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File No.: 96289

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E-FILED

Ms. Kirsten Walli, Secretary
Ontario Energy Board
Suite 2700, 2300 Yonge Street (27TH Floor)
P.O. Box 2319
Toronto, ON M4P 1E4

Dear Ms. Walli,

Re: EB-2011-0361; EB-2011-0376 -
Preliminary Issues

Goldcorp wishes to apprise the Board of two matters that relate to the hearing scheduled for Monday, December 19, 2011.

First, Goldcorp does not intend to proceed with its Motion for Interim Relief or for Orders 2(c) and 2(e) of its Application, as elaborated in pages 16 to 23 of its Written Submissions.

Since filing its Written Submissions, Goldcorp has:

(a) had an opportunity to consider HONI's Reply Evidence and Submissions regarding Goldcorp's Motion for an Interim Order filed December 5th, 2011;

(b) received from HONI and reviewed a draft CCRA; and

(c) had discussions with representatives of HONI about the CCRA.

As a result, Goldcorp believes that no Interim Orders are necessary at this time and looks forward to completing the CCRA with HONI. It requests the Board to adjourn its request for Interim Relief *sine die*.

Second, during its oral submission on Board Issue A1, Goldcorp will refer to the Board's Decision with Reasons of August 5, 2010 in EB-2010-0184, at p. 3, in addition to the authorities canvassed in its Written Submissions. A copy of that decision is enclosed.

Yours truly,

Gardiner Roberts LLP

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Ontario Energy Board

Commission de l'énergie de l'Ontario

Ontario

EB-2010-0184

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 Consumers Council of Canada in relation to section 26.1 of the *Ontario Energy Board Act, 1998* and Ontario Regulation 66/10.

BEFORE: Howard Wetston
Chair

DECISION WITH REASONS

August 5, 2010

THE PROCEEDING

On April 26, 2010, a Notice of Motion was filed by the Consumers Council of Canada ("CCC") regarding the assessments issued by the Ontario Energy Board (the "Board") pursuant to section 26.1 of the *Ontario Energy Board Act, 1998* (the "Act").

On May 11, 2010, the Board issued a Notice of Hearing and Procedural Order No. 1 (the "Notice") in which the Board decided that before determining whether or not it would hear the motion, the Board intended to hear argument on a number of preliminary questions that were set out in the Notice. The preliminary questions set out in the Notice included, but were not limited to, the following:

(a) given Rule 42.02 of the Rules, does CCC have standing to bring the Motion;
(b) does the Board have the authority to cancel the assessments issued under section 26.1 of the Act;
(c) does the Board have the authority to determine whether section 26.1 of the Act (and Ontario Regulation 66/10 made under the Act) are constitutionally valid in the absence of another proceeding (i.e., can the constitutionality of the legislation be the only issue in the proceeding); and
(d) would stating a case to the Divisional Court be a better alternative?

A number of intervenors provided written argument in response to the questions in the Notice. On July 13, 2010, the Board held an oral hearing to hear further argument on the preliminary questions. In their pre-filed materials relating to the preliminary issues, certain intervenors made arguments in favour of staying the assessments resulting from the application of section 26.1 of the Act until the motion to determine whether the assessments were constitutional was heard on its merits. However, no party had brought a formal motion to stay the assessments that was supported by evidence. The Attorney General of Ontario (the "Attorney General") argued in its responding materials that the granting of a stay had not been identified by the Board as one of the preliminary issues to be heard on July 13, 2010, and that the issue should therefore not be heard that day. In the alternative, the Attorney General argued that the test for a stay had not been met and should therefore be denied.

At the hearing on July 13, 2010, the Board determined that it would hear argument on the stay issue. After hearing the arguments and reviewing the pre-filed materials, the Board determined that it was not satisfied with the state of the record regarding the stay issue. As the request for a stay had not been made through a fully supported motion, the Board,

through Procedural Order No. 4, afforded parties the opportunity to file additional materials, including evidence to support their request for a stay.

On July 19, 2010, Canadian Manufacturers & Exporters ("CME") filed a notice of motion seeking a stay of the assessments issued by the Board on April 9, 2010 until such time as matters pertaining to the constitutional validity of Ontario Regulation 66/10 (the "Regulation") have been decided on their merits (the "CME Motion"). The CME Motion was opposed by the Attorney General. The CME Motion was argued before the Board on July 26, 2010. Several other intervenors adopted their original submissions from the July 13, 2010 hearing relating to the stay and provided some additional comments in support of CME's Motion. The Board issued a decision and order (without reasons) later that day dismissing the CME Motion. The Board's reasons for that decision and order are included below.

THE SPECIAL PURPOSE CHARGE AND THE ROLE OF THE BOARD

Sections 26.1 and 26.2 of the Act provide for a special purpose charge ("SPC") to be assessed to certain persons 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.

