nation v. British Columbia Hydro and Power Authority*,[63] the Court had to decide whether Indian taxation by-laws constitutionally applied to a provincially-owned utility. In the course of its reasons, the Court identified the four *indicia* of a "regulatory scheme" noted above, to which a levy would need to attach in order to qualify as a regulatory charge incidental to a regulatory scheme.[64] The case is important as establishing the test for a regulatory scheme under the second question to be asked when distinguishing a regulatory charge from a tax.

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59 *Id.*, ¶57.

60 *Re Eurig*, above, note 40.

61 *Id.*, ¶21.

62 *Id.*, ¶22 (emphasis added).

63 *Westbank First Nation*, above, note 44.

64 *Id.*, ¶44.

37. In the fifth case, *620 Connaught Ltd. v. Canada (Attorney General)*,[65] the Court had to decide whether business licence fees imposed by the federal Minister of National Heritage on hotels, restaurants, and bars for the right to sell alcoholic beverages in Jasper National Park were regulatory charges or taxes. If the fees were a tax, they contravened s. 53 of the *Constitution Act, 1867*, which provides that only a legislature may impose a tax (the fees in this case were imposed by the Minister rather than by Parliament). The Court distilled from the case law the above-noted test for determining whether a levy is a regulatory charge or a tax[66] and upheld the business license fees as a regulatory charge. The Court found a relevant regulatory scheme because Jasper National Park exists and operates under "an overarching statutory scheme which includes the *National Parks Act* and the *Parks Agency Act*, together with the regulations," which "form a complete and detailed scheme of how Jasper National Park should operate."[67] The Court also accepted that the fees were connected to the regulatory scheme, because the fee revenue was used to defray the operating costs of Jasper National Park itself (and not those of other national parks), and because businesses benefitted from a well-maintained national park (their revenues were linked to the number of visitors).[68] The Court also found that "the fee revenues from Jasper National Park likely did not exceed, and certainly did not significantly exceed, the cost of the regulatory scheme for the park."[69] Thus, in pith and substance the business license fees were a regulatory charge rather than a tax.[70]

38. In the sixth case, *Confédération des syndicats nationaux v. Canada (Attorney General)*,[71] the Court found that Employment Insurance premiums charged pursuant to the federal *Employment Insurance Act* were not regulatory charges but rather were unconstitutional taxes imposed by the Governor in Council contrary to s. 53 of the *Constitution Act, 1867* (which provides that taxes require legislation). The premiums were set at a level to ensure the gradual

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65 *620 Connaught*, above, note 40.

66 *Id.*, ¶¶22-28.

67 *Id.*, ¶30.

68 *Id.*, ¶34.

69 *Id.*, ¶44.

70 *Id.*, ¶47.

71 *Confédération des syndicats nationaux v. Canada (Attorney General)*, [2008] 3 S.C.R. 511.

accumulation of a reserve in order to balance the program's budget in the long term. Until 2001, the permitted premium rate was limited by an express provision in the legislation that required the Employment Insurance Commission to maintain relatively stable rate levels. In 2001, the legislation was amended to allow the Governor in Council to set the rate without regard to the limiting provision, as a result of which premiums generated large surpluses (more than $40 billion). The Court held that, following the amendment, the premiums "became a levy on payrolls and wages. They were transformed into a tax."[72] The reason was that "[t]he legal connection between the premium-setting system and the regulatory scheme ceased to exist."[73] The Court provided the following summary of the test for a regulatory charge:

> This question of the validity of imposing regulatory charges has come before this Court on several occasions. In its decisions, the Court has accepted the use of regulatory charges to finance government programs and has developed tests for identifying such special levies. There are two steps in the identification process. First, the existence of a regulatory scheme must be established. According to the analytical approach adopted in *Westbank First Nation v. British Columbia Hydro and Power Authority*, [1999] 3 S.C.R. 134, there must be (1) a complete and detailed code of regulation, (2) a regulatory purpose of influencing specific behaviour, (3) the existence of actual or properly estimated costs of the regulation and (4) a relationship between the regulation and the person who either benefits from it or made it necessary (para. 44). Rothstein J. recently reiterated these criteria in *620 Connaught Ltd. v. Canada (Attorney General)*, [2008] 1 S.C.R. 131, 2008 SCC 7, at paras. 25-26, although he reminded us that the list is not exhaustive. Next, if the court finds that a regulatory scheme exists, it must determine whether there is a relationship between that scheme and the charge (*Connaught*, at para. 27). Revenue collection must be related to the regulation or must in itself have a regulatory purpose of influencing the behaviour of the persons concerned (*Westbank*, at para. 44). As the Court noted in *Connaught*, the accumulation of excessive surpluses may indicate that a levy is a tax and not a regulatory charge (para. 40). ***However, the test is flexible, and the characterization of a levy as a regulatory charge does not depend primarily on the absence or the amounts of surpluses (Connaught, at para. 40). It depends***

[72] *Id.*, ¶79.

