Ontario Energy Board

Commission de l'énergie de l'Ontario

Ontario

EB-2011-0120

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 for certain orders under the *Ontario Energy Board Act, 1998*.

BEFORE: Cynthia Chaplin
Vice Chair and Presiding Member

Ken Quesnelle
Member

Karen Taylor
Member

DECISION AND ORDER

PRIVILEGED DOCUMENTS FILED BY TORONTO HYDRO-ELECTRIC SYSTEM LIMITED

February 22, 2012

The Canadian Distributed Antenna Systems Coalition ("CANDAS") filed an application on behalf of its member companies with the Ontario Energy Board (the "Board"), received on April 25, 2011 and subsequently amended by letters dated May 3 and June 7, 2011, seeking the following orders of the Board:

1. Orders under subsections 70(1.1) and 74(1) of the *Ontario Energy Board Act, 1998* (the "Act"): (i) determining that the Board's RP-2003-0249 Decision and Order dated March 7, 2005 (the "CCTA Order") requires electricity distributors to provide "Canadian carriers", as that term is defined in the *Telecommunications Act*, S.C. 1993, c. 38, with access to electricity

distributor's poles for the purpose of attaching wireless equipment, including wireless components of distributed antenna systems ("DAS"); and (ii) directing all licensed electricity distributors to provide access if they are not so doing;

2. in the alternative, an Order under subsection 74(1) of the Act amending the licences of all electricity distributors requiring them to provide Canadian carriers with timely access to the power poles of such distributors for the purpose of attaching wireless equipment, including wireless components of DAS;

3. an Order under subsections 74(1) and 70(2)(c) of the Act amending the licences of all licensed electricity distributors requiring them to include, in their Conditions of Service, the terms and conditions of access to power poles by Canadian carriers, including the terms and conditions of access for the purpose of deploying the wireless and wireline components of DAS, such terms and conditions to provide for, without limitation: commercially reasonable procedures for the timely processing of applications for attachments and the performance of the work required to prepare poles for attachments ("Make Ready Work"); technical requirements that are consistent with applicable safety regulations and standards; and a standard form of licensed occupancy agreement, such agreement to provide for attachment permits with terms of at least 15 years from the date of attachment and for commercially reasonable renewal rights;

4. its costs of this proceeding in a fashion and quantum to be decided by the Board pursuant to section 30 of the Act; and

5. such further and other relief as the Board may consider just and reasonable.

On December 9, 2011 the Board issued a Decision and Order with respect to motions filed by each of the Consumers Council of Canada[1] ("CCC") and CANDAS[2] for an order of the Board requiring Toronto Hydro-Electric System Limited ("THESL") to provide further and better responses to certain interrogatories (the "December Order").

[1] Notice of Motion filed October 31, 2011.
[2] Notice of Motion filed November 3, 2011, and later amended November 7, 2011.

THESL filed a letter on December 13, 2011 indicating that it would be able to produce some responses on December 23, 2011, but that satisfying the remaining requests made pursuant to the December Order would require significant time and resources. THESL indicated it would make best efforts to generate the requested information as soon as possible. Some of the material was filed on December 23, 2011, including the pole attachment agreement between Toronto Hydro Energy Services Inc. ("THESI") and Toronto Hydro Telecom Inc. (which was ultimately purchased by Cogeco Cable Inc. ("Cogeco")), which was filed in confidence.

By letter dated January 11, 2012, THESL reported that it was continuing to make best efforts to file the information identified in the Board's December Order. The letter further set out the company's estimates of when it expects to complete its filing of the ordered information. Although THESL did not formally seek an extension to the deadline imposed by the Board's December Order, the Board treated THESL's January 11 letter as a formal request for an extension.

THESL filed a letter dated January 19, 2012 that set out the significant volume of data involved in complying with the December Order and requested that the Board consider a more limited scope of information. CCC responded to THESL's letter of January 19, 2012 seeking clarification in respect of two issues.

On January 20, 2012 the Board issued its Decision on Motion and Procedural Order No. 8 (the "January Order"), which included the Board's determinations in respect of a THESL motion for further and better responses to certain interrogatories it had asked of CANDAS. As part of that January Order, the Board also made some determinations in respect of the CCC and CANDAS motions. In particular, the Board indicated that while it was prepared to grant an extension to January 20, 2012, as proposed by THESL, for the filing of materials related to other wireless communications on THESL's poles, February 17, 2012 (as proposed by THESL) was not an acceptable date to file the balance of the outstanding materials. The Board instead ordered THESL to produce a more limited scope of information falling into the following two categories: information related to the THESL letter to the Board of August 13, 2010; and information related to safety concerns; and the Board ordered filing of this information by January 30, 2012.

In the January Order, the Board also ordered that a hearing would be held on Monday, February 6, 2012 with the objective of, among other things, hearing submissions with respect to any claims of privilege or confidentiality made by THESL in respect of the

subset of interrogatory responses that THESL was required to file in accordance with the Board's January Order.

