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BY EMAIL and RESS

January 26, 2015
Our File: EB20140116

Ontario Energy Board
2300 Yonge Street
27th Floor
Toronto, Ontario
M4P 1E4

Attn: Kirsten Walli, Board Secretary

Dear Ms. Walli:

Re: EB-2014-0116 – THESL 2015-2019 – SEC's Submissions in Reply to the CEA

We are counsel to the School Energy Coalition ("SEC"). Enclosed, please find SEC's submissions in reply to the Responding Motion and Cross Motion Record of the Canadian Electricity Association.

Yours very truly,
Jay Shepherd P.C.

Original signed by

Mark Rubenstein

cc: Wayne McNally, SEC (by email)
Applicant and Intervenors (by email)
Peter Ruby, counsel to the CEA (by email)

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EB-2014-0116

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

AND IN THE MATTER OF an Application by Toronto Hydro-System Electric Limited for an Order or Orders approving or fixing just and reasonable rates and other service charges for the distribution of electricity as of May 1, 2015.

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

RESPONDING SUBMISSIONS OF THE SCHOOL ENERGY COALITION TO THE RESPONDING MOTION AND CROSS MOTION RECORD OF THE CANADIAN ELECTRICITY ASSOCIATION

PART I – OVERVIEW

1. The School Energy Coalition ("SEC") brought a motion for production from the Applicant Toronto Hydro-Electric System ("Toronto Hydro" or "THESL") of benchmarking studies in which it participated through the Canadian Electricity Association ("CEA"). Such studies are now identified in Toronto Hydro's letter of January 15th, as eight reports ("CEA Benchmarking Studies").

2. The CEA has refused to allow Toronto Hydro to produce the CEA Benchmarking Studies, and opposes disclosure on the ground that i) it would infringe the copyright of the CEA pursuant to the *Copyright Act* which is paramount to the Board's authority, and ii) there are confidentiality and policy reasons for which the Board should exercise its discretion not to make the requested relief. SEC submits that the studies should be produced in full.

3. These are SEC's submissions in reply to the Responding Motion and Cross Motion Record of the CEA.

4. Questions of relevance, and the cross motion (confidentiality and an automatic stay) also arise. Those issues are dealt with separately, in these submissions.

PART II: THE MOTION AND RELEVANCE

Background

5. SEC's motion seeks production from Toronto Hydro of the CEA Benchmarking Studies it has in its possession. SEC is not seeking an order for production from the CEA. Notwithstanding this fact, SEC submits that the CEA has consistently sought to prevent Toronto Hydro from providing even the most basic information about the CEA Benchmarking Studies.

6. Interrogatory 1B-SEC-8, sought "all benchmarking studies, analysis, and/or reports in the possession of the Applicant that it has undertaken, or that it has participated in, since 2011, that have not already been included in the application" Toronto Hydro provided 13 responsive documents, but noted that it could not provide reports related to a number of benchmarking studies of the CEA, because "the CEA has advised that information in them is proprietary and has refused consent in response to Toronto Hydro's request for disclosure and production of those materials".[1] Toronto Hydro has never challenged the relevance of the CEA Benchmarking Studies.

7. At the Technical Conference, SEC followed up on Toronto Hydro's refusal to provide the CEA Benchmarking Studies. SEC asked if Toronto Hydro could provide, for each report, its year and the topics which it covered. Toronto Hydro's witness refused to provide that information, stating that it had to seek permission of the CEA.[2]

8. SEC wrote to Toronto Hydro following up on the issue, and asked two questions:[3]

1. *Will the CEA consent to you providing for each benchmarking report/study, the year of the study, and a description of the nature and scope of the benchmarking study (i.e. what was measured, how many utilities etc.)?*

2. *From past proceedings, I understand the CEA position that they opposed production of these types of full copies of the materials, even on a confidential basis. But is the CEA willing to allow production of the information contained in the materials in any way, such as a redacted version where other participants' information cannot be identified.*

9. After speaking with CEA counsel, SEC sought from Toronto Hydro a formal response to these questions, since they are the party from whom production is being sought. SEC relayed its understanding of the CEA's position to Toronto Hydro upon request, i.e. the CEA would not give

