ONTARIO ENERGY BOARD

In the Matter of the *Electricity Act, 1998,* c.15, Schedule A;

And in the Matter of the *Ontario Energy Board Act, 1998,* s. 21;

And in the Matter of an Application made collectively by entities that have renewable energy supply contracts with the Ontario Power Authority in respect of wind generation facilities for an Order revoking certain amendments to the market rules and referring the amendments back to the Independent Electricity System Operator for further consideration.

Reply Submissions on Confidentiality and Cost Awards

1. On January 24, 2013, the Applicants (collectively the "Renewable Energy Supply Generators"), applied to the Ontario Energy Board (the "OEB" or the "Board") for an order revoking certain Market Rules passed by the Independent Electricity System Operator (the "IESO") on November 29, 2012 and referring them back to the IESO for further consideration (the "Application").

2. These submissions are in response to:

   a. The submissions on confidentiality filed by the Ontario Power Authority (the "OPA") and the Ministry of Energy on February 13, 2013; and

   b. The submissions on cost awards filed by the IESO on February 13, 2013.

Reply Submissions on Confidentiality

3. The Ontario Power Authority has requested that confidential treatment be accorded to a number of PowerPoint presentations filed by the IESO[1] in this proceeding and has based this request on its interpretation of "settlement privilege." The Ministry of Energy has requested that confidential treatment be accorded to one document in the possession of the IESO but redacted in its entirety for filing in this proceeding. The basis for this request is essentially that the document comprises confidential advice to government.

4. Both the OPA and the Ministry argue that the claim for confidentiality is so compelling in this case that persons should not be able to review documents even if they complete an undertaking in accordance with the Board's *Practice Direction on Confidentiality*. Neither provide any precedent or authority for this request. It is therefore submitted that the Board should reject it. In any event, for the reasons set out below, neither the OPA nor the Ministry have substantiated their claims for confidentiality, so the issue is academic.

Submissions of the Ontario Power Authority

5. The Ontario Power Authority has based its request for confidentiality on the basis that disclosure of the unredacted versions of the documents it has filed "will result in a breach of settlement privilege and will prejudice the settlement negotiations between the OPA and the applicants."[2]

6. However, settlement privilege clearly does not apply here because none of the documents consist of settlement communications between the parties.

[1] The OPA has also indicated that, should the Ministry of Energy's request for confidentiality not be upheld, the OPA requests confidentiality in respect of certain portions of the document subject to the Ministry of Energy's request for confidentiality based on the same grounds it sets out with respect to the PowerPoint presentations.
[2] OPA Confidentiality Submissions, pg. 2.

7. The policy interest behind settlement privilege is to encourage parties "to resolve their private disputes without recourse to litigation," the idea being that "few parties would initiate settlement negotiations for fear that any concession they would be prepared to offer could be used to their detriment if no settlement was forthcoming."[3] The principle has also been explained as follows:

> "The rule I understand to be that overtures of pacification, and any other offers or propositions *between litigating parties,* expressly or impliedly made without prejudice, are excluded on the basis of public policy."[4]

8. The purpose of settlement privilege is thus to encourage parties to negotiate settlement without the risk of their settlement provisions being held against them. This is not the case here as none of the documents for which the privilege is claimed were communicated between the parties. These documents were produced starting in October, 2010 and ending in mid-August, 2012. However, while the RES generators continued to request the OPA to enter into negotiations, the OPA did not advise the Applicants that it was prepared to enter into settlement negotiations until August 30, 2012.[5] All of the documents for which settlement privilege is claimed were produced prior to that time and none of them were communicated to the Applicants by the OPA. Instead, all of these materials were shared with the IESO and the Ministry, who are not involved in any settlement negotiations with the OPA.

9. The context for settlement privilege must be kept in mind when applying the criteria that must be met for that privilege to occur. The Applicants agree with the

[3] Bryant, Alan W., Sidney N. Lederman & Michelle K. Fuerst, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, pg. 1030.
[4] *York (County) v. Toronto Gravel Road & Concrete Co.* as cited in *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, pg. 1030, emphasis added.
[5] See letter from Joanne Butler, OPA to Robert Cary, August 30, 2012. This document can be produced with the consent of the OPA, which authored it. While the OPA claims that negotiations were commenced by August 15, 2012, the evidence in support of that is redacted and the Applicants are not in a position to respond to the specific point in the document, other than to say that if it purports to say that negotiations were ongoing at that time, it is inaccurate.

OPA that the following conditions must be present for a finding of settlement privilege:

- A litigious dispute must be in existence or within contemplation;
- The *communication* must be made with the express or implied intention that it would not be disclosed to the court in the event that negotiations failed; and
- The purpose of the *communication* must be to attempt to effect a settlement.[6]

10. The "communications" referred to in these conditions are communications *between the parties to settlement negotiations*. None of the documents meet that criteria.

