

EB-2011-0316

ONTARIO ENERGY BOARD

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

AND IN THE MATTER OF a Notice of Intention to Make an Order for Compliance and an Administrative Penalty against Summitt Energy Management Inc., License Numbers ER-2010-0368 and GM-2010-0369, dated August 25th, 2011

MEMORANDUM OF FACT AND LAW OF SUMMITT ENERGY MANAGEMENT, INC. (Motion and Cross-Motion Returnable March 20th, 2012)

PART I - OVERVIEW

1. Summitt Energy Management Inc. ("**Summitt**") brings this motion seeking:
 - (a) An Order of the Board determining the proper statutory interpretation of sub-sections 17 and 18 of Section 7(1) of new Ontario Regulation 389/10 under the *Energy Consumer Protection Act, 2010*, S.O. 2010, C. 8; namely whether those sub-sections create:
 - (i) A physical placement offence (i.e. that the sub-sections are offended if the ordering or physical placement of the signing lines or boxes for the parties to sign on a form of agreement are in an incorrect order); or

(ii) A temporal signing offence (i.e. that the sub-sections are offended if the actual chronological signing of the signatures of the parties on a contract occurs in an incorrect order).

(b) Such further and other relief as counsel may advise and the Board deem appropriate.

2. Summitt also initially responds to Compliance Counsel's concurrent Motion to amend the Notice of Intention dated August 25th, 2011.

PART II - THE FACTS

3. On August 25th, 2011, the Board issued a Notice of Intention to require that Summitt comply with certain provisions of the *Ontario Energy Board Act*, 1998, S.O. 1998, C. 15, (Schedule B) ("**OEB Act**") and pay administrative penalties for alleged contraventions of the OEB Act, the *Energy Consumer Protection Act*, 2010, S.O. 2010, C. 8 (the "**ECPA**"), Ontario Regulation 389/10 under the ECPA ("**Regulation 389**"), and section 4.6(a) and 4.7 the Board's Electricity Retailer Code of Conduct (the "**Retailer Code**"). The Retailer Code and the Board's Code of Conduct for Gas Marketers (the "**Marketer Code**") are collectively referred to as the "**Codes**").

Reference: Notice of Intention, Affidavit of Jeremy Martin sworn March 12th, 2012 (the "**Martin Affidavit**"), Exhibit A.

4. On September 7th, 2011, Summitt requested a Hearing in this proceeding.

Reference: Martin Affidavit, Exhibit B.

5. Following scheduling communications among counsel for Summitt, Compliance Counsel and the Board's case manager, the Board issued Notice of Hearing and Procedural Order No. 1 on November 22nd, 2011 providing for a procedural motion date on December 22nd, 2011, if required.

Reference: Para 4 of the Martin Affidavit
Martin Affidavit, Exhibit C.

6. On December 22nd, 2011, the Board convened a procedural hearing on motion by Summitt to address a protocol for the confidential treatment of personal information and Summitt's request for further disclosure, written interrogatories, and a timetable for the hearing of EB-2011-0316.

Reference: Para 4 of the Martin Affidavit
Martin Affidavit, Exhibit C.

7. At the December 22nd, 2011 procedural hearing it became evident that Compliance Counsel and Summitt held different positions on the proper statutory interpretation of sub-sections 17 and 18 of Section 7(1) of new Regulation 389 under the ECPA.

Reference: Martin Affidavit, Exhibit H

8. By letter dated January 23rd, 2012, Compliance Counsel proposed to amend the August 25th, 2012 Notice of Intention by reversing the alleged order of improper signing of the 25 electricity and 25 gas contracts reviewed and the consumer acknowledgements in the first charge therein.

Reference: Para 5 of the Martin Affidavit
Martin Affidavit, Exhibit D.

9. Inasmuch as Compliance Counsel bears the burden of championing the required test for Board approval of the proposed amended Notice of Intention, Summitt neither consents to or initially opposes the proposed amendment. Summitt reserves its position until such time as Compliance Counsel files and serves its motion materials for the concurrent motion to amend the August 25th, 2012 Notice of intention.

