

ONTARIO ENERGY BOARD

IN THE MATTER OF sections 25.20 and 25.21 of the Electricity Act, 1998;

AND IN THE MATTER OF a Submission by the Ontario Power Authority to the Ontario Energy Board for the review of its proposed expenditure and revenue requirement for the year 2014.

Ontario Energy Board	
FILE No.	EB-2013-0326
EXHIBIT No.	km 2
DATE	July 22/14
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08/99	

**ONTARIO POWER AUTHORITY
MATERIAL FOR MOTION
ON JULY 22, 2014**

AIRD & BERLIS LLP
Barristers and Solicitors

Brookfield Place • 181 Bay Street • Suite 1800
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Fred D. Cass

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PART II.1 ONTARIO POWER AUTHORITY

Ontario Power Authority

25.1 (1) A corporation without share capital to be known in English as the Ontario Power Authority and in French as Office de l'électricité de l'Ontario is hereby established. 2004, c. 23, Sched. A, s. 29.

Composition

(2) The OPA is composed of those persons who, from time to time, comprise its board of directors. 2004, c. 23, Sched. A, s. 29.

Objects and character

25.2 (1) The objects of the OPA are,

- (a) to forecast electricity demand and the adequacy and reliability of electricity resources for Ontario for the medium and long term;
- (b) to conduct independent planning for electricity generation, demand management, conservation and transmission and develop integrated power system plans for Ontario;
- (c) to engage in activities in support of the goal of ensuring adequate, reliable and secure electricity supply and resources in Ontario;
- (d) to engage in activities to facilitate the diversification of sources of electricity supply by promoting the use of cleaner energy sources and technologies, including alternative energy sources and renewable energy sources;
- (e) to establish system-wide goals for the amount of electricity to be produced from alternative energy sources and renewable energy sources;
- (f) to engage in activities that facilitate load management;
- (g) to engage in activities that promote electricity conservation and the efficient use of electricity;
- (h) to assist the Ontario Energy Board by facilitating stability in rates for certain types of consumers;
- (i) to collect and provide to the public and the Ontario Energy Board information relating to medium and long term electricity needs of Ontario and the adequacy and reliability of the integrated power system to meet those needs. 2004, c. 23, Sched. A, s. 29.

Not for profit

(2) The business and affairs of the OPA shall be carried on without the purpose of gain and any profits shall be used by the OPA for the purpose of carrying out its objects. 2004, c. 23, Sched. A, s. 29.

Dissolution

(3) Upon the dissolution of the OPA and after the payment of all debts and liabilities, the remaining property of the OPA is vested in Her Majesty in right of Ontario. 2004, c. 23, Sched. A, s. 29.

Capacity

(4) The OPA has the capacity, rights, powers and privileges of a natural person for the purpose of carrying out its objects, except as limited under subsection (6). 2004, c. 23, Sched. A, s. 29.

Powers

(5) Without limiting the generality of subsection (4), the OPA has the power,

- (a) to enter into contracts relating to the adequacy and reliability of electricity supply;
- (b) to enter into contracts relating to the procurement of electricity supply and capacity in or outside Ontario;
- (c) to enter into contracts relating to the procurement of electricity supply and capacity using alternative energy sources or renewable energy sources to assist the Government of Ontario in achieving goals in the development and use of alternative or renewable energy technology and resources;
- (d) to enter into contracts relating to the procurement of reductions in electricity demand and the management of electricity demand to assist the Government of Ontario in achieving goals in electricity conservation;
- (e) to take such steps as it considers advisable to facilitate the provision of services relating to,
 - (i) electricity conservation and the efficient use of electricity,
 - (ii) electricity load management, or
 - (iii) the use of cleaner energy sources, including alternative energy sources and renewable energy sources;
- (f) to take such steps as it considers advisable to ensure there is adequate transmission capacity as identified in the integrated power system plan;
- (g) to enter into contracts with distributors to provide services referred to in clause (e);
- (h) to act as a settlement agent for amounts determined under sections 78.1, 78.2 and 78.5 of the *Ontario Energy Board Act, 1998* and to contract with the IESO or another entity to perform or assist in performing the settlements;
- (i) to create a security interest in any property currently owned or subsequently acquired by the OPA, including fees receivable, rights, powers and undertakings, in order to secure any debt, obligation or liability of the OPA. 2004, c. 23, Sched. A, s. 29; 2009, c. 12, Sched. B, s. 2.

Limitation

(6) The OPA's power to borrow and to invest its funds and to manage its financial assets, liabilities and risks is subject to such rules and restrictions as may be prescribed. 2004, c. 23, Sched. A, s. 29.

Not a Crown agent

25.3 The OPA is not an agent of Her Majesty for any purpose, despite the *Crown Agency Act*. 2004, c. 23, Sched. A, s. 29.

Board of directors

25.4 (1) The OPA's board of directors shall manage and supervise the management of the OPA's business and affairs. 2004, c. 23, Sched. A, s. 29.

Composition

(2) The board of directors shall be composed of,

(a) the chief executive officer of the OPA; and

(b) 10 additional individuals appointed by the Minister. 2004, c. 23, Sched. A, s. 29.

Directors to be independent

(3) Every director shall hold office as an independent director and not as a representative of any class of persons. 2004, c. 23, Sched. A, s. 29.

Directors

(4) No person who is a member of a class of persons prescribed by the regulations may hold office as a director of the OPA. 2004, c. 23, Sched. A, s. 29.

