

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.

AMENDED REPLY SUBMISSIONS OF
THE CONSUMERS COUNCIL OF CANADA

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PART I - INTRODUCTION AND OVERVIEW

1. These are the Reply Submissions of the Consumers Council of Canada (the CCC) to the Responding Written Submissions of Toronto Hydro-Electric System Limited (THESL). This Reply is in two parts. In the first we will respond to the principles, the interpretation and application of which THESL argues should lead the Ontario Energy Board (Board) to dismiss the CCC's motion. In the second, we will respond, briefly, to THESL's submissions on the interrogatories which are the subject of the CCC's motion.

PART II – THE PRINCIPLES

(A) The Protocol to be Followed

2. In paragraph 10 of its Responding Submissions, THESL argues that “the starting point for the Board's consideration of the Disputed Interrogatories and the Motions is the principle of Proportionality”. The CCC disagrees. The starting point is the protocol, or process, required to make claims for privilege and proportionality, and the implications of THESL's adamant refusal to follow that protocol.

3. In its Submissions, the CCC argues that there is a protocol which THESL was required to follow in making a claim for privilege. THESL argues that the protocol does not apply to proceedings before the Board.

4. The protocol requires THESL to list the documents in respect to which privilege is claimed, providing sufficient details about the documents to enable the CCC, and the Board, to identify them, and to set out the reasons why THESL claimed they were subject to privilege.

5. This protocol is one which is followed under the *Rules of Civil Procedure*. THESL argued that those Rules do not apply to OEB proceedings.

6. In paragraph 31 of its Submissions, the CCC submitted that the *Rules of Civil Procedure* do not govern the practice of the Board, but provide a useful guide to the protocol for making claims for privilege. The point is not whether the *Rules of Civil Procedure* apply to the practice of the Board. They were referred to as an indication of the procedure universally followed for claims of privilege. The point is that the protocol is one sanctioned by the courts in order to allow for an orderly, and fair, disposition of claims of privilege. The attitude of courts to the protocol was expressed by the then-Ontario High Court, in the following terms:

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 the 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.)

7. The passage cited in the preceding paragraph underscores the importance of following the protocol to enable the party opposed to be able to respond to the claim and the adjudicator to assess the validity of the claim. Making a blanket claim for privilege, as THESL does, effectively prohibits both the CCC and the Board from making any reasoned assessment of the validity of the claim.

8. The obligation borne by the party claiming privilege was described in the case of *Manaca (Litigation guardian of) v. Coseco Insurance Co.*, as follows:

The onus is on the party claiming litigation privilege to lay an evidentiary foundation for that privilege. The best evidence would be an affidavit from the claims handler as to when she reasonably anticipated that litigation was likely and why and that her ongoing investigation and document creation was to assist in the defence of that litigation. It would however not be sufficient evidence for the adjuster to make general assertions that all documents created after

litigation was reasonably anticipated were prepared for purposes of that litigation. **The evidence must be specific and speak to the content of each document.** The court could also look to the circumstances and the chronology of events to help in determining the dominant purpose for creation of the documents. It may also “inspect the document for the purpose of determining...the validity of a claim of privilege” pursuant to rule 30.06(d).

Reference: *Mamaca (Litigation guardian of) v. Coseco Insurance Company*, [2007] O.J. No. 1190, para. 15 (Emphasis added)

9. In paragraph 8 of his affidavit, Mr. Labricciosa states:

Even producing lists of the documents within THESL's possession, such as a list of documents which THESL claims privilege over in respect of the Disputed Interrogatories, would place an extraordinary burden on THESL and require it to invest substantial resources.

Reference: Affidavit of Ivano Labricciosa, Sworn November 15, 2011, (the “Labricciosa Affidavit”), para. 8

10. So far from attempting to comply with the protocol, THESL is making a claim for privilege in respect to documents without even knowing what the documents are.

11. As the Board will be aware, the protocol has been followed in Board proceedings. For example, in EB-2010-0184, the Attorney General declined to produce certain information and materials on the basis that they were privileged. In support of its claim, the Attorney General described the documents in respect of which privilege was claimed, and set out the grounds for that claim. That it did so allowed the CCC respond to the claim, and the Board to adjudicate it. Appendix A to this Reply is a copy of the correspondence from the Attorney General in EB-2010-0184, setting out its claim for privilege. Appendix B to this Reply is a copy of the Board’s decisions addressing the Attorney General’s claim for privilege.