[73] *Id.*, ¶78.

> ***above all else on whether the collected amounts or a substantial part thereof are allocated to the regulated activity***.[74]

39. Against this background, the assessments in this case may now be considered.

(d) Do the assessments have the attributes of a tax?

40. The first question is whether the assessments have the four traditional attributes of a tax. It is very likely that they do. The assessments are: (1) enforceable by law, because they are imposed by s. 26.1(6) of the *OEB Act* and *Regulation 66/10*; (2) imposed under authority of the Legislature, because they are prescribed by the *OEB Act*; (3) imposed by a public body, namely, the Board; and (4) imposed for a public purpose, described in s. 26.1 of the *OEB Act* as being to assess electricity distributors and the IESO "with respect to expenses incurred and expenditures made by the Ministry of Energy and Infrastructure in respect of its energy conservation programs or renewable energy programs."

41. Thus, the assessments have all four of the traditional attributes of a tax. Unless the assessments can qualify as a regulatory charge, it is also likely that such a tax would be an indirect tax, *i.e.* demanded from one person (*i.e.*, licensed electricity distributors and the IESO) with the intention or expectation that they would be recovered from another person (*i.e.*, consumers). This is because s. 26.1(2) of the *OEB Act* and s. 7(1) of Regulation 66/10 expressly provide that electricity distributors are permitted to recoup from consumers the charges that the distributors are required to remit to the Board.

(e) Are the assessments connected to a regulatory scheme?

42. The critical issue for the Board is whether the assessments are a regulatory charge, that is, whether they are connected to a regulatory scheme. To recap, this is a two-step inquiry. At the first step, the tribunal asks whether there is a relevant regulatory scheme, based on the presence of some or all of the four *indicia* in *Westbank*. If so, at the second step the tribunal asks whether there is a relationship between the charges and the regulatory scheme, which will be found if the

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[74] *Id.*, ¶72 (emphasis added).

charges are tied to the costs of the scheme, or if the charges have a regulatory purpose (such as the regulation of certain behaviour).

Step 1: Is there a regulatory scheme?

(i) *Is there a complete, complex, and detailed code of regulation?*

43. The first factor in *Westbank* is the nature of the claimed regulatory scheme. The Court has said that "[r]egulatory schemes are usually characterized by their complexity and detail."[75]

44. The Supreme Court has taken a broad view of what qualifies as a "regulatory scheme." In *Ontario Home Builders*, the Court held that the proper regulatory scheme to consider when reviewing the constitutionality of the EDCs imposed on developers was "the entirety of planning, zoning, subdivision and development of land in the province," consisting of at least nine different statutes and associated regulations.[76] The Court adopted this broad approach even though the EDCs were "only a small part" of the overall regulatory scheme.[77]

45. Similarly, in *620 Connaught*, the Court held that the relatively insignificant matter of business licensing fees imposed by the Alberta government on bars and restaurants in Jasper National Park was a part of the "overarching statutory scheme which includes the *National Parks Act* and the *Parks Agency Act*, together with the regulations."[78]

46. Ontario's position is that the appropriate regulatory scheme to consider includes the system of statutes and regulations that govern energy distribution and consumption in Ontario, including the *Electricity Restructuring Act, 2004*, the *Electricity Act, 1998*, the *Green Energy and Green Economy Act, 2009* (Bill 150) (which enacted inter alia the *Green Energy Act, 2009*), as well as the *OEB Act* itself and its associated regulations, including Regulation 66/10.[79]

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75 *Westbank First Nation*, above, note 44, ¶25.

76 *Ontario Home Builders*, above, note 42, ¶¶57, 65.

77 *Id*., ¶65.

78 *620 Connaught*, above, note 40, ¶30.

79 Beale Affidavit, above, note 11, ¶¶7-12; Factum of the Attorney General of Ontario, ¶51.

Ontario states that the HESP and OSTHI programs are but "[t]wo components of Ontario's regulatory scheme."[80] This regulatory scheme, Ontario argues, adopts "conservation as the accepted strategy for improving the reliability of [Ontario's] electricity system."[81]

47. Ontario's broad approach to the applicable regulatory scheme – within which s. 26.1 of the *OEB Act*, Regulation 66/10 and the HESP/OSTHI programs are components parts – appears to be strongly supported by the Supreme Court's similarly broad approach to the applicable regulatory scheme in cases such as *Ontario Home Builders* and more recently *620 Connaught*.

