

ONTARIO ENERGY BOARD

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

AND IN THE MATTER OF an Application by Oakville Hydro
Electricity Distribution Inc. for an Order or Orders approving just
and reasonable rates and other charges for electricity distribution to
be effective May 1, 2014.

NOTICE OF CONSTITUTIONAL QUESTION

The Intervenor, Canadian Electricity Association (“CEA”), intends to question the constitutional validity of the jurisdiction of the Ontario Energy Board (the “Board”) to compel disclosure of documents owned by a third party pursuant to provincial legislation, namely section 21(1) of the *Ontario Energy Board Act, 1998*, S.O. 1998, Chapter 15, Schedule B and sections 5.4 and 12(1) of the *Statutory Powers Procedure Act*, R.S.O. 1990, Chapter S. 22, where the third party copyright owner of the documents has not granted consent for their disclosure and hence, reproduction, in accordance with section 3(1) of the federal *Copyright Act*, R.S.C. 1985, c. C-42.

The question is to be argued on a date and time to be fixed by the Board, at its chambers at 2300 Yonge Street, Toronto, Ontario.

The following are the material facts giving rise to the constitutional question:

1. Oakville Hydro Electricity Distribution Inc. (“Oakville Hydro”) filed a complete cost of service application with the Board on October 1, 2013 under section 78 of the *Ontario Energy Board Act, 1998*, seeking approval for changes to the rates that Oakville Hydro charges for electricity distribution, to be effective May 1, 2014.
2. Oakville Hydro filed its interrogatory responses with the Board on February 21, 2014.
3. On February 27, 2014, the School Energy Coalition (“SEC”) filed a Notice of Motion (the “SEC Motion”) with the Board, seeking the following relief:
 - (a) An order requiring Oakville Hydro to provide full and adequate responses to Interrogatory 2.1-SEC-3 by producing copies of two surveys/studies.
 - (b) Such further and other relief as SEC may request and the Board may grant.
4. On March 4, 2014, CEA filed a letter with the Board requesting intervenor status in order that it could make submissions on the SEC Motion, given that CEA is the owner of copyright of the benchmarking reports and data models (collectively, the “CEA Property”)

that could be disclosed and hence, reproduced without CEA's consent, if the Board were to grant the SEC Motion.

5. On March 6, 2014, pursuant to Procedural Order No. 4, the Board granted CEA intervenor status for the sole purpose of responding to the SEC Motion.

The following is the legal basis for the constitutional question:

6. Pursuant to section 3(1) of the federal *Copyright Act*, CEA, as the copyright owner of the CEA Property, has "[t]he sole right to produce or reproduce" the CEA Property "or any substantial part thereof in any material form whatever ... and to authorize any such acts."
7. Section 27(1) of the *Copyright Act* provides that "[i]t is an infringement of copyright for any person to do, without the consent of the owner of the copyright, anything that by this Act only the owner of copyright has the right to do."
8. The rights and remedies provided by the *Copyright Act* are exhaustive (*Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45, at para. 82; *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, at para. 9; *Théberge v. Galerie d'Art du Petit Champlain inc.*, 2002 SCC 34, at para. 5; *Bishop v. Stevens*, [1990] 2 S.C.R. 467, at para. 18; *Compo Co. v. Blue Crest Music Inc.*, [1980] 1 S.C.R. 357, at p. 373).
9. The *Copyright Act* describes the circumstances in which parties can use copyrighted material without the consent of the copyright owner; none of these exceptions or user rights is present in this case.
10. As an agent of the provincial Crown, the Board is bound by the *Copyright Act* (*Manitoba v. Canadian Copyright Licensing Agency (Access Copyright)*, 2013 FCA 91, at para. 48).
11. The Board does not have the express power to override the *Copyright Act*. The Board's authority to compel disclosure of documents is derived from the following provisions under provincial legislation:
 - (a) Section 21(1) of the *Ontario Energy Board Act, 1998* (the "OEB Act") provides that the Board "may at any time on its motion and without a hearing give directions or require the preparation of evidence incidental to the exercise of the powers conferred upon the Board by this or any other Act."
 - (b) Section 5.4(1) of the *Statutory Powers Procedure Act* (the "SPPA") provides that "[i]f the tribunal's rules made under section 25.1 deal with disclosure, the tribunal may, at any stage of the proceeding before all hearings are complete, make orders for, (a) the exchange of documents" or "(e) any other form of disclosure."
 - (c) Section 12(1) of the SPPA provides that "[a] tribunal may require any person, including a party, by summons ... (b) to produce in evidence at an oral or electronic hearing documents and things specified by the tribunal."

12. The Board has adopted Rule 14.01 in its *Rules of Practice and Procedure*, which provides that “[a] party who intends to rely on or refer to any document that has not already been filed in a proceeding shall file and serve the document in accordance with the Board’s directions.”
13. The Board’s authority to make orders for the disclosure of documents is explicitly limited by the terms of its enabling legislation. Section 5.4(1.1) of the SPPA provides that “[t]he tribunal’s power to make orders for disclosure is subject to any other Act or regulation that applies to the proceeding.”
14. Furthermore, the doctrine of federal paramountcy dictates that where there is an inconsistency, a conflict or an incompatible operational effect between validly enacted but overlapping provincial and federal legislation, the provincial legislation is inoperative to the extent of any inconsistency (*Rothmans, Benson & Hedges Inc. v. Saskatchewan*, 2005 SCC 13 at para. 11; *Canadian Western Bank v. Alberta*, 2007 SCC 22 at para. 69; *Quebec (Attorney General) v. Canadian Owners and Pilots Assn.*, 2010 SCC 39 at paras. 62-66).
15. Pursuant to section 3(1) of the *Copyright Act*, CEA must consent to the reproduction, and hence disclosure (on a confidential or public basis), of the CEA Property. Therefore, in accordance with the doctrine of federal paramountcy, an order of the Board under section 21(1) of the OEB Act, and sections 5.4 and 12(1) of the SPPA to compel disclosure of the CEA Property without CEA’s consent would result in an incompatible operational effect with section 3(1) of the *Copyright Act* and would be constitutionally invalid.

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