Reference: Ontario Energy Board Proceeding EB-2010-0184

12. THESL, in its Responding Written Submissions, cites Wigmore's definition of solicitor/client privilege also cited by the CCC in paragraph 26 of its Submissions. What the Board has to do is determine whether the documents, in respect of which THESL claims privilege, meet the definition. The Board cannot do that unless the documents are described and the basis for the claimed privilege is set out.

13. The reason that the courts have insisted on the use of the protocol is to ensure that claims for privilege are not inappropriately broad. The mischief is that, if the protocol is not followed, then privilege may be claimed for documents for which there is no valid basis for such a claim.

14. THESL has, presumably, attempted to correct its failure to follow the accepted protocol by filing the Labricciosa Affidavit. That Affidavit, or more accurately, one that complied with the protocol, should have been filed when THESL first made a claim for privilege. It should, as it does not, have described the documents in respect of which privilege is claimed, and set out the reasons for each claim. Instead, and as noted above, Mr. Labricciosa states that THESL does not even know the documents in respect of which privilege is claimed.

15. THESL's refusal to follow the protocol has delayed the resolution of the dispute over the response to the CCC interrogatories. More importantly, THESL's failure to comply with the protocol has made it impossible for the CCC to respond to the claim for privilege. It has also made it impossible for the Board to adjudicate that claim.

16. We note that THESL has chosen to use the Labricciosa Affidavit as the vehicle to raise a new issue, namely whether the wireless attachments THESL did approve were based on the wrong information and were thus "unauthorized". This is a serious allegation, raising an entirely new issue, one that would itself warrant explanation through written interrogatories.

This new issue is not relevant to the resolution of the issues that are the subject of these Reply Submissions. However, that THESL would make them in an affidavit filed at this stage of the proceedings raises, at a minimum, serious concerns about THESL's respect for the Board's processes and the rights of other parties.

17. Aside from any other consideration, the Board should, in disposing of the CCC Motion, reiterate the obligation of parties who claim privilege for documents to follow the protocol. To accede to THESL's position would be sanction to what amounts to an abuse of process.

(B) Relevance

18. At various points in the Responding Written Submissions, THESL asserts, wrongly, that the CCC is making some form of "claim". THESL also asserts, again wrongly, that the CCC has alleged that THESL has engaged in anti-competitive behaviour. Finally, THESL asserts, again wrongly, that the CCC is trying to turn the process into a compliance proceeding in respect of THESL's behaviour. The CCC is making no "claim". It is not alleging anti-competitive behaviour, by THESL or anyone else. It is not attempting to turn to the CANDAS application into a compliance proceeding.

19. CCC's interrogatories are an attempt to both clarify and understand THESL's evidence, and the positions THESL proposes to take on that evidence. CCC's interrogatories are, thus, entirely consistent with the purpose of interrogatories as describe in Rule 28.02 of the Board's *Rules of Practice and Procedure*.

20. THESL's pre-filed evidence, consisting of the affidavits of Mary Byrne, Adonis Yatchew, and Michael Starkey, all sworn September 1, 2011, contain the following assertions:

- (i) That the CCTA decision does not apply to wireless attachments;

- (ii) That safety is compromised by wireless attachments to THESL's poles;
- (iii) There are viable market alternatives for hosting wireless attachments.

21. The CCC interrogatories are an attempt to clarify and understand the evidence upon which those assertions are based. As part of that exercise, the CCC interrogatories seek information which might contradict the evidence on which those assertions are based. That, we submit, is a legitimate purpose for the delivery of interrogatories. Seeking information which might contradict, or otherwise undermine, the assertions made in THESL's pre-filed evidence does not amount to an allegation about the propriety of THESL's behaviour, and does not amount to a claim that THESL has engaged in inappropriate behaviour.

(C) Proportionality

22. THESL argues that the principle of proportionality should preclude the Board ordering a response to the CCC's interrogatories.

23. As in the case of the claim for privilege, the Board cannot assess the merits of that argument unless it has some objective information about the number of documents involved. All the Board has are Mr. Labricciosa's blanket assertions that the task of even finding the documents is both large and burdensome.

24. Mr. Labricciosa's bald assertions about the difficulty in even determining the volume of information sought make it impossible for the CCC to respond to arguments about proportionality. Intuitively, it would not seem that the universe of documents sought in the CCC interrogatories is as large as Mr. Labricciosa implies. However, the CCC, and more importantly the Board, should not be required to speculate about the number of documents involved, or about the difficulty of obtaining them.

25. In a recent decision, the Ontario Superior Court of Justice reiterated the obligation of a party seeking to limit the production of relevant documents to provide objective evidence in support of its claim, as follows:

In my view a party who seeks to limit the production of relevant documents on the basis of proportionality must put forward at least some evidence addressing the Rule 29.2.03 factors.