11. On the contrary, the documents which contain the redactions over which the OPA claims settlement privilege are presentations of the OPA, or of the IESO and OPA jointly, which apparently brief the Ministry of Energy on the Market Rule amendment and how that amendment impacts the OPA's contractual obligations.

12. The claim of settlement privilege thus has no basis with respect to the disputed documents.

13. The OPA's request for confidentiality is therefore based on a mischaracterization of the law of settlement privilege. In light of this, the Renewable Energy Supply Generators request that the Board not uphold the OPA's request and that it order disclosure of the unredacted documents filed by the OPA.

14. Finally, the OPA argues that production should be refused because otherwise it could "prejudice settlement negotiations between the OPA and the applicants." It is obviously difficult to respond to this point because the OPA has not offered any evidence in support of how it may be prejudiced. Nor has it offered even a

[6] *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, pg. 1033.

summary of the document. The Applicants submit that this bare allegation is not enough and if the OPA seeks to seriously advance this point, they should be required to provide at least some evidence to substantiate it.

Submissions of the Ministry of Energy

15. The Ministry of Energy claims confidentiality over one PowerPoint presentation entitled "Managing Surplus Generation." The document is a briefing note prepared by Ministry staff.

16. The Board has already addressed claims by a Ministry for confidentiality of briefing notes and it has unambiguously determined that briefing notes are not confidential for the purposes of disclosure. In EB-2010-0184 (the "CCC Case"), the government sought to resist disclosure of Ministry briefing notes on much the same grounds as those claimed here, i.e., the "chilling effect" that it is alleged would result if policy advice from advisors were made public. In the CCC Case, the government also relied upon the provisions and interpretation of the *Freedom of Information and Protection of Privacy Act*.[7]

17. The Board rejected these arguments.

18. In its decision, the Board cited *Carey v. Ontario*, the leading Canadian authority on the topic. The Board quoted the following statement from *Carey*: [8]

> "Cabinet documents like other evidence must be disclosed unless such disclosure would interfere with the public interest. That fact that such documents concern the decision-making at the highest level of government cannot, however, be ignored."

19. The Board thus recognized the role of Cabinet secrecy. However, it held that considerations for Cabinet secrecy did not apply to briefing notes:

[7] See Factum of the Intervenor, the Attorney General of Ontario on the Motion for Production of Documents, April 14, 2011, paragraphs 53-56.
[8] *Carey v. Ontario* [1986] 2 S.C.R. 637 at paragraph 79.

> "There are some comments from one staff member to another about why certain sections have been presented in a particular way, *but this is a briefing note to the Minister*, not minutes of a Cabinet meeting, nor indeed the comments of the Minister. It does not, in the Board's view, meet the test in *Carey* of being part of "the decision-making level of government."

20. Accordingly, in the CCC Case, the Board ordered the production of every Ministry briefing note that contained relevant and non-privileged information. In doing so, it required the production of documents and the removal of redactions from documents unless the redacted provisions were "clearly irrelevant."

21. The Ministry also asserts that disclosure of some of the information included in the briefing notes could "undermine the Economic and other Interests of Ontario." However, like the Attorney General in the CCC Case, the Ministry does not seek the formal protection of claiming public interest immunity. The way in which that claim is supposed to be made is addressed in *Carey* as follows:[9]

> "The public interest in the non-disclosure of a document is not, as Thorson J.A. noted in the Court of Appeal, a Crown privilege. Rather it is more properly called a public interest immunity, one that, in the final analysis, is for the court to weigh. The court may itself raise the issue of its application, as indeed counsel may, *but the most usual and appropriate way to raise it is by means of certificate by the affidavit of a Minister or where, as in this case, a stature permits or it is otherwise appropriate, of a senior public servant. The opinion of the Minister (or official) must be given due consideration, but its weight will vary with the nature of the public interest sought to be protected."*

22. The Ministry has not offered any certificate or evidence in this case. Rather, counsel makes vague and unsubstantiated assertions in its argument that this information must be confidential because it addresses issues around managing surplus base-load generation. According to the submissions, disclosing the PowerPoint slides:

[9] [1986] 2 S.C.R. 637 at paragraph 38.

- "may have material economic impacts for rate payers."
- "could provide counterparties and competing jurisdictions with unintended insight, economic and strategic advantages."
- "would leave the government vulnerable in its attempt to more fully develop cogent policy options and recommendations."

23. This is a remarkable proposition. The Ministry is effectively arguing that the OEB process which is aimed at determining whether a market rule allegedly aimed at surplus base-load generation should be sheltered from information on alternative means to address surplus base-load generation that were considered by the Ministry, the IESO and the OPA.