48. By contrast, CCC argues that the regulatory scheme should be limited to the *OEB Act*. In particular, CCC takes the position that the relevant regulatory scheme is the set of arrangements by which rates for the transmission and distribution of electricity, by LDCs, are approved by the Board, as set out in ss. 78(1), (2) and (3) of the *OEB Act*.[82] This argument echoes the position of the minority of the Supreme Court in *Ontario Home Builders*, where four dissenting judges rejected the majority's comprehensive approach to determining the relevant regulatory scheme. In the same vein, Professor Hogg has noted that "it seems a considerable stretch to find [a complete, complex and detailed] code of regulation in either *Allard* [...] or *Ontario Home Builders* [...]." However, as discussed above, CCC's argument does not accord with the Supreme Court's broad approach in *620 Connaught* and especially in *Ontario Home Builders*, where the majority of the Court warned against making an "artificial and rigid" distinction between various operators within a broad regulatory scheme.[83]

49. Union Gas Limited ("Union Gas") is similarly critical of Ontario's characterization of the relevant regulatory scheme as including the HESP and OSTHI programs. Union Gas acknowledges that the complex system of statutes and regulations that Ontario has outlined may comprise one or more broad regulatory schemes.[84] However, it argues that the HESP and OSTHI programs are unconnected to any provincial regulatory scheme, and that they are simply

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80 Beale Affidavit, *Id.*, ¶5.

81 *Id.*

82 Factum of CCC, ¶¶57-62.

83 *Ontario Home Builders*, above, note 42, ¶65.

84 Factum of Union Gas, ¶¶11-13.

programs or policies financed in part by general revenues and developed by the Federal government.[85] Moreover, it asserts that if the Board upholds the constitutionality of the s. 26.1 of the *OEB Act* and Regulation 66/10, then Ontario may implement a wide array of programs in accordance with the broad purposes set out in s. 26.1, and recover the attendant costs from ratepayers.

50. The fact that the HESP/OSTHI are non-statutory programs that are authorized by the Minister of Energy pursuant to s. 7(1)(e)(iii) of the *Ministry of Energy Act, 2011*[86] – and are not themselves embodied in a statute or regulation – does not mean that they are unconnected to the regulatory scheme. Whether these programs (together with the assessments levied pursuant to s. 26.1 of the *OEB Act* and Regulation 66/10) form a part of a regulatory scheme must be determined with regard to all of the *Westbank* criteria, the remainder of which are discussed further below. There is no reason in principle why a non-statutory program properly authorized pursuant to statutory authority should be excluded from the scope of a regulatory scheme for constitutional purposes. Further, even though ss. 26.1 and 26.2 of the *OEB Act* contemplate a range of possible energy conservation programs, any assessments in respect of those programs must be levied pursuant to regulation under s. 26.1. Regulation 66/10 is the only such regulation passed pursuant to this section, and is the only regulation to be considered in this application. The specific amount earmarked in Regulation 66/10 relates only to the HESP/OSTHI programs.

51. Similarly, the status of the HESP/OSTHI programs as government policies should not preclude a finding that the programs are also a part of a valid regulatory scheme. Governments implement regulatory schemes in the furtherance of policy objectives. In *Ontario Home Builders*, for example, the Supreme Court recognized the "crucial" policy rationale informing the construction of new schools, holding that schools are "an essential element in the creation of successful, dynamic and democratic communities."[87] Here, the implementation of sustainable energy consumption practices is arguably a crucial component of modern energy regulation.

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85 *Id.*, ¶¶14-15, 38; also see Factum of CCC, ¶¶25, 83-84; Factum of CME, ¶19.

86 *Ministry of Energy Act, 2011*, S.O. 2011, c. 9, Sched. 25; Factum of the Attorney General of Ontario, ¶52.

87 *Ontario Home Builders*, above, note 42, ¶66.

52. Moreover, the fact that the assessments will be used to finance only the electricity components of the OSTHI/HESP programs, rather than the entirety of the regulatory scheme (or even the entirety of OSTHI/HESP programs, including fuels other than electricity), does not affect the conclusion that a regulatory scheme exists. In *Ontario Home Builders*, the Supreme Court held that educational development charges were constitutionally valid even though they contributed to only a particular "component" of a broader regulatory scheme.[88] Similarly, that the HESP/OSTHI programs originated with the Federal government does not affect the analysis, because these programs were adopted by the Ontario government and therefore form a part of the province's broad regulatory scheme governing energy distribution and consumption.[89]

53. Despite the strong dissent in *Ontario Home Builders* and the criticism of Professor Hogg, the Supreme Court has continued to take a broad approach in qualifying the relevant regulatory scheme, as the decision in *620 Connaught* attests. As such, Ontario's approach to the applicable regulatory scheme, which treats s. 26.1 of the *OEB Act*, Regulation 66/10 and the HESP/OSTHI programs as component parts of a broader regulatory scheme, appears to be correct.