[1] SEC Interrogatory 1B-SEC-8 (See Appendix A to the Notice of Motion)
[2] Technical Conference Transcript, dated November 18th 2014 at p.158-160 (See Appendix B to the Notice of Motion)
[3] Emails between Toronto Hydro and SEC (See Appendix C to the Notice of Motion)

consent to Toronto Hydro providing any information about the scope of the studies at issue (question 1), and they would not provide the studies in redacted or other form (question 2).[4] Toronto Hydro confirmed this was also their understanding of CEA's position.[5] SEC filed its motion later that day. SEC submits that the CEA's refusal was unreasonable on its face, and increased the cost and delay associated with the SEC motion unnecessarily.[6]

10. It was not until SEC filed a letter with the Board[7] seeking an order that Toronto Hydro disclose general information about these documents that the CEA provided for the first time permission to disclose the most basic information (title and year).[8] Until that point, the CEA had refused to provide any information about the documents. In fact, at first the CEA was only willing to provide the names and years of the reports on a confidential basis.[9]

11. The evidence is now that there are eight separate reports that make up the CEA Benchmarking Studies at issue in this proceeding. While the CEA's submissions are replete with references not only to reports, but also data models, SEC's motion is not seeking production of any data models, unless that is what the eight CEA Benchmarking Studies are.

12. The CEA in its submissions seems to suggest that it was willing to make available information contained on the documents at issue, if only it had been asked, or that it is willing to offer some of the underlying information, just in another form:

> "This motion is not a situation where…the SEC has indicated that it would be satisfied with the data that CEA has prepared to make available consistent with its regulatory disclosure policy (CEA Submissions, paragraph 56(c)).
>
> "For example, the CEA, the Board, Toronto Hydro, and the SEC, can enter into discussions to consider whether an acceptable resolution can be reached that respects CEA's copyright and confidentiality requirements while providing to the SEC and Board adequate disclosure to relevant information if it exists." (CEA Submissions, paragraph 56(d))

[4] *Ibid*
[5] *Ibid*
[6] This is inconsistent with the submissions of the CEA, in which they seek to characterize their positions in this as reasonable throughout.
[7] SEC Letter to the Board, dated January 8 2015.
[8] Toronto Hydro Letter to the Board, dated January 14 2015
[9] Toronto Hydro Letter to the Board, dated January 9 2015: "We understand that it is the CEA's position that the information to be provided is confidential…"

13. While SEC understands the CEA's seeks now to appear more reasonable before the Board, its conduct in the lead up to the filings of its submission indicate a very different approach. The CEA tactic seems to be to stonewall, forcing as costly and time-consuming a formal process before the Board as possible.

14. At no point did the CEA, either directly or through Toronto Hydro, show any willingness to provide any information contained in the reports at issue, in any form. In fact, their position, as confirmed by Toronto Hydro, was that it was unwilling to do so.[10] Even if the CEA's position that it was ever willing to provide some of the information is believed, it was incumbent on it, or Toronto Hydro, to make parties and the Board aware of it. It was neither reasonable nor appropriate to deliver a blanket refusal to the interrogatory, and even less so to say after the fact that the refusal was not really what they meant.

Relevance

15. The overarching question for the Board on this motion is if the CEA Benchmarking Studies are relevant. SEC submits they are. Contrary to the view of the CEA, the standard is not "clearly relevant".[11] The Board has in the past described the scope of pre-hearing disclosure as a broad one[12], and that a party just needs to demonstrate the information may be relevant.[13] Regardless, on the face of the record, the CEA Benchmarking Studies documents are clearly relevant.