Reference: Martin Affidavit, Exhibit F
Martin Affidavit, Exhibit L

10. At the joint request of Compliance Counsel and Summitt, the Board issued Procedural Order No. 2 on February 24th, 2012 setting March 20th, 2012 as the date upon which to hear Compliance Counsel's motion to amend the August 25th, 2011 Notice of Intention and Summitt's concurrent motion herein for proper statutory interpretation of sub-sections 17 and 18 of Section 7(1) of new Ontario Regulation 389/10 under the ECPA.

Reference: Martin Affidavit, Exhibit I
Martin Affidavit, Exhibit J

PART III - THE ISSUES

11. The following issues are before the Board on this motion and the concurrent motion by Compliance Counsel to amend the August 25th, 2011 Notice of Intention:

- (a) May the Board amend the August 25th, 2011 Notice of Intention and if so, what is Compliance Counsel's onus of proof in that regard.
- (b) What is the proper statutory interpretation of sub-sections 17 and 18 of Section 7(1) of new Regulation 389 under the ECPA .

PART IV - LAW AND ANALYSIS

A. MAY THE BOARD AMEND THE AUGUST 25TH, 2011 NOTICE OF INTENTION AND IF SO, WHAT IS COMPLIANCE COUNSEL'S ONUS OF PROOF IN THAT REGARD

12. Compliance Counsel bears the burden of championing the required test for Board approval of the proposed amended Notice of Intention.

13. Pursuant to Rule 8.01 of the *Ontario Energy Board Rules of Practice and Procedure* (as revised January 9, 2012) (the "**Rules**"), Compliance Counsel may not unilaterally amend the August 25th, 2011 Notice of Intention. Instead, Compliance

Counsel must seek Board approval of the proposed amendment on motion made to the Board. Rule 8.01 reads as follows:

8.01 Unless the Board directs otherwise, any party requiring a decision or order of the Board on any matter arising during a proceeding shall do so by serving and filing a notice of motion. (emphasis added)

14. The proposed amendment to the August 25th, 2012 Notice of Intention proposes to reverse the alleged order of improper signing of the 25 electricity and 25 gas contracts reviewed and the consumer acknowledgements in the first charge therein.

Reference: Martin Affidavit, Exhibit D

15. As noted in paragraph 9 above, Summitt neither consents to or initially opposes the proposed amendment. Summitt reserves its position until such time as Compliance Counsel files and serves its motion materials, and supporting evidence, for the concurrent motion to amend the August 25th, 2012 Notice of intention.

16. None of the OEB Act or the regulations made thereunder, or the Rules, or the Codes, or the ECPA or the regulations thereunder, or the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22 (“**SPPA**”), address the procedure involved in amending a Notice of Intention issued under the OEB Act.

17. The quasi-criminal nature of the alleged violation of the ECPA and new Ontario Regulation 389 can be found in Section 126(1) of the OEB Act which provides as follows:

126. (1) A person is guilty of an offence who,

[...]

(e) contravenes the *Energy Consumer Protection Act, 2010* or the regulations made under it.

18. The statutory language in Section 126(1)(e) of the OEB Act could not more clearly illustrate that this provision was intended as a penal one. The word “guilt” is used rather than “liable”, it is clear that the legislation contemplates an “offence” being committed, and the remedies in these sections are referred to as “fines”.

19. An accused such as Summitt need only answer the charges as they appear in the indicting document. Absent express language to the contrary, or a Notice of Intention amendment procedure in the OEB Act or the regulations made thereunder, or the Rules, or the Codes, or the ECPA or the regulations thereunder, or the SPPA, procedural fairness dictates that a quasi-criminal prosecution pursuant to the August 25th, 2011 Notice of Intention should afford Summitt the procedural protections afforded by the *Provincial Offences Act*, R.S.O. 1990, c. P.33 (“**POA**”).

20. Compliance Counsel may not unilaterally amend a charge in a Notice of Intention.

Reference: *R v. Winlow* 2009 ONCA 643 at para. 64, citing *R v. Irwin* (1998) 38 O.R. (3d) 689 (Ont. C.A.)