Term of office and reappointment

(5) A director appointed in accordance with clause (2) (b) shall hold office at pleasure for an initial term not exceeding two years and, subject to subsection (4), may be reappointed for successive terms not exceeding five years each. 2004, c. 23, Sched. A, s. 29.

Quorum

(6) A majority of the members of the board of directors constitute a quorum of the board. 2004, c. 23, Sched. A, s. 29.

Chair

(7) The board of directors shall appoint one of the directors as chair of the board. 2004, c. 23, Sched. A, s. 29.

Ceasing to hold office

(8) A director ceases to hold office in the circumstances specified in the Governance and Structure By-law. 2004, c. 23, Sched. A, s. 29.

Vacancy in board

(9) If there are one or more vacancies in the board of directors, the remaining directors may exercise all the powers of the board if they would constitute a quorum of the board if there were no vacancies. 2004, c. 23, Sched. A, s. 29.

Director duties

25.5 Every director of the OPA shall, in exercising and performing his or her powers and duties,

- (a) act honestly and in good faith in the best interests of the OPA; and
- (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. 2004, c. 23, Sched. A, s. 29.

Chief executive officer

25.6 (1) The board of directors of the OPA shall appoint a chief executive officer of the OPA. 2004, c. 23, Sched. A, s. 29.

Exception

(2) Despite subsection (1), the Minister shall appoint the first chief executive officer of the OPA, but nothing in this subsection prevents the board of directors of the OPA from appointing any subsequent chief executive officer. 2004, c. 23, Sched. A, s. 29.

Conflict of interest

25.7 The directors and officers of the OPA shall comply with the provisions of the Governance and Structure By-law relating to conflict of interest. 2004, c. 23, Sched. A, s. 29.

Codes of conduct

25.8 (1) The board of directors of the OPA may establish codes of conduct applicable to the directors, officers, employees and agents of the OPA and to members of panels established by the OPA. 2004, c. 23, Sched. A, s. 29.

Conflict

(2) Any provision of a code of conduct that conflicts with this Act or the OPA's by-laws is void. 2004, c. 23, Sched. A, s. 29.

Delegation

25.9 Subject to the Governance and Structure By-law, the board of directors of the OPA may delegate any of the OPA's powers or duties to a committee of the board, to a panel established by the board or to any other person or body, subject to such conditions and restrictions as may be specified by the board of directors. 2004, c. 23, Sched. A, s. 29.

Panels

25.10 The board of directors of the OPA shall establish such panels as the board considers necessary for the purposes of this Act. 2004, c. 23, Sched. A, s. 29.

25.11 Repealed: 2009, c. 12, Sched. B, s. 3.

Stakeholder input

25.12 The OPA shall establish one or more processes by which consumers, distributors, generators, transmitters and other persons who have an interest in the electricity industry may provide advice and recommendations for consideration by the OPA. 2004, c. 23, Sched. A, s. 29.

Staff and assistance

25.13 (1) Subject to the by-laws of the OPA, a panel established by the board of directors may use the services of,

- (a) the OPA's employees, with the consent of the OPA; and
- (b) persons other than the OPA's employees who have technical or professional expertise that is considered necessary. 2004, c. 23, Sched. A, s. 29.

Provision of information to the IESO

(2) The OPA shall provide the IESO with such information as the IESO may require from time to time. 2004, c. 23, Sched. A, s. 29.

Confidential information relating to a market participant

(3) A record that contains information provided to or obtained by the OPA relating to a market participant and that is designated by the OPA as confidential or highly confidential shall be deemed, for the purpose of section 17 of the *Freedom of Information and Protection of Privacy Act*, to be a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, the disclosure of which could reasonably be expected to prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization. 2004, c. 23, Sched. A, s. 29.

Liability

25.14 (1) No action or other civil proceeding shall be commenced against a director, officer, employee or agent of the OPA or a member of the Advisory Committee or a panel established by the board for any act done in good faith in the exercise or performance or the intended exercise or performance of a power or duty under this or any other Act, the regulations, the OPA's licence, the OPA's by-laws or the market rules, or for any neglect or default in the exercise or performance in good faith of such a power or duty. 2004, c. 23, Sched. A, s. 29.

Same

(2) Subsection (1) does not relieve the OPA of any liability to which it would otherwise be subject in respect of a cause of action arising from any act, neglect or default referred to in subsection (1). 2004, c. 23, Sched. A, s. 29.

Liability of directors under the Employment Standards Act, 2000

25.15 Part XX of the *Employment Standards Act, 2000* does not apply to a director of the OPA. 2004, c. 23, Sched. A, s. 29.

By-laws

25.16 (1) The board of directors of the OPA may make by-laws regulating the business and affairs of the OPA. 2004, c. 23, Sched. A, s. 29.

Governance and Structure By-law

(2) The board of directors shall make a by-law under subsection (1) dealing with matters of corporate governance and structure, including,

- (a) the appointment of the chief executive officer of the OPA;
- (b) Repealed: 2009, c. 12, Sched. B, s. 4.
- (c) the circumstances in which a director ceases to hold office;
- (d) the remuneration and benefits of the chair and the other members of the board;
- (e) conflict of interest;
- (f) the delegation of the OPA's powers and duties;
- (g) the establishment, composition and functions of panels. 2004, c. 23, Sched. A, s. 29; 2009, c. 12, Sched. B, s. 4.

Same

(3) The Governance and Structure By-law may be made only with the approval in writing of the Minister. 2004, c. 23, Sched. A, s. 29.

