

EB-2013-0321

**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 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*.

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**SCHOOL ENERGY COALITION  
MOTION COMPENDIUM**

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**AMPCO Interrogatory #005**

**Ref:** Exhibit A2, Tab 2, Schedule 1, Page 2

**Issue Number:** 1.2

**Issue:** Are OPG's economic and business planning assumptions for 2014-2015 appropriate?

**Interrogatory**

Preamble: OPG indicates its overall generation capacity will decline by 25 per cent between 2015 and 2020 as the remaining coal units retire and the Pickering nuclear plant ceases operations around 2020.

In considering the above, please discuss OPG's longer term 10 year business plan outlook including emerging issues and proposed spending levels beyond 2016 and include any supporting materials such as memorandums, reports and presentations to OPG's Board of Directors that address this issue.

**Response**

Information beyond the 2014 / 2015 test period does not impact the setting of rates for this application and, therefore, is not relevant.

**SEC Interrogatory #116**

**Ref:** Auditor General's 2013 Annual Report/p.162

**Issue Number:** 6.8

**Issue:** Are the 2014 and 2015 human resource related costs (wages, salaries, benefits, incentive payments, FTEs and pension costs) appropriate?

**Interrogatory**

In response to Recommendation 1, OPG stated that: "In 2012, the Ministry of Energy engaged a consulting firm to assess OPG's existing benchmarking studies, and to identify organization and structural opportunity for savings". Please provide a copy of the referenced report.

**Response**

OPG does not own the referenced report. A request has been made to the Ministry of Energy for permission to submit the report as part of these proceedings. The response to that request is pending.

**CCC Interrogatory #005**

**Ref:** Ex. A4/T1/S1/p. 2

**Issue Number:** 1.2

**Issue:** Are OPG's economic and business planning assumptions for 2014-2015 appropriate?

**Interrogatory**

Please provide a copy of the KPMG Efficiency Review of OPG.

**Response**

Please see Ex L-6.8-17 SEC-116.

# ONTARIO ENERGY BOARD

## Rules of Practice and Procedure

(Revised November 16, 2006, July 14, 2008, October 13, 2011, January 9, 2012, January 17, 2013 and April 24, 2014)

- (d) expedite the proceeding.

### 26.02 Interrogatories shall:

- (a) be directed to the party from whom the response is sought;
- (b) contain a specific reference to the evidence;
- (c) be grouped together according to the issues to which they relate;
- (d) contain specific requests for clarification of a party's evidence, documents or other information in the possession of the party and relevant to the proceeding;
- (e) be numbered using a continuous numbering system such that:
  - the format is [issue number] [acronym of party] [interrogatory number for that party]
  - the "issue number" corresponds to the issues list, or if there is no issues list in the proceeding, to the exhibit or chapter number or letter in the application;
  - the "acronym of party" corresponds to the Board-issued list of acronyms;
  - the "interrogatory number for that party" is sequential for that party despite a change in issue number (e.g. 2 Staff 4 represents Board staff's fourth interrogatory on issue 2); and
  - if a supplementary round of interrogatories is ordered, the "interrogatory number for that party" remains sequential for that party and the suffix "s" is added to the interrogatory number;
- (f) be filed and served as directed by the Board; and
- (g) set out the date on which they are filed and served.

## 27. Responses to Interrogatories

27.01 Subject to **Rule 27.02**, where interrogatories have been directed and served on a party, that party shall:

- (a) provide a full and adequate response to each interrogatory;

- There were numerous examples of employees who had started working at OPG before their security clearances were issued.
- In a sample of 50 employees who were on OPG's payroll but not on its security clearance record, 13 had never obtained security clearances. OPG informed us that this was because hydro/thermal and corporate support staff hired before May 2003 were exempt from security clearance. One of these employees had held various senior positions in nuclear finance, nuclear reporting and nuclear waste management, and had access to sensitive information. The remaining 37 employees in our sample had joined OPG after May 2003, but more than half of them had never obtained security clearances or were working with expired clearances.

### RECOMMENDATION 1

To ensure that staffing levels are reasonable and that it has the right people in the right positions to meet its business needs, Ontario Power Generation should:

- evaluate and align the size of its executive and senior management group with its overall staffing levels;
- address the imbalances between overstaffed and understaffed areas in its nuclear operations; and
- review and monitor compliance with its recruitment and security clearance processes.

### ONTARIO POWER GENERATION RESPONSE

In 2010, Ontario Power Generation (OPG) launched a multi-year Business Transformation initiative to reduce labour costs, create a sustainable cost structure and allow OPG to continue to moderate consumer electricity prices.

The number of executive and senior management positions, as well as overall staffing levels, is addressed through Business Transformation.

There are currently a number of interim positions relating to Business Transformation, project work and other new initiatives. By August 2013, there were 218 senior management positions compared to 238 at the end of 2012. This number is forecast to continue to decline.

OPG has conducted extensive benchmarking of its nuclear and other operations. Based on this benchmarking, we are executing several initiatives that are designed to address opportunities for efficiencies, cost reductions and staff imbalances in nuclear operations. In 2012, the Ministry of Energy engaged a consulting firm to assess OPG's existing benchmark studies, and to identify organization and structural opportunities for cost savings. The report validated OPG's Business Transformation initiative and its objectives. We will continue to identify and implement other improvement initiatives.

As recommended by the Auditor General, OPG will review and monitor compliance with its recruitment and security clearance processes. We will also conduct an internal audit of our hiring practices.

### COMPENSATION

OPG's labour costs account for most of its total operating costs. This proportion has increased from 55% in 2003 to 64% in 2012. In its March 2011 decision, the OEB also noted the significance of OPG's labour costs compared to its total operating costs and that its compensation levels were a concern in light of the overall poor performance of its nuclear business, in terms of operations and costs, compared to its peers. Therefore, the OEB disallowed \$145 million in compensation costs, stating in its decision that the staffing levels and amount of compensation at OPG were both too high. OPG appealed the OEB's ruling. In June 2013, the Ontario Court of Appeal found that the OEB had based its decision on information that had not been available to OPG when it

### **3.0 THE BUSINESS TRANSFORMATION INITIATIVE**

#### **3.1 Background**

OPG introduced BT in 2011 to develop approaches to reducing staff levels and modifying OPG's cost structure consistent with expected decreases in capacity and energy production in the coming years.

#### **3.2 Business Transformation Objectives**

Business Transformation is intended to transform OPG so that it can compete, grow and respond to changing market conditions without compromising continued safe and reliable operations. This transformation is being accomplished through:

- Reducing staff levels by 2,000 employees by the end of 2015. This reduction aligns with expected attrition that is factored into business plan assumptions, and better aligns OPG's staff levels with production and revenue expectations.
- Creating a scalable organization, which is more efficient and effective. This will give OPG flexibility to scale up or down areas of the organization based on changing needs to support various operational units.
- Moving to a centre-led organizational model that allows best practices to be better shared and integrated across the company.

In 2012, the Ministry of Energy announced an Efficiency Review of OPG and engaged KPMG to perform the review. As part of that process, KPMG was asked to identify organizational and structural opportunities for efficiency improvements. KPMG reviewed key aspects of the BT project and reached the following conclusion:

"Based on observations from management interviews, business plans and project plans, KPMG believe that OPG has employed a systematic and structured approach to developing a company-wide transformation plan. OPG has incorporated many leading practices for implementing a large business transformation such as assigning dedicated staff to implement the transformation, establishing a program management office, incorporating change management with a focus of cultural change and incorporating business transformation milestones into executive performance plans."

**SEC Interrogatory #025**

**Ref:** A1-2-2/p.1

**Issue Number:** 3.1

**Issue:** What is the appropriate capital structure and rate of return on equity for the currently regulated facilities and newly regulated facilities?

**Interrogatory**

Please provide all studies, analyses, forecasts, presentations or other documents relating in whole or in part to the Applicant's expected, planned or forecast debt/equity ratio over the period 2014-2018.

**Response**

For regulatory accounting, reporting and ratemaking purposes the expected/planned/forecast debt/equity ratio is the 53/47 debt/equity ratio approved by the OEB. The only document related to OPG's approved debt/equity ratio was provided in Ex. L-03.1-17 SEC-024.



**CME Interrogatory #001**

**Ref:** 2013 Annual Report of the Office of the Auditor General of Ontario (December 10, 2013)

**Issue Number:** 1.0

**Issue:** General

**Interrogatory**

CME wishes to better understand the process undertaken by OPG following the release of the Annual Report of the Office of the Auditor General of Ontario on December 10, 2013. To this end:

(a) Please provide all presentations, PowerPoint slides, briefing notes, or other written memoranda prepared by OPG for OPG's Board of Directors relating to that Report of the Auditor General; and

(b) Please provide all written questions, comments or directions provided by OPG's Board of Directors to OPG relating to that Report of the Auditor General.

**Response**

Attachment 1 summarizes OPG's ongoing actions in response to the Auditor General's Report.

The Auditor General's Report was issued months after OPG filed its Application and after the filing of OPG's Impact Statement.

Therefore, any attempt to link the potential outcomes from these responsive actions to changes in OPG's 2014 -2015 costs would be speculative at this point. Many of the actions are still being developed. Moreover, full implementation of these actions would require changes in OPG's collective agreements. Even for non-represented employees, notice may be required before the most significant changes could be made. Thus, OPG declines to produce the requested materials on grounds of relevance.

Dec. 10, 2013

### OPG SUMMARY OF KEY ACTIONS 2013 AUDITOR GENERAL REPORT ON HUMAN RESOURCES POLICIES

The Auditor General's report covers a 10-year time period. In some cases the report highlights areas which OPG already had identified and has since addressed, or is currently addressing. In other areas it provides insights into issues the company will act upon and will report back openly and quickly.

In 2010 OPG initiated a business transformation to address culture and process change to ensure OPG meets the expectations and needs of the ratepayers. Since December 2012 the number of senior managers has gone down by six per cent, and since 2010, there's been a nine per cent drop in total base salary costs for management. We will also save an estimated \$1 billion over six years (2011-2016) by reducing the overall headcount, from ongoing operations, by 2,330 or 20 per cent of 2011 levels. The departure of 1,500 people since January 2011 has already saved \$275 million.

We are continuing that transformation, which was recognized by KPMG as the right way to address the needed change. The Ministry of Energy engaged KPMG to assess OPG's existing benchmark studies and to identify organization and structural opportunities for cost savings. KPMG's report validated OPG's business transformation initiative and its objectives.

*"KPMG believes that OPG has employed a systematic and structured approach to developing a company-wide transformation plan. OPG has incorporated many leading practices for implementing a large business transformation such as assigning dedicated staff to implement the transformation, establishing a program management office, incorporating change management with a focus on cultural change and incorporating business transformation milestones into executive performance plans."* KPMG Dec. 6, 2012.

The following is a summary of key actions OPG is taking (or has taken) to address the findings. A more detailed list of actions will be posted on our website later this week. In the coming weeks and months it will be updated to show our progress.

<b>ACTIONS – PLANNED AND UNDERWAY</b>	<b>PLANNED COMPLETION DATE</b>
<b><i>Executive and Senior Management Staffing Levels</i></b> <ul style="list-style-type: none"> <li>Decrease senior management headcount in proportion to overall headcount reductions. (Reduced by 6% since Dec. 2012).</li> <li>New senior executives continue to receive lower</li> </ul>	<p>2016</p> <p>Ongoing</p>

<p>compensation than their predecessors. Hiring of all director and above positions will require CEO approval.</p> <ul style="list-style-type: none"> <li>Reduce headcount by a further 830, for a total reduction of 2,330 and \$1B savings by 2016.</li> </ul>	<p>2016</p>
<p><b>Benchmarking of Staffing Levels at Nuclear Facilities</b></p> <ul style="list-style-type: none"> <li>Business plans to define continuing actions to move from current 8% over benchmark to benchmark (down from 17% over in Feb. 2012).</li> <li>CNSC and other external peer groups confirm OPG continues to ensure strong nuclear safety and operational performance.</li> </ul>	<p>2016</p> <p>Ongoing</p>
<p><b>Recruitment Practices and Requirements</b></p> <ul style="list-style-type: none"> <li>Centralized recruitment function to improve controls, compliance and efficiency of hiring processes.</li> <li>Amend Code of Conduct to clarify expectation regarding hiring policies. Failure to follow policy will result in disciplinary action.</li> <li>Conduct compliance reviews for internal/external vacancies.</li> <li>Reviewed all groups with same addresses to ensure valid hiring process was followed.(reviewed 284 files from 2011, 2012; no documentation retained for others beyond two years; found 4 cases without proper documentation).</li> </ul>	<p>Complete</p> <p>Q1 2014</p> <p>Ongoing</p> <p>Complete</p>
<p><b>Compensation and Incentive Awards</b></p> <ul style="list-style-type: none"> <li>Implement outcomes of government legislation to regarding broader public sector executive compensation.</li> <li>Reduce headcount by additional 830 for total reduction of 2,330 and \$1B savings by 2016 (already achieved 1,500 reduction since Jan. 2011);</li> <li>Reduce all management AIP for 2013 by 10%. Board to review AIP program for 2014 and beyond.</li> <li>Continue to seek collective agreements that reflect OPG business objectives and government compensation constraints.</li> <li>Reduced base salary costs for management by 9%</li> </ul>	<p>Contingent on government legislation</p> <p>2016</p> <p>Q1 2014</p> <p>Ongoing</p> <p>Completed. Further reductions ongoing.</p>

compared to 2010.	Attachment 1	
<b><i>Employee Housing and Moving Allowance</i></b> <ul style="list-style-type: none"> <li>• Adopt Ontario Public Service Relocation policy for management employees.</li> <li>• Conduct review of practices and controls related to employee relocation, including a review of practices for guarantee house values.</li> <li>• Review OPS relocation policy against collective agreements to determine what if any changes are required.</li> </ul>	<p>Q1 2014</p> <p>Q1 2014</p> <p>Coterminous with collective bargaining</p>	
<b><i>Security Clearance Requirements</i></b> <ul style="list-style-type: none"> <li>• Review security clearance requirements for non-nuclear employees to ensure appropriate levels in place.</li> <li>• Implement enhanced compliance monitoring method.</li> <li>• Implemented controls to ensure immediate security clearance compliance for new hires and ongoing compliance for existing employees.</li> <li>• CNSC, CSIS audits validate that OPG has an industry-leading nuclear security clearance program. All employees who require access to nuclear site or sensitive nuclear information have appropriate clearance. All board members at the time of the AG audit now have security clearance.</li> </ul>	<p>Q1 2014</p> <p>Q3 2014</p> <p>Complete</p>	
<b><i>Pensions and Benefits</i></b> <ul style="list-style-type: none"> <li>• Begin implementation of Board directed management pension and benefits reforms.</li> <li>• Participate in Province's review of electricity sector pension plan reforms.</li> <li>• Any changes to pension and benefits for unionized staff will be a matter for future rounds of collective bargaining.</li> </ul>	<p>Q1 2014</p> <p>TBC – dependent on Ministry of Finance</p> <p>Coterminous with collective bargaining</p>	
<b><i>Managing Contractors and Overtime</i></b> <ul style="list-style-type: none"> <li>• Conduct comprehensive assessment of contractor control framework, including contract structures, time capture and approval processes and tools.</li> <li>• Implement time tracking system for contractors at nuclear sites.</li> </ul>	<p>Q2 2014</p> <p>Q1 2014</p>	