On January 30, 2012 THESL filed an affidavit sworn by Mr. Colin McLorg (the "McLorg Affidavit") disclosing documents as required in the Board's January Order. In particular the affidavit listed in Schedule "A" all those documents that THESL did not object to producing for inspection, several of which (items 2 through 9 of Schedule "A") were filed in confidence though THESL did not object to full disclosure of the information, but noted that because it related to DASCom attachments, CANDAS may want to request that some or all of the documents remain in confidence. Schedule "B" of the McLorg Affidavit listed all those documents that THESL did object to producing because THESL claimed that same are privileged and stated the grounds for each such privilege claim.

In Procedural Order No. 9 issued February 3, 2012, the Board indicated that it would expect CANDAS, CCC, and THESL to rely on their filings made in respect of the CANDAS and CCC motions filed on October 31, 2011 and November 3, 2011, respectively for the purpose of making submissions with respect to THESL's claims of confidentiality and privilege at the oral hearing on February 6, 2012. The Board also made provision for CANDAS and CCC to receive the relevant materials filed by THESL in confidence provided that counsel for each of these parties signed the Board's form of Declaration and Undertaking. The Board also ordered THESL to file any additional materials on which it intended to rely or reference for the purpose of oral submissions and a written summary of its points of argument.

The February 6, 2012 Hearing

At the February 6th, 2012 hearing the Board indicated that it would deal with four matters:

1. claims of confidentiality in respect of certain materials which were filed pursuant to the Board's December Order and January Order;
2. claims of solicitor-client privilege and/or litigation privilege in respect of certain materials which were filed pursuant to the Board's December Order and January Order;
3. whether the balance of the material outstanding in respect of the Board's December Order is still required and, if so, when it should be filed; and
4. to set further dates in order that the proceeding might be completed in an expeditious manner.

Item 1 – Confidentiality

The Board heard submissions with respect to the 8 documents (items 2-9 in Schedule "A") of the McLorg Affidavit over which THESL had claimed confidentiality. As no party took the position that the materials should remain confidential, the Board directed that new copies be filed without being marked confidential and that the materials be placed on the public record. THESL filed non-confidential versions of these documents on February 17, 2012.

In response to the December Order, on December 23, 2011 THESL filed in confidence an agreement between THESI and Toronto Hydro Telecom Inc. (which was purchased by Cogeco in 2008). THESL submitted that the agreement contains commercially sensitive information, both with respect to terms and conditions, and pricing. THESL indicated it would clarify for the Board whether the agreement was renewed, and if the agreement was not renewed, whether there is a document that governs the current relationship between THESI and Cogeco.[3] The Board will require the information about the contract to be filed by February 27, 2012. The Board will also require the filing of any document that exists that governs the current relationship between THESI and Cogeco by the same date. The Board will hold the agreement filed on December 23, 2011 in confidence, pending THESL's compliance with the Board's Order in this respect, as set out herein.

Item 3 – Balance of the Materials

The Board heard submissions with respect to whether and to what extent THESL should be required to file additional materials over and above that subset of materials already filed in accordance with the January Order. The Board ordered THESL to file certain additional materials but did not specify filing dates. That material included:

- Any reports provided to the THESL Board of Directors between November 2009 and May 2010 related to the issue of wireless attachments; and
- Representative reports or minutes of any THESL health and safety committee meetings held from August 2008 onward.

With respect to the first item, counsel for THESL filed a letter on February 17, 2012, noting that THESL had reviewed its records between November 2009 and June 2010

[3] Tr. at 134.

and indicated that there were no responsive reports or presentations provided to the THESL Board of Directors during that time.

THESL also indicated in its February 17, 2012 letter that it continues to work to prepare responses to the balance of the requests (which would include the second item above, i.e. health and safety committee reports or minutes).

The Board will include as part of its order herein provisions for the filing of any outstanding responses regarding the balance of the materials.

Item 2 – Solicitor-Client and Litigation Privilege

The Board allowed cross-examination of Mr. Labricciosa and Mr. McLorg. THESL then made its oral argument-in-chief, followed by the arguments of CANDAS, CCC, Energy Probe and Board staff. The reply argument of THESL was filed in writing on February 9, 2012.

The Board's Jurisdiction to Assess and Determine Privilege Claims

THESL referenced the Board's Decision in EB-2010-0184 made in the context of a Notice of Motion filed by CCC regarding the constitutionality of assessments issued by the Board pursuant to section 26.1 of the *Ontario Energy Board Act*.[4] THESL indicated that in the EB-2010-0184 Decision the Board first determined that it had authority to adjudicate privilege claims pursuant to section 5.4 of the *Statutory Powers Procedure Act* ("SPPA").

Board staff also referenced the Board's Decision and Order in EB-2010-0184 and indicated that it provides an accurate description of the Board's authority with respect to adjudicating issues of privilege.

Board staff also referenced subsection 5.4(1) and subsections 15(1) and 15(2) of the SPPA and made the point that the treatment of claims of privilege is not one of the areas of the law of evidence for which the SPPA provides a general exemption to tribunals subject to the SPPA. In other words, the Board is required to adhere strictly to common law evidentiary principles in respect of adjudicating privilege claims.

