

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

AND IN THE MATTER OF an application by Canadian Distributed Antenna Systems Coalition (“CANDAS”) for certain orders under the Ontario Energy Board Act, 1998;

AND IN THE MATTER OF a Motion by the Consumers Council of Canada for an Order requiring further and better answers to Interrogatories delivered to Toronto Hydro-Electric System Limited.

SUBMISSIONS OF THE CONSUMERS COUNCIL OF CANADA

PART I - INTRODUCTION AND OVERVIEW

1. The Consumers Council of Canada (the CCC) has filed a Motion seeking an order requiring the Toronto Hydro-Electric System Limited (THESL) to provide further and better answers to interrogatories 1, 2, 3, 4, 5, 6(d) and 7 posed by the CCC. For ease of reference, the interrogatories will be referred to hereinafter either by individual number or collectively as “the CCC interrogatories”.

2. The CCC interrogatories, and THESL's responses to them, are attached to the Affidavit of Dina Awad, sworn the 31st day of October, 2011. The CCC interrogatories request that THESL provide information in several forms. For ease of reference, we will refer to the information sought as "the material or materials".

Reference: Affidavit of Dina Awad, Sworn October 31, 2011, CCC Motion Record, Tab 6 (Awad Affidavit)

3. The CCC submits that the material sought by its interrogatories is relevant to the issues raised by THESL in its pre-filed evidence, and is necessary to allow a fair and complete examination of THESL's evidence and the positions that THESL takes based on that evidence.

4. The CCC further submits that THESL has not satisfied the onus on it of establishing that some or all of the material is privileged.

5. These are the submissions of the CCC in support of its Motion, filed pursuant to Procedural Order No. 4. These submissions are in the following parts:

1. Facts;
2. Issues;
3. Argument and the Law;
4. Relief Requested.

PART II - FACTS

6. In its application, the Canadian Distributed Antenna System Coalition (CANDAS) seeks, among other relief, an order that the Ontario Energy Board (Board) RP-2003-0249 *Decision and Order*, dated March 7, 2005 (CCTA Order) requires electricity distributors to provide "Canadian carriers" with access to the power poles of such distributors for purposes of attaching wireless equipment, including wireless components of distributed

antenna systems. In the alternative, the CANDAS application seeks an order amending the licences of all electricity distributors requiring them to provide Canadian carriers with timely access to the power poles of such distributors for purposes of attaching wireless equipment.

Reference: CANDAS Application, pp. 1 and 2

7. Included in the pre-filed evidence of CANDAS is a letter from THESL to the Board, dated August 13, 2010, which includes the following statements:

- (i) That the CCTA Order does not apply to wireless attachments;
- (ii) That safety is compromised by wireless attachments to THESL's poles;
- (iii) That there are viable market alternatives for hosting wireless attachments.

Reference: Exhibit A to the Awad Affidavit, CCC Motion Record, Tab 6

8. THESL's pre-filed evidence in response to the CANDAS application includes the following:

- (i) The Affidavit of Mary Byrne, sworn September 1, 2011, in which Ms Byrne asserts, among other things, that THESL has safety, operational and cost concerns with hosting wireless attachments;

Reference: Affidavit of Mary Byrne, Sworn September 1, 2011 (Byrne Affidavit), paras. 40-50

- (ii) The Affidavit of Adonis Yatchew, sworn September 1, 2011, in which Dr. Yatchew asserts, among other things, that the CCTA Order does not apply to wireless attachments and that there is a market for wireless attachments;

Reference: Affidavit of Adonis Yatchew, Sworn September 1, 2011 (Yatchew Affidavit), pp. 4-5

- (iii) The Affidavit of Michael Starkey, sworn September 1, 2011, in which Mr. Starkey asserts, among other things, that the CCTA Order does not apply to wireless attachments and that a functioning market for the placement and maintenance of wireless equipment on stand-alone towers, rooftops and other non-power pole structures exists and is growing.