24. If the Board accepts these submissions, then it will effectively make it impossible to ever order disclosure from the Ministry. It is also prejudicial to a critical evaluation of the IESO's own positions on alternatives to addressing surplus base-load generation.

25. With respect to the Ministry's argument that non-disclosure is necessary to ensure that "persons in the public service are able to freely and frankly advise government", the following statement from the Supreme Court of Canada in *Carey* has noted that it is very easy to exaggerate its importance:

> The House of Lords had occasion to deal with the candour argument in Conway v. Rimmer, albeit at a lower level of government. Lord Reid dismissed it so far as it concerned routine documents like the probation and other reports in question in that case. He failed to see how such an argument could apply to such communications within a government department when similar communications within public corporations would not be so protected. Lord Morris of Borth-Y-Gest found the proposition that candour would be affected by the knowledge that by some remote chance a document might be the subject of possible enforced production one of "doubtful validity" (p. 957). To Lord Hodson, it seemed strange that civil servants alone are supposed to be unable to be candid without the protection denied other people (p. 976). Lord Pearce indicated that there were many circumstances where the possibility of disclosure

> would make the writer more candid (p. 987). And Lord Upjohn found it difficult to justify non-disclosure of class documents simply on the basis of the candour argument when equally important matters of confidence in relation to security and personnel matters in other walks of life were not similarly protected (p. 995).
>
> The same approach was adopted in later cases of which I mention only a few. In the Glasgow Corporation case, supra, at p. 20, Lord Radcliffe made the same point more colourfully by saying he would have supposed Crown servants were "made of sterner stuff". From my experience, he would not be disappointed. And I suspect Cabinet Ministers would be incensed at the suggestion that their officials were made of sterner stuff than themselves. In 1973, Lord Salmon in Rogers v. Home Secretary, [1973] A.C. 388 (H.L.), at p. 413, described the candour argument as "the old fallacy". More recently in Burmah Oil Co. v. Bank of England, supra, at p. 724, Lord Keith of Kinkel characterized the argument as "grotesque".[10]

26. For the reasons above, the Renewable Energy Supply Generators submit that the Ministry has not substantiated its claim for confidentiality and that the Board should therefore order that the document in question be produced.

Reply Submissions on Cost Awards

27. The IESO submits that because it has not sought its costs in this proceeding, "there is no reason for the Board to apply a different standard"[11] to allow the Renewable Energy Supply Generators to recover their costs. The Renewable Energy Supply Generators rely upon their submissions in chief on this matter and will only respond to a few specific points.

28. The IESO states that it would be "manifestly unjust" for the IESO to be "forced to defend its market rules, pay all cost awards and receive no contribution to its costs regardless of the outcome of the proceeding." However, this is the approach that the Board adopted in the Ramp Rate Appeal, and it is the one the Board adopts in

[10] *Carey v. Ontario* [1986] 2 S.C.R. 637 at paragraphs 47 and 48.
[11] IESO Cost Submissions, pg. 1.

most of its proceedings. Although Market Rule appeals are different in that the proponent of the Rule – the IESO – is not the applicant, that fact results from the formal structure of how the appeal process is designed under s. 33(9) of the *Electricity Act, 1998*. In substance, it is appropriate for the IESO, as a proponent of the Market Rule Amendment, to be responsible for the costs of reviewing it.

29. The IESO asserts that if the Board were to order the IESO to pay the costs of this proceeding, it would have effectively established a practice that the IESO will pay costs in a Market Rule amendment review and that such a practice would encourage unmeritorious applications for review. However, the Board continues to have control over the conduct of the parties, including various tools which it can use to discourage unmeritorious reviews. Further, given that this is only the second market rule review in the Board's history, it does not appear that the slippery slope warned of by the IESO is anything more than a hypothetical risk.

Conclusion

30. In light of all of the foregoing, the Renewable Energy Supply Generators respectfully request that the Board order:

- The disclosure of the unredacted documents filed by the OPA;
- The disclosure of the document in respect of which the Ministry of Energy has requested confidential treatment;
- As requested on February 13, that the Renewable Energy Supply Generators be eligible for the recovery of their costs in this proceeding from the IESO (as a corollary of this, the applicants should not be required to pay for the costs of any other party); and
- That the IESO be required to pay its own costs as well as the costs of intervenors.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated: February 15, 2013

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SCHEDULE LIST

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A	Bryant, Alan W., Sidney N. Lederman & Michelle K. Fuerst, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada* (Markham: LexisNexis Canada, 2009), pp. 1030; 1033.
B	Factum of the Intervenor, the Attorney General of Ontario on the Motion for Production of Documents, April 14, 2011, paragraphs 53-56.
C	*Carey v. Ontario* [1986] 2 S.C.R. 637.