16. As the Board's Filing Guidelines state, "[t]he purpose of the interrogatory process is to test the evidence before the Board".[14] Parties require information and documents from an applicant so that they are able to test the appropriateness of the application's requested relief, and to assist the Board determining what level of rates will be just and reasonable. Benchmarking information which involves the applicant Toronto Hydro is key to parties' ability to do that. The Board in the *Renewed Regulatory Framework for Electricity Distributors: A Performance-Based Approach* has been clear that

[10] Emails between Toronto Hydro and SEC (See Appendix C to the Notice of Motion)
[11] SEC submissions at para. 76.
[12] *Decision and Order on Motion* (EB-2007-0050 Bruce to Milton), dated April 7 2008 at p.7
[13] *Decision on Motion for the Production of Evidence and Procedural Order No. 3* (EB-2013-0029 – RES Generator Appeal), February 12 2013 at p.5
[14] *Filing Requirements For Electricity Distribution Rate Applications - 2014 Edition for 2015 Rate Applications* (Last Revised on July 18, 2014) at p.2

benchmarking will be an increasingly important part of rate regulation of electricity distributors.[15] This is especially the case in the context of a multi-year custom incentive ratemaking application.[16]

17. The Board has consistently ordered disclosure and production of benchmarking studies.[17] Toronto Hydro itself has recognized the importance of benchmarking. It has filed multiple benchmarking documents, and the structure of the proposed incentive formula is based on a custom benchmarking report it commissioned. Further, as noted earlier Toronto Hydro did not refuse to produce the CEA documents on the basis of relevance.[18]

18. The CEA Benchmarking Studies include:

- ***Four National/Public Attitudes Reports (the "CEA Survey Reports").*** In paragraph 22 of the CEA's written submissions, the CEA claims that "the CEA Survey Reports do not concern benchmarking".[19] SEC is confused by this statement. Interrogatory 1B-SEC-8 and this motion explicitly seek production of benchmarking information. The list of benchmarking studies provided by Toronto Hydro in its January 14th letter that are at issue in this motion, and are responsive to the original interrogatory, includes the CEA Survey Reports. [20] Either the documents include benchmarking, and thus were properly listed in Toronto Hydro's letter, or they are not, and fall outside the scope of the motion and the original interrogatory. At the very least, it would seem that Toronto Hydro, the author of the letter, believes they are benchmarking documents.[21]

  SEC would expect that the CEA Survey Reports likely include information comparing Toronto Hydro to other utilities, on metrics related to public perception, on important and relevant issues such as rates, customer service and reliability. SEC would expect the study is in general similar to a report produced in EB-2013-0416.[22] Considering the importance the Board has placed on

[15] *Report of the Board: Renewed Regulatory Framework for Electricity Distributors: A Performance-Based Approach*, dated October 18 2012 at p.56, 59.
[16] *Decision with Reasons*, (EB-2012-0459 - Enbridge 2014-2018), dated July 17 2014 at p.8
[17] *Procedural Order No. 4* (EB-2013-0115 Burlington 2014), dated March 19 2014 at p.4. Procedural Order No. 6 (EB-2013-0159 Oakville 2014), dated April 3, 2014. *Procedural Order No. 4* (EB-2013-0174 Veridian 2014), dated February 24 2014 at p.2-3. Motion Hearing Transcript, dated October 23 2012 (EB-2012-0031 Hydro One Transmission 2011-12) at p. 28.
[18] Technical Conference Transcript, dated November 18th 2014 at p.158-160 (See Appendix B to the Notice of Motion)
[19] CEA submissions at para. 22
[20] Toronto Hydro Letter to the Board, dated January 14 2015
[21] Exhibit 1B, Tab 2, Schedule 7
[22] EB-2013-0416 (Hydro One Networks Inc. 2015-2019), I-2.6-11 EP 23-Attachment 1.

customer feedback, preferences and engagement, information that compares Toronto Hydro with other utilities in these areas is clearly relevant this proceeding.

- ***2014 Multi-Client Budget Benchmarking Report (Information Technology).*** This report is on its face relevant to comparing Toronto Hydro's IT spending to other utilities. IT costs are an important component of Toronto Hydro's costs. Toronto Hydro's Application proposes significant new capital expenditures in this area, in additional to material increases in IT OM&A spending.[23]

- ***Three Service Continuity Reports*** These three reports appear to deal with the issue of reliability, i.e. they compare Toronto Hydro's reliability statistics against other utilities. The CEA's members include Canadian utilities outside of Ontario. Allowing the parties and the Board to compare reliability information to utilities outside of Ontario is important, especially since the PEG and PSE benchmarking information which benchmarks reliability does not include any Canadian utility outside of Ontario. Toronto Hydro has justified its significant proposed multi-year capital expenditure plan in large part on reliability issues.[24]

  While the CEA repeatedly claims that the two of the three service continuity reports are available to purchase from their website that is not true. By the CEA's own admission, those reports are <u>different</u> from the versions of the reports in Toronto Hydro's possession.[25] The reports for sale are composite versions, and would presumably not include Toronto Hydro specific information. Without this information, the reports would have limited value to parties and the Board for the purpose of this proceeding.