<ul style="list-style-type: none"><li>• Implemented enhanced management approvals and controls to limit individual overtime in Nuclear.</li></ul>	Completed
<b><i>Use of Non Regular Staff and Contract Resources</i></b> <ul style="list-style-type: none"><li>• Strengthen business case requirements and approvals for hiring retirees as contractors.</li><li>• Strengthen succession planning and develop knowledge transfer plans for critical roles.</li></ul>	 Q2 2014  Q4 2014

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For more information, please contact:

Ontario Power Generation  
Media Relations  
416-592-4008 or 1-877-592-4008  
Follow us @ontariopowergen

**SEC Interrogatory #005**

**Ref:** A2-1-1-Attach 1/p.6, and A4-1-1

**Issue Number:** 1.2

**Issue:** Are OPG's economic and business planning assumptions for 2014-2015 appropriate?

**Interrogatory**

Please provide the original plan setting out the Business Transformation Initiative, including any supporting sub-plans. Please provide the last three reports to the Board of Directors on the results of the Business Transformation Initiative.

**Response**

Attachment 1 is the Business Transformation Plan submitted to OPG's Board of Directors. Attachments 2, 3 and 4 are the last three quarterly reports to OPG's Board of Directors. OPG has provided this material in recognition of the importance of this key initiative to controlling costs in the test period.



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# Business Transformation Project

CHRC Meeting  
December 14, 2011

**ONTARIOPOWER**  
GENERATION

OPG CONFIDENTIAL

# Agenda

Filed: 2014-03-19  
EB-2013-0321  
Exhibit L  
Tab 1.2  
Schedule 17 SEC-005  
Attachment 1

- Objectives
- Organizational Structure
- High Level Implementation Schedule
- High Level Cost/Benefit Summary
- Significant Risks associated with implementation
- Labour Relations Strategy
- Change Management
- Communication Plan



# Business Transformation Objectives

Filed: 2014-03-19

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Environ L

Tab 1.2

Schedule 17 SEC-005

Attachment 1

- Transform OPG for the future to create a scalable organizational model to meet changing market conditions and capitalize on future business opportunities.
- Ensure successful implementation of 2012-2014 Business Plan and drive the organization to median benchmarks or better.
- Additional savings to be realized late 2014/early 2015

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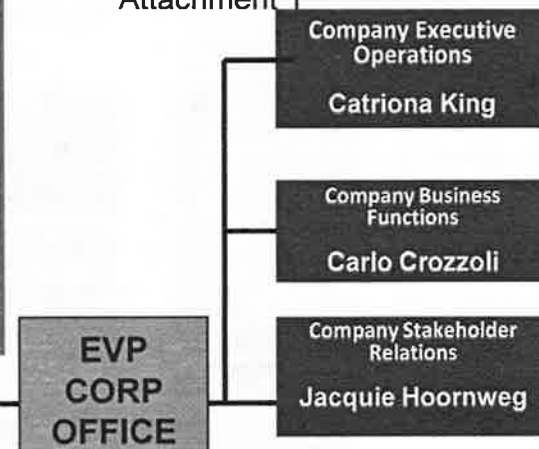
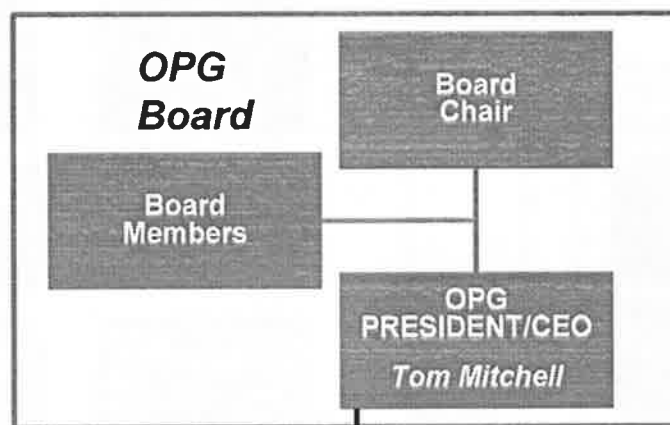
# Organizational Design Principles

- Create an Integrated Operating Model to ensure BTS objectives are met
- No compromise on safety or reliability
- Deliver on the 2012 – 2014 Business Plan
- Begin the transition to the new operating model on January 1, 2012
- Ownership of the execution transitions to the ELT and their current direct reports during Q1, 2012 with a defined project infrastructure
- Complete the transition in Q1, 2015

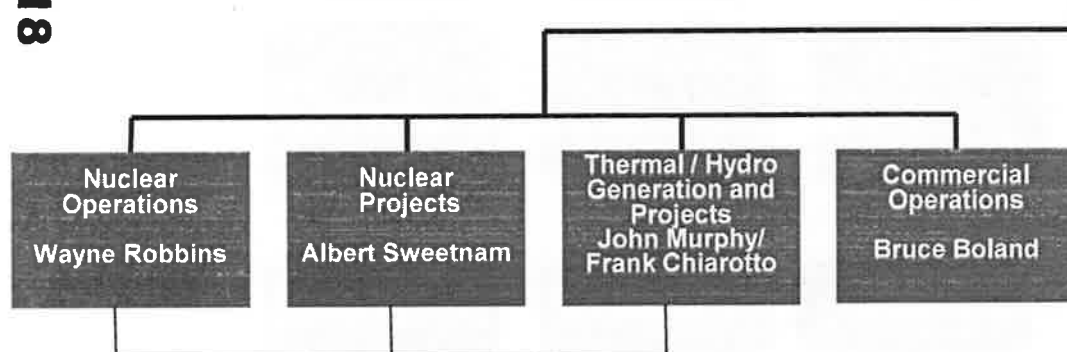
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# Organizational Structure

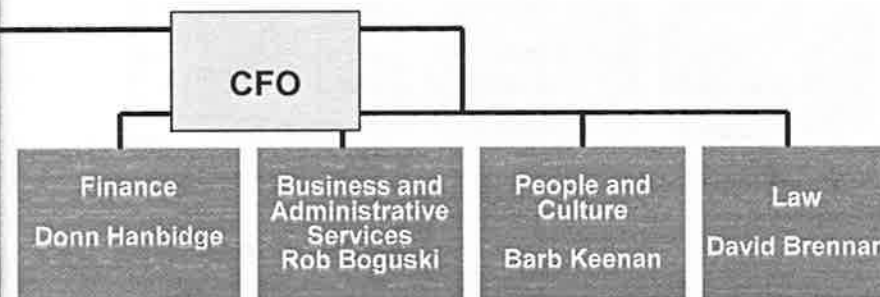
**CORPORATE OFFICE**  
*Provide Strategic Direction  
and Board Support*



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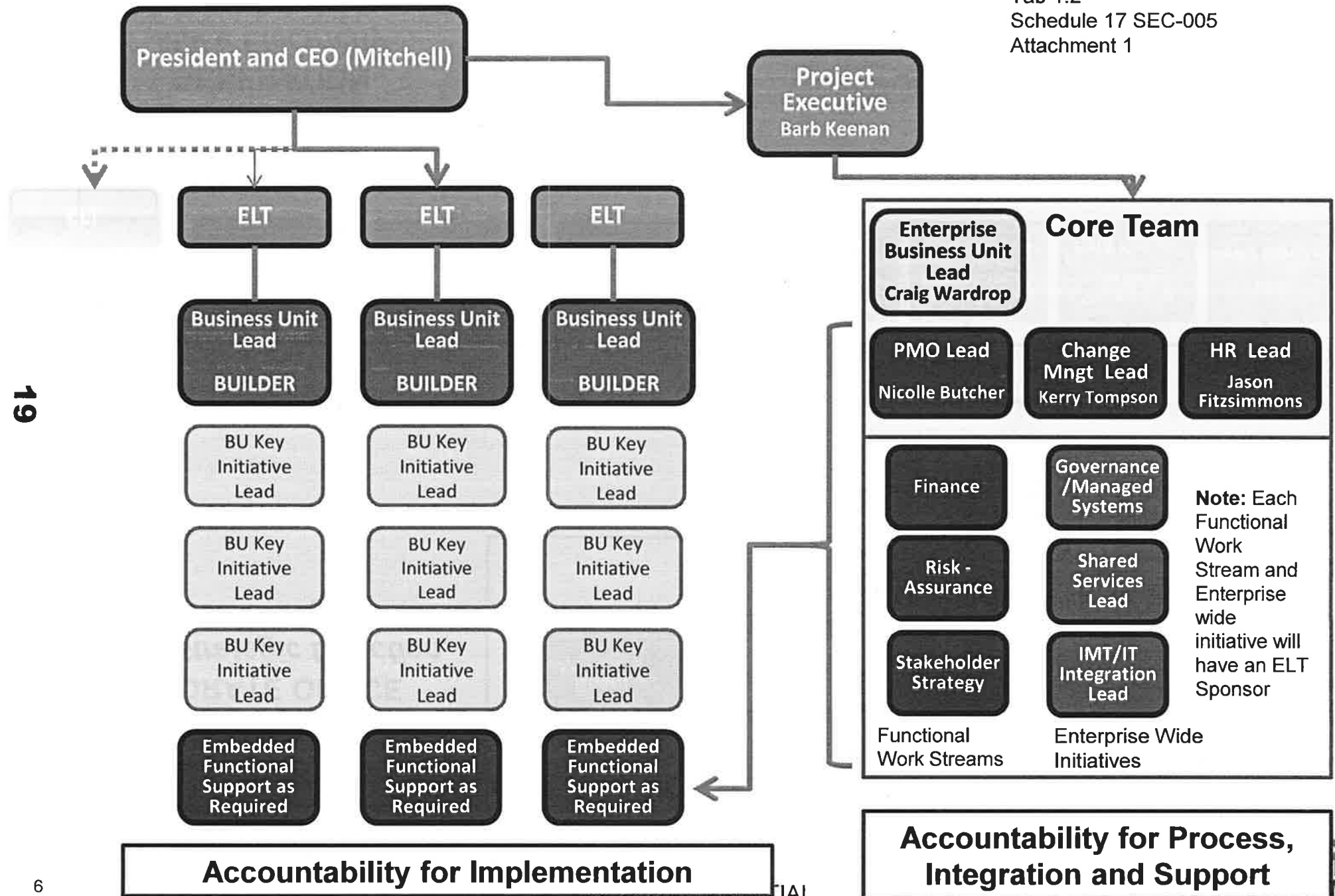


**GENERATION**  
*Make Electricity*



**SUPPORT SERVICES**  
*Provide Services*

# BT Project Implementation Structure



# Level 2 Schedule

Filed: 2014-03-19

EB-2013-0321

Exhibit L

Tab 1.2

Schedule 17, SEC-005

Attachment 4

2015

2014

2013

2012

## 1. Build the Foundation

- A. Pre-transition planning.
- B. Foundational initiatives

### Outcomes of Phase 1:

- Broad SLT involved
- Foundational initiatives and "quick wins" launched completed or underway with progress
- Plan finalized and integrated with business plan priorities.
- Selection Preparation
- Attrition aggressively managed.

## 2. Initiate Centre-Led Organization

- A. Align functional accountability to new leaders

### Outcomes of Phase 2:

- "Leaders" selected and in place. (L2/some L3)
- Organization transitioned at highest level.
- Centre-led organizations "kicked off".
- Establish centre-led transition "partnering agreements"
- Attrition aggressively managed.