The Regulation provides the details for the overall amount of the SPC, how the SPC is to be allocated between the persons required to pay the assessments, and how the persons required to pay the SPC assessments may recover the amounts.

The Regulation sets out that the total amount of the SPC is $53,695,310. The Regulation clearly states how the Board is to apportion that amount among the Independent Electricity System Operator (the "IESO") and licensed electricity distributors. In the simplest terms, the Regulation contains a formula, with corresponding definitions, that sets out how the Board is to calculate an amount. The Board then uses that amount in other formulas set out in the Regulation to apportion the SPC among the IESO and licensed electricity distributors. The Board's role is to perform the calculation identified in the Regulation and as such, the Board's role is not discretionary or adjudicative.

Similarly, the manner in which the IESO and licensed electricity distributors may recover the assessments they are required to pay under the Regulation is also set out in the

Regulation. The Board has no discretion in how those amounts are calculated or the mechanism for recovery.

CCC'S STATUS

Submissions were made regarding the issue of standing and more particularly whether or not CCC needed leave to bring the motion. The Attorney General was satisfied that Aubrey LeBlanc had standing to bring the motion. The Attorney General argued, however, that CCC itself did not have standing to bring the motion and should be considered an intervenor. For the purposes of this proceeding, the Board finds that CCC should be considered an intervenor.

THE BOARD'S AUTHORITY TO HEAR THE CONSTITUTIONAL ISSUE

The constitutional issue before the Board is whether the SPC is an unconstitutional indirect tax or a valid regulatory charge. Before hearing the question on its merits, the Board first had to satisfy itself that it had the authority to determine the constitutional question.

Section 19 of the Act provides that the Board has "in all matters within its jurisdiction authority to hear and determine all questions of law and of fact." There was no disagreement among the intervenors that the Board had the jurisdiction to hear the constitutional issue. As stated by the Attorney General, when an administrative tribunal has the explicit or implicit jurisdiction to deicide questions of law arising under a legislative provision, it is presumed that the tribunal also has jurisdiction to decide the constitutional validity of that provision.

The Board agrees that it has the jurisdiction to determine the constitutional issue regarding the SPC.

BOARD HEARING VERSUS A STATED CASE

While there was agreement that the Board has the jurisdiction to hear the constitutional issue, intervenors also acknowledged that the Board has the authority to state a case to the Divisional Court under section 32 of the Act. Most parties argued that the Board should hear the constitutional question rather than state a case to the Divisional Court. Intervenors submitted that the Board should develop the evidentiary record necessary to

state a case and that it would be more efficient for the Board to hear the matter. However, the Association of Power Producers of Ontario ("APPrO") and Union Gas Limited ("Union") argued that stating a case to the Divisional Court would be the preferred option, once the evidentiary record was developed by the Board, since the matter would likely ultimately be resolved by the Courts in any event.

The Attorney General argued that the Board should hear the case and determine the questions of fact and law rather than stating a case to the Divisional Court. The Attorney General contended that it would be more expeditious for the Board to determine the entire matter rather than to have an evidentiary hearing before the Board, an argument on the law before the Divisional Court, have the matter referred back to the Board from the Divisional Court, and then have the Board consequently apply the Court's opinion.

The Board agrees with the Attorney General and the other parties that argued that the Board should hear the matter and not state a case to the Divisional Court. The Board finds that it would be more efficient and expeditious for the Board to determine the facts and law with respect to the constitutional question in this matter. The Board will set a date for the filing of the evidence by the Attorney General by procedural order in due course.

STAYING THE ASSESSMENTS

Positions of the Intervenors

In its motion materials, CME argued that the Board has a duty and an obligation to consider the constitutionality of its actions taken in response to the Regulation. By failing to consider the legality of the Regulation prior to issuing the assessments, CME submitted that the Board erred and that it should now stay the assessments pending this consideration. CME's position was that the presumption of constitutional validity does not apply to actions taken by a quasi-judicial tribunal in response to enactments of questionable validity requiring the tribunal to perform particular actions, and cited *R.* v. *Conway*, [2010] S.C.J. No. 22 ("*Conway*") in support of this argument. In particular, counsel argued that the administration of justice is irreparably harmed where a tribunal presumes its own actions are valid prior to assessing their legality.

Although CME argued that the test for a stay established in *RJR-MacDonald Inc.* v. *Canada (Attorney General)*, [1994] 1 S.C.R. 311 ("*RJR-MacDonald*") did not apply to this case, it did

submit that irreparable harm would result if the assessments were not stayed. CME argued that any assessments paid by distributors might not be returned by the government if the assessments were ultimately found to be unconstitutional. CME further submitted that even if the assessed amounts were refunded to the distributors, returning the money to individual ratepayers would be problematic, and that distributors might face class action law suits requiring the return of the assessed amounts, including significant legal costs.