PART III: COPYRIGHT ACT AND DISCLOSURE

19. SEC submits that, in dealing with the CEA's copyright argument, the Board must answer three sequential questions:

(1) Does CEA have copyright in the CEA Benchmarking Studies?
(2) If it does, is the Board prevented from ordering disclosure and production of the CEA Benchmarking Studies by reason of the *Copyright Act?*
(3) Does the *Copyright Act* affect <u>how</u> the Board should order production of the relevant documents?

[23] See Exhibit 2B, Section E8.4,-8.6.(Capital). Exhibit 4A, Tab 2, Schedule 16 (OM&A)
[24] See for example: Exhibit 1A, Tab 2, Sch 1, p.8, Exhibit 1A, Tab 2, Sch 1, p.13-B, Exhibit 1B, Tab 2, Schedule 4, p.8
[25] CEA Submissions at para. 28

A. Does the CEA Have Copyright in the CEA Benchmarking Studies?

20. It is SEC's understanding that Association of Major Power Consumers in Ontario will address the question of whether the CEA has enforceable copyright to the CEA Benchmarking Studies. For the purposes of the submissions, SEC is assuming that the CEA has copyright in each of the CEA Benchmarking Studies. SEC's submissions in response to questions two and three above apply only if the Board determines that CEA does have those rights.

B. Does the Copyright Act Prohibit Production of the CEA Benchmarking Studies?

No Conflict Between the Statutory Powers Procedures Act and the Copyright Act

21. The CEA claims that *Copyright Act* prohibits production because it is paramount to the *Statutory Powers Procedures Act*. The constitutional doctrine of federal paramountcy is engaged where there is a conflict between a valid federal law and a valid provincial law. When the doctrine is engaged, the federal law will prevail, and the provincial law will be rendered inoperative to the extent of the conflict. The doctrine is only engaged, however, if it can be shown that there is a) an impossibility of dual compliance, or b) frustration of the federal purpose.[26]

22. SEC submits there is neither a conflict that makes dual compliance of the two acts impossible, nor a frustration of the federal purpose.

Statutory Powers Procedures Act

23. The *Statutory Powers Procedures Act* ("*SPPA*"), which applies to the Ontario Energy Board, provides for the authority for the Board to make rules regarding the disclosure process for its proceedings.[27] Section 5.4(1) enables a tribunal to require disclosure in accordance with its rule properly made under section 25.1.[28] The disclosure authority for a tribunal is broad, it includes:[29]

> (a) the exchange of documents;
> (b) the oral or written examination of a party;
> (c) the exchange of witness statements and reports of expert witnesses;
> (d) the provision of particulars;
> (e) any other form of disclosure. [emphasis added]

[26] *Bank of Montreal v. Marcotte*, 2014 SCC 55 at para. 70
[27] *Statutory Powers Procedure Act*, R.S.O. 1990 ("*SPPA*")
[28] *SPPA*, s. 5.4(1)
[29] *Ibid*

24. The Ontario Court of Appeal has confirmed that powers under section 5.4(1) do not mean disclosure in the narrow sense of word, but also include production of any relevant documents.[30]

25. The Board has implemented rules regarding disclosure in its *Rules of Practice and Procedure*, including, most germane to this motion, provisions relating to interrogatories (Rules 26-27).[31] Those rules allow parties to seek information and documents that are relevant to issues in the proceeding, and in the possession of the party to whom the interrogatory is addressed.

26. The Board also has authority to order disclosure of documents and information in a proceeding pursuant to the summons powers under section 12(1) of the *SPP*A[32], and the evidence preparation powers under section 21(1) of the *Ontario Energy Board Act* ("OEB Act").[33] While SEC is not directly relying on these provisions for the purposes of this motion, the same principle at issue would apply.