## 3. Transform the Delivery Model

- A. Update streamlined managed systems/process.
- B. Design and select for centre-led organization. (80/20)

### Outcomes of Phase 3:

- Managed systems (processes, procedures, etc) streamlined and implemented.
- Shared Services delivery model defined and processes established.
- New organization structures defined – bring as much of target organization forward as possible.
- All management group positions selected
- JRPT completed placing all people into new organization structure, including redeployments. Units of Application aligned to new functional structure, and people assigned to appropriate functional units.
- Updated term sheets with new service delivery expectations.
- New centre-led teams "kicked off".
- Attrition aggressively managed.

## 4. Finalize Centre-led Organization

- A. Implement final organization.
- B. Complete final reductions.

### Outcomes of Phase 4:

- Final target organization implemented.
- Shared Services fully operational and functioning
- JRPT's implemented by function as necessary.
- Full and final reductions taken at the end of 2104/early 2015..

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GENERATION

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# Financial Objectives

- 2012- 2014 business plan incorporates significant headcount reductions of ~1,000 regular staff and generally align with expected attrition over the planning period
- OM&A reductions embedded in the business plan will be incorporated into the 2012 rate application to the Ontario Energy Board for 2013/2014 rate
- Headcount reductions would notionally translate to OM&A savings of \$75 Million over this period, but are largely offset by cost pressures due to labour escalation and other factors
- Work undertaken as part of business Transformation will increase confidence in meeting headcount targets by
  - changing organization structure and realigning work
  - modifying service delivery model
  - developing implementation plans for process improvements contemplated as part of business plan and identifying additional opportunities to achieve targets
- Additional headcount reductions of ~1500 will take place in the late 2014/early 2015 timeframe as other initiatives come to fruition.
- Annual OM&A savings in 2015 and beyond are expected to be ~\$250M annually

# Key Risk Summary

Filed: 2014-03-19  
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Exhibit L  
Tab 1.2  
Schedule 17 SEC-005  
Attachment 1

## ■ Leadership Challenge

- Sustained Leadership Alignment
- Staff Engagement
- Skills Retention

## ■ Results Not Achieved

- Gains not as projected due to planning level at this stage
- Attrition not as projected
- LR Complexity
- Change Capacity

## ■ Stakeholder Influence

- CNSC
- Shareholder
- OEB

# Labour Relations Strategy

Filed: 2014-03-19  
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Exhibit L  
Tab 1.2  
Schedule 17 SEC-005  
Attachment 1

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- Redeploy to new structure with no Surplus (Article 64B).
- The Business Transformation is changing the company to such a significant degree that new Units of Applications (UA) must be jointly created.
- Aggressively manage performance and attrition.
- Attrition should be sufficient to meet the 2012 – 2014 Business Plan.
- Work within the bounds of the current collective agreements
- Selected, targeted packages in early 2015 if attrition does not achieve desired results



# Change Management Challenges

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- 1 Given our history, there is doubt around whether or not there is a compelling and sustaining 'burning platform' for change
- 2 The spotlight is on ELT, and there is question if ELT is really aligned and owning/driving the change
- 3 Complexity of the stakeholder landscape and their competing needs are creating challenges to communicate and move ahead with certainty.
- 4 While leaders agreed with the operating model, there was general concern that trust and accountability together are fundamental to it's success, and are not currently present.
- 5 There is recognition of the vital importance of culture as a change driver that will ensure either success or failure of this transformation
- 6 There is absence of a clear understanding of OPG's identity and future vision
- 7 A critical mass of Middle Manager/FLM who can 'own the change' will be very important. Impacts to this role will need to be carefully considered while ensuring they are set up to effectively lead change.
- 8 Importance of appropriately timing the transformation – neither too fast nor too slow

# Change Management Roadmap (to 2012 Q3)

Program Phases

1. Build the Foundation

2012

2015

2. Initiate Centre-Led Organization

3. Transform the Delivery Model

4. Finalize Centre-Led Organization

Change Navigation

BTS Framework, Missions and Implementation Plan

- Mission, From/To
- Structure, Team
- Plan, Milestones

Change Mgmt Planning

- Updated BIA
- Updated Change Roadmap

Change Mgmt Planning

- Integrated BIA
- Change Roadmap
- Team Structure

Culture & Leadership

Culture & Behaviours Definition

- Plan to engage leaders
- Leader Expectations
- Manager Expectations

Culture and Behaviours Roll-out

ELT Alignment – Preparing to Lead Change

- Personal Change
- Sponsorship of Quick Wins
- Alignment as a team
- Retention Reach-out

New Leadership Team Kickoffs

Org. Alignment

Embed the Operating Model (Organization Blueprint)

- Methods, Tools, Forums
- Accountability Model
- Measures and Matrix Objectives
- Partnering Agreements

Monitor and Improve (Adjust based on timing of Transformation Initiatives)

Leadership and Engagement

Stakeholder Plan (Jacquie)

Internal Stakeholder Plan

Retention Reach-out

SLT Forum (Feb 3)

Dir/Mgr Cascade

Empl. Cascade

- Deep-Dive on Changes, BIA
- Roadmap
- Support: FAQs, Narrative

Empl. Cascade

SLT Forum (Apr)

Dir/Mgr Sessions

- Topics TBD

Cross-Leadership Partnering Sessions

Learning

Learning Requirements

Learning and Knowledge Management Strategy

Learning Program: "Leading Change"

Learning Program "Leading & Working in a Matrix"

Day-in-the-Life (Role of the Manager)

Change Initiative Learning

Knowledge Capture & Retention

Business Change Readiness

Business Change Readiness Approach (Process, Tools, R&R, etc.)

Business Change Readiness Lead Selection and Orientation

Site Readiness Launch

Change Readiness Survey

# Stakeholder Relations

## Communication goals and risk mitigation:

- **Synchronize interdependent messaging**
  - Business Transformation / Ontario Energy Board application and hearing / Power Workers Union contract negotiations / Shareholder inputs: Auditor general report, Drummond report, 2012 spring budget / Salary disclosure / Quarterly financials / Nuclear plant licensing activities
- 26 ▪ **Enable culture and engage employees in change**
  - A stepped approach to messaging tied to change management activities to enable culture evolution to occur.
  - Change implementation and communication owned and led by the line; accepted, understood and adopted by employees.
- **Earn value recognition from stakeholders / shareholder for BT initiative and outcomes**
  - Achieve maximum value and recognition that OPG is acting as a responsibly-managed, efficient and effective company that should be the trusted generator of choice for Ontario.

May 15, 2013

**Business Transformation Q1 Update****EXECUTIVE SUMMARY:**

The purpose of this report is to provide an update on significant Business Transformation activity completed in the first quarter of 2013. Further, an update on staff reduction numbers in Q1 and project life-to-date numbers are also provided.

Consistent with OPG's mission to be the electricity generator of choice in Ontario, Business Transformation sets the foundation for the creation of an agile, scalable and competitive organization capable of meeting changing market conditions and capitalizing on future business opportunities. In 2012, the Centre-Led organization was initiated, performance improvement initiatives, "quick wins", were completed and the organization design finalized. Much of the Business Transformation effort thus far in 2013, has been focused on the process of redeploying staff from the legacy organization into the newly designed organization. Most prerequisite work is complete putting OPG in a good state of readiness for deployment.

**Submitted By:***Original signed by*

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Mike Martelli  
Project Executive  
Business Transformation

*Original signed by*

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Barb Keenan  
Senior Vice President  
People & Culture & Chief Ethics Officer

# Ready for Redeployment

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Exhibit L  
Tab 1.2  
Schedule 17 SEC-005  
Attachment 2

Create an agile, scalable, competitive organization capable of meeting changing market conditions while capitalizing on future business opportunities

## Managing the Redeployment Process

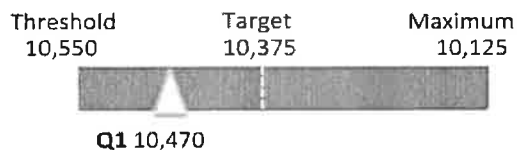
- A redeployment start date has been set for May 24<sup>th</sup>. The start is symbolized by management's presentation of the new organization details to our unions.
- Organizations were finalized and approved by ELT. This was followed by an organization freeze and a vacancy freeze.
- Joint redeployment training was conducted for both Society and Management redeployment team members.
- Coal Closure language was invoked for Lambton GS, Nanticoke GS and Thunder Bay GS. With agreement from the Society, the Coal Closure process was integrated into the reorganization deployment process (LOU 191)
- Remaining Management Group selections will start concurrently with start of the redeployment process. The expectation is that most remaining MG positions will be filled by the end of Q2. Many of these positions are boundary positions with the Society of Energy Professionals and therefore, could not be filled until formal discussions explaining exclusion criteria were completed.

## Managing Redeployment Risk

- A redeployment Impact Assessment was completed and presented to ELT for review and agreement. Impact mitigation plans are in progress and on track to be in place before May 24<sup>th</sup>.
- To ensure an orderly start to redeployment, a detailed strategy for the presentation of organization details to the unions has been established.
- To ensure consistent messaging to all employees, a communication cascade detailing the organization changes is planned to start days after the organization details are presented to our unions.
- Management continues to meet with union executives on a monthly basis to discuss the details of a centre-led organization and the potential impact to staff.
- A draft Readiness Assessment was presented to ELT in March. Organization changes relating to coal closure and Nuclear Projects reorganization are complete.

## Managing Attrition

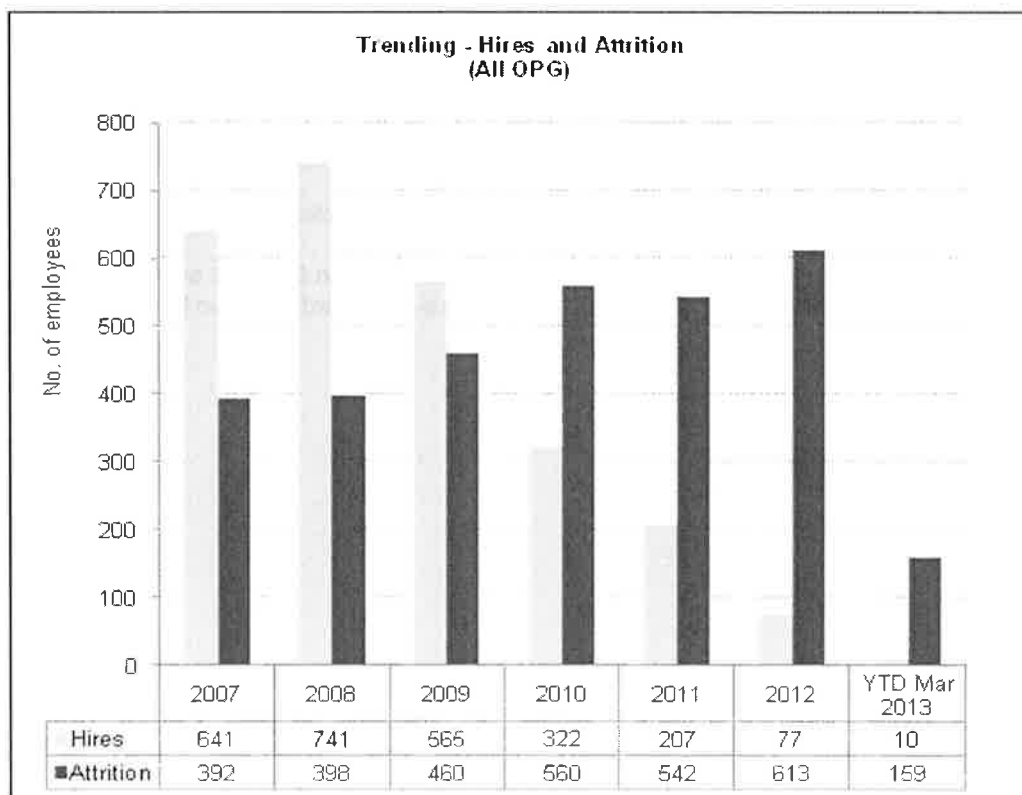
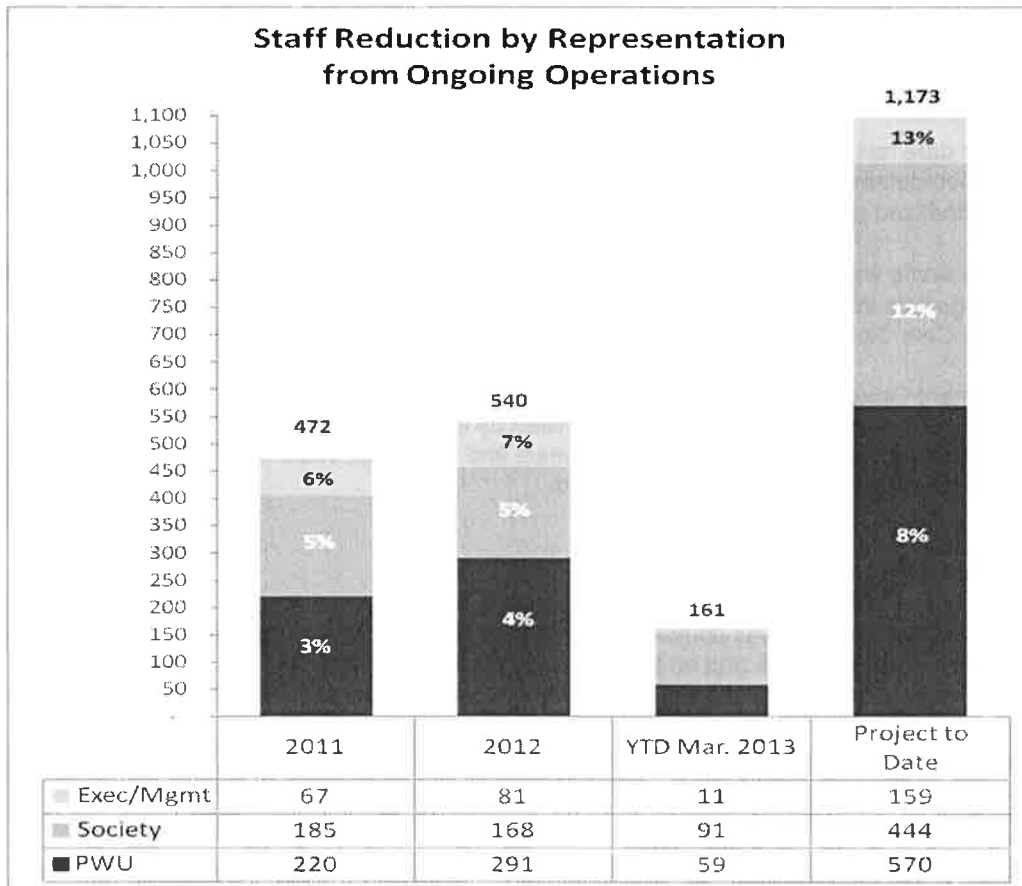
- Vacancies continue to be managed aggressively. A hiring freeze is in effect and a gated process for hiring critical operations staff is in place.
- Many vacancies have been held in the Hydro organization to help offset the deployment of Coal Closure staff.
- 2013 Q1 staff reduction from ongoing operations was 161 compared to 156 in Q1 2012 and 129 in Q1 2011.
- OPG headcount from ongoing operations against 2013 performance scorecard is shown below.