Amendment or repeal of Governance and Structure By-law

(4) A by-law that amends or repeals the Governance and Structure By-law shall be filed with the Minister by the board of directors. 2004, c. 23, Sched. A, s. 29.

Disallowance

(5) The Minister may disallow a by-law to which subsection (4) applies by written notice to the board of directors given within 60 days after the by-law is filed with the Minister. 2004, c. 23, Sched. A, s. 29.

Effective date

(6) A by-law to which subsection (4) does not apply comes into force on the day it is made or on such later date as may be specified in the by-law. 2004, c. 23, Sched. A, s. 29.

Same

(7) Subject to subsections (5) and (8), a by-law to which subsection (4) applies comes into force on the earlier of the following dates:

1. The expiry of the 60-day period referred to in subsection (5).
2. The date on which the Minister notifies the board of directors in writing that he or she will not disallow the by-law. 2004, c. 23, Sched. A, s. 29.

Same

(8) Subject to subsection (5), a by-law to which subsection (4) applies may specify that it comes into force on a date later than the date determined under subsection (7). 2004, c. 23, Sched. A, s. 29.

Conflict between by-laws

(9) In the event of a conflict between the Governance and Structure By-law and another by-law, the Governance and Structure By-law prevails. 2004, c. 23, Sched. A, s. 29.

Legislation Act, 2006, Part III

(10) Part III (Regulations) of the *Legislation Act, 2006* does not apply to by-laws made under this section. 2004, c. 23, Sched. A, s. 29; 2006, c. 21, Sched. F, s. 136 (1).

Province may purchase securities, etc.

25.17 (1) The Lieutenant Governor in Council may by order authorize the Minister of Finance to purchase securities of or make loans to the OPA at such times and on such terms and conditions as the Minister of Finance may determine subject to the maximum principal amount and to any other terms and conditions that are specified by the Lieutenant Governor in Council. 2004, c. 23, Sched. A, s. 29.

Payment from C.R.F.

(2) The Minister of Finance may pay out of the Consolidated Revenue Fund any amount required for the purposes of subsection (1). 2004, c. 23, Sched. A, s. 29.

Delegation

(3) In an order under subsection (1), the Lieutenant Governor in Council may delegate to an officer or employee of the Crown or an agency of the Crown or to a solicitor engaged to act for the Minister of Finance, any or all of the powers of the Minister of Finance under this section. 2004, c. 23, Sched. A, s. 29.

Fees payable to Minister of Finance

(4) The OPA shall pay to the Minister of Finance such fees as are prescribed by the regulations in respect of securities purchased and sums loaned under this section. 2004, c. 23, Sched. A, s. 29.

Reimbursement of costs incurred by the Crown

25.18 (1) The OPA shall reimburse the Crown or, if so directed by the Minister of Finance, an agency of the Crown for costs relating to the OPA, a procurement contract, an initiative described in clause 25.32 (4) (a) or a matter within the objects of the OPA, if,

- (a) the costs were incurred by the Crown or an agency of the Crown after January 20, 2004 and before the Board's first approval of the OPA's procurement process under subsection 25.31 (4); or
- (b) the liability of the Crown or an agency of the Crown for the costs arose during the period described in clause (a). 2004, c. 23, Sched. A, s. 29.

Payment of reimbursement

(2) The OPA shall make the reimbursement by making one or more payments in such amount or amounts at such time or times as may be determined by the Minister of Finance. 2004, c. 23, Sched. A, s. 29.

Minister's determinations final

(3) The determinations of the Minister under subsection (2) are final and conclusive and shall not be stayed, varied or set aside by any court. 2004, c. 23, Sched. A, s. 29.

25.19 Repealed: 1998, c. 15, Sched. A, s. 25.19 (3). See: 2004, c. 23, Sched. A, s. 30.

Fees and charges

- 25.20** (1) The OPA may establish and impose fees and charges to recover,
- (a) the costs of doing anything the OPA is required or permitted to do under this or any other Act; and
 - (b) any other type of expenditure the recovery of which is permitted by the regulations, subject to any limitations and restrictions set out in the regulations. 2004, c. 23, Sched. A, s. 31 (1).

Collection

- (2) The IESO shall, in accordance with the regulations, collect and pay to the OPA all fees and charges payable to the OPA. 2004, c. 23, Sched. A, s. 31 (1).

May recover costs of procurement contracts

- (3) For greater certainty, the OPA may, subject to the regulations, establish and impose charges to recover from consumers its costs and payments under procurement contracts. 2004, c. 23, Sched. A, s. 31 (2).

Board deemed to approve recovery

- (4) The OPA's recovery of its costs and payments related to procurement contracts shall be deemed to be approved by the Board. 2004, c. 23, Sched. A, s. 31 (2).

Review of requirements and fees

- 25.21** (1) The OPA shall, at least 60 days before the beginning of each fiscal year, submit its proposed expenditure and revenue requirements for the fiscal year and the fees it proposes to charge during the fiscal year to the Board for review, but shall not do so until after the Minister approves or is deemed to approve the OPA's proposed business plan for the fiscal year under section 25.22. 2004, c. 23, Sched. A, s. 32.

Board's powers

- (2) The Board may approve the proposed requirements and the proposed fees or may refer them back to the OPA for further consideration with the Board's recommendations. 2004, c. 23, Sched. A, s. 32.

Same

- (3) In reviewing the OPA's proposed requirements and proposed fees, the Board shall not take into consideration the remuneration and benefits of the chair and other members of the board of directors of the OPA. 2004, c. 23, Sched. A, s. 32.