Copyright Act

27. There is no prohibition in the *Copyright Act* regarding the disclosure of material that may be copyrighted. The *Copyright Act* is concerned with the unauthorized reproduction, not disclosure to others. Copyright in the most general terms enables the copyright owner the ability to prevent others from reproducing the copyrighted intangible expression without their consent.[34]

28. The *Copyright Act* does not allow a copyright holder to determine who has access to viewing the copyrighted work. For example, the *Copyright Act* would not prohibit Toronto Hydro from allowing the Board to look at their copy of the work. Copyright is not about secrecy, it is about reproduction (i.e. copying), so the *Copyright Act* is not even engaged in those circumstances.

29. Practically, disclosure and production of documents in Board proceedings may engage the *Copyright Act* if it is done by way of providing copies (i.e. reproduction) to others, including the Board and parties. Thus, a reproduction of the work is made, and the Board has to look to the law of copyright

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[30] *Ontario Human Rights Commission v. Dofasco Inc.*, [2001] O.J. No. 4420 at para. 42

[31] Ontario Energy Board, *Rules of Practice and Procedure*, (last revised, April 24 2014), Rules 26-27

[32] *SPPA*, 12(1):

"A tribunal may require any person, including a party, by summons,

(a) to give evidence on oath or affirmation at an oral or electronic hearing; and

(b) to produce in evidence at an oral or electronic hearing documents and things specified by the tribunal, relevant to the subject-matter of the proceeding and admissible at a hearing.

[33] O*ntario Energy Board Act, 1998*, SO 1998, c 15, Sch B, 21(1). See for example *Letter of Direction to Produce Evidence* (EB-2013-0010), dated January 22, 2013.

[34] Elizabeth F. Judge and Daniel J. Gervais, *Intellectual Property: The Law in Canada* (2nd Ed), (Toronto: Carswell, 2011) at p.34

to see whether the reproduction is one that the law limits (later in these submissions SEC notes that there is no infringement, due to the fair dealing). This is not about production, however. This is about the use of reproduction as a method of production.

30. Thus, it is submitted that the answer to the first question is no. The *Copyright Act* does not prevent the Board from ordering production of the CEA Benchmarking Studies.

31. The issue of whether the *Copyright Act* is paramount to the Board's Rules therefore only arises in regard to how the Board implements a disclosure process, not if has the authority to order it in the first place.

32. The motion seeks production of the CEA Benchmarking Studies. The *Copyright Act* does not prohibit disclosure, only unauthorized reproduction. As the Justice DM Brown said recently in *Canadian Solar Solutions Inc. v. RA Solar Leasing Inc*, rejecting a similar argument from a party resisting production, "in general terms copyright law prevents the unauthorized copying of a work, not its disclosure" [emphasis added].[35]

33. The regular practice of the Board is that interrogatory responses, including any requested documents, are sent to the Board and parties by making hard and electronic copies of those materials. Practically speaking, the Applicant (or other parties who responds to interrogatories), are making copies (i.e. reproductions) of the interrogatory responses so that it the disclosure is easily assessable to other parties, and because it is a transparent public process.

34. This method of providing documents is driven by the Board's general policy of transparency. That policy is expressed in many Board documents, but is set out succinctly in the introduction of the *Practice Direction on Confidential Filings*[36]*:*

> The Board's general policy is that all records should be open for inspection by any person unless disclosure of the record is prohibited by law. This reflects the Board's view that its proceedings should be open, transparent, and accessible. The Board therefore generally places materials it receives in the course of the exercise of its authority under the *Ontario Energy Board Act, 1998* and other legislation on the public record so that all interested parties can have equal access to those materials. That being said, the Board relies on full and complete disclosure of all relevant information in order to ensure that its decisions are well-informed, and recognizes that some of that information may be of a confidential nature and should be protected as such. [37]

[35] *Canadian Solar Solutions Inc. v. RA Solar Leasing Inc.*, 2013 ONSC 671 at para. 31
[36] The current discussion is not about confidentiality, but the Board's principle of transparency applies to both confidentiality, and disclosure generally.
[37] Ontario Energy Board, *Practice Direction on Confidential Filings* at p.2

35. The reproductions of the interrogatory responses are secondary aspect of the disclosure process, meant to implement the process in an expeditious and fair way. This is similar to any civil litigation, in which the *Rules of Civil Procedure* technically only provide parties the right to production by way of inspection of the documents disclosed by the other side and the ability to copy those documents themselves.[38] Despite this, for practical purposes the documents are almost always copied (either physically or electronically) and sent to the other party.