Schedule A

III. COMMUNICATIONS IN FURTHERANCE OF SETTLEMENT

A. Policy and General Rule

§14.313 It has long been recognized as a policy interest worth fostering that parties be encouraged to resolve their private disputes without recourse to litigation, or, if an action has been commenced, encouraged to effect a compromise without resort to trial.[543]

§14.314 With respect to persons facing criminal charges, there is a public interest in preserving the confidentiality of plea negotiations between such accused or their counsel, and the Crown. A privilege is necessary to encourage full and frank discussions with a view to coming to a resolution of the matter. There is a substantial saving by the public and a resulting benefit to the administration of justice — including victims and witnesses — in resolving such cases on a just basis.[544]

§14.315 In furthering these objectives, the courts have protected from disclosure communications, whether written or oral, made with a view to reconciliation or settlement. In the absence of such protection, few parties would initiate settlement negotiations for fear that any concession they would be prepared to offer could be used to their detriment if no settlement agreement was forthcoming. The principle of exclusion was enunciated in two early Ontario cases. In *York (County) v. Toronto Gravel Road & Concrete Co.*,[545] Proudfoot J. said:

> The rule I understand to be that overtures of pacification, and any other offers or propositions between litigating parties, expressly or impliedly made without prejudice, are excluded on grounds of public policy.[546]

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[543] Vaver, "Without Prejudice Communications — Their Admissibility and Effect" (1974) 9 U.B.C. L. Rev. 85, at 88; *British Columbia Children's Hospital v. Air Products Canada Ltd.* (2003), 224 D.L.R. (4th) 23, [2003] B.C.J. No. 591, at para. 10 (B.C.C.A.); *16th Report of the English Law Reform Committee on Privilege in Civil Proceedings*, 1967, Cmnd. 3472, at 14.

[544] *R. v. Delorme* (2005), 198 C.C.C. (3d) 431, [2005] N.W.T.J. No. 51, at paras. 17-18 (N.W.T.S.C.); *R. v. Legato* (2002), 172 C.C.C. (3d) 415, [2002] Q.J. no 5664, at para. 78 (Que. C.A.); *R. v. Pabani* (1994), 17 O.R. (3d) 659, at 665-66, [1994] O.J. No. 541 (Ont. C.A.), leave to appeal refused (1994), 91 C.C.C. (3d) vi, [1994] S.C.C.A. No. 294 (S.C.C.); *R. v. Bernardo*, [1994] O.J. No. 1718 (Ont. Gen. Div.); *R. v. Lake*, [1997] O.J. No. 5447 (Ont. Gen. Div.). It was held in *R. v. Larocque* (1998), 124 C.C.C. (3d) 564, [1998] O.J. No. 1496 (Ont. Gen. Div.) that the privilege does not end when an accused states that he or she will plead guilty in exchange for a particular position offered by the Crown and later declines to follow through with the agreement and pleads not guilty. See also *Forest Protection Ltd. v. Bayer A.G.* (1999), 169 D.L.R. (4th) 374, [1999] N.B.J. No. 484 (N.B.C.A.).

[545] (1882), 3 O.R. 584 (Ont. H.C.J.), affd without reference to this point (1885), 11 O.A.R. 765 (Ont. C.A.), affd (1885), 12 S.C.R. 517, [1885] S.C.J. No. 35 (S.C.C.).

[546] *Ibid.*, at 593-94 (O.R.).

B. A Class or Case-by-Case Privilege?

§14.321 Although the issue of whether a class privilege has been accorded to settlement discussions has not been finally determined,[556] there has been increasing suggestion that it comes within the category of class or blanket privilege.[557]

C. Conditions for Recognition of the Privilege

§14.322 There are a number of conditions that must be present for the privilege to be recognized:

(1) A litigious dispute must be in existence or within contemplation.[558]
(2) The communication must be made with the express or implied intention that it would not be disclosed to the court in the event negotiations failed.
(3) The purpose of the communication must be to attempt to effect a settlement.[559]

1. Litigious Disputes in Existence

§14.323 A litigious dispute must be in existence or at least contemplated for this privilege to be recognized. It is not necessary that proceedings have commenced.[560]

2. Made with Intention of Non-Disclosure: Use of Phrase "Without Prejudice"

§14.324 A second condition is that the communication be made with the intention that, should negotiations fail, it would not be disclosed without

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[556] See R. Hubbard, S. Magotiaux & S. Duncan, *The Law of Privilege in Canada* (Canada Law Book, 2007), at para. 12.280.20.