Changes in fees

- (4) The OPA shall not establish, eliminate or change any fees without the approval of the Board. 2004, c. 23, Sched. A, s. 32.

Hearing

(5) The Board may hold a hearing before exercising its powers under this section, but it is not required to do so. 2004, c. 23, Sched. A, s. 32.

(6), (7) Repealed: 2009, c. 33, Sched. 14, s. 2 (3).

Business plan

25.22 (1) At least 90 days before the beginning of its 2006 and each subsequent fiscal year, the OPA shall submit its proposed business plan for the fiscal year to the Minister for approval. 2004, c. 23, Sched. A, s. 32.

Minister's approval

(2) The Minister may approve the proposed business plan or refer it back to the OPA for further consideration. 2004, c. 23, Sched. A, s. 32.

Deemed approval

(3) If the Minister does not approve the proposed business plan and does not refer it back to the OPA for further consideration at least 70 days before the beginning of the fiscal year to which it relates, the Minister shall be deemed to have approved the OPA's proposed business plan for the fiscal year. 2004, c. 23, Sched. A, s. 32.

(4) Repealed: 2009, c. 33, Sched. 14, s. 2 (4).

Auditor

25.23 The board of directors of the OPA shall appoint one or more auditors licensed under the *Public Accountancy Act* to audit annually the accounts and transactions of the OPA. 2004, c. 23, Sched. A, s. 32.

Auditor General

25.24 The Auditor General may audit the accounts and transactions of the OPA. 2004, c. 23, Sched. A, s. 32; 2008, c. 7, Sched. G, s. 3.

Annual report

25.25 (1) The OPA shall, within 90 days after the end of every fiscal year, submit to the Minister an annual report on its affairs during that fiscal year, signed by the chair of its board of directors. 2004, c. 23, Sched. A, s. 32.

Financial statements

(2) The audited financial statements of the OPA shall be included in the annual report. 2004, c. 23, Sched. A, s. 32.

Tabling

(3) The Minister shall submit the annual report to the Lieutenant Governor in Council and shall then table the report in the Assembly. 2004, c. 23, Sched. A, s. 32.

Other persons

(4) The OPA may give its annual report to other persons before the Minister complies with subsection (3). 2004, c. 23, Sched. A, s. 32.

Other reports

25.26 (1) The OPA shall submit to the Minister such reports and information as the Minister may require from time to time. 2004, c. 23, Sched. A, s. 32.

Same

(2) The OPA shall submit to the Minister of Finance and the Minister such reports and information as the Minister of Finance may require from time to time. 2004, c. 23, Sched. A, s. 32.

Information to Board

25.27 The OPA shall provide the Board with such information as the Board may require from time to time. 2004, c. 23, Sched. A, s. 32.

Application of corporations statutes

25.28 Except as otherwise provided by the regulations, the Corporations Act and the Corporations Information Act do not apply to the OPA. 2004, c. 23, Sched. A, s. 32.



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January 23, 2014

The Honourable Bob Chiarelli
Minister of Energy
900 Bay Street, Hearst Block
4th Floor
Toronto, ON M7A 2E1

Dear Minister: *Minister*

Thank you for your letter of October 22, 2013 regarding the OPA's 2014-16 business plan. In response to the government's commitment to further expenditure and staffing restraints across its various agencies, the OPA has reviewed its 2014 operating budget, as well as its 2015 and 2016 plans for additional efficiencies and reductions. This revised operating budget demonstrates the OPA's commitment to finding further efficiencies and savings as outlined in your letter.

In the OPA's revised business plan, operating expenses of \$60.3 million have been reduced by \$2.5 million or 3.9 percent from the October 2013 budget submission. This represents a decline in the operating budget of 5.9 percent from the 2011 budget submitted to the Ontario Energy Board (OEB), and is flat relative to OPA spending for 2012 and 2013.

In December, the OEB approved our proposed 2014 interim revenue requirement usage fee, which is approximately 20 percent lower than our approved interim rate from 2011 to 2013, resulting in annual savings for the average residential rate payer of \$1.09. The OPA has received OEB approval of this rate on an interim basis, effective January 1, 2014. The OPA also intends to rebate approximately \$25 million of its cumulative surplus to ratepayers.

The reductions have been achieved through a combination of headcount decreases and administrative efficiencies. Reducing headcount while implementing program priorities and meeting adequate service levels within an expanding mandate and increasing volume and complexity is challenging and there may be impacts on our service and delivery levels.

The OPA has been successfully delivering work on 15 government directives issued since November 2012, including four new directives added on December 16, 2013 (i.e., Renewable Energy Program, Hydroelectric Projects and Industrial Electricity Incentive and others related to the Long-Term Energy Plan) – more than any other agency in the province – while also managing its resources in a prudent manner.

Our stakeholder base today is also broader and more complex than in the past, which drives more interactions and touch points with the public and sector participants. In 2014, we expect further increases in the volume and complexity of our workload in all areas of our mandate. This includes increased stakeholder and regional planning activities, implementing the 18 regional planning recommendations accepted by you and the Premier, managing 28,000 contracts that account for two-thirds of Ontario's electricity system, designing a large renewable procurement process, implementing the Long-Term Energy Plan recommendations, and doubling generation and conservation program spending to \$4.7 billion in 2014 compared to 2011.