# Ready for Redeployment

Filed: 2014-03-19  
EB-2013-0321  
Exhibit L  
Tab 1.2  
Schedule 17 SEC-005  
Attachment 2

Create an agile, scalable, competitive organization capable of meeting changing market conditions while capitalizing on future business opportunities



**Business Transformation Q2 Update****EXECUTIVE SUMMARY:**

The purpose of this report is to provide an update on significant Business Transformation activities completed in the second quarter of 2013 including an update on staff reduction numbers in Q2 and cumulatively from commencement of the project.

We are in the 3<sup>rd</sup> Phase, "Transform the Way We Work", of our four phased Business Transformation Plan. In second quarter of 2013 we achieved a significant milestone with the commencement of redeployment for the Society and PWU represented employees. This milestone is the culmination of significant work across the entire leadership team. Information on the organizational structure and the redeployment processes was cascaded out to the employees once the information had been formally handed over to the Unions. We are also continuing to make progress on the key change initiatives and shifting our culture.

**Submitted By:**

*"Original signed by"*

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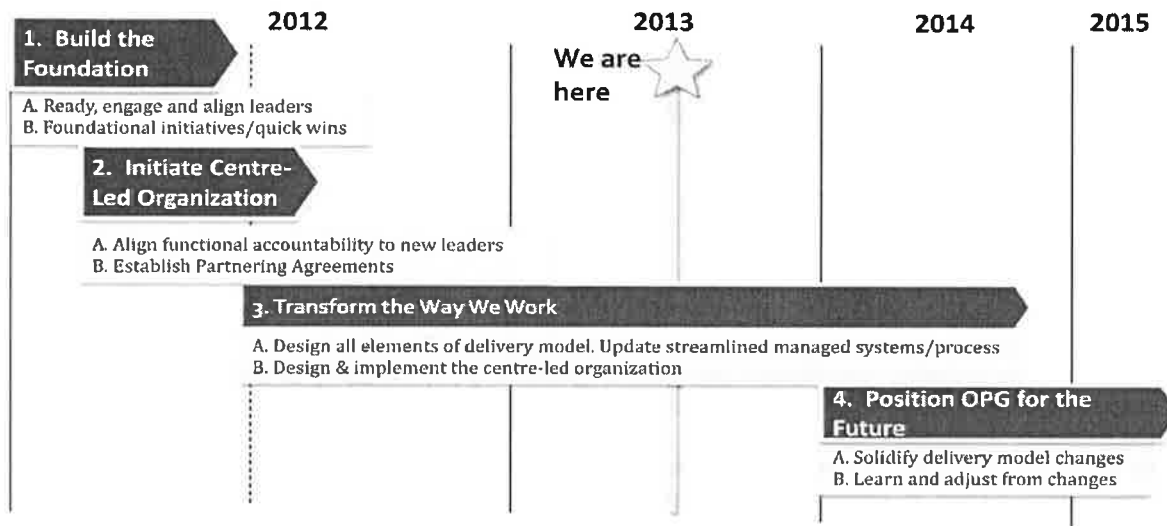
Nicolle Butcher  
Project Executive  
Business Transformation

*"Original signed by"*

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Barb Keenan  
Senior Vice President  
People & Culture & Chief Ethics Officer

## Business Transformation – Transforming the Way We Work through Redeployment and Change Initiatives



We are continuing on Phase 3 of our BT journey – Transform the Way We Work. Having successfully completed Phase 1 and 2, our focus is designing and implementing the centre-led organization, designing delivery models, and streamlining systems and processes to accommodate declining staff numbers. This BT Phase has the biggest impact on individuals so we are starting to receive more union and employee feedback relative to the changes. Our challenge remains staying the course on deployment and change initiatives, maintaining leadership alignment, and reinforcing the cultural changes required to sustain these efforts. The following provides a high level review of the key areas of focus.

### Fully Implement the Centre-Led Organization

- The redeployment process commenced on May 24<sup>th</sup> with the Society and PWU with Management presenting the new organizational designs to the Unions.
- For Society deployment, the Joint Redeployment Planning Team (joint management/union team) is working through the details of the deployment process with the next major step being the issuance of a fact sheet to all employees. Thus far, one dispute has been taken through arbitration for resolution.
- The PWU process is expected to be completed by year end for both nuclear and non-nuclear business units with the new PWU roles expected to be in place early in 2014.
- Remaining Management Group selections will be filled throughout the summer period.

### Transforming the Way We Work

- Work continues in all Business Units on completing their change initiatives to streamline work and ensure the staff reductions achieved through BT are sustainable over the long term.
- The 29 key initiative milestones that are critical for driving BT in 2013 have been included in the BT Corporate Scorecard.
- 15 deliverables have been completed on time and all remaining deliverables are on track for completion as scheduled.

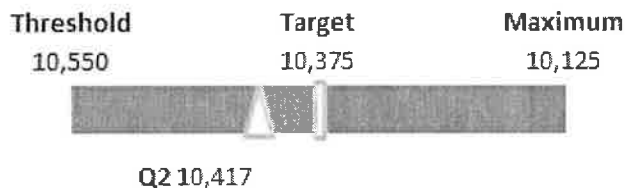
### Transforming Our Culture

- A Leader's Guide to Culture has been prepared to support leaders in demonstrating and embedding our Values and new Behaviours. The guide, which provides practical tools for teams to use to build the understanding of what it means to live our behaviours, will be rolled out over the coming months.
- A Change Readiness Pulse Check has been prepared to provide management with a status of current levels of understanding around OPG's mission and identify areas for additional focus.

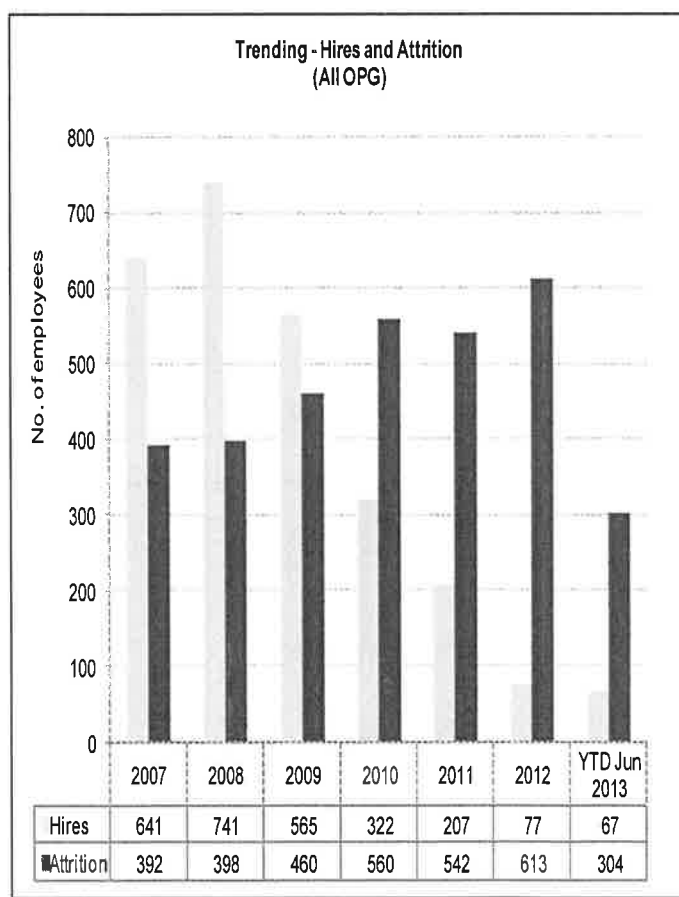
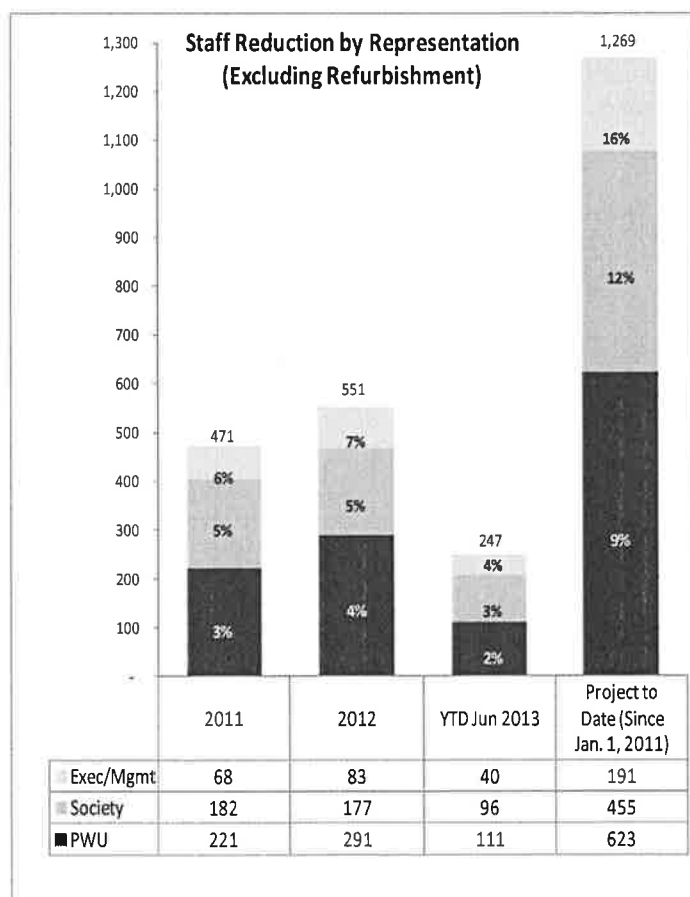


## Effectively Managing Attrition

- Vacancies continue to be managed aggressively. Hiring in select areas is allowed to fill critical roles. YTD there have been 67 external hires – a significant portion of which are nuclear engineering trainees hired based on the expected attrition in the coming years.
- OPG Headcount from Ongoing Operations against 2013 performance scorecard targets is shown below, along with detailed graphs showing attrition trends.



## Attrition Trends – June 2013



November 13, 2013

**Business Transformation Q3 Update****EXECUTIVE SUMMARY:**

The purpose of this report is to provide an update on significant Business Transformation activities completed in the third quarter of 2013 including an update on staff reduction numbers in Q3 and cumulatively from commencement of the project.

We are in the 3<sup>rd</sup> Phase, "Transform the Way We Work", of our four phased Business Transformation Plan. In the third quarter of 2013, we continued to work through the JRPT processes collaboratively with the Society. There have been 3 issues taken to arbitration for resolution to date. For the PWU redeployment, the focus for the third quarter was on completing the coal closure processes to allow us to better understand the magnitude and skill set of over complement staff.

We are also continuing to make progress on the key change initiatives and shifting our culture. Many of our larger BT initiatives, such as our Human Resources Service Centre, are reaching the final phase of implementation planning with the expectation of significant changes being rolled out in 2014.