[557] *R. v. Delorme* (2005), 198 C.C.C. (3d) 431, [2005] N.W.T.J. No. 51, at para. 15 (N.W.T.S.C.); *per* McEachern C.J.B.C. in *Middelkamp v. Fraser Valley Real Estate Board* (1992) 97 D.L.R. (4th) 227, at 233, [1992] B.C.J. No. 1947 (B.C.C.A.) (but see Locke J.A. at 250-51, who viewed it as a case-by-case privilege); *Heritage Duty Free Shop v. Canada (Attorney General)* (2005), 40 B.C.L.R. (4th) 152, [2005] B.C.J. No. 670 (B.C.C.A.); D. Paciocco & L. Steusser, *The Law of Evidence*, 5th ed. (Toronto: Irwin Law, 2008), at 248-49; *Husted v. Law Society of Manitoba* (2005), 201 Man. R. (2d) 91, [2005] M.J. No. 434 (Man. C.A.).

[558] *Blueline Hockey Acquisition Co. v. Orca Bay Hockey Ltd. Partnership*, [2007] B.C.J. No. 179, at paras. 103-104 (B.C.S.C.).

[559] *Meyers v. Dunphy* (2007), 38 C.P.C. (6th) 265, [2007] N.J. No. 5 (N.L.C.A.); *Corner Brook Pulp & Paper Ltd. v. Geocon*, [2001] N.J. No. 130 (Nfld. S.C.T.D.); see *Costello v. Calgary (City)* (1998), 152 D.L.R. (4th) 453, at 485-89, [1998] A.J. No. 888 (Alta. C.A.).

[560] *Warren v. Gray Goose Stage Ltd.*, [1937] 1 W.W.R. 465, at 472, [1937] S.J. No. 7 (Sask. C.A.), revd on other grounds [1938] S.C.R. 52, [1938] S.C.J. No. 47 (S.C.C.).

Schedule B

File No. 2010-0184

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

FACTUM OF THE INTERVENOR, THE ATTORNEY GENERAL OF ONTARIO, ON THE MOTION FOR PRODUCTION OF DOCUMENTS

(Returnable April 21, 2011)

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52. This concern is so fundamental that it has informed the recognition of a unique ground of privilege, namely public interest immunity, that applies in certain circumstances to Minister and Cabinet-level information. Where public interest immunity applies, even documents or portions of documents that are relevant to the litigation may be kept confidential.

Carey v. Ontario, *supra* **at para. 38**

53. In this proceeding, the Attorney General is not claiming that the redacted portions are subject to public interest immunity privilege; if the redacted portions were relevant the Crown would disclose them, just as it has already disclosed relevant portions of the same documents. The Attorney General's position is that it is unnecessary to assert privilege, other than solicitor-client privilege, because the redacted portions of the documents at issue are not relevant to the legal inquiry before the Board, and may be redacted in accordance with the principles set out in *North American Trust* and *McGee*, *supra*. However, the fact that public interest immunity has not been formally claimed does not fundamentally alter the "nature" of these Cabinet-level documents or the important public interest considerations that provide "good reason" to resist disclosure.

cf. Moving Parties' Factum, Motion for Production, para. 22

Nova Scotia (Attorney General) v. Royal & Sun Alliance Insurance Co. of Canada, *supra* **at para. 46**

54. The confidential nature of Minister and Cabinet-level documents is given further recognition in the *Freedom of Information and Protection of Privacy Act,* which prevents disclosure of policy advice from public servants as well as Cabinet documents. The

purpose of the exemption for policy advice from civil servants was described by Privacy Commissioner Cropley in *Order PO-2034 (Ministry of Community and Social Services)* as protecting "the free-flow of advice and recommendations within the deliberative process of government decision-making and policy-making" to ensure that "persons employed in the public service are able to advise and make recommendations freely and frankly, and to preserve the head [of the department]'s ability to take actions and make decisions without unfair pressure."

> ***Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, s. 12(1), 13(1)**
>
> ***Order PO-2034 (Ministry of Community and Social Services)*, [2002] O.I.P.C. No. 119 at paras. 53-54; aff'd in *Ontario (Ministry of Community and Social Services) v. Ontario (Information and Privacy Commissioner)* (2004), 70 O.R. (3d) 680 (Div. Ct.) at para. 12**

55. Statutory exclusion[1] of Cabinet documents from access to information was recommended by the Commission on Freedom of Information and Individual Privacy in order to preserve full and frank discussions at Cabinet, and to preserve the collective responsibility of Cabinet.

> [i]f Cabinet discussions were to become a matter of public record, individual ministers would be inhibited from expressing their frank opinions for fear of later being identified as dissidents. Moreover, if government policy were presented as a series of opposing views, the ability of members of the public and of the legislature to hold all ministers responsible for government policy would be diminished.
>
> ...
>
> The preservation of the confidentiality of Cabinet discussions would appear to be a necessary feature of a freedom of information scheme "compatible with the parliamentary traditions of the Government of Ontario."
>
> ***Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy*, vol. 2 (Toronto: Queen's Printer of Ontario, 1980) at 85**

56. In this case, where the information redacted is "clearly irrelevant" to the legal inquiry before the Board, and there are "good reasons" why the redacted material should not be disclosed, the interests of justice will not be served by ordering production.

i. Inspection by the Board

57. The moving parties contend that it is necessary that the Board inspect the redacted material, for the purpose of disposing of the motion. In the Attorney General's submission while inspection is within the Board's authority, the Board may permit the redaction without inspecting the material at issue. In other instances where a party has unsuccessfully challenged non-disclosure, Ontario courts and tribunals have deemed it unnecessary to review Cabinet and Minister-level documents to confirm the important public interests at stake. In such instances, the moving party's lack of access to materials in question did not impede the Court's resolution of the dispute.