21. A standard provincial offence charge can only be amended by the Court, in this case by the Board, if the charge:

- (i) Fails to state, or states defectively, anything requisite to charge the offence;
- (ii) Does not negative an exception that should be negated; or
- (iii) Is in any way defective in substance or in form.

Reference: Sections 33 and 34 POA

22. Whether the amendment should be granted or not is a question of law.

Reference: Section 34(5) POA

23. In making its decision, the Court, in this case the Board, must consider, and Compliance Counsel has the onus of proving based upon the evidence and the circumstances of the case:

- (i) Whether the defendant, in this case Summitt, has been misled or prejudiced in its defence by a variance, error or omission; and
- (ii) Whether, having regard to the merits of the case, the proposed amendment can be made without injustice being done.

Reference: Sections 33 and 34 POA

24. The Board should be concerned with the procedural unfairness to Summitt of the proposed amendment, which appears to have only come to light after the December 22nd, 2011 procedural hearing day. The Board must be vigilant not to allow Compliance Counsel to make the charge fit the evidence rather than the other way around.

Reference: *R. c. Bois*, 2004 SCC 6 at para. 22, citing *Elliott v. R. (No. 2)*, [1978] 2 S.C.R. 393. See para. 39, Laskin C.J.C. in dissent (but not on this recital of extant law): trial judges have the power to “supply an essential averment of the offence charged as well as power to make changes in the assertions of the charge to conform with the evidence as to any such details... Wide as was the power to amend reposed in the trial judge, it did not extend to authorize him to substitute an offence different from the one charged.”

25. Moreover, the proposed amendment does not serve to clarify the underlying different positions of Compliance Counsel and Summitt on the proper statutory interpretation of sub-sections 17 and 18 of Section 7(1) of new Regulation 389 under the ECPA. Thus the proposed amendment does not serve to clarify the scope of disclosure that Compliance Counsel must make. The proposed amendment also does not afford Summitt an opportunity to know the case it has to meet, and does not afford Summitt an opportunity to provide a full answer and defence to the charge.

B. WHAT IS THE PROPER STATUTORY INTERPRETATION OF SUBSECTIONS 17 AND 18 OF SECTION 7(1) OF NEW REGULATION 389 UNDER THE ECPA

26. The first charge contained in the August 25th, 2011 Notice of Intention, and as proposed to be amended, speaks to an improper **signing** ordering (emphasis added) on the 25 electricity and 25 gas contracts reviewed and indentified by contract number in the Notice of Intention, contrary to sections 17 and 18 of Section 7(1) of new Regulation 389, section 12 of the ECPA and sections 4.6(a) and 4.7 of the Electricity Retailer Code of Conduct.

Reference: Notice of Intention, Martin Affidavit Exhibit A.
Martin Affidavit Exhibit D

27. During the December 22nd, 2011 procedural hearing day Compliance Counsel asserted that these sections of new Regulation 389, the ECPA create a **physical placement offence** (i.e. that the sections are offended if the ordering or physical placement of the signing lines or boxes for the parties to sign on a form of agreement are in an incorrect order), and that the scope of disclosure, interrogatories and proof are limited to evidence of same.

Reference: Martin Affidavit Exhibit H
Martin Affidavit Exhibit I

28. It is and remains Summitt's position that that the ECPA, new Regulation 389 and the Electricity Retailer Code of Conduct must be construed liberally as remedial consumer protection legislation. The ECPA is so titled as a "consumer protection act" and the Legislative Committee transcripts, Orders of the Day and the Ontario Energy Association's submissions to the Legislative Standing Committee on General Government for the Province of Ontario, all reinforce throughout the consumer protection focus of this legislation.