[4] Decision and Order, EB-2010-0184, December 8, 2011.

The jurisdiction of the Board to hear and determine claims of privilege (both solicitor-client and litigation) was not contested in this case. The Decision in EB-2011-0184 accurately describes the Board's power to adjudicate privilege claims.

Solicitor-Client Privilege

No party contested the solicitor-client privilege claims over document numbers 3, 13, 15, 16, 18, 19, 20, 21, 22, 24, 26, 31 and 32 in Schedule "B" of the McLorg Affidavit. The Board has reviewed the descriptions of these documents in the McLorg Affidavit, the cross-examination in respect thereof and the arguments of THESL and the parties in respect of solicitor-client privilege.

The Board accepts THESL's characterization of the law in respect of solicitor-client privilege and in particular that it is a core value in the legal system and a fundamental civil and legal right. The Board accepts further that communications protected by solicitor-client privilege have a *prima facie* presumption of inadmissibility and that the onus is on parties seeking disclosure of communications over which such privilege is asserted to show why the communication should not be privileged. No parties expressed any contrary views.

The Board is of the view that the description of the documents over which THESL has claimed solicitor-client privilege are consistent with materials over which solicitor-client privilege exists. In particular, each of the document descriptions appear to be authored by one or more solicitors and therefore appear to contain communications that are in the nature of legal advice. In the absence of any challenge to such claims, the Board is satisfied that each of the documents enumerated above are privileged. The Board will not, therefore order disclosure of any of the enumerated documents.

Litigation Privilege

THESL has claimed litigation privilege over all 32 documents that were listed in Schedule "B" of the McLorg Affidavit. Of these THESL also claimed solicitor-client privilege over document numbers 3, 13, 15, 16, 18, 19, 20, 21, 22, 24, 26, 31 and 32. Because the Board has determined that it will not require production of the documents over which solicitor-client privilege was claimed, the remaining documents over which only litigation privilege is claimed and that remain in dispute are document numbers 1, 2, 4-12, 14, 17, 23, 25, 27-30.

The Legal Test for Establishing a Claim of Litigation Privilege

THESL, CCC and Board staff made submissions on the appropriate test to be applied in adjudicating claims of litigation privilege. There was general agreement that the appropriate test that the Board should apply is the "dominant purpose test". In particular the Board was referred to the decision in *Chrusz*[5] described by CCC as a foundational case, in which the Ontario Court of Appeal states:

> Litigation privilege applies to communications generated by a lawyer or a client, or between them, for the dominant purpose of related litigation where litigation is realistically contemplated, anticipated or ongoing.

Board staff referred the Board to an excerpt of "The Law of Privilege in Canada, Volume 1"[6] which in turn refers to the case of *Mamaca (Litigation Guardian of) v. Coseco Insurance Co.*[7] wherein the court articulates the test for claims of litigation privilege as follows:

(a) on what date was there a reasonable apprehension of litigation; and
(b) for each document prepared after that date, was the dominant purpose in preparing the document to assist in the apprehended litigation.[8]

The Board is of the view that parties have accurately described the test to be applied by this Board in assessing and adjudicating the claims of litigation privilege made by THESL in this matter. In particular, in making its assessment, the Board will require that:

i. there must be a reasonable apprehension of litigation that predates the documents for which THESL is claiming litigation privilege; and
ii. for each document prepared after that date, the dominant purpose in preparing the document must have been to assist in the apprehended litigation.

The Board, in respect of both parts i. and ii. above, will also consider certain questions arising from the submissions of parties with respect to determining whether there is a reasonable apprehension of litigation. These questions include:

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[5] *General Accident Assurance Co. v. Chrusz*, [1999], 180 DLR (4th) 241.
[6] Hubbard, Robert W., S. Magotiaux & S.M. Duncan, *The Law of Privilege in Canada*, Release No. 12 (Aurora: Canada Law Book, 2011).
[7] [2007] O.J. No. 1190.
[8] *Ibid*. at par. 16.

i. Reasonable Apprehension of Litigation:
- Does a Board proceeding constitute litigation for the purposes of a claim of litigation privilege?
- If THESL establishes to the satisfaction of the Board that there was a reasonable apprehension of litigation, and no litigation has actually been commenced, is it appropriate for the Board to consider whether the reasonable apprehension still exists? If so, on what basis should the Board determine whether and when the apprehension of litigation terminates?

ii. Dominant Purpose:
- What information is a party that is claiming litigation privilege required to provide in describing the documents over which the privilege is claimed? Has THESL provided the required information?

The Board will also be mindful of CCC's submission that litigation privilege is an exception to the general proposition that in civil litigation documents should be produced in order to assist the trier of fact in getting at the truth.

CCC further indicated, and Board staff agreed, that there has been a continuum over which the trend has been to increase discoverability and narrow exceptions to the blanket proposition that all materials that are relevant should be produced.

Staff took the Board to the case of *Blank*[9] in which the Supreme Court of Canada said:

> While the solicitor-client privilege has been strengthened, reaffirmed and elevated in recent years, the litigation privilege has had, on the contrary, to weather the trend toward mutual and reciprocal disclosure which is the hallmark of the judicial process.[10]

It is against this backdrop that the Board will assess the claims of litigation privilege asserted by THESL.