(ii) *Is there a regulatory purpose that seeks to affect behaviour?*

54. The second criterion of a regulatory scheme is a defined regulatory purpose.[90] In *Westbank*, the Supreme Court stated that "a regulatory scheme usually delineates certain required or prohibited conduct," and that "a regulatory scheme must 'regulate' in some specific way and for some specific purpose."[91]

55. CCC takes the position that because the HESP/OSTHI programs are voluntary and do not impose rules prescribing behaviour, they cannot properly be considered to be a part of a

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88 *Ontario Home Builders*, above, note 42, ¶¶65-66, where Iacobucci J. for the majority stated that "the Act is one component of a comprehensive regulatory framework governing land development in Ontario [...]" and that "[t]he construction of schools is a legitimate and crucial component of modern land use planning [...]."

89 Cross-examination of Barry Beale, November 16, 2010, pp. 14-18.

90 *Westbank First Nation*, above, note 44, ¶26.

91 *Id.*

regulatory scheme.[92] In this regard, CCC asserts that the programs are distinguishable from regulatory schemes in *Allard*, *Ontario Home Builders* and *620 Connaught*.

56. However, the regulatory scheme under the *OEB Act* governing the assessments does seek to regulate consumer behaviour. Under the recent amendments to the *OEB Act*, the Board's statutory objectives now include promoting conservation of electricity and demand management, and promoting the use and generation of electricity from renewable energy sources.[93]

57. Ontario's evidence is that the HESP and OSTHI programs are designed to provide incentives for Ontario consumers to reduce their consumption of electricity and other fuels.[94] Ontario's affiant, Mr. Beale, states that these programs are "two examples of the various measures that the Government of Ontario has undertaken in order to foster a culture of conservation and to support system reliability at the transmission and distribution levels."[95] It is therefore reasonable to conclude that the programs seek to regulate consumer behaviour by encouraging consumers to adopt more efficient and sustainable energy consumption practices.

(iii) *Are there actual or properly estimated costs of regulation?*

58. The third *Westbank* criterion for a regulatory scheme is whether there are actual or properly estimated costs of regulation. The Supreme Court has ruled that a party seeking to meet this criterion should lead evidence "demonstrating how the revenues would be used and how the regulatory costs of the scheme were estimated."[96] The British Columbia Supreme Court

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92 Factum of CCC, ¶82.

93 *OEB Act*, above, note 2, s. 1(1).

94 Beale Affidavit, above, note 11, ¶¶13-23; Factum of the Attorney General of Ontario, ¶66.

95 Beale Affidavit, *id.*, ¶23.

96 *Westbank First Nation*, above, note 44, ¶27.

recently stated that "*Westbank* stands simply for the proposition that there must be some evidence of actual or estimated costs: the bar is not set high."[97]

59. Union Gas argues that because s. 26.1 of the *OEB Act* contemplates expenditures for a number of possible programs, the potential expenditures will be unconstrained if the constitutionality of this provision is upheld.[98] However, the Supreme Court dealt with a similar situation in *Ontario Home Builders*, where the majority acknowledged that the statute in question "authorizes municipalities to impose development charges not only for education but also for water mains, sewers, roads, libraries, parks and recreational facilities."[99] In that case, in spite of this potentially expansive power to collect development charges, the Supreme Court focussed on the mechanism for the collection of charges relating specifically to education, which was "meticulous in its detail, and clearly operate[d] so as to limit recoupment to the actual costs involved in providing educational facilities occasioned by new development."[100]

60. Here, Regulation 66/10 estimates the regulatory cost to the dollar and inserts this estimate into the body of the Regulation itself: $53,695,310.00 (Regulation 66/10, s. 4). Ontario's evidence is that the government engaged in "a thorough and rigorous cost estimation methodology."[101] Specifically, Ontario: (1) estimated the amounts to be spent in the HESP and OSTHI programs and excluded all overhead and administration, which would be funded from the budget of the Ministry of Energy; (2) apportioned amounts based on the type of fuel displaced (if incentives were given to reduce electricity consumption, costs were allocated to

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97 *Greater Vancouver Sewerage and Drainage District v. Ecowaste Industries Ltd.* 2006 BCSC 859, 22 M.P.L.R. (4th) 98 ¶214, appeal dismissed 2008 BCCA 126, ¶84 ("The trial judge correctly instructed himself on the applicable law").

98 Factum of Union Gas, ¶43. Note that Union Gas emphasizes Justice La Forest's statement in dissent in *Ontario Home Builders* that the "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" (¶121, emphasis in original). However, as Justice Iacobucci responded for the majority, "[t]he key finding I make is that the EDC scheme is part of a comprehensive and integrated regulatory scheme [...] The fact that the scheme specifically provides for the use that will be made of the funds levied, and that the amount levied is carefully limited to such purposes, is mentioned as further support for the main finding, not as the only hallmarks [...]" (¶85).

99 *Ontario Home Builders*, above, note 42, ¶66.

100 *Id.*, ¶55.