Reference: Affidavit of Michael Starkey, Sworn September 1, 2011 (Starkey Affidavit), p. 4

9. THESL did provide access to poles for wireless attachments, through an application process, from sometime after the date of the CCTA Order until sometime in 2010, in apparent compliance with that CCTA Order.

Reference: Byrne Affidavit, para. 49

10. The CCC's interrogatories and THESL's responses thereto, are attached as exhibits to the Awad Affidavit. We will not repeat them herein. Instead, we will describe, in broad categories, the material that the interrogatories sought, as follows:

- (i) Material related to THESL's positions, as set out in its letter of August 13, 2010 to the Board;
- (ii) Material related to THESL's decisions to deny certain applications for wireless attachments to some of its poles;
- (iii) Material related to THESL's dealings with, among others, the Electricity Distributors Association (EDA) or its members and the City of Toronto;

- (iv) Material related to THESL's assertion, through the Bryne Affidavit, that there are safety, operational and cost concerns about the attachment of wireless communications equipment to THESL's poles.

11. Broadly speaking, THESL's response to those interrogatories is in three categories, as follows:

- (i) The material sought is subject to solicitor/client privilege, and/or litigation privilege (THESL's responses to CCC interrogatories 1, 5 and 7);
- (ii) The material sought is not relevant to the issues in the CANDAS application or does not relate to THESL's evidence (THESL's responses to CCC interrogatories 2, 3 and 6(d));
- (iii) The material sought is too onerous to produce in relation to its probative value (THESL's responses to CCC interrogatories 2, 3, 4, 5 and 7).

12. THESL also asserts that some materials are confidential. Assertions of confidentiality can be dealt with under the Board's Rules, and so will not be the subject of submissions herein.

13. Likewise, THESL's assertions that the material sought is too onerous to produce will not be the subject of submissions herein. THESL has provided no information about the volume of material in issue. In the absence of such information, it is impossible to make submissions on the issue. In any event, questions as to the volume of the material to be produced are practical ones that can be readily resolved once the material is properly identified.

14. THESL does not describe the documents in respect of which privilege is claimed, or the basis for the claim of privilege in respect of the documents. THESL also does

not describe the litigation, or contemplated litigation, in respect of which litigation privilege is claimed.

PART III - ISSUES

15. There are three issues to be determined:

- (i) Are the materials sought in the CCC interrogatories relevant to the issues in the CANDAS application?
- (ii) Are the materials sought in the CCC interrogatories necessary to a fair and complete examination of THESL's evidence and the positions THESL takes on the basis of that evidence?
- (iii) Are the materials sought in the CCC interrogatories protected by privilege?

PART IV - ARGUMENT AND LAW

(A) RELEVANCE

16. All of the materials sought in the CCC interrogatories are relevant to an examination of the assertions made in THESL's pre-filed evidence, as follows:

- (i) **That the CCTA Order does not apply to wireless attachments.**

17. This assertion, first found in the THESL letter to the Board of August 13, 2010, is in apparent contradiction with THESL's decision to process, and grant, applications for wireless attachments to its poles, from sometime after the date of the CCTA Order to sometime in 2010. The material sought is necessary in order to examine the basis for the assertion and the apparent contradiction. That examination is, in turn, relevant to the assertion that is at the centre of THESL's response to the CANDAS application, namely that the CCTA Order does not apply to wireless attachments.

(ii) Safety, operational and cost concerns

18. The material is relevant to Ms Byrne's assertions about safety, operational and cost concerns, and whether those concerns were reflected in the decision to change the policy and in the refusal to grant some applications for attachments.

(iii) The existence of a market

19. The information is relevant to the claims of Dr. Yatchew and Mr. Starkey about the existence of a market and whether those claims are belied by THESL's own actions or by its actions in relation to the EDA, THESL's parent, or THESL's affiliates.

20. We submit, therefore, that the material sought is relevant to the issues in the CANDAS application, and in particular to the issues raised by THESL itself.

(B) NECESSITY

21. The material sought is necessary for a fair and complete examination of the factual basis for THESL's apparent compliance with the CCTA Order, and the subsequent decision that the CCTA Order did not apply to wireless attachments.