[9] *Blank v. Canada (Minister of Justice),* [2006] 2 SCR 319, 2006 SCC 39.
[10] *Ibid.* at par. 61.

Is There a Reasonable Apprehension of Litigation?

THESL submitted, with reference to *Chrusz*, that a reasonable apprehension of litigation does not mean that there has to be a Statement of Claim filed or an application filed with the Board and added that the requirement is that litigation be reasonably contemplated or anticipated.

Both CCC and THESL (in its reply argument) referred to the *Hamalainen*[11] case in which the British Columbia Court of Appeal stated:

> I am not aware of any case in which the meaning of "in reasonable prospect" has been considered by this court. Common sense suggests that it must mean something more than a mere possibility, for such possibility must necessarily exist in every claim for loss due to the injury whether that claim be advanced in tort or in contract. On the other hand, a reasonable prospect clearly does not mean a certainty, which could hardly ever be established unless a writ had actually issued. In my view, litigation can properly be said to be in reasonable prospect when a reasonable person, possessed of all pertinent information including that peculiar to one party or the other, would conclude it is unlikely that the claim for loss will be resolved without it. The test is not one that will be particularly difficult to meet...[12]

THESL's counsel, Mr. Rodger indicated that as external counsel to THESL, he and his colleagues were retained specifically because of the concern about potential litigation, and that THESL requested legal advice in direct response to that perceived threat. He also indicated that the documents over which THESL is claiming litigation privilege were prepared for the sole purpose of preparation for potential litigation.

THESL submitted further that the affidavit of Ivano Labricciosa filed with the Board on November 15, 2011 "paints a picture" from the time of the Board's CCTA decision in 2005 to the Public Mobile meeting in January of 2010. THESL described in its submissions "…an increasingly acrimonious relationship, where Toronto Hydro came to the conclusion, back in January, that either a court process or a potential OEB process was going to be the result."[13]

The Board notes, however, that under cross-examination, Mr. Labricciosa confirmed that he attended the Public Mobile meeting and he described it as follows:

[11] *Hamalainen (Committee of) v. Sippola* (1991), 62 BCLR (2d) 254 (BCAA).
[12] *Ibid.* at par. 22.
[13] Tr. at 51.

> They approached us initially thinking that they had a relationship with us. We were surprised at the request for the meeting, since we didn't have any relationship with Public Mobile. But as they disclosed their business plans to us, which involved the relationships with these other parties, DAScom, ExteNet and also Cogeco, it became clear to us that they just assumed they had a right to be on our poles. They also identified the fact they were hanging their assets on our poles and did not have an agreement with us.
>
> And so when we began to have that dialogue, it was a surprise to them that they could not actually attach their assets on our poles.
>
> And at that point, the conversation went very graphic, very heated, and it quickly turned into a discussion about next steps.
>
> One of those next steps in the discussion that they asked was in relation to the regulator, which, they believed at that point, they could go to the regulator for some sort of relief.
>
> Then it also went to a discussion of sort of business models, in terms of, without hanging these antennas on our poles, that their business model fails.
>
> And then it went to some discussion of how to proceed with getting an agreement with us. So it quickly went from aggressive to restorative or conciliatory at that stage. At which point we had discussed with them that we had other things we had to attend to, and the meeting ended at that stage.[14]

In later questioning by the Board, Mr. Labricciosa clarified his earlier testimony as follows:

> It became crystal-clear for us after the meeting that we would be expecting litigation. We were surprised that it could take several months to produce the formality of a letter describing the outcomes of that meeting, which confirmed litigation from our perspective, even though there hasn't been any litigation processed in the courts to date.[15]

CCC submitted that there is no civil ligation, and that nearly two years after "heated suggestions", there is no Statement of Claim. CCC further submitted that a claim for

[14] Tr. at 20-21.
[15] Tr. at 32, ln. 9-15.

litigation privilege does not exist when there is some vague possibility of a civil claim. In CCC's view, there must be something more concrete than that, that the onus is on THESL to establish there is something more concrete than that, and that THESL has failed to do so.

CANDAS cited a number of disputes in its submissions, and attempted to differentiate the dispute regarding the "no wireless" policy that THESL contends gives rise to a reasonable apprehension of litigation, from the original dispute which CANDAS said it had with THESL regarding lack of timeliness in connecting the attachments of CANDAS' members. In its submissions, CANDAS characterized its initial dispute as one with respect to untimely connection by THESL of its wireless attachments, which would not have given rise to a reasonable apprehension of litigation. CANDAS submitted that THESL indicated that the lack of timeliness in that instance was due to a lack of human resources, and not that THESL had a "no wireless" policy.

CANDAS submitted that the trigger for the CANDAS application was not the dispute regarding timeliness of connection which occurred over the period from September 2009 to June 2010. CANDAS contended that dispute was purely a commercial dispute. CANDAS submitted that the trigger for the larger CANDAS proceeding was the August 13, 2010 letter, which was not prepared in contemplation of litigation, but rather was the result of work done to establish a "no wireless" policy. CANDAS submitted that whether there is or is not litigation in the future is not relevant to the decision on THESL's claim to litigation privilege.