Union also argued in favour of a stay, and relied on the three part test for a stay from *RJR-MacDonald*, namely:

(a) is there a serious issue to be tried;
(b) will the moving party suffer irreparable harm prior to the determination of the matter if the stay is refused; and
(c) does the balance of convenience, taking into account the public interest, favour the granting of a stay?

All three branches of the test must be satisfied if a stay is to be granted.

Union argued that the threshold for a serious issue was low and that it was proven in this case.

Union submitted that irreparable harm in the form of class action law suits brought by ratepayers against distributors could result if the assessed amounts are ultimately found to be unconstitutional. Even if the government were to return the assessed amounts to the distributors, such amounts could not be returned on a dollar for dollar basis to the ratepayers from whom the distributors initially recovered the money. A class action law suit could impose serious financial harm on distributors. Union also submitted that distributors may suffer a loss of profits and that the loss of profits would constitute irreparable harm.

Union further argued that the balance of convenience in this case favours ratepayers and distributors over the Province, largely on the basis that, once paid, it would be very difficult to return the amounts either to distributors or to ratepayers.

The request for a stay was also supported by CCC, VECC, and APPrO.

The CME Motion was opposed by the Attorney General. The Attorney General relied on

the three-part test in *RJR-MacDonald*. The Attorney General agreed that the threshold for establishing a serious issue is not high but submitted that the moving party cannot succeed on this branch of the test.

The Attorney General argued that even if the Board finds that the serious issue branch of the test has been met, that the CME Motion meets neither the irreparable harm nor the balance of convenience branches of the test.

The meaning of "irreparable" was discussed at paragraph 59 in *RJR-MacDonald*:

> "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other.

The Attorney General argued that any alleged harm that may be suffered if the assessments are ultimately found to be unconstitutional can be quantified in monetary terms because the amount of the assessments is known and that any harm can be remedied. In *Kingstreet Investments Ltd.* v. *New Brunswick (Finance)*, [2007] 1 S.C.R. 3 ("*Kingstreet*"), the Supreme Court held that where the government collects a tax that is found to be unconstitutional, those who paid the tax are entitled to restitution. The Attorney General further observed that irreparable harm must relate to the applicant's own interests, and that here the moving party (CME) was not alleging harm to itself, but rather to distributors. Finally, the Attorney General argued that the courts have already decided in *Canada (Attorney General)* v. *Amnesty International Canada*, [2009] F.C.J. 545, and *Canadian National Railways* v. *Leger*, [2000] F.C.J. 243, that potential legal costs incurred by distributors to defend against class proceedings do not constitute irreparable harm.

The Attorney General argued that the CME Motion also fails the balance of convenience branch of the test because CME must demonstrate that the balance of convenience operates in favour of granting a stay. The Attorney General cited a number of cases which stand for the principle that, in constitutional cases, the balance of convenience is a very low hurdle for governments, and a very high hurdle for applicants. In *RJR-MacDonald*, the Court held:

> In order to overcome the assumed benefit to the public interest

> arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit. (para. 80)

The Attorney General argued that CME cannot satisfy the balance of convenience branch of the test.

The Attorney General submitted that tribunals perform their duties under the presumption that statutes passed by the legislature are constitutionally valid until determined to be otherwise. The Attorney General argued that CME's submission that a tribunal should not act pursuant to legislation until it has considered the constitutional validity of the legislation is incorrect.

Decision

The Board finds that the appropriate test for granting a stay in these circumstances is the three part test identified in *RJR-MacDonald.*

The Board accepts that there is a serious issue to be tried in this case. However, it is not satisfied that irreparable harm will result if a stay is not granted, nor is it satisfied that the balance of convenience rests in favour of CME or the intervenors seeking the stay.

The potential harm identified in support of the motion is not irreparable. The harm identified is monetary and quantifiable; indeed, the total amount of the assessments is already known. The *Kingstreet* decision determined that, at a minimum, restitution would be available if the assessments are ultimately found to be unconstitutional. In the event that the assessments were returned to distributors, although a dollar for dollar refund to each ratepayer that paid their share of the original assessment would be impractical, the Board would have the ability to return these amounts to ratepayers by requiring the refunded amounts to be placed in a variance account or a deferral account. This amount could then be cleared through rates and act as an offset to each distributor's revenue requirement.

The Board also agrees with the Attorney General that the possibility of a class action law suit does not constitute irreparable harm.

CME argued that the Board should stay the assessment based on *Conway*. CME submitted that the Board had an obligation and a duty to determine the constitutional validity of the legislation and that that obligation and duty constituted a threshold legal requirement that the Board had to take into account when issuing the assessments. CME submitted that the assessments must be set aside until the threshold constitutional question had been answered. The Board is not persuaded by this argument. *Conway* deals with a tribunal's authority to determine constitutional questions; it does not deal with matters of interlocutory relief or stays. The Board does not find that the *Conway* case provides authority for the Board to stay the assessments.