> **See e.g. *Masse et al. v. Ontario* (November 8, 1995), Court File No. 590/95 (Div. Ct.)**
>
> ***Domus Architects v. Ontario (Ministry of Municipal Affairs and Housing), supra* at paras. 48-49**
>
> ***Ontario (Management Board of Cabinet),* [1998] O.L.R.D. No. 1598 (L.R.B.) at paras. 8. 46, 47, 52**
>
> **See also: *Westminster Airways Ltd. v. Kuwait Oil Co., supra* at 603-604, per Singleton LJ and Jenkins LJ**
>
> ***Cholakis v. Cholakis, supra* at para. 20**
>
> **Moving Parties' Factum, Motion for Production at para. 23**

58. Conversely, the Court or tribunal may not order disclosure of Cabinet and Minister-level material unless it has reviewed the material and satisfied itself that the

Schedule C

Indexed as:

Carey v. Ontario

H. Rod Carey, appellant,
v.
Her Majesty The Queen in right of Ontario, the Ontario Development Corporation, the Northern Ontario Development Corporation, Claude Bennett and Allan Grossman, respondents.

[1986] 2 S.C.R. 637

[1986] S.C.J. No. 74

Also reported at 35 D.L.R. (4th) 161

File No: 18060.

Supreme Court of Canada

1985: October 2 / 1986: December 18.

Present: Beetz, McIntyre, Chouinard, Lamer, Wilson, Le Dain and La Forest JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Evidence -- Crown privilege -- Production of cabinet and cabinet committee documents necessary to legal case -- Low level policy matter several years old and of little public interest -- Crown privilege claimed because of class of documents -- Whether court should inspect documents to decide whether Crown's claim valid -- Whether Crown's claim to immunity should be upheld.

The Government of Ontario increasingly became financially involved with Minaki Lodge, a resort in northwestern Ontario, and eventually became owner. Its dealings with appellant, the principal and later controlling shareholder of the lodge, gave rise to this action. On examination for discovery, the defendants' witnesses claimed an absolute privilege respecting all documents that went to or emanated from Cabinet and its committees. The claim was not based on the contents of the documents but on the class to which they belonged. Production, it was alleged, would breach confidentiality and inhibit Cabinet discussion of matters of significant public policy. An application to quash the subpoena duces tecum was granted, notwithstanding the judge's assumption that the documents would be relevant to the matters in issue. Both the Divisional Court and the Court of Appeal upheld that decision. At issue was whether to claim to refuse production of Cabinet documents as a class was valid, and whether it was necessary for the appellant to prove not only that the documents were relevant but also would assist his case.

[page638]

production of, and oral evidence respecting, the income tax returns of the accused despite the objection of the Minister of National Revenue. The Court there clearly reiterated "the general principle that in a court of justice every person and every fact must be available to the execution of its supreme functions" in the absence of a public interest recognized as overriding it (see Rand J. at p. 482).

34 A similar approach was taken in Gagnon v. Commission des valeurs mobilières du Québec, [1965] S.C.R. 73. There the Attorney General of Quebec objected on the basis of public interest to the Secretary of the Commission's divulging in the course of bankruptcy proceedings a letter written to the Commission by the bankrupt regarding the business of the bankrupt, but the Court refused to uphold this objection. By this time, the English courts themselves had begun to move away from the approach adopted in Duncan's case; see Re Grosvenor Hotel, London (No. 2), [1964] 3 All E.R. 354 (C.A.) Fauteux J., who gave the judgment of the majority of this Court, referred to the [page652] latter case in concluding that the courts had the final say in deciding between the conflicting demands of the litigant and the state, or at least in determining whether a ministerial objection is well founded. He conceded that such objection would obviously be well founded in the case of military secrets, diplomatic relations, Cabinet papers and high level political decisions. But the courts' power, though it must be prudently exercised, remained nonetheless. The facts, he added, will vary from case to case; each must be determined on its own merits.

