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DELIVERED BY EMAIL

Kirsten Walli
Board Secretary
Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, 27th Floor
Toronto, ON M4P 1E4

Dear Ms. Walli:

Re: EB-2013-0159

We are counsel to the Association of Major Power Consumers in Ontario ("AMPCO"), an intervener in this application. We refer to the letters recently filed by the School Energy Coalition ("SEC") and the Canadian Electricity Association ("CEA") in relation to SEC's motion for disclosure of a CEA benchmarking report.

Prior to being advised of the settlement of SEC's motion, we were preparing on behalf of AMPCO to respond to CEA's copyright and constitutional arguments against potential disclosure of its benchmarking report pursuant to Rule 29. Having now spent these resources, we wish to make the following comments for the record to advise the Board of our understanding of the legal position.

It is most unusual to encounter arguments from litigants that the disclosure and copying of documents pursuant to the applicable rules of practice and procedure - rules made under statutory authority -- would raise copyright and federal paramountcy concerns. Arguments of this type are almost never made because it has long been accepted, as a matter of public policy, that the economic interests of copyright owners simply do not apply when the rules of practice and procedure, designed to allow courts and tribunals to adjudicate disputes fairly, provide for disclosure of copies of relevant documents.

As Lord Justice Templeman of the English Court of Appeal observed in 1981, "[b]oth the right to privacy and copyright are only exercisable subject to laws of disclosure which, for example, require publication of copies of the accounts of limited companies, and copies of wills which have been proved, and copies of minutes of certain public authorities. The laws of procedure relating to litigation also require limitations on the right to privacy and copyright. Every party to an action must disclose all documents in his possession or power relating to the matters in issue in the action, must allow the other parties to inspect those documents and to take copies of them and to make use of the documents and the copies and the contents for the purposes of the action in which they are revealed." (Home Office v. Harman, [1981] Q.B. 534 at 558-559, aff'd on other grounds, [1983] 1 A.C. 280 (H.L.)).

The reasons behind this rule of public policy are obvious. Without this rule, the consequences for the fair and just adjudication of disputes would be dire. As the U.S. Court of Appeals for the Second Circuit recently said in Unclaimed Property Recovery Service, Inc. v. Gelb (Aug. 20, 2013, Docket No. 12-4030),

"[l]itigation cannot be conducted successfully unless the parties to the litigation and their attorneys are free to use documents that are part of the litigation....A court's ability to perform its function depends on the ability of the parties (and their attorneys) to put before it copies of all the documents in contention and to serve one another with copies of such documents."

The difficulty with the position advanced by CEA becomes evident when one examines the logical consequences of it. If copyright and "federal paramountcy" concerns are indeed raised by orders to disclose copies of relevant documents pursuant to provincial rules of practice and procedure, then the superior court rules of every province and virtually every provincial agency, board and tribunal are unconstitutional.

Finally, we submit that courts and tribunals must always be suspicious of attempts to use intellectual property rights as a cloak behind which to shield documents that litigants would rather not reveal -- particularly when other safeguards against abuse exist, including confidentiality orders and implied undertakings. As the Federal Court of Appeal said in 1994, in relation to copyright and patent rights, "care must always be taken not to allow them to be made instruments of oppression and extortion." (Cdn. Association of Broadcasters v. SOCAN, [1994] F.C.J. No. 1540.)

The above represents our views.

Sincerely,
DAVIS LLP
Per:

A Radhakant

Andy Radhakant
AR/szp

cc: Maureen Helt
Harold Thiessen
Intervenors

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