Board staff submitted that the Board should apply an objective test in determining whether it was reasonable for THESL to contemplate litigation when THESL says it did. Board staff cautioned that the fact that a party retains a lawyer, and that reports are generated subsequent to that retainer, does not in and of itself lead inextricably to a conclusion that litigation was apprehended.

Board staff pointed out that if litigation was apprehended or contemplated at all there is a question as to what the appropriate date for such apprehension would be. Staff indicated that it might be sometime in January of 2010 (the Public Mobile meeting), sometime in May of 2010 (letter(s) from CANDAS members following on the Public Mobile meeting), or some other date.

Board staff indicated that while the January 2010 meeting seems to be the earliest evidence of acrimonious moments in a meeting, since commercial dealings and the relationships that underpin them can be acrimonious without being litigious, the Board should ask itself, based on the information it has before it, whether it was reasonable for THESL to have apprehended litigation at all, and if so, when.

In its reply argument, THESL indicated that during the meeting with Public Mobile it arrived at the conclusion that the positions of THESL and the CANDAS members were "polar if not irreconcilable".[16]

THESL further submitted that as a result of the conclusion reached by THESL following the Public Mobile meeting, it formed an internal senior staff team to collect information and reports, including expert reports that were provided to Mr. Rodger directly so he could provide legal advice and analysis for his client. THESL reiterated that but for this acrimonious situation, this work would just not have been started.

THESL further submitted that CANDAS itself has indicated that litigation is contemplated, which THESL says is evidenced by the correspondence that was exchanged following the Public Mobile meeting and which THESL wanted to produce for the Board, but over which CANDAS claimed settlement privilege. THESL submitted that the basis of settlement privilege, like litigation privilege, is that a litigious dispute is in existence or within contemplation.

THESL also referenced CANDAS' submission with respect to the issuance by the senior management of THESL of a "stop work order" following the January 2010 meeting with Public Mobile as evidence that there was a reasonable prospect of litigation at that point in time.

THESL pointed out that of the documents listed in Schedule B of the McLorg Affidavit in all cases the work commenced shortly after the January 2010 Public Mobile meeting, and continued into August of 2010. THESL submitted that the descriptions of the documents show that information was gathered from external consultants and internal staff and directed to counsel in order for THESL to prepare and assess its situation on various possible legal processes.

[16] THESL Reply, at par. 14.

Board Findings

The Board finds that there was a reasonable apprehension of civil litigation, beginning after the January 2010 meeting between THESL and Public Mobile. It is clear that the relationship between THESL and the members of CANDAS was – and remains – acrimonious. Although no Statement of Claim has yet been filed, the nature of the disagreements, as described by counsel at the hearing, is clearly still central to the thinking of both parties. This conclusion is further substantiated by CANDAS' refusal to disclose the letters of May and June 2010. CANDAS confirmed this refusal by way of letter dated February 17, 2012 .

Is the Board Hearing Litigation?

In its argument-in-chief, THESL indicated that the litigation that it reasonably contemplated included both regulatory proceedings before the Ontario Energy Board and civil litigation.

CCC submitted that the Board's processes are non-adversarial in nature, and that the relief sought by CANDAS cannot end with a penalty or fine on THESL. CCC further submitted that the parties are engaged in a standard form of administrative decision making by the Board in a non-adversarial setting. CCC provided several authorities to address whether an administrative proceeding is litigation for the purposes of attracting a litigation privilege claim. Citing *Ed Miller Sales & Rentals Ltd.*,[17]*, College of Physicians of British Columbia*[18] and *Order F06-16*[19] CCC argued that the administrative proceeding must demonstrate that there is a penalty involved, or that such penalty could be seen as a logical consequence of the proceeding, for an administrative proceeding to be considered litigation, or to create an apprehension of litigation.

> Once the Director focussed on the Caterpillar Companies to inquire whether they were guilty of offences under the Act, litigation in the fullest sense of the word was then in actual progress let alone in contemplation.[20]

[17] *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.* [1988] AJ No. 810 (CA).
[18] *College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner),* 2002 BCCA 665, [2002] BCJ No. 2779 (QL).
[19] 2006 CanLII 25576 (BC IPC).
[20] *Supra*, note 15 at 5.

CCC noted that in *College of Physicians,* it was held that, where litigation is not apprehended in an administrative proceeding, no litigation privilege is extended:

> At the investigative stage, the College is not seeking to impose penalties or sanctions against the member, but (through a special deputy registrar acting under section 21(2) of the MPA) to make findings on which to base a recommendation...[21]
>
> . . .
>
> Litigation privilege does not apply to the documents, as litigation was not a reasonable prospect when they were created and the dominant purpose for their creation was not litigation. The College was not engaged in an adversarial process when it investigated the Applicant's complaint…[22]

Board staff argued that the Board's processes are not litigation for the purposes of litigation privilege.