101 Beale Affidavit, above, note 11, ¶57.

that fuel); (3) excluded amounts allocated to fuels other than electricity; (4) applied special rules of apportionment when a single conservation measure affected several fuels; (5) apportioned all the program grant costs to a particular fuel when an HESP retrofit measure reduced consumption of only one fuel; (6) estimated the amount to be collected for the April 1, 2009 to March 31, 2010 fiscal year on December 31, 2009, 3 months before the end of the fiscal year in which the charges applied. As Ontario notes, "the total estimated electricity-based cost for the period represented in O.Reg. 66/10 was $53,695,310, which is reflected in s. 4 of the Regulation."[102]

61. As such, the assessments meet the third criterion for a regulatory scheme.

(iv) *Is there a relationship between the regulation and the person regulated?*

62. The fourth *Westbank* criterion for a regulatory scheme is whether the individual subject to the regulatory charge either benefits from or causes the need for the regulation.

63. The Supreme Court has again applied this criterion broadly. In *Allard*, the Court found that gravel companies caused the need for and benefitted from levies imposed to fund the construction of new roads, since their trucks constituted the heaviest traffic.[103] In *Ontario Home Builders*, the Court found that developers caused the need for and benefitted from the construction of new schools.[104] And in *620 Connaught*, the Court found that bar owners benefitted from the regulation of Jasper National Park (including the liquor licence fees imposed by regulation), because that regulation resulted in greater tourism.[105]

64. According to Ontario's evidence, each of the electricity distributors, the IESO, and consumers cause the need for, or derive a benefit from, the HESP and OSTHI programs funded by the assessments, for the following reasons:

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[102] *Id*., ¶57(6).

[103] *Allard*, above, note 42, pp. 407-408.

[104] *Ontario Home Builders*, above, note 42, ¶66.

[105] *620 Connaught*, above, note 40, ¶34.

(a) ***Grid reliability***: even the modest electricity reductions associated with the HESP and OSTHI programs increase the reliability of Ontario's electricity system, on which consumers place significant demands. Thus, consumers cause the need for energy conservation programs such as the HESP and OSTHI, and each of the electricity distributors, the IESO and consumers benefit from increased grid reliability.[106]

(b) ***Environmental concerns***: in light of the increased demands for electricity and the detrimental effects of fuel-based electricity generation on the environment, consumers have created the need for green energy programs that seek to promote conservation and the use of renewable energy. Ontario states that the HESP and OSTHI are examples of such programs.[107]

(c) ***Reduced costs***: there are numerous cost savings associated with the HESP and OSTHI programs, which Ontario states will benefit consumers, licensed electricity distributors, and the IESO. The claimed benefits include:[108]

(i) "over time, a reduced requirement for generation resources results in a more affordable and reliable system for consumers";

(ii) "load reduction reduces Ontario's reliance upon coal";

(iii) "consumers in every class who consume less electricity will reduce their overall electricity expenses, resulting in obvious economic benefits for the consumer."

(iv) "The benefits to each residential consumer, depending upon their personal investment in their individual home under the HESP, are notable." Consumers who implement home-energy efficiency measures will likely

[106] Beale Affidavit, above, note 11, ¶¶24-35.

[107] Beale Affidavit, above, note 11, ¶¶36-41.

[108] *Id*., ¶¶42-50.

benefit from an increase in the value of their homes and lower long-term energy costs.

(v) "All consumers are expected to benefit from the overall reduction in consumption," since "[l]ower overall peak consumption will result in lower commodity prices."

(vi) "As the consumption of electricity is reduced, the price of electricity for the consumer will also diminish."

(vii) The regulation also "results in economic benefits for LDCs and the IESO, as these parties frequently must bear the immediate short-term costs and financing associated with infrastructure improvements and expansion. By deferring the need for such upgrades, conservation can positively influence the overall business efficiency of LDCs and the IESO."

(viii) "In addition, by reducing demand during peak periods, conservation measures can benefit LDCs and the IESO in the form of reduced system losses."

65. CCC and Union Gas argue that there is no relationship between ratepayers and the assessments, since all ratepayers are required to pay for the assessments regardless of whether they participate in the HESP/OSTHI, and because all Ontarians share in the environmental benefits resulting from these programs.[109] However, whether or not ratepayers engage in the HESP/OSTHI programs, they undoubtedly cause the need for the regulation because they use and place demands on Ontario's electricity system. Similarly, electricity distributors and the IESO also arguably cause the need for the HESP and OSTHI programs since they facilitate the market for electricity.[110] In a similar vein, in *Canada (Canadian Private Copying Collective) v. Canadian Storage Media Alliance*, the Federal Court of Appeal considered levies imposed on manufacturers and importers of blank CDs and noted that "it seems clear that, by making blank

[109] Factum of CCC, ¶82; Factum of Union Gas, ¶50.