35 It was left to the House of Lords in Conway v. Rimmer, supra, in 1968, to dispose of the more excessive views in Duncan's case and to bring English law in line with that of Canada and other parts of the Commonwealth as well as that of Scotland; for the latter, see Glasgow Corporation v. Central Land Board, 1956 S.C. (H.L.) 1. In Conway, a probationary constable brought action for malicious prosecution against his former superintendent. In the course of discovery, the latter revealed relevant documents in his possession which included four reports made by the defendant during the plaintiff's probationary period and a report by him to his chief constable for transmission to the Director of Public Prosecutions in connection with the prosecution of the plaintiff on a criminal charge, on which he was acquitted and on which the civil action was based. The Secretary of State for Home Affairs objected in proper form to the production of these documents on the ground that they fell within a class of documents the production of which would be injurious to the public interest. The House of Lords held that the documents should be produced for inspection and if it was found that disclosure would not be prejudicial to the public interest or that the possibility of such prejudice was insufficient to justify their being withheld, disclosure should be ordered.

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36 The House firmly rejected the notion that the Minister's statement was final and conclusive. It was the courts that must determine the balance to be struck between the public interest in the proper administration of justice and the public interest in withholding certain documents or other evidence. Proper deference should, of course, be given to the Minister's views, particularly in relation to objections to production of particular documents on the basis of their contents, or where the Minister's reasons involve considerations that cannot properly be weighed on the basis of judicial experience. But class documents are often not of this character. For example, it noted, a court is certainly able to assess whether candour in making a report would likely be lessened by the possibility of its revelation in judicial proceedings.

37 In assessing whether documents should be produced or not, the court could in some cases come to a decision one way or the other on the basis of the Minister's statement alone, but in case of doubt the judge could inspect them.

38 The public interest in the non-disclosure of a document is not, as Thorson J.A. noted in the Court of Appeal, a Crown privilege. Rather it is more properly called a public interest immunity, one that, in the final analysis, is for the court to weigh. The court may itself raise the issue of its application, as indeed counsel may, but the most usual and appropriate way to raise it is by means of a certificate by the affidavit of a Minister or where, as in this case, a statute permits it or it is otherwise appropriate, of a senior public servant. The opinion of the Minister (or official) must be given due consideration, but its weight will vary with the nature of the public interest sought to be protected. And it must be weighed against the need of producing it in the particular case.

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45 At all events, the Government' s counsel in his factum put it on the following basis. The principles of joint responsibility of the members of Cabinet, and of Cabinet solidarity, are basic to Canadian constitutional law and must be maintained and preserved in the public interest. These principles, he added, would be prejudiced by disclosure of the documents and information sought to be produced in these proceedings. In Canada, the United Kingdom and elsewhere in the Commonwealth, he maintained, Cabinet documents have consistently been accorded a high degree of protection against disclosure and courts will order them inspected or [page657] produced only in the most exceptional and unusual circumstances.

46 I am prepared to attach some weight to the candour argument but it is very easy to exaggerate its importance. Basically, we all know that some business is better conducted in private, but generally I doubt if the candidness of confidential communications would be measurably affected by the off-chance that some communication might be required to be produced for the purposes of litigation. Certainly the notion has received heavy battering in the courts.

47 The House of Lords had occasion to deal with the candour argument in Conway v. Rimmer, albeit at a lower level of government. Lord Reid dismissed it so far as it concerned routine documents like the probation and other reports in question in that case. He failed to see how such an argument could apply to such communications within a government department when similar communications within public corporations would not be so protected. Lord Morris of Borth-Y-Gest found the proposition that candour would be affected by the knowledge that by some remote chance a document might be the subject of possible enforced production one of "doubtful validity" (p. 957). To Lord Hodson, it seemed strange that civil servants alone are supposed to be unable to be candid without the protection denied other people (p. 976). Lord Pearce indicated that there were many circumstances where the possibility of disclosure would make the writer more candid (p. 987). And Lord Upjohn found it difficult to justify non-disclosure of class documents simply on the basis of the candour argument when equally important matters of confidence in relation to security and personnel matters in other walks of life were not similarly protected (p. 995).

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48 The same approach was adopted in later cases of which I mention only a few. In the Glasgow Corporation case, supra, at p. 20, Lord Radcliffe made the same point more colourfully by saying he would have supposed Crown servants were "made of sterner stuff". From my experience, he would not be disappointed. And I suspect Cabinet Ministers would be incensed at the suggestion that their officials were made of sterner stuff than themselves. In 1973, Lord Salmon in Rogers v. Home Secretary, [1973] A.C. 388 (H.L.), at p. 413, described the candour argument as "the old fallacy". More recently in Burmah Oil Co. v. Bank of England, supra, at p. 724, Lord Keith of Kinkel characterized the argument as "grotesque".