Reference: Martin Affidavit Exhibits N, O and P

29. In consequence, the wording in sub-sections 17 and 18 of Section 7(1) of new Regulation 389 and the Notice of Intention (as originally issued and as proposed to be amended), speak to the timing of actual signatures and thus create a **temporal signing offence** (i.e. that the sections are offended if the actual chronological signing of the signatures of the parties on a contract occurs in an incorrect order). It is Summitt's position that this interpretation is the proper one and thus Summitt is entitled to a broader scope of disclosure and interrogatories than proposed by Compliance Counsel, and that Compliance Counsel's burden of proof is more stringent than proposed by Compliance Counsel.

Reference: Martin Affidavit Exhibit H
Martin Affidavit Exhibit I

30. In the context of the present case, as sub-section 7(1)(17) of Regulation 389 requires that the contract must "contain" the "signature of the consumer [and the...] supplier" "before the acknowledgment" the authority suggests that the element to be proven is that the written signatures are set down in a certain order, not that the signature lines are in a particular order.

Reference: sub-section 7(1)(17) of Regulation 389

31. The current definition of 'signature' in Ontario law was canvassed by the Ontario Superior Court in *Mississauga (City) v. Robson*:

A "signature" is defined as:

(a) "whatever mark, symbol, or device one may choose to employ as representative of [oneself]" (see *Black's Law Dictionary* (5th ed., 1979);

(b) "... use of any name, including any trade or assumed name, upon an instrument, or by any word or mark used in lieu of a written signature" (see *Uniform Commercial Code*, para. 3-401);

(c) "a person's name, initials, or distinctive mark used in signing a letter, document, etc." (see *Canadian Oxford Dictionary*, 2nd ed., 2004); and

(d) "... the writing, or otherwise affixing, a person's name, or a mark to represent his name... with the intention of authenticating a document as being that of, or binding on, the person... (see *Stroud's Judicial Dictionary*, 4th ed., 1974, citing *R. v. Kent Justices* (1873), (1872-73) L.R. 8 Q.B. 305 (Eng. Q.B.)).

Reference: *Mississauga (City) v. Robson* 2005 CarswellOnt 2067, 12 M.P.L.R. (4th) 91 (Ont. S.C.) at para. 7

32. As these definitions indicate, the status of "signature" attaches to a "mark" itself when it is intended by the maker that the mark have solemn effect, not the place on the page where the person makes his mark.

33. The Court has noted, over and above the physical description of a signature, which appears to be specific in comprising only the actual mark affixed in an act of ratification (exclusive of any space in the document set out to bear such a signature), there is an implied element of authentication underlying the definition of "signature". A signature is understood by the courts to imply "knowledge and approval of the contents" of the executed document.

Reference: *R. v. Zwicker* (1980), 53 C.C.C. (2d) 239 (N.S.C.A.), cited with approval in *R. v. McIvor*, 2006 BCCA 343 at para. 35

34. In accordance with commercial practice and common sense, of course a signature line cannot itself be considered a 'signature'. In such a case, a document awaiting execution would already be executed.

Reference: *Hi Hotel Partnership v. Holiday Hospitality Franchising Inc.*, 2008 ABCA 276 at paras. 3-6: "[T]here was no signed or dated certificate: at most there was a blank form of certificate. There was no other signature... [t]here is no evidence that the appellant franchisor ever provided anywhere a signed or dated certificate... as the legislation requires."

35. The above definitions strongly imply that a signature is purely that mark that is made by the signatory in an act of ratification. At most, the question to be decided is whether or not the signature line becomes a part of the signature once the document has been signed – but as a litany of commonly accepted authority reflected in the above excerpts require the actual *affixing* of a mark to constitute a signature, the static text of the signature line, which predates the act of signing, cannot be brought within the legal definition of 'signature'.

36. Where there is doubt as to whether a signature preceded a certain disposition, there is a presumption at law that in the absence of proof that something has been executed wrongly, it is assumed to have been executed correctly.