Reference: Midland Resources Holdings Ltd. v. Shhtaif [2010] O.J. No. 2767, para. 15

26. To put the matter another way, merely asserting that producing the documents will be burdensome is not sufficient.

27. Rule 29.02(b) of the Board's *Rules of Practice and Procedure* sets out a mechanism for dealing with circumstances where a party is unable or unwilling to provide a full and adequate response based on the contention that information cannot be provided with a reasonable effort. That Rule requires that the party set out the reasons for the unavailability of such information, as well as any alternative available information in support of the response. THESL has done neither of those things. In his affidavit, Mr. Labricciosa simply asserts that there are a lot of documents and that it would take a lot of time to find them. That assertion does not comply with the requirements of Rule 29.02(b).

28. As in the case of its claim for privilege, THESL has made it impossible for the CCC to respond to the argument about proportionality and, more importantly, has made it impossible for the Board to assess the validity of the claim.

(D) Litigation Privilege

29. Although it is not clear from its Reply Submissions, it would now appear that THESL's claim for privilege is based largely, if not entirely, on the concept of litigation

privilege. In the absence of a list of documents for which privilege is claimed, and the basis for the claim for each document, it impossible to determine with any precision the nature of the privilege in issue.

30. Litigation privilege is both broader than, and narrower than, solicitor/client privilege. It is broader than solicitor/client privilege in that it encompasses a broader array of communications than just those between a client and his or her solicitor. It encompasses, for example, communications with third parties. It is, however, significantly narrower than solicitor/client privilege in that it must be related to actual or “contemplated” litigation, and ends when the litigation ends.

31. In keeping with its adamant refusal to provide specifics about any of its privileged claims, THESL does not identify the actual or “contemplated” litigation in respect of which it asserts the claim arises. Mr. Labricciosa, in his affidavit, asserts the following as the basis for the claim for litigation privilege:

- (i) That something which occurred at the “Public Mobile meeting” appears to have given rise to a concern that might be litigation;

Reference: Labricciosa Affidavit, para. 26

- (ii) That the correspondence between THESL and certain members of CANDAS exchanged throughout the first half of 2010 gave rise to “the potential fact and nature of THESL's anticipated or contemplated litigation;

Reference: Labricciosa Affidavit, para. 27

- (iii) The “acrimonious nature of the period after the Public Mobile meeting”;

Reference: Labricciosa Affidavit, para. 32

- (iv) The tone and content of CANDAS's application itself.

Reference: Labricciosa Affidavit, para. 28

32. We submit that it is impossible for the CCC, and for the Board, to determine what litigation was contemplated, who the parties might be, and what the basis for the litigation might be. For example, Mr. Labricciosa asserts that "THESL did not have a pole attachment agreement, or any other agreement, with Public Mobile". In the absence of such an agreement, it is difficult to know on what basis Public Mobile would make a claim. However, neither the CCC nor the Board should have to speculate about what litigation is referred to. The obligation is on THESL to provide objective information about the contemplated litigation.

Reference: Labricciosa Affidavit, para. 23

33. The Saskatchewan Court of Queen's Bench expressed the obligation on a party asserting a claim for litigation privilege in the following terms:

Mere assertion in an affidavit that the document was prepared for litigation purposes is not necessarily sufficient to establish privilege. The document must address the issue of blame, fault, responsibility or liability, or in some other way establish that its dominant purpose was for litigation. In addition, there must be some reasonable anticipation that litigation will be the result of the event being reviewed or investigated.

Reference: *Mistik Management Ltd. v. Canada (Attorney General)* [1997] S.J. No. 73

34. Mr. Labricciosa's vague assertions provide no basis upon which the Board can conclude that there was contemplated litigation.

35. THESL simply asserts that, from and after sometime in January of 2010, relations between THESL and CANDAS had deteriorated to the point whether litigation, at least from THESL's perspective, might be a possibility. It does not describe what the nature of the litigation would be.

36. Whatever litigation might have been contemplated never in fact occurred. Accordingly, whatever basis may have existed, for example prior to the August 13, 2010 letter from THESL to the Board, for such a claim clearly no longer exists.

37. Inherent in every commercial relationship is the possibility that parties may at some point disagree and that litigation may result. That possibility is not sufficient to ground a claim for litigation privilege. There has to be something more specific and more concrete than the mere possibility that a dispute between parties may give rise to litigation. In the present circumstances, CANDAS has elected to seek regulatory relief, and not to litigate whatever claims it may have against THESL. In those circumstances, there is simply no basis for a claim for litigation privilege.