**Submitted By:***"Original signed by"*

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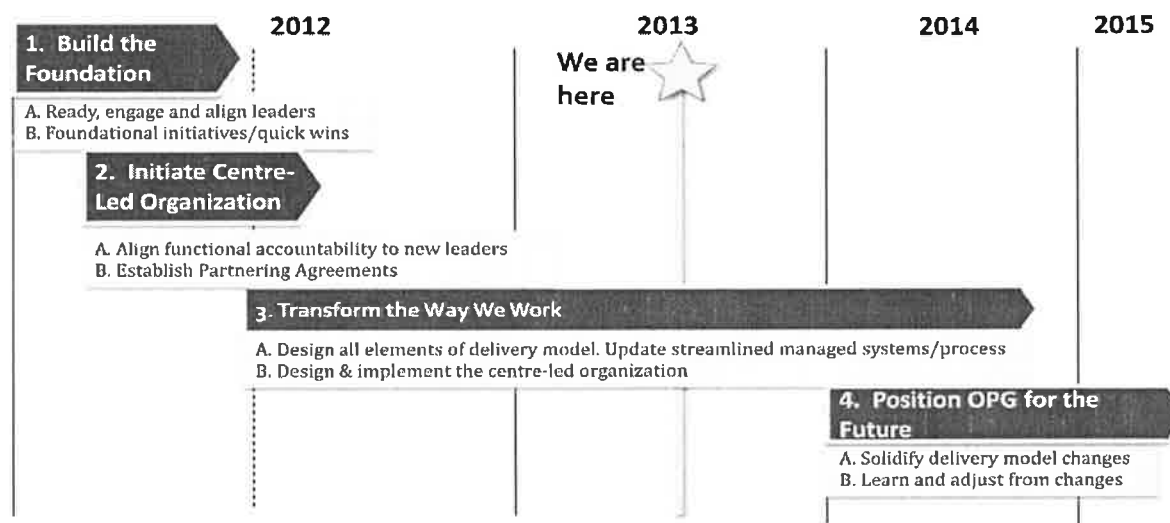
Nicolle Butcher  
Project Executive  
Business Transformation

*"Original signed by"*

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Barb Keenan  
Senior Vice President  
People & Culture & Chief Ethics Officer

## Business Transformation – Transforming the Way We Work through Redeployment and Change Initiatives



We are continuing on Phase 3 of our BT journey – Transform the Way We Work. Having successfully completed Phase 1 and 2, our focus is designing and implementing the centre-led organization, designing delivery models, and streamlining systems and processes to accommodate declining staff numbers. The centre-led organization design was completed earlier in 2013 and the organization designs were rolled out to employees in late Q2. Continuing discussions on the organization design with the unions has been the focus for Q3, in order to move forward and staff the new organization and realize the benefits of the new design. Momentum is growing around the change initiatives, in that changes are moving from planning to implementation. These changes are starting to push on the need to transform the culture and demonstrate the new behaviours. Our challenge remains staying the course on redeployment and change initiatives, maintaining leadership alignment and commitment, sustaining momentum through a slow redeployment process, and reinforcing the cultural changes required to sustain these efforts. The following provides a high level review of the key areas of focus.

### Fully Implement the Centre-Led Organization

- The redeployment process with the Society continues to progress, albeit at a slow pace. Thus far, there have been 3 issues taken to Arbitration. As the process is fundamentally a collaborative one, the Joint Redeployment Planning Team (JRPT) is spending time up front to work through process issues and reaching agreement where possible.
- Given the likelihood of the JRPT process running beyond Q1 of 2014, the BT team is working toward providing the business units with greater flexibility to put temporary arrangements in place to achieve their business objectives without disrupting the JRPT process.

### Transforming the Way We Work

- Work continues in all Business Units on completing their change initiatives to streamline work and ensuring the staff reductions achieved through BT are sustainable over the long term.
- A Management Group survey, the “Business Transformation Check-in”, has been created, to provide the Enterprise Leadership Team with an assessment on the overall progress of business transformation, and to emphasize focus areas that are required in order to sustain the change over the long term. The “Check-In” has been designed to assess progress with the Senior Leadership Team leading sustained change, and with the broader Management Group understanding and managing change within their teams. The results will be used to identify areas of focus, both at the Business Unit and the OPG level.

- The 23 of the 29 key initiative milestones that are critical for driving BT in 2013 have been completed on time. Of the 6 remaining for Q4, 5 deliverables are on track for completion as scheduled and one is at risk.

### Transforming Our Culture

As outlined in an earlier report, OPG is progressing along 5 paths to culture implementation. The following provides an update on each of these paths for the last 2 quarters of 2013:

1. **Leader-led, Leader accountable: Prepare and align leaders to lead a shift in culture.** A Leader's Guide to Culture was created, and is in progress of being used, to support leaders in leading culture change in their organizations. Each Business Unit has a culture plan, which is in the process of being executed, which focuses on leader-led accountability for culture change. A key component of many of the BU plans are leadership conversations focused on self-assessment of progress against behaviours, and critical actions needed in order to advance culture change.
2. **Educate and engage staff so they understand what it means for them.** As part of Business Unit culture plans, educating all employees is a focus for 2013.
3. **Make it real through business practices and change initiatives.** Engineering business practices to ensure they align to the desired culture is fundamental, and ensuring stakeholders also align to the desired behaviours. Continued effort is required in this area, and will continue to be tackled through the change initiatives.
4. **Values and Behaviours into HR Practices.** A significant emphasis for culture change is to embed the cultural changes into HR practices, to ensure reinforcement mechanisms were in place. The following HR practices now incorporate values and behaviours, and are part of a larger integrated plan to ensure all HR processes align: Code of Conduct training, 2013 performance review and development planning, recruitment questions, leadership model aligned to behaviours.
5. **Measure and monitor progress.** The "Business Transformation Check-in" is a key opportunity to measure and monitor progress on the cultural transformation. Key questions have been designed to assess OPG's progress in this area.

### Effectively Managing Attrition

- The OPG headcount has reduced by 1,494 from January 2011 to September 30, 2013. This represents a total project to date reduction of 13% of the OPG total headcount (excluding Darlington Refurbishment).
- OPG Headcount from Ongoing Operations against 2013 performance scorecard targets is shown below, along with detailed graphs showing attrition trends.



## Attrition Trends – September 2013

Filed: 2014-03-19

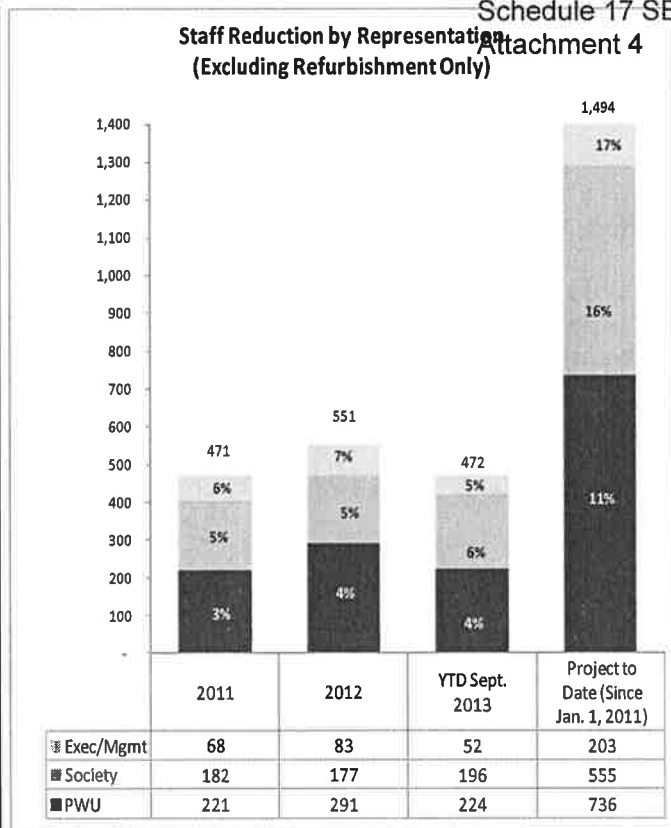
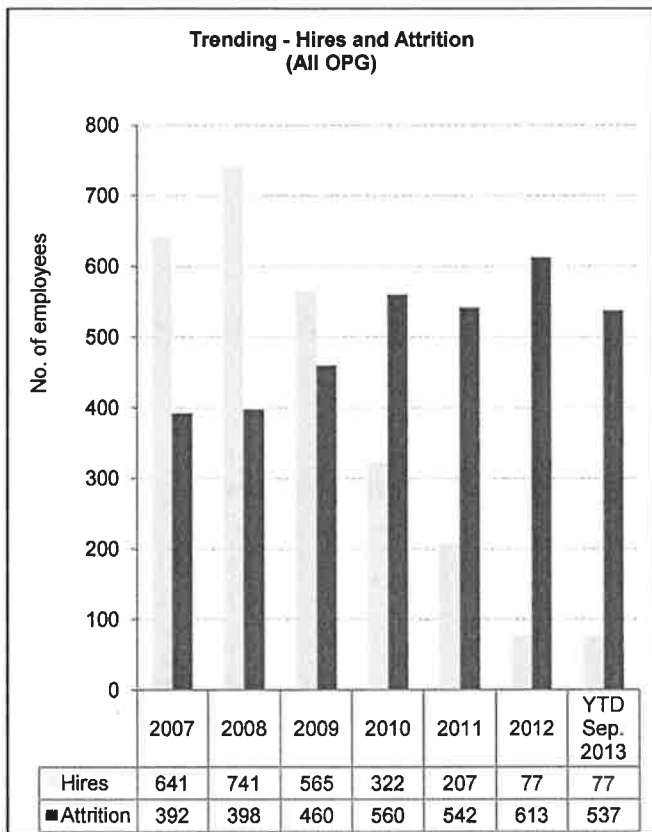
EB-2013-0321

Exhibit L

Tab 1.2

Schedule 17 SEC-005

Attachment 4



**SEC Interrogatory #020**

**Ref:**

**Issue Number: 1.4**

**Issue:** Is the overall increase in 2014 and 2015 revenue requirement reasonable given the overall bill impact on customers?

**Interrogatory**

Please provide a copy of all documents provided to the Board of Directors in approving this application.

**Response**

OPG declines to provide the requested documents on the basis of relevance and litigation privilege. The same type of material was requested in EB-2010-0008. The OEB Panel in that proceeding decided that the requested material was not relevant, stating:

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. **EB-2010-0008, Tr. Vol. 1, pages 113-114.**



EB-2011-0120

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

**AND IN THE MATTER OF** an application by Canadian  
Distributed Antenna Systems Coalition for certain orders  
under the *Ontario Energy Board Act*, 1998.

**BEFORE:** Cynthia Chaplin  
Vice Chair and Presiding Member

Ken Quesnelle  
Member

Karen Taylor  
Member

### **DECISION AND ORDER**

#### **PRIVILEGED DOCUMENTS FILED BY TORONTO HYDRO-ELECTRIC SYSTEM LIMITED February 22, 2012**

The Canadian Distributed Antenna Systems Coalition ("CANDAS") filed an application on behalf of its member companies with the Ontario Energy Board (the "Board"), received on April 25, 2011 and subsequently amended by letters dated May 3 and June 7, 2011, seeking the following orders of the Board:

1. Orders under subsections 70(1.1) and 74(1) of the *Ontario Energy Board Act*, 1998 (the "Act"): (i) determining that the Board's RP-2003-0249 Decision and Order dated March 7, 2005 (the "CCTA Order") requires electricity distributors to provide "Canadian carriers", as that term is defined in the *Telecommunications Act*, S.C. 1993, c. 38, with access to electricity

- distributor's poles for the purpose of attaching wireless equipment, including wireless components of distributed antenna systems ("DAS"); and (ii) directing all licensed electricity distributors to provide access if they are not so doing;
2. in the alternative, an Order under subsection 74(1) of the Act amending the licences of all electricity distributors requiring them to provide Canadian carriers with timely access to the power poles of such distributors for the purpose of attaching wireless equipment, including wireless components of DAS;
  3. an Order under subsections 74(1) and 70(2)(c) of the Act amending the licences of all licensed electricity distributors requiring them to include, in their Conditions of Service, the terms and conditions of access to power poles by Canadian carriers, including the terms and conditions of access for the purpose of deploying the wireless and wireline components of DAS, such terms and conditions to provide for, without limitation: commercially reasonable procedures for the timely processing of applications for attachments and the performance of the work required to prepare poles for attachments ("Make Ready Work"); technical requirements that are consistent with applicable safety regulations and standards; and a standard form of licensed occupancy agreement, such agreement to provide for attachment permits with terms of at least 15 years from the date of attachment and for commercially reasonable renewal rights;
  4. its costs of this proceeding in a fashion and quantum to be decided by the Board pursuant to section 30 of the Act; and
  5. such further and other relief as the Board may consider just and reasonable.

On December 9, 2011 the Board issued a Decision and Order with respect to motions filed by each of the Consumers Council of Canada<sup>1</sup> ("CCC") and CANDAS<sup>2</sup> for an order of the Board requiring Toronto Hydro-Electric System Limited ("THESL") to provide further and better responses to certain interrogatories (the "December Order").

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<sup>1</sup> Notice of Motion filed October 31, 2011.

<sup>2</sup> Notice of Motion filed November 3, 2011, and later amended November 7, 2011.



THESL filed a letter on December 13, 2011 indicating that it would be able to produce some responses on December 23, 2011, but that satisfying the remaining requests made pursuant to the December Order would require significant time and resources. THESL indicated it would make best efforts to generate the requested information as soon as possible. Some of the material was filed on December 23, 2011, including the pole attachment agreement between Toronto Hydro Energy Services Inc. ("THESI") and Toronto Hydro Telecom Inc. (which was ultimately purchased by Cogeco Cable Inc. ("Cogeco")), which was filed in confidence.

By letter dated January 11, 2012, THESL reported that it was continuing to make best efforts to file the information identified in the Board's December Order. The letter further set out the company's estimates of when it expects to complete its filing of the ordered information. Although THESL did not formally seek an extension to the deadline imposed by the Board's December Order, the Board treated THESL's January 11 letter as a formal request for an extension.

THESL filed a letter dated January 19, 2012 that set out the significant volume of data involved in complying with the December Order and requested that the Board consider a more limited scope of information. CCC responded to THESL's letter of January 19, 2012 seeking clarification in respect of two issues.