Board staff's rationale was that the Board is a creature of statute with a public interest mandate. Staff indicated that the decisions made and the orders issued are in the public interest, and they are not intended to redress some harm as between two or more parties. As such, staff submitted that the Board's processes are not litigious in the sense of being adversarial or in the sense of needing to provide parties with the protections afforded by litigation privilege.

In its reply argument THESL submitted that if the Board accepted the submissions of CCC, CANDAS and Board staff that the current proceeding before the Board does not constitute litigation that would afford the protections of the litigation privilege, it would be acting in contravention of the wording of Section 5.4(2) of the SPPA which THESL says is not limited to solicitor-client privilege and includes litigation privilege.

THESL submitted that the Board should not confuse the Board's public interest mandate with the "undeniably adversarial process" the Board has elected to adopt to fulfill that mandate. THESL cites the Board's *Rules of Practice and Procedure* and in particular, *inter alia*, provisions for the filing and service of documents, evidence, expert

[21] *Supra*, note 16 at par. 81.
[22] *Supra*, note 16 at par. 91.

evidence and other steps in the commencement and participation in Board proceedings as well as the appeal and review provisions as "the hallmarks" of the adversarial process.

THESL concluded that the Board has adopted an adversarial process to facilitate its quest for truth in the pursuit of the public interest and that therefore the protections afforded by litigation privilege should apply in the context of Board proceedings.

THESL also challenged the characterization of the cases provided by CCC that were presented in order to provide some clarity around the question of whether a proceeding before an administrative tribunal, such as the Board constitutes litigation for the purpose of litigation privilege. In particular, in its reply argument THESL submitted that the cases of *Ed Miller Sales & Rentals*,[23] *College of Physicians of British Columbia*[24] and *Order F06-16*[25] all stand for the proposition that litigation privilege applies in the context of a process before an administrative tribunal.

THESL went on to cite the cases of *Ontario Human Rights Commission v. Dofasco Inc.*[26] and *Brewers Retail Inc. v. United Food and Commercial Workers International Union Local 326W*[27] as well as three decisions[28] from administrative tribunals in support of its proposition that the Board's proceeding constitutes litigation.

Finally, THESL's reply argument also pointed out that the substance of the dispute between THESL and the CANDAS members in this Board proceeding is the applicability of the CCTA Decision to wireless attachments and that because the CCTA Decision is a mandatory term of THESL's distribution licence, there is the possibility of a future compliance proceeding against THESL. THESL pointed out that Board staff had indicated that compliance matters involving penalties may not fall within the scope of staff's argument that Board's processes are not litigation for the purposes of litigation privilege.

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[23] *Supra*, note 15.
[24] *Supra*, note 16.
[25] *Supra*, note 17.
[26] 2001 CanLII 2554 (ON CA).
[27] [1998] O.L.A.A. No. 185.
[28] *Canada (Director of Investigation and Research, Competition Act) v. Nutrasweet Co.,* [1989] C.C.T.D. No. 54; *Beazer East Inc. v. British Columbia (Ministry of Environment, Lands and Parks),* [2000] B.C.E.A. No. 53; *Gardiner v. British Columbia (Ministry of Public Safety and Solicitor General),* [2007] B.C.H.R.T.D. No. 306.

Board Findings

The Board does not agree that the current proceeding is to be considered litigation for the purposes of litigation privilege. However, nothing turns on this particular issue, because the Board has already determined that there is a reasonable apprehension of civil litigation between the parties.

Does the Reasonable Apprehension of Litigation Still Exist?

CCC argued that there is no reasonable prospect of litigation, and that the mere possibility of litigation is not sufficient grounds for litigation privilege. CCC submitted that one cannot look at every commercial agreement and say there is a reasonable prospect of litigation. CCC pointed out that, in light of a near two years lapse since the "unhappy" letters were exchanged between THESL and CANDAS members, it is clear that CANDAS has chosen (and its members have chosen) not to seek civil remedy, and has instead sought interpretation of a Board decision.

CCC also indicated that when litigation is not reasonably contemplated, there is no litigation privilege and when litigation ends, the privilege ends

Board staff also referenced the two years that have passed since THESL says it first apprehended the litigation and submitted that there is little guidance with respect to when a reasonable apprehension of litigation ends if actual litigation is not commenced. Board staff submitted that the Board should apply an objective test to determine whether the reasonable apprehension of litigation continues to exist and noted that the onus is on THESL's to convince the Board that there continues to be a reasonable apprehension of litigation.

In its reply argument THESL submitted that the fact that civil litigation has not yet occurred is not in any way determinative of whether or not there was a reasonable prospect of anticipated litigation commencing as early as January of 2010.

Board Findings

The Board has already determined that a reasonable apprehension of civil litigation existed beginning around January 2010. The issue is whether that reasonable apprehension still applies now. CCC would have us find that because the parties have brought the issue of the interpretation of the CCTA Decision to the Board and there has been no civil litigation initiated in the two years since the January 2010 meeting, there no longer exists a reasonable apprehension of litigation. The Board does not agree.