Reference: *Re Moir Estate* [1942] 1 W.W.R. 241 (Alta. C.A.) and ***In re Long Estate***, [1936] P. 166, 1 All E.R. 435: “[T]here is evidence which completely satisfies me that the side of the page containing the bequests in each case was written in its present form before the signatures of the testatrix and witnesses were made... of which not the least important is the drawing of the final line above the signatures and the absence of any such line after the requests, from which it may be inferred that the page containing the bequests in each case, was written before the page containing the execution; but it is impossible to be certain about this. *In my opinion this is not essential.* Provided that the Court is satisfied that the whole document was written before the signatures were made, and that the dispositive part of the document may be fairly read as preceding and leading up to the part containing the signatures, and in no sense as a mere annex or schedule thereto, I think that it would be transgressing... ‘the spirit of the Act’ to insist, as a criterion of valid execution, upon proof that the several parts of the document were actually written in any particular order”. (Italics added by court in *Moir Estate*, underscore added.) Note that the Court presumes that the order of signing is a matter of proof and that its appearance is not dispositive

37. As noted in paragraph 17 above, the quasi-criminal nature of the alleged violation of the ECPA and new Ontario Regulation 389 can be found in Section 126(1) of the OEB Act.

38. Accordingly, the *actus reus* or factual elements of the alleged contravention of the ECPA, Regulation 389 and the Electricity Retailer Code of Conduct, as quasi-criminal penal provisions, must be proven by Compliance Counsel beyond a reasonable doubt in order to find Summitt liable.

Reference: *Regina v. Budget Car Rentals (Toronto) Ltd.* (1981), 57 C.C.C. (2d) 201 at 207-8 (Ont. C.A.)
R. v. Falconbridge Nickel Mines Ltd. (1983), 7 C.C.C. (3d) 68 (Ont. Dist. Ct.)
R. v. Pierce Fisheries Ltd., [1971] S.C.R. 5 at para. 27
R. v. Sault Ste. Marie (City), [1978] 2 S.C.R. 1299
R. v. Stucky, 2009 ONCA 151 at para. 20

39. As a strict liability quasi-criminal penal offence, if Compliance Counsel is able to meet its burden of proof, the burden of proof will then shift to Summitt to establish a due diligence defence on the balance of probabilities.

Reference: *R. v. Sault Ste. Marie (City)*, [1978] 2 S.C.R. 1299 at paras. 59 and 61

40. Particularly in the quasi-criminal context, where the burden of proof on Compliance Counsel to prove the elements of the offence is set beyond a reasonable doubt, the elements of the offence may well be held not to have been made out on the basis of the bare positioning of signatures, particularly with reference to contextual evidence of a customary practice of signing in a different order.

41. This kind of contextual evidentiary reading of signatures was apparent in *Campbell v. MacDonald*, a Nova Scotia Supreme Court case involving the purchase of real estate. .

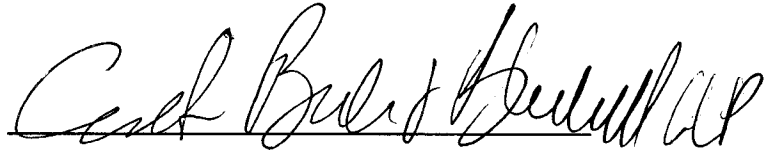
Reference: *Campbell v. MacDonald*, [1989 Carswell NS 152 (N.S.T.D.) at paras. 19, 20 and 21.

PART V - ORDER SOUGHT

42. Summitt hereby requests that the motion be allowed and that the Board order that the proper statutory interpretation of sub-sections 17 and 18 of Section 7(1) of new Regulation 389 and the Notice of Intention (as originally issued and as proposed to be amended), is that they speak to the timing of actual signatures and thus create a **temporal signing offence** (i.e. that the sections and the Notice of Intention are offended if the actual chronological signing of the signatures of the parties on a contract occurs in an incorrect order).