On January 20, 2012 the Board issued its Decision on Motion and Procedural Order No. 8 (the "January Order"), which included the Board's determinations in respect of a THESL motion for further and better responses to certain interrogatories it had asked of CANDAS. As part of that January Order, the Board also made some determinations in respect of the CCC and CANDAS motions. In particular, the Board indicated that while it was prepared to grant an extension to January 20, 2012, as proposed by THESL, for the filing of materials related to other wireless communications on THESL's poles, February 17, 2012 (as proposed by THESL) was not an acceptable date to file the balance of the outstanding materials. The Board instead ordered THESL to produce a more limited scope of information falling into the following two categories: information related to the THESL letter to the Board of August 13, 2010; and information related to safety concerns; and the Board ordered filing of this information by January 30, 2012.

In the January Order, the Board also ordered that a hearing would be held on Monday, February 6, 2012 with the objective of, among other things, hearing submissions with respect to any claims of privilege or confidentiality made by THESL in respect of the

subset of interrogatory responses that THESL was required to file in accordance with the Board's January Order.

On January 30, 2012 THESL filed an affidavit sworn by Mr. Colin McLorg (the "McLorg Affidavit") disclosing documents as required in the Board's January Order. In particular the affidavit listed in Schedule "A" all those documents that THESL did not object to producing for inspection, several of which (items 2 through 9 of Schedule "A") were filed in confidence though THESL did not object to full disclosure of the information, but noted that because it related to DASCom attachments, CANDAS may want to request that some or all of the documents remain in confidence. Schedule "B" of the McLorg Affidavit listed all those documents that THESL did object to producing because THESL claimed that same are privileged and stated the grounds for each such privilege claim.

In Procedural Order No. 9 issued February 3, 2012, the Board indicated that it would expect CANDAS, CCC, and THESL to rely on their filings made in respect of the CANDAS and CCC motions filed on October 31, 2011 and November 3, 2011, respectively for the purpose of making submissions with respect to THESL's claims of confidentiality and privilege at the oral hearing on February 6, 2012. The Board also made provision for CANDAS and CCC to receive the relevant materials filed by THESL in confidence provided that counsel for each of these parties signed the Board's form of Declaration and Undertaking. The Board also ordered THESL to file any additional materials on which it intended to rely or reference for the purpose of oral submissions and a written summary of its points of argument.

### **The February 6, 2012 Hearing**

At the February 6<sup>th</sup>, 2012 hearing the Board indicated that it would deal with four matters:

1. claims of confidentiality in respect of certain materials which were filed pursuant to the Board's December Order and January Order;
2. claims of solicitor-client privilege and/or litigation privilege in respect of certain materials which were filed pursuant to the Board's December Order and January Order;
3. whether the balance of the material outstanding in respect of the Board's December Order is still required and, if so, when it should be filed; and
4. to set further dates in order that the proceeding might be completed in an expeditious manner.

### **Item 1 – Confidentiality**

The Board heard submissions with respect to the 8 documents (items 2-9 in Schedule “A”) of the McLorg Affidavit over which THESL had claimed confidentiality. As no party took the position that the materials should remain confidential, the Board directed that new copies be filed without being marked confidential and that the materials be placed on the public record. THESL filed non-confidential versions of these documents on February 17, 2012.

In response to the December Order, on December 23, 2011 THESL filed in confidence an agreement between THESI and Toronto Hydro Telecom Inc. (which was purchased by Cogeco in 2008). THESL submitted that the agreement contains commercially sensitive information, both with respect to terms and conditions, and pricing. THESL indicated it would clarify for the Board whether the agreement was renewed, and if the agreement was not renewed, whether there is a document that governs the current relationship between THESI and Cogeco.<sup>3</sup> The Board will require the information about the contract to be filed by February 27, 2012. The Board will also require the filing of any document that exists that governs the current relationship between THESI and Cogeco by the same date. The Board will hold the agreement filed on December 23, 2011 in confidence, pending THESL’s compliance with the Board’s Order in this respect, as set out herein.

### **Item 3 – Balance of the Materials**

The Board heard submissions with respect to whether and to what extent THESL should be required to file additional materials over and above that subset of materials already filed in accordance with the January Order. The Board ordered THESL to file certain additional materials but did not specify filing dates. That material included:

- Any reports provided to the THESL Board of Directors between November 2009 and May 2010 related to the issue of wireless attachments; and
- Representative reports or minutes of any THESL health and safety committee meetings held from August 2008 onward.

With respect to the first item, counsel for THESL filed a letter on February 17, 2012, noting that THESL had reviewed its records between November 2009 and June 2010

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<sup>3</sup> Tr. at 134.

and indicated that there were no responsive reports or presentations provided to the THESL Board of Directors during that time.

THESL also indicated in its February 17, 2012 letter that it continues to work to prepare responses to the balance of the requests (which would include the second item above, i.e. health and safety committee reports or minutes).

The Board will include as part of its order herein provisions for the filing of any outstanding responses regarding the balance of the materials.

## **Item 2 – Solicitor-Client and Litigation Privilege**

The Board allowed cross-examination of Mr. Labricciosa and Mr. McLorg. THESL then made its oral argument-in-chief, followed by the arguments of CANDAS, CCC, Energy Probe and Board staff. The reply argument of THESL was filed in writing on February 9, 2012.

### **The Board's Jurisdiction to Assess and Determine Privilege Claims**

THESL referenced the Board's Decision in EB-2010-0184 made in the context of a Notice of Motion filed by CCC regarding the constitutionality of assessments issued by the Board pursuant to section 26.1 of the *Ontario Energy Board Act*.<sup>4</sup> THESL indicated that in the EB-2010-0184 Decision the Board first determined that it had authority to adjudicate privilege claims pursuant to section 5.4 of the *Statutory Powers Procedure Act* ("SPPA").

Board staff also referenced the Board's Decision and Order in EB-2010-0184 and indicated that it provides an accurate description of the Board's authority with respect to adjudicating issues of privilege.

Board staff also referenced subsection 5.4(1) and subsections 15(1) and 15(2) of the SPPA and made the point that the treatment of claims of privilege is not one of the areas of the law of evidence for which the SPPA provides a general exemption to tribunals subject to the SPPA. In other words, the Board is required to adhere strictly to common law evidentiary principles in respect of adjudicating privilege claims.

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<sup>4</sup> Decision and Order, EB-2010-0184, December 8, 2011.

The jurisdiction of the Board to hear and determine claims of privilege (both solicitor-client and litigation) was not contested in this case. The Decision in EB-2011-0184 accurately describes the Board's power to adjudicate privilege claims.

### **Solicitor-Client Privilege**

No party contested the solicitor-client privilege claims over document numbers 3, 13, 15, 16, 18, 19, 20, 21, 22, 24, 26, 31 and 32 in Schedule "B" of the McLorg Affidavit. The Board has reviewed the descriptions of these documents in the McLorg Affidavit, the cross-examination in respect thereof and the arguments of THESL and the parties in respect of solicitor-client privilege.

The Board accepts THESL's characterization of the law in respect of solicitor-client privilege and in particular that it is a core value in the legal system and a fundamental civil and legal right. The Board accepts further that communications protected by solicitor-client privilege have a *prima facie* presumption of inadmissibility and that the onus is on parties seeking disclosure of communications over which such privilege is asserted to show why the communication should not be privileged. No parties expressed any contrary views.

The Board is of the view that the description of the documents over which THESL has claimed solicitor-client privilege are consistent with materials over which solicitor-client privilege exists. In particular, each of the document descriptions appear to be authored by one or more solicitors and therefore appear to contain communications that are in the nature of legal advice. In the absence of any challenge to such claims, the Board is satisfied that each of the documents enumerated above are privileged. The Board will not, therefore order disclosure of any of the enumerated documents.

### **Litigation Privilege**

THESL has claimed litigation privilege over all 32 documents that were listed in Schedule "B" of the McLorg Affidavit. Of these THESL also claimed solicitor-client privilege over document numbers 3, 13, 15, 16, 18, 19, 20, 21, 22, 24, 26, 31 and 32. Because the Board has determined that it will not require production of the documents over which solicitor-client privilege was claimed, the remaining documents over which only litigation privilege is claimed and that remain in dispute are document numbers 1, 2, 4-12, 14, 17, 23, 25, 27-30.

### ***The Legal Test for Establishing a Claim of Litigation Privilege***

THESL, CCC and Board staff made submissions on the appropriate test to be applied in adjudicating claims of litigation privilege. There was general agreement that the appropriate test that the Board should apply is the “dominant purpose test”. In particular the Board was referred to the decision in *Chrusz*<sup>5</sup> described by CCC as a foundational case, in which the Ontario Court of Appeal states:

Litigation privilege applies to communications generated by a lawyer or a client, or between them, for the dominant purpose of related litigation where litigation is realistically contemplated, anticipated or ongoing.

Board staff referred the Board to an excerpt of “The Law of Privilege in Canada, Volume 1”<sup>6</sup> which in turn refers to the case of *Mamaca (Litigation Guardian of) v. Coseco Insurance Co.*<sup>7</sup> wherein the court articulates the test for claims of litigation privilege as follows:

- (a) on what date was there a reasonable apprehension of litigation; and
- (b) for each document prepared after that date, was the dominant purpose in preparing the document to assist in the apprehended litigation.<sup>8</sup>

The Board is of the view that parties have accurately described the test to be applied by this Board in assessing and adjudicating the claims of litigation privilege made by THESL in this matter. In particular, in making its assessment, the Board will require that:

- i. there must be a reasonable apprehension of litigation that predates the documents for which THESL is claiming litigation privilege; and
- ii. for each document prepared after that date, the dominant purpose in preparing the document must have been to assist in the apprehended litigation.

The Board, in respect of both parts i. and ii. above, will also consider certain questions arising from the submissions of parties with respect to determining whether there is a reasonable apprehension of litigation. These questions include:

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<sup>5</sup> *General Accident Assurance Co. v. Chrusz*, [1999], 180 DLR (4th) 241.

<sup>6</sup> Hubbard, Robert W., S. Magotiaux & S.M. Duncan, *The Law of Privilege in Canada*, Release No. 12 (Aurora: Canada Law Book, 2011).

<sup>7</sup> [2007] O.J. No. 1190.

<sup>8</sup> *Ibid.* at par. 16.

i. Reasonable Apprehension of Litigation:

- Does a Board proceeding constitute litigation for the purposes of a claim of litigation privilege?
- If THESL establishes to the satisfaction of the Board that there was a reasonable apprehension of litigation, and no litigation has actually been commenced, is it appropriate for the Board to consider whether the reasonable apprehension still exists? If so, on what basis should the Board determine whether and when the apprehension of litigation terminates?

ii. Dominant Purpose:

- What information is a party that is claiming litigation privilege required to provide in describing the documents over which the privilege is claimed? Has THESL provided the required information?

The Board will also be mindful of CCC's submission that litigation privilege is an exception to the general proposition that in civil litigation documents should be produced in order to assist the trier of fact in getting at the truth.

CCC further indicated, and Board staff agreed, that there has been a continuum over which the trend has been to increase discoverability and narrow exceptions to the blanket proposition that all materials that are relevant should be produced.

Staff took the Board to the case of *Blank*<sup>9</sup> in which the Supreme Court of Canada said:

While the solicitor-client privilege has been strengthened, reaffirmed and elevated in recent years, the litigation privilege has had, on the contrary, to weather the trend toward mutual and reciprocal disclosure which is the hallmark of the judicial process.<sup>10</sup>

It is against this backdrop that the Board will assess the claims of litigation privilege asserted by THESL.

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<sup>9</sup> *Blank v. Canada (Minister of Justice)*, [2006] 2 SCR 319, 2006 SCC 39.

<sup>10</sup> *Ibid.* at par. 61.

***Is There a Reasonable Apprehension of Litigation?***

THESL submitted, with reference to *Chrusz*, that a reasonable apprehension of litigation does not mean that there has to be a Statement of Claim filed or an application filed with the Board and added that the requirement is that litigation be reasonably contemplated or anticipated.

Both CCC and THESL (in its reply argument) referred to the *Hamalainen*<sup>11</sup> case in which the British Columbia Court of Appeal stated:

I am not aware of any case in which the meaning of “in reasonable prospect” has been considered by this court. Common sense suggests that it must mean something more than a mere possibility, for such possibility must necessarily exist in every claim for loss due to the injury whether that claim be advanced in tort or in contract. On the other hand, a reasonable prospect clearly does not mean a certainty, which could hardly ever be established unless a writ had actually issued. In my view, litigation can properly be said to be in reasonable prospect when a reasonable person, possessed of all pertinent information including that peculiar to one party or the other, would conclude it is unlikely that the claim for loss will be resolved without it. The test is not one that will be particularly difficult to meet...<sup>12</sup>

THESL’s counsel, Mr. Rodger indicated that as external counsel to THESL, he and his colleagues were retained specifically because of the concern about potential litigation, and that THESL requested legal advice in direct response to that perceived threat. He also indicated that the documents over which THESL is claiming litigation privilege were prepared for the sole purpose of preparation for potential litigation.

THESL submitted further that the affidavit of Ivano Labricciosa filed with the Board on November 15, 2011 “paints a picture” from the time of the Board’s CCTA decision in 2005 to the Public Mobile meeting in January of 2010. THESL described in its submissions “...an increasingly acrimonious relationship, where Toronto Hydro came to the conclusion, back in January, that either a court process or a potential OEB process was going to be the result.”<sup>13</sup>

The Board notes, however, that under cross-examination, Mr. Labricciosa confirmed that he attended the Public Mobile meeting and he described it as follows:

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<sup>11</sup> *Hamalainen (Committee of) v. Sippola* (1991), 62 BCLR (2d) 254 (BCAA).