22. The material sought is necessary to a fair and complete examination of Ms Byrne's assertions about safety, operational and cost concerns, and whether those concerns were reflected in the decision of THESL to change its policy with respect to compliance with the CCTA Order and allowing wireless attachments to its poles.

23. The material sought is necessary for a fair and complete examination of the claims of Dr. Yatchew and Mr. Starkey about the existence of a market and whether those claims are belied by THESL's own actions or by its actions in relation to the EDA, THESL's parent or THESL's affiliates.

24. We submit, therefore, that the material sought is necessary for a fair and complete examination of THESL's evidence. If the material is not ordered produced, then CCC's ability to examine THESL's evidence, and the conclusions THESL invites the Board to reach on the basis of that evidence, will be severely prejudiced.

(C) PRIVILEGE

25. There are two components to the submissions on THESL's claim of privilege. The first addresses the basic definitions of solicitor/client and litigation privilege. The second addresses the law on the protocol for making a claim of privilege.

(i) Privilege

26. The accepted definition of solicitor/client privilege is that found in Wigmore, as follows:

Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except the protection be waived.

Reference: *General Accident Assurance Co. et al. v. Chrusz, et al.* (1999), 180 D.L.R. (4TH) 241 (Ont. C.A.) ("*Chrusz*"), 272 (CCC Book of Authorities, Tab 1)

27. Given the requirement that the privilege applies only to confidential communications between the client and his solicitor, THESL's blanket assertion that all of the material sought in CCC interrogatories 1, 5 and 7 is subject to solicitor/client privilege is, aside from any other consideration, excessive on its face.

28. Litigation privilege applies to communications, including documents, between a client and solicitor, prepared with the dominant purpose of preparing for litigation, actual or contemplated. Litigation privilege ends when the litigation in question ends.

29. The Ontario Court of Appeal, citing the *Chrusz* decision, made the following observation about litigation privilege:

As emphasized in this passage, litigation privilege is focused on litigation itself. A claim of litigation privilege triggers consideration of competing interests: the need for an arena of protected communications to assist the adversarial process, on the one hand, and the need for disclosure to ensure hearing fairness, on the other hand. In *Chrusz*, this court held that in order to balance these competing interests and to engage litigation privilege, the communication at issue must have been made when litigation was commenced or contemplated, where the dominant purpose for the communication was for use in, or advice concerning, the litigation. In addition, once implicated, litigation privilege is extinguished when the litigation, or the contemplation of it, comes to an end.

Reference: *Ontario (Liquor Control Board) v. Lifford Wine Agencies Ltd.*, 2005 CanLII 25179 (Ont. C.A.), para 74, (CCC Book of Authorities, Tab 2)

(ii) The Protocol for Making a Claim for Privilege

30. The Ontario Court of Appeal, made the following statement about the protocol to be followed when making a claim for privilege:

It is incumbent on the party asserting the privilege to establish an evidentiary basis for it. Broad privilege claims which blanket many documents, some of which are described in the vaguest way, will often fail, not because the privilege has been strictly construed, but because the party asserting the privilege has failed to meet its burden

Reference: *Chrusz*, p. 274 (CCC Book of Authorities, Tab 1)

31. While the Rules of Civil Procedure do not govern the practice of the Board, they do provide a useful guide to the protocol for making claims for privilege. Rule 30.03(2)(b) provides that a party must list, in its affidavit of documents, all documents relevant to any matter in issue “that are or were in the party’s possession, control or power, and for which the party claims privilege, and the grounds for the claim”.

Reference: *Courts of Justice Act*, R.R.O. 1990, Reg 194, as amended, Rule 30.03(2(b)) (CCC Book of Authorities, Tab 3)

32. The requirements of the protocol have been the subject of comment in many cases. For example, in *Grossman et al. v. Toronto General Hospital*:

It has equally always been the case that sufficient information must be given of documents for which privilege is claimed to enable a party opposed in interest to be able to identify them... Enough must be given to enable a court to make a *prima facie* decision as to whether a claim for privilege has been established from what appears on the face of the affidavit.