ALL OF WHICH IS RESPECTFULLY SUBMITTED BY,

Date: March 12th, 2012



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SCHEDULE "A"
STATUTORY AND REGULATORY PROVISIONS

1. *Ontario Energy Board Rules of Practice and Procedure*

- 8.01 Unless the Board directs otherwise, any party requiring a decision or order of the Board on any matter arising during a proceeding shall do so by serving and filing a notice of motion. (emphasis added)
- 8.02 The notice of motion and any supporting documents shall be filed and served within such a time period as the Board shall direct.
- 8.03 Unless the Board directs otherwise, a party who wishes to respond to the notice of motion shall file and serve, at least two calendar days prior to the motion's hearing date, a written response, an indication of any oral evidence the party seeks to present, and any evidence the party relies on, in appropriate affidavit form.
- 8.04 The Board, in hearing a motion, may permit oral or other evidence in addition to the supporting documents accompanying the notice, response or reply. (Emphasis added.)

2. *Ontario Energy Board Act, 1998, S.O. 1998, C. 15, (Schedule B)*

126. (1) A person is guilty of an offence who,

[...]

(e) contravenes the *Energy Consumer Protection Act, 2010* or the regulations made under it.

3. *Energy Consumer Protection Act, 2010, S.O. 2010, C. 8*

[...]

Information required in contract

12. (1) A contract with a consumer shall,

(a) in the case of retailing of electricity and in the case of gas marketing,

(i) contain such information as may be prescribed, presented in the prescribed form or manner, if any, and under the prescribed circumstances, if any, and

(ii) be accompanied by such information or documents as may be required by regulation, provided in such languages as may be prescribed, and presented in the prescribed form or manner, if any, and under the prescribed circumstances, if any;

(b) in the case of the retailing of electricity by a retailer and subject to such requirements as may be prescribed in accordance with clause (a),

(i) contain such information as may be required by a code issued under section 70.1 of the *Ontario Energy Board Act, 1998*, provided in such languages as may be required by the code, and presented in the form or manner, if any, and under the circumstances, if any, required by the code, if a condition of a licence requires the retailer to comply with the code, and

- (ii) be accompanied by such information or documents as may be required by a code issued under section 70.1 of the *Ontario Energy Board Act, 1998*, provided in such languages as may be required by the code, and presented in the form or manner, if any, and under the circumstances, if any, required by the code, if a condition of a licence requires the retailer to comply with the code; and
- (c) in the case of gas marketing and subject to such requirements as may be prescribed in accordance with clause (a),
 - (i) contain such information as may be required by rules made by the Board pursuant to clause 44 (1) (c) of the *Ontario Energy Board Act, 1998*, provided in such languages as may be required by the rules, and presented in the form or manner, if any, and under the circumstances, if any, required by the rules, and
 - (ii) be accompanied by such information or documents as may be required by rules made by the Board pursuant to clause 44 (1) (c) of the *Ontario Energy Board Act, 1998*, provided in such languages as may be required by the rules, and presented in the form or manner, if any, and under the circumstances, if any, required by the rules. 2010, c. 8, s. 12 (1).

Consumer acknowledgments and signatures

(2) If a supplier enters into a contract with a consumer, the supplier shall ensure that the consumer provides such acknowledgments and signatures as may be prescribed, in such form or manner as may be prescribed, and respecting such information or matters as may be prescribed. 2010, c. 8, s. 12 (2).

Information, etc., not permitted in contracts

(3) A contract with a consumer shall not contain or be accompanied by such information or requirements or obligations, as may be prescribed. 2010, c. 8, s. 12 (3).

[. . . .]

4. Ontario Regulation 389/10 under the Energy Consumer Protection Act, 2010, S.O. 2010, C. 8

[. . .]

Contract requirements

7. (1) A contract must contain the following, be clearly legible and, except for the information to be added at the time the contract is entered into, must be in a typeface having a font size of at least 12:

1. The name, business address and telephone number of the supplier and any fax number, website address, e-mail address and toll-free telephone number for the supplier.
2. The number of the supplier's licence issued under the *Ontario Energy Board Act, 1998*.
3. If the contract is entered into with the consumer in person, the name of the person who negotiated and signed the contract on behalf of the supplier.
4. In printed letters, the consumer's name, the address to which the electricity or gas is to be provided and, if it is different, the account holder's name and mailing address.
5. The date on which the contract is entered into, the length of time during which electricity or gas is to be provided pursuant to the contract, the date that the provision of electricity or gas is intended to start under the contract and a description of any circumstances that may prevent the provision of electricity or gas from starting on that date.