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A key OPA project, to be completed in early 2014, will establish and monitor performance metrics that link to strategic objectives, goals and initiatives; including both outcome-based measures and financial operating metrics to track the OPA's overall long-term success, and milestone-based measures to track and report on the OPA's initiatives and projects.

We have historically managed the requirement for surge capacity for new programs by using temporary staffing resources. Our current resource plan reflects a one-time, mid-2013 conversion of some long-term temporary roles to regular positions to support the long-term sustainability of the FIT and microFIT programs. No further conversions are planned or reflected in the 2014 to 2016 planning period.

In 2014, we will manage an increased volume of activities with an average staffing level of 260. This will be accomplished through greater use of third-party entities to support program delivery, focus on simpler standard offer activities for ease of delivery, reallocation of staff with retraining as required, realizing further administrative efficiencies, a slower pace of program delivery using fewer resources and taking longer to review applications and respond to inquiries.

The OPA remains committed to complying with the government's goal to restrain staffing levels. While we are operating with an expanded mandate and an increased volume and complexity of work, our revised 2014 budget remains flat with respect to staffing levels compared to 2011 and 2012. The OPA is committed to deliver the planned resource changes, working within the context of the recent union certification process that is under way.

We are also committed to reductions in 2015 and 2016 and are exploring options to achieve results with fewer resources, including a focus on policy and analysis with a reduction in retail delivery activities, greater planning integration with the IESO and other sector agencies, migration of the delivery and administration of the labour-intensive microFIT Program to local distribution companies, greater leverage of the IESO settlement system, ongoing efficiencies through further automation and system enhancements, and consideration of a memorandum of understanding with the IESO for further collaboration to ensure the effective and efficient delivery of our respective mandates.

The OPA fully supports the government's cost savings initiatives and is committed to helping Ontario become a world-leading clean energy jurisdiction that will support the economy of tomorrow.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Colin Andersen", with a long horizontal flourish extending to the right.

Colin Andersen
Chief Executive Officer

cc:

Serge Imbrogno, Deputy Minister of Energy

Andrew Teliszewsky, Chief of Staff

Michael Reid, ADM, Regulatory Affairs and Strategic Policy, Ministry of Energy

John Whytock, Director of Communications, Ministry of Energy

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MC-2014-229

January 29, 2014

Mr. Colin Andersen
Chief Executive Officer
Ontario Power Authority
1600-120 Adelaide Street West
Toronto ON M5H 1T1

Dear Mr. Andersen:

Re: Revised 2014-2016 OPA Business Plan

Thank you for submitting, for my approval, the Ontario Power Authority's (OPA) revised 2014-2016 Business Plan, which we received on January 24, 2014. It is my pleasure to inform you that I am satisfied with the overall direction, strategic priorities and the revised budget proposed by the OPA for its 2014-2016 fiscal years.

As requested in my letter of October 22, 2013, I am pleased that the OPA is making efforts to find efficiencies and savings through a \$2.5 million reduction in the operating budget and an overall reduction of the OPA's total number of FTEs to 260. It is my expectation that the OPA will continue to deliver a high level of service to its customers while implementing these savings.

In addition, I am encouraged that the OPA intends to rebate approximately \$25 million of its cumulative surplus to ratepayers and that a lower interim usage fee in the amount of \$0.438/KWh has already been approved by the Ontario Energy Board.

I appreciate that the OPA is working to establish and monitor performance metrics that link to strategic objectives, goals and initiatives as outlined in your letter of January 23, 2014, and I look forward to receiving additional information in early 2014.

I am now able to approve the OPA's 2014-16 Business Plan for the purposes of the *Electricity Act, 1998*.

Sincerely,


Bob Chiarelli
Minister

c: James D. Hinds, Chair, Ontario Power Authority
OPA Board of Directors
Andrew Teliszewsky, Chief of Staff, Ministry of Energy
Serge Imbrogno, Deputy Minister, Ministry of Energy

ONTARIO ENERGY BOARD

IN THE MATTER OF sections 25.20 and 25.21 of the
Electricity Act, 1998;

AND IN THE MATTER OF a Submission by the Ontario
Power Authority to the Ontario Energy Board for the review
of its proposed expenditure and revenue requirements for
the year 2014.

AFFIDAVIT

I, Terry Gabriele, of the City of Toronto, in the Province Ontario, MAKE OATH AND SAY
AS FOLLOWS:

1. I am Director, Finance, and also the Internal Audit Manager, for the Ontario Power Authority (OPA) and as such I have knowledge of the matters addressed in this affidavit.
2. As the OPA's Internal Audit Manager, I am responsible for the development of the Internal Audit Plan, monitoring the execution of the Internal Audit Plan, executing select audits and reviews aligned with the Internal Audit Plan, and reporting results of the internal audits to the Audit Committee of the OPA's Board of Directors. In my role as Internal Audit Manager, I report directly to the Audit Committee. I also report administratively to the Vice President Business Strategy and Solutions.

3. The fundamental purpose of the Internal Audit function is to assist management of the OPA and the Audit Committee in the effective discharge of their responsibilities with respect to ensuring that controls and procedures are operating as intended. It is the ultimate responsibility of management to establish adequate internal control policies and procedures to create a strong internal control environment.
4. The internal audit program is not a review of operating budgets or financial forecasts, nor is it a review of the annual business plan. The program focuses on business procedures and processes, and not on the financial outcomes of those procedures and processes.
5. Any audit that bears on a current year's expenses would occur only after the fact and generally in future years as an element of controls and assurance testing. The "controls" aspect of controls and assurance testing relates to the segregation of duties, authorization of transactions and review of accounts and the "assurance" aspect relates to the reasonableness of processes and procedures.
6. It is management of the OPA, rather than the internal audit function, that is responsible for the efficiency and effectiveness of operations and financial outcomes. The evidence filed in this proceeding explains the measures and metrics developed by management for the specific purpose of reporting on the effectiveness of activities in the 2014 business plan.