36. The argument that copyright trumps disclosure in litigation is almost never claimed. When it has been claimed, courts have soundly rejected it. For example, the Ontario Superior Court in *Canadian Solar Solutions Inc. v. RA Solar Leasing Inc.* rejected an argument that a party did not need to produce copyrighted material party to a court-appointed monitor in the litigation.[39]

37. The Nova Scotia Supreme Court in *S.S. v. D.S.*, rejected an argument from one litigant that a psychologist retained as an expert to it, should not have to disclosure material contained in the file underlying her expert report because it was copyrighted.[40] Similarly, in *Tetefstky v. General Motors Corp*, which is cited by the CEA in its submissions, while exercising its discretion not to order production from a third-party of copyrighted material, the Court was clear that it had the authority to do so.[41] In *Millar v. Thunder Bay (City)* and *R. v. Oosterman*, Courts rejected arguments that the manuals for radar guns were not disclosable because they were copyrighted.[42]

38. SEC is not aware of a single decision, nor has the CEA cited one, where disclosure has been refused by a court or tribunal because the provisions of the *Copyright Act* override their authority to make such an order. This is true notwithstanding the fact that, in many of those cases, disclosure would necessarily have included copying of the documents in question.

39. The position of the CEA that somehow the *Copyright Act* limits the authority of this Board to do its job properly is not tenable, and would lead to absurd results. The CEA's logic would apply not only to documents whose copyright is held by third parties, but also those held by the actual litigants. Dozens of public interest regulators who not be able to do their job if they could not fully exercise their

[38] *Rules of Civil Procedure*, RRO 1990, Reg 194, Rule 30.04
[39] *Canadian Solar Solutions Inc. v. RA Solar Leasing Inc.*, 2013 ONSC 671 at para. 31
[40] *S.S. v. D.S.*, 2008 NSSC 87 at paras. 35-37
[41] *Tetefsky v. General Motors Corp*., 2010 ONSC 1675 at para. 43
[42] *Millar v. Thunder Bay (City)*, 2009 ONCJ 485 at para. 10, *R. v. Oosterman*, [1998] O.J. No. 5785 at para. 29

powers of requiring disclosure pursuant to *SPPA* or their home statutes, not just for hearings but for investigations.[43] In civil litigation, parties would be easily be able to shield the majority of documents from the other side, wholly undermining the purpose of discovery. As best observed by the English Court of Appeal:

> The laws of procedure relating to litigation also require limitations on the right to privacy and copyright. Every party to an action must disclose all documents in his possession or power relating to the matters in issue in the action, must allow the other parties to inspect those documents and to make copies of them, and to make use of the documents and the copies and contents for the purposes of the action in which they are revealed [emphasis added]. [44]

C. Does the Copyright Act affect how the Board should order production?

The Dealing is Fair

40. Considering how the Board should order production of the CEA Benchmarking Studies involves considering the concept of "fair dealing".

41. Even if the *Copyright Act* is engaged, the Board can order production of the CEA Benchmarking Studies from Toronto Hydro since for the purposes of providing copies to the parties for use in this proceeding, because it is considered fair dealing.

42. Section 29 of the *Copyright Act* provides that "[f]air dealing for the purpose of research, private study, education, parody or satire does not infringe copyright".[45] This is not about disclosure and production. This is about reproduction, and sets out a range of types and purposes of reproduction that are allowed without the permission of the copyright-holder.