6. The contract price for the electricity or gas, or the method of calculating it, and, if any additional energy charges are payable by the consumer for the supply or delivery of the electricity or gas, a statement describing the categories of the additional energy charges and indicating to whom they are payable.
7. The terms of payment for the electricity or gas, including the terms relating to any deposit, late payment or other charges, interest or penalties that may be payable under the contract.
8. A statement that the consumer has the right under the Act to cancel the contract without cost or penalty up to 10 days after the consumer acknowledges receipt or is deemed to acknowledge receipt of a text-based copy of the contract.
9. A statement that if the consumer cancels the contract within that 10-day period, the consumer is entitled to a full refund of all amounts paid under the contract.
10. In the case of a contract for the provision of electricity, a statement that the consumer may cancel the contract without cost or penalty up to 30 days after receiving the first bill under the contract.
11. A statement that nothing in the contract negates or varies the consumer's rights to cancel the contract under and in accordance with the Act and this Part.
12. A statement that if the consumer permanently moves out of the premises to which the electricity or gas is provided under the contract, the consumer may, without cost or penalty, cancel the contract.
13. A description of any other circumstances in which the consumer or the supplier is entitled to cancel the contract with or without notice or cost or penalty, the length of any notice period, the manner in which notice can be given and the amount of any cost or penalty.
14. Information about whether the contract may be assigned by either the supplier or the consumer and any provisions relating to the assignment.
15. If the contract is for the provision of electricity and provides for the assignment of any rebate to which the consumer is entitled to another person, a statement informing the consumer that he or she will not receive the rebate.
16. A description of how the consumer may contact the supplier to make a complaint, request information or renew, extend the term of or cancel the contract.
17. Except as otherwise provided in section 9, the signature and printed name of the consumer, or the account holder's agent signing the contract on behalf of the consumer, and of the person signing the contract on behalf of the supplier, at the bottom of the contract and before the acknowledgment described in paragraph 18.
18. Except as otherwise provided in section 9, following the signatures referred to in paragraph 17, an acknowledgment to be signed and dated by the consumer or account holder's agent that he or she has received a text-based copy of the contract.

(2) For the purposes of subsection 12 (3) of the Act, a contract must not contain any provision or be accompanied by any document,

- (a) that purports to negate or vary any of the consumer's rights under any Act or regulation or under any code, order or rule issued or made by the Board;
- (b) that falsely represents that the supplier is relieved from the requirement to comply with any provision of any Act or regulation or any code, order or rule issued or made by the Board.

(3) A provision of a contract or document that is prohibited under subsection (2) is void and, in the case of a contract, is severable from the contract and shall not be evidence of circumstances showing an intent that a deemed or implied warranty or condition does not apply.

(4) If a contract is in a language other than English, the contract is deemed to be void if it does not comply with the requirements of the Act, this Part or any applicable code, order or rule issued or made by the Board by reason that the wording is inaccurate, incomplete, unclear or capable of more than one meaning.

[. . .]

5. *Electricity Retailer Code of Conduct*

4.6 A retailer shall ensure that a disclosure statement provided to a low volume consumer is accompanied by a price comparison. For that purpose, the retailer shall:

(a) use the applicable price comparison template approved by the Board, in the form and with the content that is made available by the Board at the relevant time and without alteration or redaction other than to include details of the retailer's contract price offer and such other information as is required by the instructions contained in the template; [. . .]

4.7 A retailer shall ensure that the information regarding the contract price being offered to a low volume consumer that is included by the retailer in the price comparison is an accurate reflection of the contract price over the term of the contract and is not presented in a manner that is misleading in any way.

6. *Provincial Offences Act, R.S.O. 1990, c. P. 33*

[. .]

Dividing counts

33. (1) A defendant may at any stage of the proceeding make a motion to the court to amend or to divide a count that,

- (a) charges in the alternative different matters, acts or omissions that are stated in the alternative in the enactment that creates or describes the offence; or
- (b) is double or multifarious,

on the ground that, as framed, it prejudices the defendant in the defendant's defence.