7. The OPA's Board of Directors does not review day-to-day activities of the organization and, accordingly, the Board of Directors requires assurance, independent from management, that processes and procedures employed at the OPA are reasonable. The internal audit review of procedures is one method by which the Board of Directors can receive this assurance.
8. Internal audits are not relevant to the 2014 business plan, nor are they relevant to the OPA's Revenue Requirement Submission to the Ontario Energy Board (OEB). The internal audit program is built on a five-year cycle and examines activities that have concluded, as opposed to the 2014 business plan, which is a forecast of the future.
9. Business processes reviewed as part of the internal audit function can and do change over time. For instance, the OPA is currently working with electricity distributors (LDCs) to develop the new Conservation First Framework which will fundamentally change the way conservation is delivered and significantly enhance the role of LDCs. Similarly, generation procurement, once a public competitive process, moved into a standard offer program (FIT and microFIT) and now a public competitive process will be re-introduced, for the Large Renewable Procurement program.
10. An internal audit reviewing the process for conservation program delivery from 2011-2014 will not provide insight into the effectiveness of the Conservation First

Framework to be delivered by LDCs in 2015 and beyond. Reviews of processes for standard offer programs will not provide useful insight into 2014 expenses related to the Large Renewable Procurement program. In short, the OPA's internal audit program does not provide insight into the efficiency and effectiveness of the 2014 business plan.

11. More generally, internal audits do not provide insight into the overall efficiency and effectiveness of operations. They are designed to provide reasonable assurance that controls and procedures are operating as intended and to recommend incremental improvements to processes.
12. In order to assist with an understanding of the internal audit function, I will provide an example of how an internal audit report might address a specific element of operations. The example (exaggerated for clarity of concept) is a situation in which an internal audit is conducted of a business process used for 40,000 transactions. In this example, the audit reveals that two transactions may have passed when they should have failed.
13. The outcome of the internal audit in my example is a recommendation for an incremental improvement to the particular process in order to prevent future recurrence of the two failed transactions, rather than an assessment that the process largely operated in an appropriate fashion. Management may then

implement the recommendation or it may decide, with its reasons for doing so, that implementation of the recommendation is not warranted.

14. Continuing with the example, management's decision is reviewed by the Audit Committee when the auditor's report is presented to the Board of Directors. The Audit Committee decides whether management has taken appropriate action.
15. The important point of this example is that the internal audit report does not assess whether the costs and other consequences of changing the particular process are warranted due to the two failed transactions. The internal audit report is not a basis for forming conclusions about the cost-effectiveness or efficiency of changing the process that was used for 40,000 transactions.
16. An internal auditor holds a unique position in that he or she reports directly to the Audit Committee and yet is still an employee of the organization. The direct reporting relationship with the Audit Committee provides independence from other parts of the organization and is relied upon by the Board of Directors for assurance that controls and procedures implemented by management are operating as intended.
17. It is fundamental to the internal auditor's reporting relationship with the Audit Committee that the Audit Committee can be confident that audit reports are prepared without in any way being influenced by the implications of the reports becoming available to another audience. To the extent that external parties

become involved in an examination of internal audit reports, the unique position of the auditor, with duties to the Audit Committee and an employment relationship with the organization, will be compromised. To the extent that there is any reason for the Board of Directors to think that there has been any reason for influence on the independence and objectivity of the auditor, the Board of Directors will be unable to rely on audit opinions.

18. The preparation and reporting of the auditor's findings cannot be influenced by an awareness of viewpoints of different audiences, but must be focused on the pure purpose of providing information to the Audit Committee and management. It is particularly important not to compromise the integrity of the internal audit process by seeking to gain insights from audit reports that they do not actually provide, such as insights into the efficiency and effectiveness of the OPA's 2014 business plan.
19. When an audit review has been completed, all findings are communicated both verbally and in written form to both the Audit Committee and management. Also, on an annual basis, the Internal Audit function oversees a follow-up review of internal audit reports and recommendations
20. The most recent review completed by BDO Dunwoody found that, of the 42 outstanding recommendations for audits completed in the period spanning January 2009 through February 2013, 29 were complete and nine were

substantially complete, with four having some additional work to complete. Three of the four are related to a records retention program at the OPA and a project is under way to codify and structure the 15 terabytes of electronic documents and the existing inventory of paper documents. The final recommendation is a review of external vendors providing incentive redemption services and is under way. BDO Dunwoody has concluded that, of the 42 recommendations, there are zero that have not been or will not be implemented by the OPA.

21. The OPA contracts with LDCs to deliver electricity savings through specific conservation programs. Under the contracts with the LDCs, the OPA reviews the controls and procedures of the LDCs to obtain reasonable assurance that those controls and procedures are operating as intended. The reviews assess controls and procedures employed by the LDCs in the delivery of electricity savings through the LDC-managed conservation programs. These reviews are not related to any costs or operating expenses in the OPA's 2014 business plan or in its Revenue Requirement Submission to the OEB.

SWORN before me at the City of)
Toronto, this 18th day of July,)
2014)



A COMMISSIONER, ETC.)