<sup>12</sup> *Ibid.* at par. 22.

<sup>13</sup> Tr. at 51.



They approached us initially thinking that they had a relationship with us. We were surprised at the request for the meeting, since we didn't have any relationship with Public Mobile. But as they disclosed their business plans to us, which involved the relationships with these other parties, DAScom, ExteNet and also Cogeco, it became clear to us that they just assumed they had a right to be on our poles. They also identified the fact they were hanging their assets on our poles and did not have an agreement with us.

And so when we began to have that dialogue, it was a surprise to them that they could not actually attach their assets on our poles.

And at that point, the conversation went very graphic, very heated, and it quickly turned into a discussion about next steps.

One of those next steps in the discussion that they asked was in relation to the regulator, which, they believed at that point, they could go to the regulator for some sort of relief.

Then it also went to a discussion of sort of business models, in terms of, without hanging these antennas on our poles, that their business model fails.

And then it went to some discussion of how to proceed with getting an agreement with us. So it quickly went from aggressive to restorative or conciliatory at that stage. At which point we had discussed with them that we had other things we had to attend to, and the meeting ended at that stage.<sup>14</sup>

In later questioning by the Board, Mr. Labricciosa clarified his earlier testimony as follows:

It became crystal-clear for us after the meeting that we would be expecting litigation. We were surprised that it could take several months to produce the formality of a letter describing the outcomes of that meeting, which confirmed litigation from our perspective, even though there hasn't been any litigation processed in the courts to date.<sup>15</sup>

CCC submitted that there is no civil litigation, and that nearly two years after "heated suggestions", there is no Statement of Claim. CCC further submitted that a claim for

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<sup>14</sup> Tr. at 20-21.

<sup>15</sup> Tr. at 32, ln. 9-15.

litigation privilege does not exist when there is some vague possibility of a civil claim. In CCC's view, there must be something more concrete than that, that the onus is on THESL to establish there is something more concrete than that, and that THESL has failed to do so.

CANDAS cited a number of disputes in its submissions, and attempted to differentiate the dispute regarding the "no wireless" policy that THESL contends gives rise to a reasonable apprehension of litigation, from the original dispute which CANDAS said it had with THESL regarding lack of timeliness in connecting the attachments of CANDAS' members. In its submissions, CANDAS characterized its initial dispute as one with respect to untimely connection by THESL of its wireless attachments, which would not have given rise to a reasonable apprehension of litigation. CANDAS submitted that THESL indicated that the lack of timeliness in that instance was due to a lack of human resources, and not that THESL had a "no wireless" policy.

CANDAS submitted that the trigger for the CANDAS application was not the dispute regarding timeliness of connection which occurred over the period from September 2009 to June 2010. CANDAS contended that dispute was purely a commercial dispute. CANDAS submitted that the trigger for the larger CANDAS proceeding was the August 13, 2010 letter, which was not prepared in contemplation of litigation, but rather was the result of work done to establish a "no wireless" policy. CANDAS submitted that whether there is or is not litigation in the future is not relevant to the decision on THESL's claim to litigation privilege.

Board staff submitted that the Board should apply an objective test in determining whether it was reasonable for THESL to contemplate litigation when THESL says it did. Board staff cautioned that the fact that a party retains a lawyer, and that reports are generated subsequent to that retainer, does not in and of itself lead inextricably to a conclusion that litigation was apprehended.

Board staff pointed out that if litigation was apprehended or contemplated at all there is a question as to what the appropriate date for such apprehension would be. Staff indicated that it might be sometime in January of 2010 (the Public Mobile meeting), sometime in May of 2010 (letter(s) from CANDAS members following on the Public Mobile meeting), or some other date.

Board staff indicated that while the January 2010 meeting seems to be the earliest evidence of acrimonious moments in a meeting, since commercial dealings and the relationships that underpin them can be acrimonious without being litigious, the Board should ask itself, based on the information it has before it, whether it was reasonable for THESL to have apprehended litigation at all, and if so, when.

In its reply argument, THESL indicated that during the meeting with Public Mobile it arrived at the conclusion that the positions of THESL and the CANDAS members were “polar if not irreconcilable”.<sup>16</sup>

THESL further submitted that as a result of the conclusion reached by THESL following the Public Mobile meeting, it formed an internal senior staff team to collect information and reports, including expert reports that were provided to Mr. Rodger directly so he could provide legal advice and analysis for his client. THESL reiterated that but for this acrimonious situation, this work would just not have been started.

THESL further submitted that CANDAS itself has indicated that litigation is contemplated, which THESL says is evidenced by the correspondence that was exchanged following the Public Mobile meeting and which THESL wanted to produce for the Board, but over which CANDAS claimed settlement privilege. THESL submitted that the basis of settlement privilege, like litigation privilege, is that a litigious dispute is in existence or within contemplation.

THESL also referenced CANDAS’ submission with respect to the issuance by the senior management of THESL of a “stop work order” following the January 2010 meeting with Public Mobile as evidence that there was a reasonable prospect of litigation at that point in time.

THESL pointed out that of the documents listed in Schedule B of the McLorg Affidavit in all cases the work commenced shortly after the January 2010 Public Mobile meeting, and continued into August of 2010. THESL submitted that the descriptions of the documents show that information was gathered from external consultants and internal staff and directed to counsel in order for THESL to prepare and assess its situation on various possible legal processes.

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<sup>16</sup> THESL Reply, at par. 14.

## Board Findings

The Board finds that there was a reasonable apprehension of civil litigation, beginning after the January 2010 meeting between THESL and Public Mobile. It is clear that the relationship between THESL and the members of CANDAS was – and remains – acrimonious. Although no Statement of Claim has yet been filed, the nature of the disagreements, as described by counsel at the hearing, is clearly still central to the thinking of both parties. This conclusion is further substantiated by CANDAS' refusal to disclose the letters of May and June 2010. CANDAS confirmed this refusal by way of letter dated February 17, 2012 .

### *Is the Board Hearing Litigation?*

In its argument-in-chief, THESL indicated that the litigation that it reasonably contemplated included both regulatory proceedings before the Ontario Energy Board and civil litigation.

CCC submitted that the Board's processes are non-adversarial in nature, and that the relief sought by CANDAS cannot end with a penalty or fine on THESL. CCC further submitted that the parties are engaged in a standard form of administrative decision making by the Board in a non-adversarial setting. CCC provided several authorities to address whether an administrative proceeding is litigation for the purposes of attracting a litigation privilege claim. Citing *Ed Miller Sales & Rentals Ltd.*,<sup>17</sup> *College of Physicians of British Columbia*<sup>18</sup> and *Order F06-16*<sup>19</sup> CCC argued that the administrative proceeding must demonstrate that there is a penalty involved, or that such penalty could be seen as a logical consequence of the proceeding, for an administrative proceeding to be considered litigation, or to create an apprehension of litigation.

Once the Director focussed on the Caterpillar Companies to inquire whether they were guilty of offences under the Act, litigation in the fullest sense of the word was then in actual progress let alone in contemplation.<sup>20</sup>

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<sup>17</sup> *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.* [1988] AJ No. 810 (CA).

<sup>18</sup> *College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665, [2002] BCJ No. 2779 (QL).

<sup>19</sup> 2006 CanLII 25576 (BC IPC).

<sup>20</sup> *Supra*, note 15 at 5.

CCC noted that in *College of Physicians*, it was held that, where litigation is not apprehended in an administrative proceeding, no litigation privilege is extended:

At the investigative stage, the College is not seeking to impose penalties or sanctions against the member, but (through a special deputy registrar acting under section 21(2) of the MPA) to make findings on which to base a recommendation...<sup>21</sup>

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Litigation privilege does not apply to the documents, as litigation was not a reasonable prospect when they were created and the dominant purpose for their creation was not litigation. The College was not engaged in an adversarial process when it investigated the Applicant's complaint...<sup>22</sup>

Board staff argued that the Board's processes are not litigation for the purposes of litigation privilege.

Board staff's rationale was that the Board is a creature of statute with a public interest mandate. Staff indicated that the decisions made and the orders issued are in the public interest, and they are not intended to redress some harm as between two or more parties. As such, staff submitted that the Board's processes are not litigious in the sense of being adversarial or in the sense of needing to provide parties with the protections afforded by litigation privilege.

In its reply argument THESL submitted that if the Board accepted the submissions of CCC, CANDAS and Board staff that the current proceeding before the Board does not constitute litigation that would afford the protections of the litigation privilege, it would be acting in contravention of the wording of Section 5.4(2) of the SPPA which THESL says is not limited to solicitor-client privilege and includes litigation privilege.

THESL submitted that the Board should not confuse the Board's public interest mandate with the "undeniably adversarial process" the Board has elected to adopt to fulfill that mandate. THESL cites the Board's *Rules of Practice and Procedure* and in particular, *inter alia*, provisions for the filing and service of documents, evidence, expert

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<sup>21</sup> *Supra*, note 16 at par. 81.

<sup>22</sup> *Supra*, note 16 at par. 91.

evidence and other steps in the commencement and participation in Board proceedings as well as the appeal and review provisions as “the hallmarks” of the adversarial process.

THESL concluded that the Board has adopted an adversarial process to facilitate its quest for truth in the pursuit of the public interest and that therefore the protections afforded by litigation privilege should apply in the context of Board proceedings.

THESL also challenged the characterization of the cases provided by CCC that were presented in order to provide some clarity around the question of whether a proceeding before an administrative tribunal, such as the Board constitutes litigation for the purpose of litigation privilege. In particular, in its reply argument THESL submitted that the cases of *Ed Miller Sales & Rentals*,<sup>23</sup> *College of Physicians of British Columbia*<sup>24</sup> and *Order F06-16*<sup>25</sup> all stand for the proposition that litigation privilege applies in the context of a process before an administrative tribunal.

THESL went on to cite the cases of *Ontario Human Rights Commission v. Dofasco Inc.*<sup>26</sup> and *Brewers Retail Inc. v. United Food and Commercial Workers International Union Local 326W*<sup>27</sup> as well as three decisions<sup>28</sup> from administrative tribunals in support of its proposition that the Board’s proceeding constitutes litigation.

Finally, THESL’s reply argument also pointed out that the substance of the dispute between THESL and the CANDAS members in this Board proceeding is the applicability of the CCTA Decision to wireless attachments and that because the CCTA Decision is a mandatory term of THESL’s distribution licence, there is the possibility of a future compliance proceeding against THESL. THESL pointed out that Board staff had indicated that compliance matters involving penalties may not fall within the scope of staff’s argument that Board’s processes are not litigation for the purposes of litigation privilege.

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<sup>23</sup> *Supra*, note 15.

<sup>24</sup> *Supra*, note 16.

<sup>25</sup> *Supra*, note 17.

<sup>26</sup> 2001 CanLII 2554 (ON CA).

<sup>27</sup> [1998] O.L.A.A. No. 185.

<sup>28</sup> *Canada (Director of Investigation and Research, Competition Act) v. Nutrasweet Co.*, [1989] C.C.T.D. No. 54; *Beazer East Inc. v. British Columbia (Ministry of Environment, Lands and Parks)*, [2000] B.C.E.A. No. 53; *Gardiner v. British Columbia (Ministry of Public Safety and Solicitor General)*, [2007] B.C.H.R.T.D. No. 306.

### **Board Findings**

The Board does not agree that the current proceeding is to be considered litigation for the purposes of litigation privilege. However, nothing turns on this particular issue, because the Board has already determined that there is a reasonable apprehension of civil litigation between the parties.

#### ***Does the Reasonable Apprehension of Litigation Still Exist?***

CCC argued that there is no reasonable prospect of litigation, and that the mere possibility of litigation is not sufficient grounds for litigation privilege. CCC submitted that one cannot look at every commercial agreement and say there is a reasonable prospect of litigation. CCC pointed out that, in light of a near two years lapse since the “unhappy” letters were exchanged between THESL and CANDAS members, it is clear that CANDAS has chosen (and its members have chosen) not to seek civil remedy, and has instead sought interpretation of a Board decision.

CCC also indicated that when litigation is not reasonably contemplated, there is no litigation privilege and when litigation ends, the privilege ends

Board staff also referenced the two years that have passed since THESL says it first apprehended the litigation and submitted that there is little guidance with respect to when a reasonable apprehension of litigation ends if actual litigation is not commenced. Board staff submitted that the Board should apply an objective test to determine whether the reasonable apprehension of litigation continues to exist and noted that the onus is on THESL’s to convince the Board that there continues to be a reasonable apprehension of litigation.

In its reply argument THESL submitted that the fact that civil litigation has not yet occurred is not in any way determinative of whether or not there was a reasonable prospect of anticipated litigation commencing as early as January of 2010.

### **Board Findings**

The Board has already determined that a reasonable apprehension of civil litigation existed beginning around January 2010. The issue is whether that reasonable apprehension still applies now. CCC would have us find that because the parties have brought the issue of the interpretation of the CCTA Decision to the Board and there has been no civil litigation initiated in the two years since the January 2010 meeting, there no longer exists a reasonable apprehension of litigation. The Board does not agree.