[110] Factum of Union Gas, ¶49.

media available to consumers, the manufacturers and importers of blank media allowed for the proliferation of consumer copying and thereby caused the need which led Parliament to implement Part VIII."[111]

66. Union Gas nevertheless submits that Ontario has provided no evidence in support of its claims that the HESP/OSTHI reduced peak demand and enhanced grid reliability.[112] As noted above, the efficacy of the measures is simply irrelevant to their constitutionality. Measures may be constitutional even if they are ineffective, and even if they are otherwise bad policy. This is an issue for the legislature, not the courts. Further, and in any event, although Mr. Beale stated during cross-examination that Ontario is unable to provide exact evidence regarding the extent to which the HESP and OSTHI programs result in load reduction during peak demand times,[113] Ontario estimates that the HESP resulted in a reduction of 11,912KW in fiscal year 2009/2010 for all households, and the OSTHI resulted in a reduction of 39KW during the same period for all institutions.[114] There is therefore a rational basis in fact for the view that these programs are effective to some degree (even if this were constitutionally relevant).

67. Thus, given how broadly the Supreme Court has applied the fourth criterion for a regulatory scheme and the relative cogency of Ontario's evidence, it seems quite reasonable to conclude that consumers, electricity distributors and the IESO cause the need for and/or benefit from the measures funded by the assessments.

Step 2: Is there a nexus or relationship between the assessments and the regulatory scheme?

68. Once a tribunal finds a regulatory scheme, the second stage of the test for determining whether a levy is a regulatory charge or a tax involves determining whether there is a relationship or nexus between the levy and the regulatory scheme.[115] In *620 Connaught*, the

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111 *Canada (Canadian Private Copying Collective) v. Canadian Storage Media Alliance*, [2005] 2 F.C.R. 654, ¶¶68-69 (F.C.A.).

112 Factum of Union Gas, ¶17.

113 Beale Cross-Examination, above, note 83, pp. 46-47.

114 Answer to undertaking JT 1.2, given during the Beale Cross-Examination, above, note 83, p. 47.

115 *620 Connaught*, above, note 40, ¶27.

Supreme Court stated that "in order for a regulatory charge intended to defray the costs of a regulatory scheme to be 'connected', the fee revenue must be tied to the costs of the regulatory scheme."[116]

69. The Supreme Court has established a relatively low evidentiary threshold to find a nexus between the levy and the regulatory scheme. If the government has made a "reasonable attempt" to match revenues from the assessments with the costs of the regulation, the threshold will likely be met.[117] The Court has held that government is to be given "reasonable leeway" in fixing its charges, and that a precise correspondence between the fees and the cost of the regulatory scheme is not required.[118]

70. The Supreme Court endorsed the "reasonable leeway" approach in *Allard*, *Ontario Home Builders*, and *620 Connaught*. In *Allard*, even though there was evidence that "considerably more moneys would be received" from the levy than the costs of the regulatory scheme, the Court held that the fees were proper regulatory charges, noting that "it is not for this Court to undertake a rigorous analysis of a municipality's accounts. A surplus itself is not a problem so long as the municipalities made reasonable attempts to match the fee revenues with the administrative costs of the regulatory scheme."[119] Similarly, in *620 Connaught*, the Court found a connection between the impugned fees and the regulatory scheme, even in the face of evidence that Professor Hogg later described as "incredibly deficient."[120] Although the fee revenue represented less than one percent of the costs of running Jasper National Park, there was no evidence of the total amount of the Park's other revenues. Based on testimony that there was a budgetary shortfall for all Mountain Parks, the Supreme Court simply invoked the "reasonable leeway" rule and inferred that "the fee revenues from Jasper National Park likely did not exceed [...] the cost of the regulatory scheme for the Park."[121]

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116 *Id.*, ¶38.

117 *Id.*, ¶44.

118 *Id.*, ¶40.

119 *Allard*, above, note 42, p. 411.

120 Hogg, above, note 34, p. 31-22.

121 *620 Connaught*, above, note 40, ¶44.

71. By contrast, the Supreme Court has found no nexus between the charges and the regulatory scheme only where there has been no connection whatsoever between the revenue collected and the costs of the regulation. In *Re Eurig*, the Court found that the evidence failed to disclose "any correlation between the amount charged for grants of letters probate and the cost of providing that service."[122] In *Westbank*, the Court found that none of the costs of the regulatory scheme had even been identified.[123] Similarly, in *Confédération des syndicats nationaux*, the Court refused to find that charges imposed under the *Employment Insurance Act* regime were regulatory in nature.[124] Since the Minister of Finance had discretion to vary the amount charged without regard to the amount required to offset expenses, the Court held that "[e]very legal connection between revenues and expenditures disappeared. The collection of premiums ceased to be tied to the system and to its requirements [...]."[125]

72. Applying the nexus criterion to the assessments in this case, Ontario's evidence is that the actual cost for fiscal year 2009/2010 of the electricity-based components of the HESP and OSTHI programs was $51,253,901, slightly (4.55%) less than the amount collected from the assessments.[126] Ontario states that this surplus will be maintained in a special purpose account and may be used only for the "special purposes" identified in s. 26.2 of the *OEB Act*.[127]

73. Ontario's estimate has thus proved 95.45% accurate, although the assessments have generated a relatively small surplus of $2,441,409. This surplus does not undermine the claim that the assessments meet the third criterion for a regulatory scheme. As the Court recently held in *Confédération des syndicats nationaux*, "the test is flexible, and the characterization of a levy as a regulatory charge does not depend primarily on the absence or the amounts of surpluses [...] It depends above all else on whether the collected amounts or a substantial part thereof are

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122 *Re Eurig*, above, note 40, ¶22.