Idem

(2) Upon a motion under subsection (1), where the court is satisfied that the ends of justice so require, it may order that a count be amended or divided into two or more counts, and thereupon a formal commencement may be inserted before each of the counts into which it is divided. R.S.O. 1990, c. P.33, s. 33.

Amendment of information or certificate

34. (1) The court may, at any stage of the proceeding, amend the information or certificate as may be necessary if it appears that the information or certificate,

- (a) fails to state or states defectively anything that is requisite to charge the offence;
- (b) does not negative an exception that should be negated; or
- (c) is in any way defective in substance or in form.

Idem

(2) The court may, during the trial, amend the information or certificate as may be necessary if the matters to be alleged in the proposed amendment are disclosed by the evidence taken at the trial.

Variations between charge and evidence

(3) A variance between the information or certificate and the evidence taken on the trial is not material with respect to,

- (a) the time when the offence is alleged to have been committed, if it is proved that the information was laid or certificate issued within the prescribed period of limitation; or
- (b) the place where the subject-matter of the proceeding is alleged to have arisen, except in an issue as to the jurisdiction of the court.

Considerations on amendment

(4) The court shall, in considering whether or not an amendment should be made, consider,

- (a) the evidence taken on the trial, if any;
- (b) the circumstances of the case;
- (c) whether the defendant has been misled or prejudiced in the defendant's defence by a variance, error or omission; and
- (d) whether, having regard to the merits of the case, the proposed amendment can be made without injustice being done.

Amendment, question of law

(5) The question whether an order to amend an information or certificate should be granted or refused is a question of law. R.S.O. 1990, c. P.33, s. 34 (1-5).

**SCHEDULE “B”
AUTHORITIES**

1. ***R v. Winlow*** 2009 ONCA 643
2. ***R v. Irwin*** (1998) 38 O.R. (3d) 689 (Ont. C.A.)
3. ***R. c. Bois***, 2004 SCC 6
4. ***Elliott v. R. (No. 2)***, [1978] 2 S.C.R. 393.
5. ***Regina v. Budget Car Rentals (Toronto) Ltd.*** (1981), 57 C.C.C. (2d) 201 at 207-8 (Ont. C.A.)
6. ***R. v. Falconbridge Nickel Mines Ltd.*** (1983), 7 C.C.C. (3d) 68 (Ont. Dist. Ct.)
7. ***R. v. Pierce Fisheries Ltd.***, [1971] S.C.R. 5
8. ***R. v. Sault Ste. Marie (City)***, [1978] 2 S.C.R. 1299
9. ***R. v. Stucky***, 2009 ONCA 151
10. ***Mississauga (City) v. Robson*** 2005 CarswellOnt 2067, 12 M.P.L.R. (4th) 91 (Ont. S.C.)
11. ***R. v. Zwicker*** (1980), 53 C.C.C. (2d) 239 (N.S.C.A.),
12. ***R. v. McIvor***, 2006 BCCA 343
13. ***Hi Hotel Partnership v. Holiday Hospitality Franchising Inc.***, 2008 ABCA 276
14. ***Re Moir Estate*** [1942] 1 W.W.R. 241 (Alta. C.A.)
15. ***In re Long Estate***, [1936] P. 166, 1 All E.R. 435
16. ***Campbell v. MacDonald***, [1989 Carswell NS 152 (N.S.T.D.)

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

Case Number: EB-2010-022

AND IN THE MATTER OF a Notice of Intention to Make an Order for Compliance
and an Administrative Penalty against Summitt Energy Management Inc., License
Numbers ER-2010-0368 and GM-2010-0369, dated August 25th, 2011

ONTARIO ENERGY BOARD

Proceeding commenced at TORONTO

**MEMORANDUM OF FACT AND LAW
OF SUMMITT ENERGY MANAGEMENT INC.
(Motion and Cross-Motion
Returnable March 20th, 2012)**

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