While the parties are seeking the Board's interpretation of the CCTA Decision and its applicability to wireless connections (THESL through its August 2010 letter and CANDAS through its April 2011 application), there are clearly other significant matters of disagreement between the parties. The Board's decision in the current proceeding will not resolve these matters, the nature of which were described at some length by counsel for CANDAS. While the threat of civil litigation may in some sense be suspended during the conduct of the current hearing, the Board concludes that civil litigation remains realistically contemplated or anticipated.

Do the Documents Meet the Dominant Purpose Test

THESL indicated that the Board must consider the factual circumstances under which the documents were created. THESL further argued that the description of the documents for which litigation privilege is claimed should include the details that will allow the document to be identified, and information which will permit the Board to determine whether a prima facie case for privilege exists.

THESL referred the Board to the *Brewster*[29] case, wherein the Court of Queen's Bench for Saskatchewan states:

> However, no details need to be provided which would enable the opposite party to discover indirectly the contents of the privileged documents as opposed to their existence and location.[30]

THESL also referenced the case of *Kennedy v. McKenzie*[31] 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.[32]

THESL pointed to Schedule B of the McLorg Affidavit and said that for each document it has provided a date, a description of the document, whether a fax, memo or letter, the author and the recipient, and that this information is sufficient to meet the requirements.

[29] *Brewster v. Quayle Agencies Inc*., 2008 SKQB 137 (CanLII).
[30] *Ibid*. at par. 3.
[31] [2005] CanLII 18295 (ON SC).
[32] *Ibid*. at par. 23.

THESL asserted that not only was the preparation of the documents over which it is claiming privilege for the dominant purpose of assisting in litigation, but that it was for the sole purpose of preparing for potential litigation.

CCC cited the separate decision of Justice Doherty in the *Chrusz* case and suggested that if a particular document over which litigation privilege is claimed meets the dominant purpose test,

> …it should be determined whether, in the circumstances, the harm flowing from non-disclosure clearly outweighs the benefit accruing from the recognition of the privacy interest of the party resisting production. I would put the onus on the party claiming privilege at the first stage of this enquiry and of the party seeking production of the document at the second stage of the enquiry. I appreciate that the party seeking production will not have seen the material and will be at some disadvantage in attempting to make the case for production.[33]

CCC submitted that the Board should ask itself the whether the failure to disclose this information will impede in a material way the Board's ability to make a decision on the fulcrum issues in this case?

In its submissions, CANDAS suggested that the dominant purpose of the documents over which THESL is claiming litigation privilege was not for the purpose of assisting counsel in anticipated or contemplated litigation, and thus this test is not met. CANDAS submitted that it was not credible that the August 13th "no wireless" letter was prepared for the dominant purpose of reasonably anticipated litigation between CANDAS and THESL. CANDAS instead argued that the August 13th letter was prepared to aid in the formulation of a "no wireless" policy.

CANDAS also submitted that the Board must consider THESL's motivation when it considers dominant purpose because the information uncovered may go against the assertion that the fundamental reason for the "no wireless" policy was related directly to safety and operational concerns.

Board Findings

THESL claims litigation privilege for the following items in Schedule "B" of the McLorg affidavit: 1, 2, 4 – 12, 14, 17, 23, 25, 27 – 30. The Board has already found that there

[33] Supra, note 4 at par. 142.

was and continues to be a reasonable apprehension of litigation. The Board has not accepted that proceedings such as the current proceeding are "litigation" for purposes of litigation privilege. However, there remained and remains the reasonable prospect of civil litigation, and at least theoretically, compliance litigation. Given the timing of the documents and the descriptions provided, the Board accepts that the dominant purpose of the documents was in relation to contemplated litigation. The Board therefore will not require production of these documents.

The Board is satisfied that the failure to produce these documents will not impede the Board's ability to make a decision on the issues which are the subject of the application, namely whether or not the CCTA Decision applies to wireless, and if not, whether it should.

As the Board stated in its December Order, "the Board does not intend to enquire into the motivations of THESL unless it has a direct bearing on the enumerated issues." For example, on the issue of safety, the Board will consider the evidence offered by all the parties and determine whether the claims are substantiated by the evidence offered.

Did THESL Waive Privilege Over Certain Documents?

CCC submitted that there are reports prepared by Dr. Yatchew and Dr. Starkey in respect of which litigation privilege is claimed by THESL that are drafts of reports which CCC said the Board should conclude were filed as part of the pre-filed evidence from THESL in this case.

CCC asserted that while Mr. McLorg said, under cross-examination, that these documents were not drafts of reports current filed in this proceeding, Mr. McLorg does not know for certain whether they are and has not compared the two documents to be able to answer definitively.

CCC submitted the description of the Yatchew and Starkey reports in Schedule B of the McLorg Affidavit indicates that they deal with the same subject matter as the reports that were filed as evidence in the CANDAS proceeding and that the logical conclusion is that these are drafts of the reports that were filed in this case. CCC submitted, however, that even if they are drafts of the reports filed in evidence, CCC should be entitled to cross-examine the witness, to compare what was in the draft reports over which privilege is claimed with what was ultimately filed in this case.