Michael Lyle)



TERRY GABRIELE

Tab 4

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THE LAW OF EVIDENCE IN CANADA

THIRD EDITION

Alan W. Bryant

Justice of the Superior Court of Justice for Ontario

Sidney N. Lederman

Justice of the Superior Court of Justice for Ontario

Michelle K. Fuerst

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§2.54 Subsequent to *Wray*, the Supreme Court of Canada rejected this restrictive approach to the discretion. Justice La Forest in *R. v. Harter*¹⁰⁵ stated that the trial judge has a duty, now constitutionalized by the enshrinement of a fair trial in the *Charter*, to exercise properly his or her judicial discretion to exclude evidence that would result in an unfair trial. As such, the trial judge has a discretion to exclude evidence where its probative value is outweighed by its prejudicial effect or where the effect of admitting the evidence would be to mislead the jury or to otherwise render the trial unfair.¹⁰⁶

§2.55 Thus, even where the evidence is logically relevant and does not run afoul of any specific exclusionary rule and is therefore technically admissible, trial judges may take into account other considerations to determine whether its probative value is overcome by its prejudicial effect in terms of its impact on the trial process or fairness in allowing the evidence to be put forth.

§2.56 The exercise of the discretion is generally called upon in two broad situations: (a) where the reliability of the evidence is questionable and its prejudicial impact significant; and (b) where, quite apart from any *Charter* breach, there has been unfairness in the manner in which the evidence was obtained.

(i) Probative Value and Prejudice

§2.57 A trial judge has a discretion to weigh considerations of probative value and prejudice and to exclude evidence, not only if its probative weight is "trifling", but whenever its prejudicial effect would be out of proportion to its true evidential value.¹⁰⁷

¹⁰⁵ [1995] 3 S.C.R. 562, [1995] S.C.J. No. 81 (S.C.C.). Also see *R. v. Terry*, [1996] 2 S.C.R. 207, 106 C.C.C. (3d) 508, at 518-19, [1996] S.C.J. No. 62 (S.C.C.); *R. v. Bevan*, [1993] 2 S.C.R. 599, 82 C.C.C. (3d) 310, at 326, [1993] S.C.J. No. 69 (S.C.C.); *R. v. Clarke* (1998), 18 C.R. (5th) 219, [1998] O.J. No. 3521 (Ont. C.A.). See also *R. v. Hape*, [2007] 2 S.C.R. 292, [2007] S.C.J. No. 26, at para. 108 (S.C.C.).

¹⁰⁶ *R. v. Mohan*, [1994] 2 S.C.R. 9, [1994] S.C.J. No. 36 (S.C.C.); *R. v. Buric* (1996), 28 O.R. (3d) 737, [1996] O.J. No. 1657 (Ont. C.A.), affd [1997] 1 S.C.R. 535, [1997] S.C.J. No. 38 (S.C.C.); *R. v. Savoy* (1997), 6 C.R. (5th) 61, [1997] B.C.J. No. 449 (B.C.C.A.). See also *R. v. Buhay*, [2003] 1 S.C.R. 631, [2003] S.C.J. No. 30, at para. 40 (S.C.C.). In *R. v. Crawford*; *R. v. Creighton*, [1995] 1 S.C.R. 858, [1995] S.C.J. No. 30 (S.C.C.) an accused exercised his right to remain silent by failing to make a statement to authorities at an early date. When the co-accused sought to use this evidence at trial to support an inference against the accused, Justice McLachlin of the Supreme Court of Canada found that there was a risk that the probative value of this evidence would not outweigh the prejudicial effect arising from the danger that the jury might infer not only lack of credibility, which was the only permissible inference, but also guilt.

¹⁰⁷ The evolution of this discretion in the Supreme Court of Canada can be traced through the cases of *R. v. Corbett*, [1988] 1 S.C.R. 670, 28 B.C.L.R. (2d) 145, [1988] S.C.J. No. 40 (S.C.C.); *R. v.*

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§2.58 In assessing probative value, a trial judge is necessarily determining the degree or extent to which the evidence will prove the fact in issue for which it is tendered.¹⁰⁸ That sometimes requires an assessment of the strength of the inferential link between the evidence in question and the fact in issue. But probative value may also depend upon the reliability of the evidence in question. Any consideration of the reliability of the evidence involves an examination of its frailties and liberal exercise of the exclusionary discretion in this context runs the danger of the trial judge usurping the role of the jury in deciding the weight of the evidence. Particularly in situations where a judge is considering admitting evidence as an exception to a specific exclusionary rule, such as in the case of expert opinion evidence¹⁰⁹ or hearsay evidence,¹¹⁰ a threshold of reliability must be met. In exercising the discretion, however, the trial judge must take care not to determine ultimate reliability, which is for the jury, but rather, must ensure that the proposed evidence meets a threshold of sufficient reliability. In addition, other factors may come into play, such as whether the proposed evidence "involves an inordinate amount of time which is not commensurate with its value, or, if it is misleading in the sense that its