The Board does not agree with CME's argument that the administration of justice would be irreparably harmed if the Board presumes the actions it took pursuant to the Regulation are legal. There is no basis for a finding that the presumption of legislative validity should not apply in this case.

The Board also does not accept Union's argument that any alleged loss of profits to the distributors would amount to irreparable harm to distributors. The amounts the electricity distributors pay as assessments will be recovered from consumers within a twelve month period. The variance account which has been established by the Board to record this recovery will ensure that there is no over or under recovery. In addition, the variance account allows distributors to recover their carrying charges for the assessed amounts.

The Board accepts the Attorney General's arguments with respect to the balance of convenience. CME has failed to meet the high threshold of establishing that the balance of convenience weighs in its favour.

As previously stated, in order to overcome the assumed benefit to the public interest from the continued application of the legislation, it must be demonstrated that the suspension of the legislation would itself provide a public benefit. The intervenors that argued for a stay suggested that the public interest to be gained by staying the legislation and Regulation is that electricity distributors and the IESO, and their consumers, will not have to pay the costs of the SPC.

Arguments that suggest that the suspension of the assessments would amount to a public interest which outweighs the public interest in the continued application of the legislation are not supportable. These arguments relate only to an economic and personal interest in

not paying the SPC. The Supreme Court addressed similar arguments in *RJR-MacDonald* relating to the increased price of tobacco products. The Supreme Court stated that "such an increase is not likely to be excessive and is purely economic in nature. Therefore any public interest in maintaining the current price of tobacco products cannot carry much weight." (*RJR-MacDonald* at para. 93)

The Board agrees that there is a high threshold for applicants to overcome in constitutional cases, and the parties seeking the stay have not provided clear evidence to meet this threshold.

COSTS

The Notice stated that the Board did not intend to grant cost awards in this proceeding. The Board had decided that no costs were warranted as the original Notice limited the extent of participation in the hearing to four parties, namely CCC, the Attorneys General of Ontario and Canada, and the Ministry of Energy and Infrastructure. However, as the hearing progressed, the Board allowed further participation in the hearing and a number of other parties intervened in the proceeding. Given the expanded participation in the proceeding, and the value the Board sees in having the expanded participation, the Board will allow for costs. Costs were requested by a number of intervenors, namely CCC, CME, VECC, and APPrO.

Under the circumstances, the Board will not rely on section 30 of the Act for costs. Distributors and the IESO should not be entirely responsible for paying the costs of this proceeding. The electricity distributors and the IESO are required to pay the SPC by virtue of the Regulation; this was not within their control. The Board also notes that the assessments may be extended to the natural gas sector in the future. Section 26.1 of the Act contemplates gas distributors being included in the assessments. Therefore, natural gas utilities and customers will also benefit from having the constitutional issue decided.

The Board has therefore determined that it would be more efficient for the Board to provide funding to groups representing the interests of customers that may be affected by this proceeding through section 26 of the Act. The rates for legal counsel's hourly fees will be determined in accordance with the Tariff in the Board's Practice Direction on Cost Awards (the "Practice Direction") and the Board will follow the principles set out in section 3 of the Practice Direction when determining eligibility for costs and the principles in section 5 of the

Practice Direction amount of the costs it will allow the intervenors to recover.

Based on section 3 of the Practice Direction, the Board finds that CCC, CME, and VECC are eligible to apply for their costs of participating in this proceeding.

APPrO has also requested costs in this proceeding. APPrO represents the interests of power producers who are not eligible under the Practice Direction unless they are a customer of the applicant or there are special circumstances. APPrO is not a customer of the "applicant" in this proceeding because the "applicant" in this proceeding is Aubrey LeBlanc/CCC (or for the motion for the stay, CME) and APPrO is not a customer of those parties. Therefore, the Board must consider whether there are special circumstances to warrant granting cost eligibility to APPrO.

APPrO has been granted intervenor status and of course may participate in this proceeding. While it is true that generators will pay the SPC assessments as load customers, is that sufficient to amount to special circumstances in this proceeding? The Board is of the opinion that it is not. APPrO's position as a consumer (as load) in this proceeding is not unique compared to the other consumer groups. APPrO would also not appear to have any greater expertise with respect to the constitutional issue being determined by the Board in this proceeding than any other consumer group. The Board therefore finds there are no special circumstances to warrant granting APPrO costs in this proceeding. This is in no way a comment on the contributions made by APPrO, to date, in this matter.

DATED at Toronto, August 5, 2010

ONTARIO ENERGY BOARD

Original signed by

Howard Wetston
Chair