38. While litigation privilege covers a broader array of documents, there are limits to it. Not every document can properly be subject to litigation privilege. The breadth of THESL's claim for litigation privilege is evident from the fact that THESL has not even searched out the documents in respect of which the claim is asserted.

39. THESL hints at, but does not assert, that CANDAS's application is the "litigation" in respect of which the privilege is claimed. It is difficult for the CCC to respond to that assertion without knowing whether, in fact, THESL is making it. However, on the assumption that it is, CCC submits that an application for the kind of relief that CANDAS is seeking does not qualify for litigation in respect of which privilege obtains.

40. Finally, THESL claims the protection of subsection 5.4(2) of the *Statutory Powers Procedure Act*, which prohibits the Board from requiring disclosure of privileged documents. For that section to apply, the Board must first have determined that the documents were privileged. Given the Board has not made such a determination, and given that THESL has effectively precluded the Board from being able to make that determination, the subsection does not apply.

PART III -- THE CCC INTERROGATORIES

(A) CCC Interrogatory No. 1

41. THESL argues that the CCC's interrogatory, seeking information about THESL's August 13, 2010 letter to the Board, seeks information which is not relevant because: (a) that letter is not part of THESL's evidence; and (b) THESL has, elsewhere in its evidence, addressed the assertions that are contained in that letter. THESL also asserts that the CCC wrongly characterizes that letter as describing a "policy" of THESL not to allow wireless attachments.

42. The CCC submits, with respect, that the assertion that no interrogatories can be asked about the August 13, 2010 letter because it is not contained in THESL's evidence is not credible. That argument is based on a reading of Rule 28.02 of the Board's *Rules of Practice and Procedure* which, THESL asserts, allows interrogatories to be filed only in respect of any evidence filed by the party to whom the interrogatory is directed. With respect, trying to argue that the Rule does not apply to a letter written by THESL because of the happenstance that CANDAS filed it as part of its evidence is an absurdly narrow reading of Rule 28.02.

43. The August 13, 2010 letter sets out THESL's assertion that the CCTA decision does not apply to wireless attachments. It also sets out reasons why THESL believes wireless

communication devices should not be attached to its poles. But for that letter, and for the positions THESL took, subsequently, based on it, CANDAS would never have had to make this application. In that sense, the letter is the trigger for this application. The background to the letter and the accuracy of the factual assertions in it are relevant to the positions THESL has taken in the CANDAS application.

44. Finally, THESL asserts that the materials sought in CCC interrogatory no. 1 are subject to litigation privilege. For the reasons set out above, CCC submits that litigation privilege does not apply.

(B) CCC Interrogatories Nos. 2, 3 and 4

45. These interrogatories seek, in various ways, information related to the assertions in the affidavits of Dr. Yatchew and Mr. Starkey that there is a competitive market for wireless attachments. The assertions are ones which, we submit, the CCC is entitled to test. Part of the testing of that assertion is an inquiry into whether, or to what extent, THESL has, for example, encouraged, or been encouraged by, the EDA and its members to take this position.

46. THESL claims that CCC is making “vague allegations of undue influence” by asking for communications between THESL and the City of Toronto and its subsidiaries. CCC is making no such claim.

47. The premise of these interrogatories is that the City, and its subsidiaries, may be users of THESL's poles. To the extent that the City or its subsidiaries may wish to use the poles, and my have so indicated to THESL, it may belie the existence of the competitive market which THESL claims, in its evidence, exists. The information is, therefore, relevant.

(d) CCC Interrogatories Nos. 5, 6 and 7

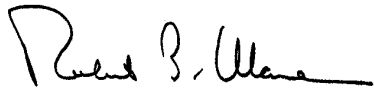
48. THESL argues that the information sought in these interrogatories is not relevant. The information goes to the assertions in Ms Byrne's affidavit about the factors which preclude THESL from being able to accommodate wireless communications attachments on its poles. Ms Byrne's affidavit contains assertions about certain matters, with no backup information about them. Given that, CCC submits that the questions it asks are relevant to an understanding of whether there is in fact any basis for Ms Byrne's broad assertions.

49. In respect of all of the CCC interrogatories, THESL claims that it would be burdensome to try to find the information requested. For the reasons set out above, the CCC finds it impossible to respond to this assertion, given that THESL has provided no objective information upon which the assertion can be tested.

PART IV - RELIEF REQUESTED

50. The CCC reiterates its request that its Motion be granted, and that the Board order THESL to provide further and better answers to CCC's interrogatories 1, 2, 3, 4, 5, 6(d) and 7.

All of which is respectfully submitted.



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