Potvin, [1989] 1 S.C.R. 525, [1989] S.C.J. No. 24 (S.C.C.); *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research)*, [1990] 1 S.C.R. 425, at 559-60, [1990] S.C.J. No. 23 (S.C.C.). See also *R. v. Arp*, [1998] 3 S.C.R. 339, [1998] S.C.J. No. 82 (S.C.C.). The analysis of hair samples in criminal cases is an area particularly fraught with potential for misuse. Hair samples are not akin to fingerprint comparisons, and the assessment of similarities, differences and importance of hair characteristics is highly subjective. The prejudicial effect of hair comparison evidence may be substantial, since the scientific opinion brings with it an aura of respectability and infallibility. Yet its probative value may often be insufficient to justify its reception: *R. v. Bennett* (2003), 19 C.R. (6th) 109, [2003] O.J. No. 3810 (Ont. C.A.), leave to appeal refused [2003] S.C.C.A. No. 534 (S.C.C.). However, while hair comparison evidence that is based only on microscopic similarities has limited probative value, the probative value of such evidence was increased where hairs found at the scene and in the accused's apartment were microscopically similar to hairs which matched the DNA of the accused and the victim: *R. v. Portillo* (2003), 17 C.R. (6th) 362, [2003] O.J. No. 3030 (Ont. C.A.). The accused's right to make full answer and defence and the principle against self-incrimination do not entitle the accused to adduce irrelevant and prejudicial material at trial; to be admissible under s. 276(2) of the *Criminal Code*, evidence of a complainant's sexual activity must be more probative than prejudicial: *R. v. Darrach*, [2002] 2 S.C.R. 443, [2000] S.C.J. No. 46, at paras. 24 and 28 (S.C.C.).

¹⁰⁸ *R. v. Pascoe* (1997), 32 O.R. (3d) 37, [1997] O.J. No. 88 (Ont. C.A.). In *R. v. Duguay* (2007), 50 C.R. (6th) 378, [2007] N.B.J. No. 337 (N.B.C.A.), it was held that a trial judge should not take into account the lack of credibility or reliability of an unsavoury witness in determining the probative value of the witness' evidence versus its prejudicial effect.

¹⁰⁹ See Chapter 12; *R. v. Terceira* (1998), 38 O.R. (3d) 175, [1998] O.J. No. 428 (Ont. C.A.), aff'd [1999] 3 S.C.R. 866, [1999] S.C.J. No. 74 (S.C.C.).

¹¹⁰ See Chapter 6.

effect on the trier of fact, particularly a jury, is out of proportion to its reliability".¹¹¹

§2.59 In the case of s. 12 of the *Canada Evidence Act*¹¹² which permits cross-examination of an accused on his or her prior convictions, the trial judge has a residual discretion to exclude or limit the cross-examination or edit the criminal record if the prejudicial effect is out of proportion to the probative value in respect of credibility.¹¹³

(ii) Improperly Obtained Evidence

§2.60 In *R. v. Harter*,¹¹⁴ La Forest J., speaking for the majority, recognized the existence of a discretion to exclude evidence which was improperly obtained. Where the issue is whether the admission of the proposed evidence would itself constitute a violation of principles of fundamental justice including trial fairness, the judge is required to balance societal interests in the effective prosecution of serious criminal cases and individual interests before deciding whether the evidence should be excluded or admitted.¹¹⁵

(b) In Favour of the Crown and Third Persons

§2.61 In *R. v. Valley*,¹¹⁶ the Ontario Court of Appeal held that there was no judicial discretion to exclude evidence on the basis that its admission would

¹¹¹ *R. v. Mohan*, [1994] 2 S.C.R. 9, [1994] S.C.J. No. 36 (S.C.C.); *R. v. Buric* (1996), 28 O.R. (3d) 737, [1996] O.J. No. 1657 (Ont. C.A.), affd [1997] 1 S.C.R. 535, [1997] S.C.J. No. 38 (S.C.C.). See also *R. v. Underwood* (2002), 9 C.R. (6th) 354, [2002] A.J. No. 1558 (Alta. C.A.).

¹¹² R.S.C. 1985, c. C-5. See Chapter 10, § 10.84 ff. and Chapter 16, § 16.165.

¹¹³ See *R. v. Corbett*, [1988] 1 S.C.R. 670, [1988] S.C.J. No. 40 (S.C.C.); *R. v. Charland* (1997), 187 A.R. 161, [1996] A.J. No. 819 (Alta. C.A.), affd [1997] 3 S.C.R. 1006/1, [1997] S.C.J. No. 106 (S.C.C.); *R. v. Underwood*, [1998] 1 S.C.R. 77, [1998] S.C.J. No. 107 (S.C.C.). As for the exercise of a similar discretion in the United States, see *Old Chief v. United States*, 117 S.Ct. 644 (1997). Also, see Chapter 10, § 10.84 ff. and Chapter 16, § 16.165. The court should be very wary of permitting cross-examination on prior convictions where the prior conviction is similar to the conduct for which the accused is on trial. In *R. v. Wilson* (2006), 39 C.R. (6th) 345, [2006] O.J. No. 2478 (Ont. C.A.), cross-examination on prior drug convictions where the accused was charged with a drug-related offence was highly prejudicial and not probative on the issue of credibility. The trial judge erred in principle by permitting such cross-examination and her decision was accordingly not entitled to the considerable deference normally accorded discretionary decisions.

¹¹⁴ [1995] 3 S.C.R. 562, [1995] S.C.J. No. 81 (S.C.C.).

¹¹⁵ *R. v. Buric* (1996), 28 O.R. (3d) 737, [1996] O.J. No. 1657 (Ont. C.A.), affd [1997] 1 S.C.R. 535, [1997] S.C.J. No. 38 (S.C.C.).

¹¹⁶ (1986), 26 C.C.C. (3d) 207, at 239, [1986] O.J. No. 77 (Ont. C.A.), leave to appeal refused [1986] 1 S.C.R. xiii, 26 C.C.C. (3d) 207n (S.C.C.).