While the parties are seeking the Board's interpretation of the CCTA Decision and its applicability to wireless connections (THESL through its August 2010 letter and CANDAS through its April 2011 application), there are clearly other significant matters of disagreement between the parties. The Board's decision in the current proceeding will not resolve these matters, the nature of which were described at some length by counsel for CANDAS. While the threat of civil litigation may in some sense be suspended during the conduct of the current hearing, the Board concludes that civil litigation remains realistically contemplated or anticipated.

***Do the Documents Meet the Dominant Purpose Test***

THESL indicated that the Board must consider the factual circumstances under which the documents were created. THESL further argued that the description of the documents for which litigation privilege is claimed should include the details that will allow the document to be identified, and information which will permit the Board to determine whether a prima facie case for privilege exists.

THESL referred the Board to the *Brewster*<sup>29</sup> case, wherein the Court of Queen's Bench for Saskatchewan states:

However, no details need to be provided which would enable the opposite party to discover indirectly the contents of the privileged documents as opposed to their existence and location.<sup>30</sup>

THESL also referenced the case of *Kennedy v. McKenzie*<sup>31</sup> as follows:

In order to discharge this preliminary onus, the party resisting production is not required to give particulars that would destroy the benefit of any privilege which might properly attach to the documents.<sup>32</sup>

THESL pointed to Schedule B of the McLorg Affidavit and said that for each document it has provided a date, a description of the document, whether a fax, memo or letter, the author and the recipient, and that this information is sufficient to meet the requirements.

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<sup>29</sup> *Brewster v. Quayle Agencies Inc.*, 2008 SKQB 137 (CanLII).

<sup>30</sup> *Ibid.* at par. 3.

<sup>31</sup> [2005] CanLII 18295 (ON SC).

<sup>32</sup> *Ibid.* at par. 23.



THESL asserted that not only was the preparation of the documents over which it is claiming privilege for the dominant purpose of assisting in litigation, but that it was for the sole purpose of preparing for potential litigation.

CCC cited the separate decision of Justice Doherty in the *Chrusz* case and suggested that if a particular document over which litigation privilege is claimed meets the dominant purpose test,

...it should be determined whether, in the circumstances, the harm flowing from non-disclosure clearly outweighs the benefit accruing from the recognition of the privacy interest of the party resisting production. I would put the onus on the party claiming privilege at the first stage of this enquiry and of the party seeking production of the document at the second stage of the enquiry. I appreciate that the party seeking production will not have seen the material and will be at some disadvantage in attempting to make the case for production.<sup>33</sup>

CCC submitted that the Board should ask itself whether the failure to disclose this information will impede in a material way the Board's ability to make a decision on the fulcrum issues in this case?

In its submissions, CANDAS suggested that the dominant purpose of the documents over which THESL is claiming litigation privilege was not for the purpose of assisting counsel in anticipated or contemplated litigation, and thus this test is not met. CANDAS submitted that it was not credible that the August 13th "no wireless" letter was prepared for the dominant purpose of reasonably anticipated litigation between CANDAS and THESL. CANDAS instead argued that the August 13th letter was prepared to aid in the formulation of a "no wireless" policy.

CANDAS also submitted that the Board must consider THESL's motivation when it considers dominant purpose because the information uncovered may go against the assertion that the fundamental reason for the "no wireless" policy was related directly to safety and operational concerns.

### **Board Findings**

THESL claims litigation privilege for the following items in Schedule "B" of the McLorg affidavit: 1, 2, 4 – 12, 14, 17, 23, 25, 27 – 30. The Board has already found that there

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<sup>33</sup> Supra, note 4 at par. 142.

was and continues to be a reasonable apprehension of litigation. The Board has not accepted that proceedings such as the current proceeding are “litigation” for purposes of litigation privilege. However, there remained and remains the reasonable prospect of civil litigation, and at least theoretically, compliance litigation. Given the timing of the documents and the descriptions provided, the Board accepts that the dominant purpose of the documents was in relation to contemplated litigation. The Board therefore will not require production of these documents.

The Board is satisfied that the failure to produce these documents will not impede the Board’s ability to make a decision on the issues which are the subject of the application, namely whether or not the CCTA Decision applies to wireless, and if not, whether it should.

As the Board stated in its December Order, “the Board does not intend to enquire into the motivations of THESL unless it has a direct bearing on the enumerated issues.” For example, on the issue of safety, the Board will consider the evidence offered by all the parties and determine whether the claims are substantiated by the evidence offered.

#### **Did THESL Waive Privilege Over Certain Documents?**

CCC submitted that there are reports prepared by Dr. Yatchew and Dr. Starkey in respect of which litigation privilege is claimed by THESL that are drafts of reports which CCC said the Board should conclude were filed as part of the pre-filed evidence from THESL in this case.

CCC asserted that while Mr. McLorg said, under cross-examination, that these documents were not drafts of reports current filed in this proceeding, Mr. McLorg does not know for certain whether they are and has not compared the two documents to be able to answer definitively.

CCC submitted the description of the Yatchew and Starkey reports in Schedule B of the McLorg Affidavit indicates that they deal with the same subject matter as the reports that were filed as evidence in the CANDAS proceeding and that the logical conclusion is that these are drafts of the reports that were filed in this case. CCC submitted, however, that even if they are drafts of the reports filed in evidence, CCC should be entitled to cross-examine the witness, to compare what was in the draft reports over which privilege is claimed with what was ultimately filed in this case.

CCC submitted that it is a legitimate line of inquiry to determine whether or not an opinion was changed at some point in the process, why was it changed, what forces required it to be changed.

CCC cited the *Delgamuukw*<sup>34</sup> case, wherein the Supreme Court of British Columbia said:

Thus, the present law requires an expert witness who is called to testify at trial to produce all documents which are or have been in his possession, including draft reports, even if they come from the file of the solicitor with annotations, and other communications which are or may be relevant to matters of substance in his evidence or his credibility, unless it would be unfair to require production. It is a presumption of law that solicitor's privilege is waived in respect of such matters of substance, et cetera, when the witness is called to give evidence at trial.<sup>35</sup>

CANDAS submitted that once THESL submitted the August 13th "no wireless" letter to the Board, THESL waived any privilege that might have attached to those documents that are at issue. CANDAS submitted that THESL invited the Board to initiate a proceeding, and that by that very act, waived the privilege that THESL now attempts to claim.

THESL submitted in its reply that the expert reports by THESL in the CANDAS proceeding were prepared for the stated purpose of responding to the CANDAS Application and interrogatory responses. THESL cited parts of each of the Starkey and Yatchew affidavits as evidence of this contention. THESL indicated that it is impossible for the drafts over which THESL is claiming litigation privilege to have been drafts of the expert reports for the current proceeding since the CANDAS application was not filed until April 21, 2011. THESL submitted that the use of the same experts in respect of two separate matters does not evidence that the reports prepared in respect of the first matter are drafts of reports prepared for the second matter.

### **Board Findings**

CCC submitted that the documents which refer to draft reports by Yatchew or Starkey are likely drafts of the current reports filed on the record in this proceeding. THESL maintained that they are not. The Board accepts THESL's explanation that the drafts

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<sup>34</sup> *Delgamuukw v. British Columbia* (1988), 32 BCLR (2d) 156 (WL) (SC).

<sup>35</sup> *Ibid.* at par. 11.

over which privilege is claimed were prepared for a separate purpose than the current proceeding. The analysis and opinions contained in these drafts may have found their way into the final reports which have been filed in this proceeding. However, given the dates of drafts – all well in advance of the CANDAS application – the Board concludes that these documents do not reasonably represent drafts of the current reports and therefore the Board concludes that the litigation privilege protection remains and no production will be required.

As indicated above, the Board also concludes that the failure to disclose these materials will not impede the Board's ability to decide the issues in this proceeding.

#### **Item 4 – Procedural Matters**

The Board canvassed the parties as the availability and composition of two expert pre-hearing conferences. CANDAS requested that the Board make provision for a settlement conference in advance of the expert pre-hearing conference. No parties objected to this and the Board will schedule a settlement conference for March 5 and 6, 2012. The Board will require that any settlement agreement be filed by March 27, 2012.

There was also discussion as to which witnesses should participate at the expert pre-hearing conference. CANDAS requested that Mr. Larsen, an employee of ExteNet Systems (a member of CANDAS), be allowed to participate, and THESL opposed this.

#### **Board Findings**

The purpose of the expert panel is to provide opinion evidence to the Board from objective experts on the relevant issues. Mr. Larsen as an employee of one of the applicant's members is inherently not objective. The Board will not include Mr. Larsen on the expert panel.

The Board has instructed Board staff to continue discussions with the parties in order to establish an agreed composition of the expert panel or panels and to establish a schedule for the expert pre-hearing conference in April 2012. The Board will provide additional details in due course.

**THE BOARD ORDERS THAT:**

1. THESL shall file any representative reports or minutes of any THESL health and safety committee meetings held from August 2008 onward **on or before February 27, 2012.**
2. THESL shall clarify for the Board whether the agreement between THESI and Toronto Hydro Telecom Inc. (ultimately purchased by Cogeco) filed in confidence with this Board on December 23, 2011 has been renewed, and if not, whether there is a document that governs the current relationship between THESI and Cogeco. The Board orders the information about the contract to be filed **on or before February 27, 2012.** The Board also orders the filing of any document that exists that governs the current relationship between THESI and Cogeco by the same date. The Board will hold the agreement filed on December 23, 2011 in confidence, pending compliance by THESL with this Order.
3. A Settlement Conference will be convened on **March 5, 2012**, at 9:30 a.m. with the objective of reaching a settlement among the parties on as many issues as possible. The Settlement Conference will be held at 2300 Yonge Street, Toronto in the Board's hearing rooms on the 25th Floor and if needed, may continue on **March 6, 2012.**
4. Any Settlement Proposal arising from the Settlement Conference shall be filed with the Board no later than 4:45 p.m. on **March 27, 2012.**

All filings to the Board must quote file number EB-2011-0120, be made through the Board's web portal at [www.errr.ontarioenergyboard.ca](http://www.errr.ontarioenergyboard.ca), and consist of two paper copies and one electronic copy in searchable / unrestricted PDF format. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Parties must use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at [www.ontarioenergyboard.ca](http://www.ontarioenergyboard.ca). If the web portal is not available parties may email their document to the address below. Those who do not have internet access are required to submit all filings on a CD in PDF format, along with two paper copies. Those who do not have computer access are required to file 7 paper copies.

**DATED** at Toronto, February 22, 2012.

**ONTARIO ENERGY BOARD**

*Original signed by*

Kirsten Walli  
Board Secretary

**SEC Interrogatory #004**

**Ref:** A1-4-1/p.3

**Issue Number:** 1.2

**Issue:** Are OPG's economic and business planning assumptions for 2014-2015 appropriate?

**Interrogatory**

Please provide the last five "timely reports and information on major developments and issues" provided by OPG to the Shareholder pursuant to section E1. Please provide the last five reports under that section provided by the Shareholder to OPG.

**Response**

OPG declines to produce the requested documents on the basis of relevance. These documents formed no part of OPG's Application and have no probative value in deciding it. To the extent that any of the major developments and issues have impacted OPG's test period revenue requirement, they are fully discussed in OPG's Application.

performance of the top quartile of electricity generating companies in North America.

2. Benchmarking will need to take account of key specific operational and technology factors including the operation of CANDU reactors worldwide, the role that OPG's coal plants play in the Ontario electricity market with respect to load following, and the Government of Ontario's coal replacement policy.
3. OPG will annually prepare a 3 – 5 year investment plan for new projects.
4. Once approved by OPG's Board of Directors, OPG's annual performance targets and investment plan will be submitted to the Shareholder and the Minister of Finance for concurrence.

#### **D. Financial Framework**

1. As an OBCA corporation with a commercial mandate, OPG will operate on a financially sustainable basis and maintain the value of its assets for its shareholder, the Province of Ontario.
2. As a transition to a sustainable financial model, any significant new generation project approved by the OPG Board of Directors and agreed to by the Shareholder may receive financial support from the Province of Ontario, if and as appropriate.

#### **E. Communication and Reporting**

1. OPG and the Shareholder 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. Such reporting from OPG should be on an immediate or, at minimum, an expedited basis where an urgent material human safety or system reliability matter arises.
2. OPG will ensure the Minister of Finance receives timely reports and information on multi-year and annual plans and major developments that may have a material impact on the financial performance of OPG or the Shareholder.
3. The OPG Board of Directors and the Minister of Energy will meet on a quarterly basis to enhance mutual understanding of interrelated strategic matters.
4. OPG's Chair, President and Chief Executive Officer and the Minister of Energy will meet on a regular basis, approximately nine times per year.



5. OPG's Chair, President and Chief Executive Officer and the Minister of Finance will meet on an as needed basis.
6. OPG's senior management and senior officials of the Ministry of Energy and the Ministry of Finance will meet on a regular and as needed basis to discuss ongoing issues and clarify expectations or to address emergent issues.
7. OPG will provide officials in the Ministry of Energy and the Ministry of Finance with multi-year and annual business planning information, quarterly and monthly financial reports and briefings on OPG's operational and financial performance against plan.
8. In all other respects, OPG will communicate with government ministries and agencies in a manner typical for an Ontario corporation of its size and scope.

**F. Review of this Agreement**

This agreement will be reviewed and updated as required.

Dated: the 17th day of August, 2005

On Behalf of OPG:

On Behalf of the Shareholder:

Original signed by:

Original signed by:

\_\_\_\_\_  
Jake Epp  
Chairman  
Board of Directors

\_\_\_\_\_  
Her Majesty the Queen in Right of  
the Province of Ontario as  
represented by the Minister of Energy,  
Dwight Duncan