123 *Westbank First Nation*, above, note 44, ¶38.

124 *Confédération des syndicats*, above, note 71.

125 *Id.*, ¶78.

126 Beale Affidavit, above, note 11, ¶58 and Appendix, Table 4.

127 *Id.*, ¶58.

allocated to the regulated activity."[128] Clearly, a substantial part of the collected amount (95.45%) has been allocated to the regulated activity.

74. Thus, given how the courts have applied the nexus criterion in past decisions, there is a sufficient connection between the assessments and the cost of the regulatory scheme in this case. Although the amount collected from the assessments has modestly exceeded the cost of the HESP and OSTHI programs attributable to electricity, the 4.55% difference is likely well within the "reasonable leeway" that the Supreme Court has said should be afforded to government in applying the test.

75. Further, s. 26.2(3) of the *OEB Act* requires the Minister of Finance to keep the collected charges in a separate account, a factor that weighed in favour of finding a regulatory charge in *Ontario Home Builders*.[129]

76. Thus, there likely exists a sufficient nexus between the regulatory scheme and the assessments in this case.

(f) Conclusion

77. While the assessments at issue likely have the four traditional *indicia* of a tax, and, if a tax, would likely be an indirect tax that is outside the legislative competence of the Province of Ontario, the assessments appear to be connected to a regulatory scheme, and thus are likely a regulatory charge that is within the Province's legislative competence.

78. In particular: (1) the assessments are imposed as part of a broad regulatory scheme consisting of the system of statutes and regulations that govern energy distribution and consumption in Ontario, which has adopted conservation as the accepted strategy for improving the reliability of Ontario's electricity system. The impugned assessments form part of that scheme; (2) there is a regulatory purpose that seeks to affect consumer behaviour, by providing incentives for Ontario consumers to reduce their consumption of electricity and to promote

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[128] *Confédération des syndicats*, above, note 71, ¶72, citing *620 Connaught*, above, note 40, ¶40.

[129] *Ontario Home Builders*, above, note 42, ¶56.

renewable energy sources; (3) there are actual and properly estimated costs of regulation, calculated to the dollar and inserted into the body of the regulation itself; and (4) the individuals subject to the assessments – consumers, electricity distributors, and the IESO – likely either cause the need for the regulation (by consuming or supplying electricity) or will benefit from it (in the form of enhanced grid reliability, home improvements, lower infrastructure costs, and reduced energy costs over time). Finally, there is a nexus or relationship between the assessments and the regulatory scheme. The assessments are intended to defray the costs of the electricity components of the HESP and OSTHI programs, and the fee revenue from the assessments have been tied (with 95% accuracy) to the costs of the regulatory scheme. The modest $2.5 million surplus generated by the assessments, which will be maintained in a separate account, is likely well within the reasonable leeway granted by the Supreme Court in such cases. Based on the regulatory structure and all the evidence, it appears that the assessments are not intended to raise revenue for general purposes, but rather are intended to finance part of the regulatory scheme in the form of funding for the HESP and OSTHI programs. As such, it is likely that the assessments are, in pith and substance, a constitutionally permissible provincial regulatory charge rather than a tax.

(g) Does the Board have jurisdiction to adjudicate the constitutional issues?

79. As the Board has already found in its decision refusing a stay of the assessments,[130] the Board clearly has jurisdiction to adjudicate the constitutional issues raised in this motion. It is settled that administrative tribunals that have the jurisdiction to determine questions of law can address division of powers questions, and courts will then review their decisions under a correctness standard. For example, in *Cooper v. Canada (Human Rights Commission)*,[131] in speaking of the tribunal under the *Canadian Human Rights Act*,[132] La Forest J. for a majority of the Supreme Court noted that "it is well accepted that a tribunal has the power to address questions on the constitutional division of powers."[133] Later Supreme Court cases have

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130 EB-2010-0184, Decision With Reasons, August 5, 2010 (Howard Wetston, Chair), p. 1.

131 *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854.

132 *Canadian Human Rights Act*, R.S.C. 1985, c. H-6.