49 In both the Gagnon and Conway cases, however, Cabinet documents were looked upon in a different light than lower level official documents, and in the latter case the Law Lords dealt with the issue at some length. Most of them looked at these, we saw, as requiring a similar degree of protection as documents relating to national security and diplomatic relations. Production of Cabinet correspondence, they asserted, would never be ordered. For them this was simply obvious. Given the general attitude at the time, this is not surprising. The best explanation is that of Lord Reid. For him it was not candour but the political repercussions that might result if Cabinet minutes and the like were disclosed before such time as they were of historical interest only. He put it this way at p. 952:

> I do not doubt that there are certain classes of documents which ought not to be disclosed whatever their content may be. Virtually everyone agrees that Cabinet minutes and the like ought not to be disclosed until such time as they are only of historical interest. But I do not think that many people would give as the reason that premature disclosure would prevent candour in the Cabinet. To my mind the most important reason is that [page659] such disclosure would create or fan ill-informed or captious public or political criticism. The business of government is difficult enough as it is, and no government could contemplate with equanimity the inner workings of the government machine being exposed to the gaze of those ready to criticise without adequate knowledge of the background and perhaps with some axe to grind. And that must, in my view, also apply to all documents concerned with policy making within departments including, it may be, minutes and the like by quite junior officials and correspondence with outside bodies. Further

du Québec, supra, he noted that the court will weigh the facts in each particular case to determine whether the public interest in the administration of justice should prevail over the public interest in non-disclosure.

76 This Court had occasion to deal with the matter the following year in Smallwood v. Sparling, supra. Sparling was appointed under the Canada Corporations Act to conduct an investigation for the Restrictive Trade practices Commission into the management of Canadian Javelin Ltd. A subpoena was issued to Mr. Smallwood, the former Premier of Newfoundland, to give evidence and to bring forth certain particularized documents. Mr. Smallwood then applied for an injunction enjoining Sparling and others from acting upon the subpoena. In support of his application, it was asserted that at the relevant times he had acted solely as Premier, and that any testimony he would be called upon to give or any documents he would be called upon to produce were subject to public interest immunity.

77 This Court, however, decided against the granting of the injunction. In dealing with these issues, Wilson J., who delivered the judgment, first noted that while a former Minister may, in some circumstances, claim public interest immunity with respect to specific oral or documentary evidence, he cannot claim complete immunity. In her review of the cases, she emphasized Rand J.'s statement in R. v. Snider, supra, that the general principle was that all facts must be available to the court in the absence of an overriding public interest. Conway v. Rimmer, she added, later adopted the view that state documents enjoyed only relative immunity and could in appropriate circumstances be divulged. She noted, however, that some comments in that case indicated that Cabinet documents could not be disclosed until they were of [page670] historical interest. In her view, however, the more recent Burmah Oil case did not appear to be based on any absolute principle of public immunity. That case, Wilson J. concluded, indicated that "it is the role of the courts, not the administration to determine whether disclosure of documents would be injurious to the public interest" (p. 704). The same principle applied to oral evidence.

78 In rejecting Mr. Smallwood's claim to immunity on the basis of the doctrine of collective Cabinet responsibility, Wilson J. underlined that in Attorney-General v. Jonathan Cape Ltd., supra, Lord Widgery C.J. had made it clear that there was a time limit on the application of the doctrine. Indeed after a careful examination of the case, she concluded at p. 707 that:

> ... the onus would be on Mr. Smallwood to establish that the public interest in joint cabinet responsibility would be prejudiced by any particular disclosure he was being asked to make. Any blanket claim to immunity on this basis must, in my view, also fail.

Later, at p. 708, she added:

> His immunity in that regard is relative only and must wait upon the content of the proposed examination. Mr. Smallwood cannot be the arbiter of his own immunity. This is for the courts. The application in this respect was therefore premature.

Summary and Application of the Principles

79 The foregoing authorities, and particularly, the Smallwood case, are in my view, determinative of many of the issues in this case. That case determines that Cabinet documents like other evidence must be disclosed unless such disclosure would interfere with the public interest. The fact that such documents concern the decision-making process at the highest level of government cannot, however, be ignored. Courts must proceed with caution in having them produced. But the level of the decision-making process concerned is only one of many variables to be taken into account. The nature of the policy concerned and the particular contents of the documents are, I would have thought, even more important. So far as the protection [page671] of the decision-making process is concerned, too, the time when a document or information is to be revealed is an extremely important factor. Revelations of Cabinet discussion and planning at the developmental stage or other circumstances when there is keen public interest in the subject matter might seriously inhibit the proper functioning of Cabinet government, but this can scarcely be the case when low level policy that has long become of little public interest is involved.

80 To these considerations, and they are not all, one must, of course, add the importance of producing the documents in the interests of the administration of justice. On the latter question, such issues as the importance of the case and the need or desirability of producing the document; to ensure that it can be adequately and fairly presented are factors to be placed in the balance. In doing this, it is well to remember that only the particular facts relating to the case are revealed. This is not a serious departure from the general regime of secrecy that surrounds high level government decisions.