Reference: *Grossman et al. v. Toronto General Hospital et al.* (1983), 41 O.R. (2d) 457 (Ont. H. Ct.), p. 10 (CCC Book of Authorities, Tab 4)

33. In the case of *Ansell Canada Inc. v. Ions World Corp.*, the court expressed the principle that the onus of establishing the factual prerequisites of a claim of litigation privilege over a document rests on the party seeking to claim the privilege.

Reference: *Ansell Canada Inc. v. Ions World Corp.*, [1998] O.J. No. 5034 (Ont. Ct., Gen. Div.), p. 7 (CCC Book of Authorities, Tab 5)

34. In *Kennedy v. McKenzie*, the Court elaborated on that principle as follows:

In order to discharge this preliminary onus, the party resisting production is not required to give particulars that would destroy the benefit of any privilege which might properly attach to the documents. However, in order for a proper determination to be made, they must provide a sufficient description of the documents, the circumstances of their creation and the dominant purpose therefor.

Reference: *Kennedy v. McKenzie*, [2005] O.J. No. 2060, 17 C.P.C. (6th) 229 (Ont. Sup. Ct.), p. 10, (CCC Book of Authorities, Tab 7)

35. THESL has made a broad claim for privilege, effectively a blanket claim covering a wide array of different kinds of materials, without identifying either the documents

in respect of which the claim is made or the grounds for the claim, or the litigation in respect of which the claim is made. THESL has, in other words, made the kind of blanket claim which the Court of Appeal in *Chrusz* said was inappropriate. In so doing, THESL has made it impossible for the CCC to address, in any meaningful way, the claim for privilege. It would be idle for the CCC to speculate on what litigation THESL says was contemplated (given that no litigation has ever existed), let alone try to assess the validity of that claim.

36. More importantly, THESL's blanket claim of privilege over a wide array of different kinds of material, and without reference to any litigation, actual or contemplated, makes it impossible for the Board to adjudicate THESL's claim of privilege.

37. The law on what constitutes privilege, and the law on the protocol for making a claim for privilege, are both well-established and well-known. THESL has chosen to ignore both.

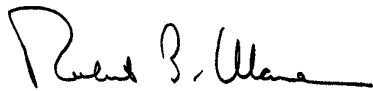
38. In light of THESL's failure to meet the minimum requirements to support a claim for privilege, the Board has two options. One is to deny the claim for privilege as not having been established. The alternative is to require THESL to follow the required protocol by first listing the documents in respect of which the claim for privilege is made, then providing a justification for the claim for privilege, and then describing the actual or contemplated litigation. The CCC would then have to be given an opportunity to respond. This second alternative would, necessarily be detrimental to CANDAS because it would necessarily delay the hearing of CANDAS's application.

39. THESL has chosen to make its claim for privilege in a way which is contrary to well-established law and unfair to both the CCC and the Board. Allowing THESL the chance to correct this would be both unfair and prejudicial.

PART V - RELIEF REQUESTED

40. The CCC asks that its Motion be granted, and that the material requested in its interrogatories be supplied by THESL forthwith.

All of which is respectfully submitted.



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09/11/2011

SCHEDULE "A"

LIST OF AUTHORITIES

1. *General Accident Assurance Co. et al. v. Chrusz, et al.* (1999), 180 D.L.R. (4TH) 241 (Ont. C.A.)
2. *Ontario (Liquor Control Board) v. Lifford Wine Agencies Ltd.*, 2005 CanLII 25179 (Ont. C.A.)
3. *Courts of Justice Act*, R.R.O. 1990, Reg 194, as amended, Rule 30.03(2(b))
4. *Grossman et al. v. Toronto General Hospital et al.* (1983), 41 O.R. (2d) 457 (Ont. H. Ct.)
5. *Ansell Canada Inc. v. Ions World Corp.*, [1998] O.J. No. 5034 (Ont. Ct., Gen. Div.)
6. *Kennedy v. McKenzie*, [2005] O.J. No. 2060, 17 C.P.C. (6th) 229 (Ont. Sup. Ct.)

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ONTARIO ENERGY BOARD

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