133 *Cooper*, above, note 131, ¶64.

confirmed that administrative tribunals with the power to determine questions of law can adjudicate division of powers questions relating to their jurisdiction.[134]

80. As the Board noted in its decision refusing a stay, s. 19 of the *OEB Act* provides that the Board has "in all matters within its jurisdiction authority to hear and determine all questions of law and fact."[135] The assessments are within the Board's jurisdiction, and their constitutionality is a question of law. Consequently, the Board clearly has jurisdiction to determine the above constitutional issues.

B. Are The Assessments A "Rate" That Requires An Order Of The Board?

81. The CCC and Aubrey LeBlanc have also challenged the validity of the special purpose charge assessments on the basis that the assessments require an order of the Board under s. 78 of the *OEB Act*, which states that "[n]o transmitter shall charge for the transmission of electricity except in accordance with an order of the Board." While not pursued in their written submission, the moving parties' argument would appear to be that because the assessments are a "rate" imposed in connection with the transmission of electricity, the Board has exceeded its jurisdiction by authorizing such a rate without a hearing and without an order of the Board.[136]

82. The Board was not required to issue an order to implement the assessments. The charges are not a "rate" for the transmission of electricity within the meaning of s. 78 of the *OEB Act*, but rather are charges in respect of the expenses associated with energy conservation programs relating to electricity. The assessments are imposed to finance specific electricity conservation programs, not to compensate distributors for the transmission of electricity.

83. In addition, the assessments are required by specific statutory and regulatory provisions quite apart from s. 78 of the *OEB Act*. In fact, Regulation 66/10 provides the Board with no

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134 See, for example, *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, ¶58; *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322; *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, ¶¶3, 28, 29, and 36; *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, ¶8.

135 EB-2010-0184, Decision With Reasons, August 5, 2010 (Howard Wetston, Chair), p. 3.

136 Notion of Motion of the Consumers Council of Canada, ¶¶16-19.

discretion to establish "just and reasonable rates" in respect of the assessments, because the assessments are prescribed by formulae. The only order the Board is authorized to make relating to the assessments is to compel payment from a person who has failed to pay.[137] As such, the assessments are not rates and did not require an order of the Board.

PART V – ORDER SOUGHT

84. Board Staff do not seek any order.

All of which is respectfully submitted this 26th day of September, 2011.

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[137] *OEB Act*, above, note 2, s. 26.1(6).

PART VI – LIST OF AUTHORITIES

Cases

1. *620 Connaught Ltd. v. Canada (Attorney General)*, [2008] 1 S.C.R. 131
2. *Allard Contractors v. Coquitlam*, [1993] 4 S.C.R. 371
3. *Canada (Canadian Private Copying Collective) v. Canadian Storage Media Alliance*, [2005] 2 F.C.R. 654 (F.C.A.)
4. *Canadian Association of Broadcasters v. Canada*, [2009] 1 F.C.R. 3 (F.C.A.)
5. *Charter Construction Ltd. v. Ontario* (2008), 167 A.C.W.S. (3d) 1010 (Ont. S.C.J.)
6. *Confederation des syndicats nationaux v. Canada (Attorney General)*, [2008] 3 S.C.R. 511
7. *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854
8. *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190
9. *Greater Vancouver Sewerage and Drainage District v. Ecowaste Industries Ltd.* 2006, BCSC 859, 22 M.P.L.R. (4th) 98 (B.C.S.C.) appeal dismissed 2008 BCCA 126
10. *Lawson v. Interior Tree Fruit and Vegetable Committee of Direction*, [1931] S.C.R. 357
11. *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504
12. *Ontario Home Builders Association v. York Region Board of Education*, [1996] 2 S.C.R. 929
13. *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585
14. *Re Eurig Estate*, [1998] 2 S.C.R. 565
15. *Reference re Firearms Act (Can.)*, [2000] 1 S.C.R. 783
16. *Siemens v. Manitoba (Attorney General)*, [2003] 1 S.C.R. 6
17. *Ward v. Canada (Attorney General)*, [2002] 1 S.C.R. 569
18. *Westbank First Nation v. British Columbia Hydro and Power Authority*, [1999] 3 S.C.R. 134
19. *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322

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20. P.W. Hogg, *Constitutional Law of Canada*, loose-leaf, 1997+, vol. 1

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21. *Canadian Human Rights Act*, R.S.C. 1985, c. H-6
22. *Constitution Act, 1867*, 30 & 31 Victoria, c. 3. (U.K.)

23. *Electricity Act, 1998*, S.O. 1998, c. 15, Sched. A
24. *Green Energy Act, 2009*, S.O. 2009, c. 12, Sched. A
25. *Green Energy and Green Economy Act*, S.O. 2009, c. 12, Sched. D
26. *Ministry of Energy Act, 2011*, S.O. 2011, c. 9, Sched. 25
27. *Ministry of Energy and Infrastructure Act*, R.S.O. 1990, c. M.23
28. *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sched. B
29. *Ontario Energy Board Act, 1998*, O. Reg. 66/10