CCC submitted that it is a legitimate line of inquiry to determine whether or not an opinion was changed at some point in the process, why was it changed, what forces required it to be changed.

CCC cited the *Delgamuukw*[34] case, wherein the Supreme Court of British Columbia said:

> Thus, the present law requires an expert witness who is called to testify at trial to produce all documents which are or have been in his possession, including draft reports, even if they come from the file of the solicitor with annotations, and other communications which are or may be relevant to matters of substance in his evidence or his credibility, unless it would be unfair to require production. It is a presumption of law that solicitor's privilege is waived in respect of such matters of substance, et cetera, when the witness is called to give evidence at trial.[35]

CANDAS submitted that once THESL submitted the August 13th "no wireless" letter to the Board, THESL waived any privilege that might have attached to those documents that are at issue. CANDAS submitted that THESL invited the Board to initiate a proceeding, and that by that very act, waived the privilege that THESL now attempts to claim.

THESL submitted in its reply that the expert reports by THESL in the CANDAS proceeding were prepared for the stated purpose of responding to the CANDAS Application and interrogatory responses. THESL cited parts of each of the Starkey and Yatchew affidavits as evidence of this contention. THESL indicated that it is impossible for the drafts over which THESL is claiming litigation privilege to have been drafts of the expert reports for the current proceeding since the CANDAS application was not filed until April 21, 2011. THESL submitted that the use of the same experts in respect of two separate matters does not evidence that the reports prepared in respect of the first matter are drafts of reports prepared for the second matter.

Board Findings

CCC submitted that the documents which refer to draft reports by Yatchew or Starkey are likely drafts of the current reports filed on the record in this proceeding. THESL maintained that they are not. The Board accepts THESL's explanation that the drafts

[34] *Delgamuukw v. British Columbia* (1988), 32 BCLR (2d) 156 (WL) (SC).
[35] *Ibid.* at par. 11.

over which privilege is claimed were prepared for a separate purpose than the current proceeding. The analysis and opinions contained in these drafts may have found their way into the final reports which have been filed in this proceeding. However, given the dates of drafts – all well in advance of the CANDAS application – the Board concludes that these documents do not reasonably represent drafts of the current reports and therefore the Board concludes that the litigation privilege protection remains and no production will be required.

As indicated above, the Board also concludes that the failure to disclose these materials will not impede the Board's ability to decide the issues in this proceeding.

Item 4 – Procedural Matters

The Board canvassed the parties as the availability and composition of two expert pre-hearing conferences. CANDAS requested that the Board make provision for a settlement conference in advance of the expert pre-hearing conference. No parties objected to this and the Board will schedule a settlement conference for March 5 and 6, 2012. The Board will require that any settlement agreement be filed by March 27, 2012.

There was also discussion as to which witnesses should participate at the expert pre-hearing conference. CANDAS requested that Mr. Larsen, an employee of ExteNet Systems (a member of CANDAS), be allowed to participate, and THESL opposed this.

Board Findings

The purpose of the expert panel is to provide opinion evidence to the Board from objective experts on the relevant issues. Mr. Larsen as an employee of one of the applicant's members is inherently not objective. The Board will not include Mr. Larsen on the expert panel.

The Board has instructed Board staff to continue discussions with the parties in order to establish an agreed composition of the expert panel or panels and to establish a schedule for the expert pre-hearing conference in April 2012. The Board will provide additional details in due course.

THE BOARD ORDERS THAT:

1. THESL shall file any representative reports or minutes of any THESL health and safety committee meetings held from August 2008 onward **on or before February 27, 2012**.

2. THESL shall clarify for the Board whether the agreement between THESI and Toronto Hydro Telecom Inc. (ultimately purchased by Cogeco) filed in confidence with this Board on December 23, 2011 has been renewed, and if not, whether there is a document that governs the current relationship between THESI and Cogeco. The Board orders the information about the contract to be filed **on or before February 27, 2012.** The Board also orders the filing of any document that exists that governs the current relationship between THESI and Cogeco by the same date. The Board will hold the agreement filed on December 23, 2011 in confidence, pending compliance by THESL with this Order.

3. A Settlement Conference will be convened on **March 5, 2012**, at 9:30 a.m. with the objective of reaching a settlement among the parties on as many issues as possible. The Settlement Conference will be held at 2300 Yonge Street, Toronto in the Board's hearing rooms on the 25th Floor and if needed, may continue on **March 6, 2012.**

4. Any Settlement Proposal arising from the Settlement Conference shall be filed with the Board no later than 4:45 p.m. on **March 27, 2012**.

All filings to the Board must quote file number EB-2011-0120, be made through the Board's web portal at www.errr.ontarioenergyboard.ca, and consist of two paper copies and one electronic copy in searchable / unrestricted PDF format. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Parties must use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at www.ontarioenergyboard.ca. If the web portal is not available parties may email their document to the address below. Those who do not have internet access are required to submit all filings on a CD in PDF format, along with two paper copies. Those who do not have computer access are required to file 7 paper copies.

DATED at Toronto, February 22, 2012.

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary