EB-2013-0321

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 Ontario Power Generation Inc. for an order or orders approving payment amounts for prescribed generating facilities commencing January 1, 2014.

AND IN THE MATTER OF Rule 27 of the Board's *Rules of Practice and Procedure*.

RESPONDING SUBMISSIONS OF ONTARIO POWER GENERATION TO THE MOTIONS OF SEC, AMPCO AND ED

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Ontario Power Generation Inc.

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RESPONDING SUBMISSIONS OF ONTARIO POWER GENERATION TO THE MOTIONS OF SEC, AMPCO AND ED

PART I - OVERVIEW

1. The School Energy Coalition ("SEC"), the Association of Major Power Consumers in Ontario ("AMPCO") and Environmental Defence ("ED") each submit that Ontario Power Generation ("OPG") has refused to provide a full and adequate response to certain interrogatories and each brings a motion for an order requiring OPG to do so.

2. The information sought by SEC, AMPCO and ED on these motions either:

   (a) is not relevant to the issues to be decided in this proceeding;

   (b) has already been or will be provided; or

   (c) is subject to litigation privilege.

As such, they were properly refused.[1] Against the backdrop of the volumes of information that OPG has provided, the refused interrogatories and these motions arising from them amount to a fishing expedition. The motions should be denied.

3. This submission also responds to the Ontario Energy Board's ("OEB") request for further information in relation to OPG's request that its responses to Board Staff interrogatories 76 and 176 be accorded confidential treatment.

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[1] While all refused interrogatories were properly refused, OPG has, as described further below, provided further responses to certain questions with a view to the efficient conduct of the proceeding.

PART II – OPG'S POSITION ON THE INTERROGATORY MOTIONS

4. OPG filed an application, dated September 27, 2013, with the OEB under section 78.1 of the *Ontario Energy Board Act, 1998,* S.O. 1998, c.15, Schedule B seeking approval for increases in payment amounts for the output of its nuclear generating facilities and the currently prescribed hydroelectric generating facilities, to be effective January 1, 2014. The application also seeks approval for payment amounts for newly prescribed hydroelectric generating facilities, to be effective July 1, 2014.

Irrelevant information regarding business plans beyond the test period

5. SEC and AMPCO seek irrelevant information regarding OPG business plans beyond the 2014-2015 test period. SEC complains that "OPG has refused to answer a number of interrogatories on the basis that the information sought relates to costs that go beyond the test period".[2] SEC submits that this constitutes "an inappropriate and unduly narrow interpretation of relevance in payment amounts proceedings."[3] AMPCO also moves for answers to interrogatories asking for information outside the 2014-2015 test period.[4]

6. OPG disagrees. The scope of relevance in a payment amounts proceeding is determined by the issues to be decided in the proceeding. OPG is seeking approval of payment amounts for 2014-2015. Information regarding business plans beyond the 2014-2015 test period is not relevant to forecast costs within that test period. Moreover, it is very likely to change over the intervening years. The information sought is not probative in respect of the evidence before the OEB. In this respect, the information neither advances nor questions the evidence put forward by OPG in respect of its 2014-2015 forecasts and the determination of the applicable payment amounts for the test period.

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[2] SEC Notice of Motion ("SEC Motion"), p. 2, para. 4

[3] SEC Motion, p. 2, para. 4

[4] AMPCO Notice of Motion ("AMPCO Motion"), p. 3, paras. 9-10

1.2-AMPCO-5

7. In this interrogatory, AMPCO asks OPG to "discuss OPG's longer term 10 year business plan outlook including emerging issues and proposed spending levels beyond 2016 and include any supporting materials".[5] This request is extremely broad and unfocused. It is not even clear which operating expenditures for 2014-2015, if any, are being questioned.

8. In its Notice of Motion, AMPCO submits that this information "will provide a context that is missing in the current application and one that is necessary in order for the OEB to properly assess OPG's pacing, prioritization and importance of work programs and level of spending".[6] AMPCO refers in further support to the Long-Term Energy Plan and the OEB's Renewed Regulatory Framework ("RRF").

9. SEC also moves for an order compelling OPG to respond to this interrogatory on the grounds that it asks for information that is "important to understanding whether OPG's proposed 2014-2015 capital and operating expenditures are appropriately paced."[7]

10. None of the justifications for this interrogatory has any merit. As discussed further below, neither the LTEP nor the planning decisions made by the Province of Ontario reflected in that document is at issue in this proceeding.

11. The RRF also has no application to this proceeding. On its face, the RRF does not apply to OPG. Even if it did, this is a cost of service proceeding. It is not a multi-year IRM in which an electricity distributor may be expected to file cost and revenue forecasts covering the full IRM period. In any event, OPG has filed cost and revenue forecasts for the relevant test period.

12. Finally, there is no substance to the comments about the "pacing" of spending during and after the 2014-2015 test period. AMPCO and SEC do not identify a single item of capital or operations and maintenance expense as being at issue in this respect. Even if they had identified

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[5] AMPCO Record, Appendix A

[6] AMPCO Record, p. 4, para. 14

[7] SEC Motion, p. 2, para.5

such an item, the information sought would be of little probative value. Unlike actual historic or near term forecast data, the information sought extends out 10 years. There is no reason to believe that this, inherently uncertain, information would be informative as to payment amounts over the test period.

13. SEC also submits that the information sought is "particularly important with respect to OPG's hydroelectric facilities, as this payment amount application will be the base year for OPG's first hydroelectric incentive regulation application."[8] While this may or may not be the case, SEC has failed to provide any reason why information about OPG's plans years beyond the test period would help the OEB evaluate the current base year.[9] The information sought is not relevant for the current proceeding. To the extent it may be relevant to a future IRM proceeding, it should be explored at that time.

5.1-AMPCO-23(d)

14. In this interrogatory AMPCO asks OPG for information regarding forecast hydroelectric production in 2016 from OPG's 2014-2016 Business Plan. In its Notice of Motion, AMPCO submits that this information is relevant because it will allow AMPCO to "better understand future production trends and the relationship to the forecast for the test period."[10]

15. As discussed above, information beyond the 2014-2015 test period, including information regarding "future production trends", does not impact the setting of rates for this application and, therefore, is not relevant.

6.8-SEC-118

16. OPG has responded to this interrogatory. It is not at issue.

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[8] SEC Motion, p. 2, para.5

[9] See *Report of the Board: Incentive Rate-making for Ontario Power Generation's Prescribed Generation assets* (EB-2012-0340) at p. 8 and Appendix B.

[10] AMPCO Record, p. 5, para. 20

Benchmarking data from third parties

6.2-SEC-84

17. In this interrogatory SEC asks for benchmarking reports specific to OPG's hydroelectric facilities, including those prepared by third parties. In its response and at the Technical Conference, OPG indicated that it does not actually have any benchmarking reports as contemplated by this interrogatory. OPG further explained that it does have certain data, mainly in spreadsheet format, that was provided confidentially by Navigant, EUCG and the CEA. The data was then used by OPG to perform its own benchmarking work. Subsequent to the technical conference OPG sought consent from Navigant, EUCG and the CEA to produce the data provided to OPG. OPG does not oppose production of the data.

18. OPG has agreed to take reasonable steps to safeguard the information relating to the participants listed in the data provided by each of Navigant, EUCG and the CEA. Respecting these agreements is, it is submitted, in the public interest. Practically, participants will be less inclined to participate if their identities are not protected. OPG will ask the OEB that the data be kept confidential when filed.

The Ministry of Energy's Report

6.8-SEC-116/1.2-CCC-5

19. These interrogatories seek disclosure of a report owned by the Ministry of Energy (the "KPMG Efficiency Review"). OPG has made a request to the Ministry of Energy for authorization to submit the KPMG Efficiency Review in this proceeding. The Ministry of Energy has not granted authorization to submit the KPMG Efficiency Review at this time.

Communications with the OPG Board of Directors and the Ministry of Energy

20. These interrogatories seek disclosure of:

(a) all documents provided to OPG's Board of Directors in approving OPG's application;

(b) communications between OPG and OPG's Board of Directors in respect of the Annual Report of the Office of the Auditor General of Ontario on December 10, 2013 (the "Auditor General's Report"); and

(c) communications between OPG and the Ministry of Energy in respect of timely reports and information on major developments and issues.

21. The information sought in these interrogatories is not relevant to the determination of the issues before the OEB in this proceeding. The OEB should make its decision on the application and supporting materials filed by the applicant and the evidence of intervenors, all of which is subject to cross-examination.

1.4-SEC-20

22. This interrogatory by SEC seeks disclosure of all documents provided to OPG's Board of Directors in approving this application. These documents are irrelevant and, in any event, litigation privileged. OPG should not be ordered to produce them.

23. OPG management submitted a memorandum, together with an executive summary, to the Board of Directors recommending that OPG submit this application to the OEB. Discussion of the application and the memorandum recommending it were treated as privileged and confidential by the members of the OEB. Board members asked a number of questions in relation to the application including as to the regulatory risk to OPG presented by the application and the likely prospect of success before the OEB.

24. In all cases, the essential purpose of the documents remained the same: to seek the OEB's approval of management's strategic decision to submit this application to the OEB. That approval was given. Approval to modify the 2013-2015 Business Plan which underpins the application and which had been approved by the Board of Directors at the May 2013 Board meeting was not sought. The Business Plan and budgets, including the assumptions regarding work requirements, work programs, resource requirement and performance objectives, form the basis of OPG's application. All of these documents have been produced.

25. Intervenors can explore, through witnesses, whether alternatives to the application should have been considered, and the impacts of OPG's choices. None of this relies on what management presented to the Board of Directors in respect of this application.

26. This very issue was before this Board on a motion brought for the same relief in the EB-2010-0008 proceeding.[11] The OEB denied the relief sought because it was irrelevant.

> In the Board's view, these materials are not relevant to the determination of the issues before the Board in this proceeding. The Board will make its decision on the application and supporting materials filed by the applicant and the evidence of intervenors, all of which is subject to cross-examination.
>
> This evidence goes to the financial and operational impacts of the application and of the alternatives which have been considered.
>
> The material which has been sought through the motions includes the communication between OPG's management and its board of directors, seeking approval to file the application, delegated authority to deal with the proceeding, and the analysis of "likely prospects for success." This material does not form part of the application and does not enhance nor detract from the merits of the application.[12]

27. The same result should obtain in this case. In any event, the information sought in SEC's motion in this application was prepared for the dominant purpose of preparing for this application and is subject to litigation privilege.[13]

1.1-CME-1

28. This interrogatory by Canadian Manufacturers and Exporters ("CME") seeks disclosure of written material relating to the Auditor General's Report that was:

(a) prepared by OPG for OPG's Board of Directors; or

(b) provided by OPG's Board of Directors to OPG.

29. As OPG explained in its response to this interrogatory, the purpose of this application is to set payment amounts for the 2014-2015 test years. It is not to evaluate or conduct an inquiry with respect to the Auditor General's Report. That Report was issued months after OPG filed this application.

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[11] Motion Hearing Transcript, EB-2010-0008, September 30, 2010, p. 1, attached as Exhibit "A"

[12] Motion Hearing Transcript, EB-2010-0008, October 4, 2010, pp. 113-114, attached as Exhibit "B"

[13] *Blank v. Canada (Department of Justice)*, [2006] 2 S.C.R. 319 at para. 34, attached as Exhibit "C"

30. SEC says in its motion that parties and the OEB "must determine if the steps OPG is taking are appropriate."[14] To the extent this is a relevant question – at least in so far as it seeks information relevant to the determination of payment amounts – OPG has provided information about the substantive issues raised by the Auditor General.

31. In its response to this interrogatory, OPG provided its "Summary of Key Actions: 2013 Auditor General Report on Human Resources Policies". At the Technical Conference, all of CME's questions were directed at this document. None of the questions were refused. Several undertakings were given, all of which have been answered by OPG.[15] In brief, the question as to what OPG has done in response to the issues raised by the Auditor General's Report has been asked and comprehensively answered.

1.2-SEC-4

32. In this interrogatory SEC seeks production of communications between OPG and the Ministry of Energy pursuant to paragraph E1 of the Memorandum of Agreement. That paragraph provides that "OPG will ensure timely reports and information on major developments and issues that may materially impact the business of OPG or the interests of the shareholder".

33. Similar to the OEB's determination that documents provided to OPG's Board of Directors in approving an application are irrelevant the same logic applies, with greater force, in respect of communications between OPG and its shareholder, the Ministry of Energy.

34. Moreover, OPG's primary method of reporting to the Minister on matters relevant to this application – its formal 2013-2015 and 2014-2016 Business Plans – have been produced and will be the subject of further examination at the hearing of the application.

35. Finally, OPG reports to the Ministry on a monthly and *ad hoc* basis in a variety of ways (report, email and telephone) on a full range of issues, including safety, environmental matters,

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[14] SEC Record, p. 5, para. 16

[15] Technical Conference Transcript, April 23, 2014, pp. 120-134

weather and production matters, among others. Most issues are entirely irrelevant to this application and would have little or no probative value.

Capital structure

3.1-SEC-25

36. This interrogatory by SEC seeks disclosure of all documents related to OPG's expected, planned or forecast debt/equity ratio over the period 2014-2018. In its motion, SEC says that "a material issue in this proceeding is the impact, if any, of the inclusion of the newly- regulated hydroelectric facilities on the appropriate equity thickness" for OPG.[16] It goes on to say that "internal analysis" of the change of those assets … will assist the OEB in understanding the appropriate equity thickness."[17]

37. OPG does not have any internal analysis directed at the question of how the inclusion of the newly-regulated hydroelectric facilities may impact its planned or forecast deemed equity ratio.

38. Payments amounts are a function of OPG's deemed regulatory capital structure. The OEB's approach to capital structure is based on its assessment of the business risk faced by the utility. Rather than conduct an internal assessment of business risk, OPG retained Foster Associates to conduct an independent, third party expert assessment of the risk associated with the newly regulated hydroelectric facilities in order to determine whether a change in OPG's deemed capital structure was warranted. The Foster Associates report, which concludes that no change is warranted, can be found at Ex. L-03.1-17 SEC-024. OPG is not seeking a change to its deemed capital structure.

2.1-ED-2, 3 and 4

39. As ED says in its notice of motion, these interrogatories seek information relating to the calculation of rate base for the newly regulated hydroelectric facilities. It further justifies these interrogatories as necessary to determine:

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[16] SEC Record, p. 7, para. 23

[17] SEC Record, p. 7, para. 23

(a) "whether OPG's methodology for determining rate base for its newly regulated facilities is consistent with the Board's methodology..."[18]; and,

(b) "the magnitude of the gap, if any, between" the "cost" and "fair market" values of the facilities.[19]

40. Neither justification withstands scrutiny. The information sought is irrelevant having regard to the clear language of O.Reg. 53/05, which requires that the OEB accepted the value of those facilities as reflected on OPG's financial statement. In fact, the OEB has already rejected the relevance of the requested information in this proceeding. In Procedural Order No. 3. The OEB considered and rejected a request by SEC to add to the Issues List an issue relating to the calculation of rate base for the newly regulated hydroelectric facilities. As the OEB held:

> SEC proposed an additional issue relating to the calculation of the initial rate base for the newly regulated hydroelectric facilities. SEC referred to section 6(2)5 of O. Reg. 53/05, and stated that unlike when OPG was first regulated, the Board was not bound to accept net fixed amounts as set out in its then most recent financial statements.
>
> The Board finds that the proposed issue is not required. As noted by OPG, section 6(2)11, as amended, provides that, in making its first order for the newly regulated hydroelectric facilities, the Board shall accept values for assets and liabilities as set out in OPG's most recently audited financial statements for the newly regulated hydroelectric facilities.[20]

Annual Capacity Factor

4.7-ED-7

41. In interrogatory 4.7-ED-7, ED seeks data for periods prior to the regulation and also prior to the existence of OPG as an entity. The OEB has consistently found that data prior to 2005 is not relevant for purposes of establishing payment amounts. This is consistent with the OEB's findings in EB-2007-0905.

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[18] ED Motion Record ("ED Record"), p. 2, para. 5(a)

[19] ED Record, p. 2, para. 5(b)

[20] Procedural Order No. 3, p.7

42. In its response to interrogatory 4.7-ED-7 OPG did provide, for the period beginning 2005, the Unit Capability Factor. Unit Capability Factor is a standard WANO indicator of performance reliability. Unit Capability Factor is the percentage of maximum energy generation that a unit is capable of supplying to the electrical grid, limited only by factors within control of plant management. By contrast, Net Capacity Factor includes events not under station management control (e.g. loss of transmission) in measuring energy generation.

43. In any event, set out below is a table providing the Net Capacity Factor from 2005.

	2005	2006	2007	2008	2009	2010	2011	2012	2013
NCF	89.28	87.35	88.26	93.49	84.60	86.26	93.96	91.79	81.48

Generation Alternatives

4.7-ED-8 and 9/6.3-ED-15(c)

44. Here, the significant issues before the OEB are whether the contracting strategies in respect of the Darlington Refurbishment Project (the "DRP") are reasonable and whether the capital expenditures for the 2014-2015 test years are reasonable. The issue is not to evaluate the need for the DRP or to review the LTEP and the supply mix set out in that plan or to suggest an alternative supply mix. Interrogatories 4.7-ED-8 and 9 are in respect to the latter aspect and as such the interrogatory or any analysis arising from that interrogatory are not relevant.

45. The interrogatories posed by ED fundamentally relate to energy planning and the planning priorities selected. This is within the sphere of responsibility of the Ontario Power Authority and the Ministry of Energy and not OPG. OPG is a generator and it has no ability to select whether Ontario's energy needs are satisfied by conservation, Quebec imports or conventional means. As a generator, OPG's obligation is to work within the supply mix established by the appropriate planning authority and to develop and operate its generation in a prudent and reasonable manner.

46. OPG has through it business case considered the LUEC related to the DRP and compared that LUEC to combined cycle gas generation as it is prudent and reasonable to consider DRP's cost relative to generation currently serving Ontario. But it is not within OPG's scope of responsibility or the OEB's scope of review to calculate LUEC and compare that with alternatives, like Quebec hydro, for the purposes of considering whether Ontario should pursue nuclear or hydro imports from Quebec. That is the role and responsibility of the OPA and the Ministry of Energy and a review of the OPA or the Ministry forms no part of this proceeding.

47. The OEB in exercising its jurisdiction over OPG under section 78.1 of the Act is to assess whether OPG's actions were prudent and reasonable in undertaking generation activities and projects for purposes of establishing just and reasonable payment amounts. The jurisdiction of the OEB is not to approve or deny the right to carry on a project on the basis that an alternative supply mix should be pursued. The consideration of the appropriateness of the supply mix is not before the OEB in the current proceeding and as such inquiries as to the economics of other generation or energy use alternatives relative to the DRP are not relevant.

48. Likewise, in 6.3-ED-15(c), ED seeks the comparison of Pickering's forecast OM&A costs (per MWh) for 2014-2015 to the incremental cost of meeting Ontario's electricity needs by increased energy efficiency, increased output from other Ontario generation, reduced exports and increased hydro from Quebec. For the same reasons as set out above, this interrogatory is irrelevant.

49. For each of 4.7-ED-8 and 9 and 6.3-ED-15, OPG notes that it should not be required to respond to these interrogatories on the basis that it is not within OPG's power to perform the calculations requested. For example, increased energy efficiency depends on the nature of OPA programs and the uptake of those programs. This information is in the control of the OPA. Increased imports from Quebec would only come about by way of negotiated arrangement established by a Ministerial directive. The parameters of the directive are unknown and, as a result, so too are the potential results of the negotiation. The uncertainty means that OPG does not and will not possess the information to effectively perform the calculation.

Historic Nuclear Projects

4.12-ED-14

50. In 4.12-ED-14, ED seeks to have OPG confirm certain facts relating to forecast versus actual costs that are not in evidence in this proceeding and which are contained in a report that was not prepared by OPG or filed by anyone as evidence in this proceeding. OPG objects to responding to this interrogatory on the following basis.

51. First, OPG has provided detailed evidence related to the DRP, its contracting strategy, its risk mitigation strategy and costs. Past projects carried out by OPG or its predecessor Ontario Hydro and any variation of actual verses forecast are not relevant. The DRP is a unique project in regard to its scope, cost management, contracting and timing. No previous activity is directly comparable and, as such, any consideration of past project activities is irrelevant to the issues before the OEB in this proceeding.

52. Second, the interrogatory fails to comply with Procedural Order No.1 in this proceeding. That order requires that "interrogatories… reference the pre-filed evidence filed on September 27, 2013 or information and reports subsequently filed on December 5 and 6, 2013."[21] The interrogatory's sole reference is to a document that does not form any part of OPG's evidence.

53. Third, apart from the Procedural Order, the interrogatory represents an improper attempt to require OPG to create "evidence" for ED. The document for which ED seeks verification is not OPG's document. OPG is not aware of its origin nor of the basis on which it was created. While it is common to have an applicant comment on tables or charts prepared by intervenors derived from the applicant's evidence or the evidence filed by the intervenor, here, ED has provided no evidentiary foundation at all. Through the interrogatory ED intends to skip the step of preparing its own evidence, which could then be challenged. It should not be permitted to do so. There is further a clear possibility that ED will, in argument, rely not only on the interrogatory response (which OPG believes is factual irrelevant), but on the contents of the

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[21] Procedural Order No. 1, p. 4

document generally as if the facts contained therein were established. It would be unfair to permit ED to "back door" documents on this basis.

PART III – ADDITIONAL INFORMATION RELATING TO CONFIDENTIALITY

54. In Procedural Order No. 8 the OEB asked OPG to provide further information in relation to OPG's request for confidentiality in respect of its responses to Board Staff interrogatories 76 and 176. That information is set out below.

55. **IR 76**. OPG has now been advised that the IESO does not object to public disclosure of the response.

56. **IR 176**. In relevant part, OPG's response provides as follows:

> In addition to uranium concentrate contracts, OPG has a 10 year supply contract with the domestic supplier of uranium conversion services for the period 2012 - 2021 inclusive [redacted] This contract was entered into in 2011 following the expiry of the prior 10 year contract. OPG also has a multi-year supply contract with of the two domestic CANDU fuel bundle manufacturers to supply OPG's requirements through the test period [redacted] In 2011, OPG negotiated an extension to the fuel bundle supply contract through to 2018 in order to secure the supply of the modified fuel design for Darlington stations (see Ex. F2-5-1).

57. OPG maintains its request for confidential treatment of the specific cost information contained in this response. The concern with publicly disclosing actual and forecasted amounts is that the unit pricing being paid to the suppliers can be determined. In the case of conversion services, disclosing this information could work to the detriment of Ontario ratepayers, since the supplier will in future negotiations ensure that OPG pays the highest price given the risk that the price OPG pays will become publically available to other potential customers despite confidentiality provisions.

58. In the case of fuel bundle supply, providing information on the prices that OPG pays its current supplier for fuel bundles would provide the other potential supplier of this service with a price to beat. Rather than providing its best offer, that other supplier could set its price just below the price that OPG currently pays.

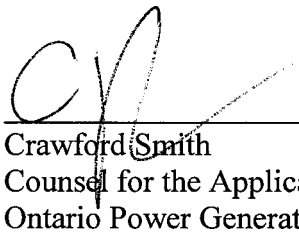
59. OPG notes that the small amount of redacted information is available to all those parties who have signed the Declaration and Undertaking. In sum, OPG sees no benefit to publicly disclosing this information, but does see the potential for harm.

PART IV – ORDER SOUGHT

60. OPG respectfully requests that the motions be denied.

May 8, 2014

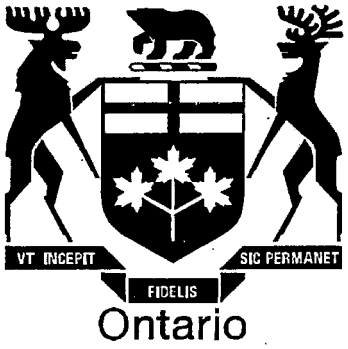
ALL OF WHICH IS RESPECTFULLY SUBMITTED



Crawford Smith
Counsel for the Applicant,
Ontario Power Generation Inc.

EXHIBIT "A"

EXHIBIT "A"



ONTARIO ENERGY BOARD

FILE NO.: **EB-2010-0008**

VOLUME: **Motion Hearing**

DATE: **September 30, 2010**

BEFORE:	**Cynthia Chaplin**	**Presiding Member and Vice-Chair**
	Cathy Spoel	**Member**
	Marika Hare	**Member**

Thursday, September 30, 2010

--- On commencing at 1:15 p.m.

MS. CHAPLIN: Please be seated.

Good afternoon, everyone. The Board is sitting today in the matter of application EB-2010-0008, submitted by Ontario Power Generation Inc. This application was filed under section 78.1 of the Ontario Energy Board Act and is for the approval of increases in the payment amounts for the output of certain of OPG's generating facilities to be effective March 1st, 2011.

My name is Cynthia Chaplin, and I'll be the Presiding Member in this proceeding, and joining me on the Panel are Board Members Cathy Spoel and Marika Hare. The Board sits today to consider two motions. One was filed by the Consumers Council of Canada on September 17, 2010, and the other was filed by the Canadian Manufacturers and Exporters on September 23rd, 2010.

The motions both concern the production of certain materials which were originally requested in interrogatories. Specifically, the CCC motion seeks production of the materials requested in CCC Interrogatory 1(b). This interrogatory requested the filing of all presentations or reports made to the OPG board of directors during the period April 1, 2010, to May 26, 2010. OPG replied that the requested presentations and reports are privileged, and OPG objected to their production.

The CME motion requests an order requiring OPG to provide the documents requested in CME Interrogatory

EXHIBIT “B”

EXHIBIT "B"

ONTARIO ENERGY BOARD

FILE NO.: **EB-2010-0008**

VOLUME: **1**

DATE: **October 4, 2010**

BEFORE:	**Cynthia Chaplin**	**Presiding Member and Vice-Chair**
	Cathy Spoel	**Member**
	Marika Hare	**Member**

I guess we'll break for lunch now. You're done, Mr. Millar?

MR. MILLAR: Yes.

MS. CHAPLIN: And after lunch, I believe it's Mr. Lord? You're going to be up after lunch?

MR. LORD: That is correct.

MS. CHAPLIN: Okay. Great. So it's now quarter to 1:00. We'll break for an hour. Thank you.

--- Luncheon recess taken at 12:46 p.m.

--- On resuming at 1:53 p.m.

MS. CHAPLIN: Please be seated.

Good afternoon. Before we continue with the cross-examination of the hydroelectric panel, the Board will deliver its decision on the motions.

DECISION:

The Board sat on Thursday, September 30th, to hear motions by CCC and CME. Both motions sought the production of materials presented to the OPG board of directors in the period between April 1, 2010 and May 26, 2010.

The Board has decided not to order production of the materials sought in the CME and CCC motions. In the Board's view, these materials are not relevant to the determination of the issues before the Board in this proceeding. The Board will make its decision on the application and supporting materials filed by the applicant and the evidence of intervenors, all of which is subject to cross-examination.

This evidence goes to the financial and operational

impacts of the application and of the alternatives which have been considered.

The material which has been sought through the motions includes the communication between OPG's management and its board of directors, seeking approval to file the application, delegated authority to deal with the proceeding, and the analysis of "likely prospects for success." This material does not form part of the application and does not enhance nor detract from the merits of the application.

The evidence is that no changes to the business plans and budgets which underpin the application were sought or made as a result of the board of directors' meeting. These plans and budgets have been filed.

Intervenors can explore, through the witness, whether alternatives to the application should have been considered, and the impacts of OPG's choices. None of this relies on what management presented to the board of directors.

Having found that the materials are not relevant and need not be produced, the question of privilege will not be addressed.

That concludes the Board's decision, and subject to any questions, we can continue with the cross-examination.

PROCEDURAL MATTERS:

MS. CHAPLIN: Okay. Mr. Lord.

MR. SMITH: Perhaps, Members of the Panel, before Mr. Lord begins his cross-examination, I have been advised that

EXHIBIT "C"

EXHIBIT "C"

2006 SCC 39 (CanLII)

Minister of Justice *Appellant*

v.

Sheldon Blank *Respondent*

and

Attorney General of Ontario, The Advocates' Society and Information Commissioner of Canada *Interveners*

INDEXED AS: BLANK *v.* CANADA (MINISTER OF JUSTICE)

Neutral citation: 2006 SCC 39.

File No.: 30553.

2005: December 13; 2006: September 8.

Present: McLachlin C.J. and Bastarache, Binnie, Deschamps, Fish, Abella and Charron JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Access to information — Exemptions — Solicitor-client privilege — Distinction between solicitor-client privilege and litigation privilege — Claimant requesting documents relating to prosecutions of himself and a company for federal regulatory offences — Charges subsequently quashed or stayed — Request for access denied by government on various grounds including solicitor-client privilege exemption set out in s. 23 of Access to Information Act — Whether documents once subject to litigation privilege remain privileged when litigation ends — Access to Information Act, R.S.C. 1985, c. A-1, s. 23.

Law of professions — Barristers and solicitors — Solicitor-client privilege — Litigation privilege — Distinction between solicitor-client privilege and litigation privilege — Nature, scope and duration of litigation privilege.

In 1995, the Crown laid 13 charges against B and a company for regulatory offences; the charges were quashed, some of them in 1997 and the others in 2001.

Ministre de la Justice *Appelant*

c.

Sheldon Blank *Intimé*

et

Procureur général de l'Ontario, The Advocates' Society et Commissaire à l'information du Canada *Intervenants*

RÉPERTORIÉ : BLANK *c.* CANADA (MINISTRE DE LA JUSTICE)

Référence neutre : 2006 CSC 39.

N° du greffe : 30553.

2005 : 13 décembre; 2006 : 8 septembre.

Présents : La juge en chef McLachlin et les juges Bastarache, Binnie, Deschamps, Fish, Abella et Charron.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Accès à l'information — Exemptions — Secret professionnel de l'avocat — Distinction entre le secret professionnel de l'avocat et le privilège relatif au litige — Requérant demandant l'accès à des documents relatifs à des poursuites intentées contre lui et une société pour des infractions réglementaires fédérales — Annulation des accusations ou arrêt des procédures — Accès refusé par le gouvernement pour divers motifs dont l'exemption du secret professionnel de l'avocat prévue à l'art. 23 de la Loi sur l'accès à l'information — Les documents protégés par le privilège relatif au litige, continuent-ils à bénéficier de cette protection lorsque le litige prend fin? — Loi sur l'accès à l'information, L.R.C. 1985, ch. A-1, art. 23.

Droit des professions — Avocats et procureurs — Secret professionnel de l'avocat — Privilège relatif au litige — Distinction entre le secret professionnel de l'avocat et le privilège relatif au litige — Nature, portée et durée du privilège relatif au litige.

En 1995, le ministère public a porté 13 accusations contre B et une société pour des infractions réglementaires; certaines accusations ont été annulées en 1997, et

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In 2002, the Crown laid new charges by way of indictment, but stayed them prior to trial. B and the company sued the federal government in damages for fraud, conspiracy, perjury and abuse of its prosecutorial powers. In 1997 and again in 1999, B requested all records pertaining to the prosecutions of himself and the company, but only some of the requested documents were furnished. His requests for information in the penal proceedings and under the *Access to Information Act* were denied by the government on various grounds, including the "solicitor-client privilege" exemption set out in s. 23 of the Act. Additional materials were released after B lodged a complaint with the Information Commissioner. The vast majority of the remaining documents were found to be properly exempted from disclosure under the solicitor-client privilege. On application for review under s. 41 of the Act, the motions judge held that documents excluded from disclosure pursuant to the litigation privilege should be released if the litigation to which the record relates has ended. On appeal, the majority of the Federal Court of Appeal on this issue found that the litigation privilege, unlike the legal advice privilege, expires with the end of the litigation that gave rise to the privilege, subject to the possibility of defining "litigation" broadly.

Held: The appeal should be dismissed.

Per McLachlin C.J. and Binnie, Deschamps, Fish, and Abella JJ.: The Minister's claim of litigation privilege under s. 23 of the *Access to Information Act* fails. The privilege has expired because the files to which B seeks access relate to penal proceedings that have terminated. [9]

The litigation privilege and the solicitor-client privilege are driven by different policy considerations and generate different legal consequences. Litigation privilege is not directed at, still less, restricted to, communications between solicitor and client. It contemplates, as well, communications between a solicitor and third parties or, in the case of an unrepresented litigant, between the litigant and third parties. The purpose of the litigation privilege is to create a zone of privacy in relation to pending or apprehended litigation. The common law litigation privilege comes to an end, absent closely related proceedings, upon the termination of the litigation that gave rise to the privilege. Unlike the solicitor-client

les autres en 2001. En 2002, le ministère public a porté de nouvelles accusations par voie de mise en accusation, mais a ordonné l'arrêt des procédures avant le procès. B et la société ont intenté une action en dommages-intérêts contre le gouvernement fédéral pour fraude, complot, parjure et exercice abusif des pouvoirs de la poursuite. En 1997, et de nouveau en 1999, B a demandé tous les dossiers se rapportant aux poursuites engagées contre lui et contre la société, mais seuls certains de ces documents lui ont été communiqués. Le gouvernement a soulevé divers motifs, y compris l'exemption relative au « secret professionnel de l'avocat » établie à l'art. 23 de la *Loi sur l'accès à l'information*, pour rejeter les demandes de renseignements qui lui ont été présentées en vertu de cette loi et dans le cadre des procédures pénales. D'autres documents ont été communiqués à B après qu'il eut porté plainte auprès du Commissaire à l'information. Il a été décidé que la très grande majorité des documents restants avaient été exclus à bon droit de la communication parce qu'ils étaient protégés par le secret professionnel de l'avocat. Saisi d'une demande de révision en application de l'art. 41 de la Loi, le juge des requêtes a conclu que les documents soustraits à la communication par application du privilège relatif au litige devaient être divulgués si le litige auquel ils se rapportaient avait pris fin. En appel, la Cour d'appel fédérale a conclu à la majorité, sur ce point, que le privilège relatif au litige, contrairement au privilège de la consultation juridique, s'éteint à l'issue du litige qui lui a donné lieu, sous réserve de la possibilité de définir le « litige » en termes larges.

Arrêt : Le pourvoi est rejeté.

La juge en chef McLachlin et les juges Binnie, Deschamps, Fish et Abella : La revendication, par le ministre, du privilège relatif au litige, fondée sur l'art. 23 de la *Loi sur l'accès à l'information*, ne saurait être accueillie. Le privilège a pris fin parce que les dossiers auxquels B tente d'avoir accès concernent des procédures pénales qui sont terminées. [9]

Le privilège relatif au litige et le secret professionnel de l'avocat reposent sur des considérations de principe différentes et entraînent des conséquences juridiques différentes. Le privilège relatif au litige n'a pas pour cible, et encore moins pour cible unique, les communications entre un avocat et son client. Il touche aussi les communications entre un avocat et des tiers, ou dans le cas d'une partie non représentée, entre celle-ci et des tiers. L'objet du privilège relatif au litige est de créer une zone de confidentialité à l'occasion ou en prévision d'un litige. Le privilège relatif au litige reconnu en common law prend fin, en l'absence de procédures étroitement liées, lorsque le

privilege, it is neither absolute in scope nor permanent in duration. The privilege may retain its purpose and its effect where the litigation that gave rise to the privilege has ended, but related litigation remains pending or may reasonably be apprehended. This enlarged definition of litigation includes separate proceedings that involve the same or related parties and arise from the same or a related cause of action or juridical source. Proceedings that raise issues common to the initial action and share its essential purpose would qualify as well. [27] [33-39]

The litigation privilege would not in any event protect from disclosure evidence of the claimant party's abuse of process or similar blameworthy conduct. Even where the materials sought would otherwise be subject to litigation privilege, the party seeking their disclosure may be granted access to them upon a *prima facie* showing of actionable misconduct by the other party in relation to the proceedings with respect to which litigation privilege is claimed. Whether privilege is claimed in the originating or in related litigation, the court may review the materials to determine whether their disclosure should be ordered on this ground. [44-45]

Litigation privilege should attach to documents created for the dominant purpose of litigation. The dominant purpose test is more compatible with the contemporary trend favouring increased disclosure. Though it provides narrower protection than would a substantial purpose test, the dominant purpose standard is consistent with the notion that the litigation privilege should be viewed as a limited exception to the principle of full disclosure and not as an equal partner of the broadly interpreted solicitor-client privilege. [59-60]

Per Bastarache and Charron JJ.: Litigation privilege cannot be invoked at common law to refuse disclosure which is statutorily mandated. Either litigation privilege must be read into s. 23 of the *Access to Information Act* or it must be acknowledged that the Crown cannot invoke litigation privilege so as to resist disclosure under the Act. An exemption for litigation privilege should be read into s. 23 because litigation privilege has always been considered a branch of solicitor-client privilege. The two-branches approach to solicitor-client privilege should subsist, even accepting

litige qui lui a donné lieu est terminé. Contrairement au secret professionnel de l'avocat, il n'est ni absolu quant à sa portée, ni illimité quant à sa durée. Le privilège peut conserver son objet et son effet lorsque le litige qui lui a donné lieu a pris fin, mais qu'un litige connexe demeure en instance ou peut être raisonnablement appréhendé. Cette définition élargie du litige comprend les procédures distinctes qui opposent les mêmes parties, ou des parties liées, et qui découlent de la même cause d'action ou source juridique, ou d'une cause d'action connexe. Les procédures qui soulèvent des questions communes avec l'action initiale et qui partagent son objet fondamental seraient également visées. [27] [33-39]

Quoi qu'il en soit, le privilège relatif au litige ne saurait protéger contre la divulgation d'éléments de preuve démontrant un abus de procédure ou une conduite répréhensible similaire de la part de la partie qui le revendique. Même lorsque des documents seraient autrement protégés par le privilège relatif au litige, l'auteur d'une demande d'accès peut en obtenir la divulgation, s'il démontre *prima facie* que l'autre partie a eu une conduite donnant ouverture à action dans le cadre de la procédure à l'égard de laquelle elle revendique le privilège. Peu importe que le privilège soit revendiqué dans le cadre du litige initial ou d'un litige connexe, le tribunal peut examiner les documents afin de décider s'il y a lieu d'ordonner leur divulgation pour ce motif. [44-45]

Le privilège relatif au litige devrait s'attacher aux documents créés principalement en vue du litige. Le critère de l'objet principal est davantage compatible avec la tendance contemporaine qui favorise une divulgation accrue. Bien qu'il confère une protection plus limitée que ne le ferait le critère de l'objet important, le critère de l'objet principal est conforme à l'idée que le privilège relatif au litige devrait être considéré comme une exception limitée au principe de la communication complète et non comme un concept parallèle à égalité avec le secret professionnel de l'avocat interprété largement. [59-60]

Les juges Bastarache et Charron : On ne peut revendiquer le privilège relatif au litige en s'appuyant sur la common law pour refuser de communiquer un document que la loi nous oblige à divulguer. Soit l'art. 23 de la *Loi sur l'accès à l'information* doit être interprété comme visant implicitement le privilège relatif au litige, soit il faut reconnaître que le gouvernement ne peut invoquer ce privilège pour refuser de divulguer des documents sous le régime de cette loi. L'article 23 doit être tenu pour inclure implicitement une exemption concernant le privilège relatif au litige, parce que ce

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that solicitor-client privilege and litigation privilege have distinct rationales. [67] [69-71] [73]

Once the privilege is determined to exist, s. 23 grants the institution a discretion as to whether or not to disclose. Although litigation privilege is understood as existing only *vis-à-vis* the adversary in the litigation, the effect of s. 23 is to permit the government institution to refuse disclosure to any requester so long as the privilege is found to exist. In this case, the Minister's claim of litigation privilege fails because the privilege has expired. [72] [74]

Cases Cited

By Fish J.

Referred to: *R. v. Stinchcombe*, [1991] 3 S.C.R. 326; *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860; *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353; *Smith v. Jones*, [1999] 1 S.C.R. 455; *R. v. McClure*, [2001] 1 S.C.R. 445, 2001 SCC 14; *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, [2002] 3 S.C.R. 209, 2002 SCC 61; *Goodis v. Ontario (Ministry of Correctional Services)*, [2006] 2 S.C.R. 32, 2006 SCC 31; *Hodgkinson v. Simms* (1988), 33 B.C.L.R. (2d) 129; *Liquor Control Board of Ontario v. Lifford Wine Agencies Ltd.* (2005), 76 O.R. (3d) 401; *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167; *College of Physicians & Surgeons (British Columbia) v. British Columbia (Information & Privacy Commissioner)* (2002), 9 B.C.L.R. (4th) 1, 2002 BCCA 665; *Gower v. Tolko Manitoba Inc.* (2001), 196 D.L.R. (4th) 716, 2001 MBCA 11; *Mitsui & Co. (Point Aconi) Ltd. v. Jones Power Co.* (2000), 188 N.S.R. (2d) 173, 2000 NSCA 96; *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321; *In re L. (A Minor)*, [1997] A.C. 16; *Three Rivers District Council v. Governor and Company of the Bank of England (No. 6)*, [2004] Q.B. 916, [2004] EWCA Civ 218; *Hickman v. Taylor*, 329 U.S. 495 (1947); *Alberta (Treasury Branches) v. Ghermezian* (1999), 242 A.R. 326, 1999 ABQB 407; *Boulianne v. Flynn*, [1970] 3 O.R. 84; *Wujda v. Smith* (1974), 49 D.L.R. (3d) 476; *Meaney v. Busby* (1977), 15 O.R. (2d) 71; *Canada Southern Petroleum Ltd. v. Amoco Canada Petroleum Co.* (1995), 176 A.R. 134; *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.* (1988), 90 A.R. 323; *Waugh v. British Railways Board*, [1979] 2 All E.R. 1169; *Davies v. Harrington* (1980), 115 D.L.R. (3d) 347;

privilège a toujours été considéré comme une composante du secret professionnel de l'avocat. Il faut continuer à considérer le secret professionnel de l'avocat comme comportant deux composantes, même si l'on admet que le secret professionnel de l'avocat et le privilège relatif au litige reposent sur des fondements différents. [67] [69-71] [73]

Une fois établie l'existence du privilège, l'art. 23 confère à l'institution le pouvoir discrétionnaire de divulguer ou non les renseignements. Alors que le privilège relatif au litige est considéré comme n'ayant d'effet que contre l'autre partie au litige, l'art. 23 permet à une institution fédérale de refuser la communication à quiconque la demande, à condition que l'existence du privilège soit établie. La revendication par le ministre du privilège relatif au litige ne saurait être accueillie en l'espèce, parce que ce privilège a pris fin. [72] [74]

Jurisprudence

Citée par le juge Fish

Arrêts mentionnés : *R. c. Stinchcombe*, [1991] 3 R.C.S. 326; *Descôteaux c. Mierzwinski*, [1982] 1 R.C.S. 860; *Geffen c. Succession Goodman*, [1991] 2 R.C.S. 353; *Smith c. Jones*, [1999] 1 R.C.S. 455; *R. c. McClure*, [2001] 1 R.C.S. 445, 2001 CSC 14; *Lavallee, Rackel & Heintz c. Canada (Procureur général)*, [2002] 3 R.C.S. 209, 2002 CSC 61; *Goodis c. Ontario (Ministère des Services correctionnels)*, [2006] 2 R.C.S. 32, 2006 CSC 31; *Hodgkinson c. Simms* (1988), 33 B.C.L.R. (2d) 129; *Liquor Control Board of Ontario c. Lifford Wine Agencies Ltd.* (2005), 76 O.R. (3d) 401; *Ontario (Attorney General) c. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167; *College of Physicians & Surgeons (British Columbia) c. British Columbia (Information & Privacy Commissioner)* (2002), 9 B.C.L.R. (4th) 1, 2002 BCCA 665; *Gower c. Tolko Manitoba Inc.* (2001), 196 D.L.R. (4th) 716, 2001 MBCA 11; *Mitsui & Co. (Point Aconi) Ltd. c. Jones Power Co.* (2000), 188 N.S.R. (2d) 173, 2000 NSCA 96; *General Accident Assurance Co. c. Chrusz* (1999), 45 O.R. (3d) 321; *In re L. (A Minor)*, [1997] A.C. 16; *Three Rivers District Council c. Governor and Company of the Bank of England (No. 6)*, [2004] Q.B. 916, [2004] EWCA Civ 218; *Hickman c. Taylor*, 329 U.S. 495 (1947); *Alberta (Treasury Branches) c. Ghermezian* (1999), 242 A.R. 326, 1999 ABQB 407; *Boulianne c. Flynn*, [1970] 3 O.R. 84; *Wujda c. Smith* (1974), 49 D.L.R. (3d) 476; *Meaney c. Busby* (1977), 15 O.R. (2d) 71; *Canada Southern Petroleum Ltd. c. Amoco Canada Petroleum Co.* (1995), 176 A.R. 134; *Ed Miller Sales & Rentals Ltd. c. Caterpillar Tractor Co.* (1988), 90 A.R. 323; *Waugh c. British Railways Board*, [1979] 2 All E.R. 1169; *Davies c. Harrington* (1980),

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"chamber" of privacy. Another important distinction leads to the same conclusion. Confidentiality, the *sine qua non* of the solicitor-client privilege, is not an essential component of the litigation privilege. In preparing for trial, lawyers as a matter of course obtain information from third parties who have no need nor any expectation of confidentiality; yet the litigation privilege attaches nonetheless.

d'une « zone » de confidentialité; elle devrait donc y avoir droit. Une autre distinction importante mène à la même conclusion. La confidentialité, condition *sine qua non* du secret professionnel de l'avocat, ne constitue pas un élément essentiel du privilège relatif au litige. Lorsqu'ils se préparent en vue de l'instruction, les avocats obtiennent ordinairement des renseignements auprès de tiers qui n'ont nul besoin ni attente quant à leur confidentialité, et pourtant ces renseignements sont protégés par le privilège relatif au litige.

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In short, the litigation privilege and the solicitor-client privilege are driven by different policy considerations and generate different legal consequences.

33 Bref, le privilège relatif au litige et le secret professionnel de l'avocat reposent sur des considérations de principe différentes et entraînent des conséquences juridiques différentes.

The purpose of the litigation privilege, I repeat, is to create a "zone of privacy" in relation to pending or apprehended litigation. Once the litigation has ended, the privilege to which it gave rise has lost its specific and concrete purpose — and therefore its justification. But to borrow a phrase, the litigation is not over until it is over: It cannot be said to have "terminated", in any meaningful sense of that term, where litigants or related parties remain locked in what is essentially the same legal combat.

34 L'objet du privilège relatif au litige est, je le répète, de créer une « zone de confidentialité » à l'occasion ou en prévision d'un litige. Aussitôt que le litige prend fin, le privilège auquel il a donné lieu perd son objet précis et concret — et, par conséquent, sa raison d'être. Mais, comme certains le diraient, le litige n'est pas terminé tant qu'il n'est pas terminé : On ne peut pas dire qu'il est « terminé », au vrai sens du terme, lorsque les parties au litige ou des parties liées demeurent engagées dans ce qui constitue essentiellement le même combat juridique.

Except where such related litigation persists, there is no need and no reason to protect from discovery anything that would have been subject to compellable disclosure but for the pending or apprehended proceedings which provided its shield. Where the litigation has indeed ended, there is little room for concern lest opposing counsel or their clients argue their case "on wits borrowed from the adversary", to use the language of the U.S. Supreme Court in *Hickman*, at p. 516.

35 Sauf lorsqu'un tel litige connexe persiste, il n'est ni nécessaire ni justifié de protéger contre la communication quelque élément que ce soit qui aurait pu faire l'objet d'une divulgation forcée, n'eût été la procédure en cours ou prévue en raison de laquelle il est protégé. Lorsque le litige est effectivement terminé, il n'y a pas vraiment lieu de craindre que l'avocat de la partie adverse ou ses clients plaident leur cause en [TRADUCTION] « se servant des capacités intellectuelles de l'adversaire », pour reprendre les termes utilisés par la Cour suprême des États-Unis dans *Hickman*, p. 516.

I therefore agree with the majority in the Federal Court of Appeal and others who share their view that the common law litigation privilege comes to an end, absent closely related proceedings, upon the termination of the litigation that gave rise to the

36 Je suis donc d'accord avec les juges majoritaires de la Cour d'appel fédérale et ceux qui partagent leur avis pour dire que, en l'absence de procédures étroitement liées, le privilège relatif au litige reconnu en common law prend fin lorsque