43. Fair dealing is more than just a defence or exemption to general provisions of the *Copyright Act*, but is an integral part of the statutory scheme. As such, it must be given a large and liberal interpretation. In *CCH Canadian Ltd. v. Law Society of Upper Canada* ("*CCH*"), the Supreme Court characterized fair dealing as broad:

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[43] See for example, the Ontario Securities Commission powers pursuant to the *Securities Act,* RSO 1990, c S.5 13. (1), 14(1), 17(1)(5), or the many health professions regulators who derive their powers pursuant to the *Health Professionals Procedure Code,* Schedule 2 to the *Regulated Health Professions Act,* 1991 S.O. 1991 c 18 42(1)(78(1).

[44] *Home Office v. Harman*, [1981] Q.B. 534 at p. 558

[45] *Copyright Act*, R.S.C., 1985, c. C-42 ("*Copyright Act*"), s.29

> The fair dealing exemption, like other exceptions in the Copyright Act, is a user's right. In order to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be interpreted restrictively.[46]

44. The CEA's position that the fair dealing provisions do not apply because they are not available to the Crown - is simply incorrect.

45. First, SEC notes that it is actually Toronto Hydro who would be providing the CEA Benchmarking Studies to the Board and parties, not the Board. Neither Toronto Hydro nor any of the parties are the Crown (or agents of the Crown).

46. Second, the *Copyright Act* in no way excludes the Crown (or an agent of the Crown like the Board), from relying on the fair dealing provision. While the *Copyright Act* does contain a few specific provisions specific to government institutions, that in no way means they are excluded from the general provisions. Such an interpretation is in fact inconsistent with the CEA's own reliance on *Manitoba v. Canadian Copyright Licensing Agency (Access Copyright).* In that case the Federal Court of Appeal found that *Copyright Act* binds the Crown, even though there is no specific provision which explicitly says so.[47]

47. What the *Copyright Act* does do is provide government institutions (which are not the same thing as the Crown)[48] additional user rights in certain circumstances, not less. Fair dealing is best sought as upstream exceptions, and exceptions specific to a certain category of users (including those cited by the CEA), are downstream exceptions.[49]

Fair Dealing Test

48. The test for fair dealing involves two steps: first, whether the dealing is for an allowable purpose under the *Copyright Act*, and second, is the dealing "fair".

49. ***Allowable Purpose*** SEC submits that the purpose of the proposed reproduction in this proceeding is allowable under section 29, as it is for research and private study. In *CCH*, the Supreme Court held that the photocopying by the library of the Law Society of Upper Canada on request from its members was an allowable purpose of research. The Court held that research must be given a large and

[46] *CCH Canadian Ltd. v. Law Society of Upper Canada,* [2004] 1 S.C.R. 339,(*"CCH"*) at para. 48
[47] *Manitoba v. Canadian Copyright Licensing Agency (Access Copyright),* 2013 FCA 91
[48] For example, see the definition for government educational institution in section 2 of the *Copyright Act*.
[49] Elizabeth F. Judge and Daniel J. Gervais, *Intellectual Property: The Law in Canada* (2nd Ed), (Toronto: Carswell 2011) at p.214

liberal interpretation, and that "research is not limited to non-commercial or private contexts".[50] Research for the purposes of advising clients, giving legal opinions, arguing cases, even if it is paid work, is still research.

50. In *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, the Supreme Court similarly cautioned against using a restrictive meaning to the "private study" use, stating that the use of the qualifier private should not be understood as requiring a user to view the copyrighted work in isolation.[51] It is simply that "studying and learning are essentially personal endeavours, whether they are engaged in with others or in solitude."[52] Production of the CEA Benchmarking Studies for the purposes of use by the parties and the Board in this proceeding, allows them to properly have the research necessary to determine the reasonableness of Toronto Hydro's application.

51. ***Tests of "Fairness"*** The Supreme Court has set out six factors for guidance in determining if the dealing is fair: (1) purpose, (2) character, (3) amount of the dealing, (4) existence of any alternative to the dealing, (5) nature of the work, and (6) effect of the dealing on the work.[53] SEC submits that an evaluation of the factors taken as a whole demonstrates that disclosure and production (including reasonable reproduction) of the CEA Benchmarking Studies is fair:

- ***Purpose of the Dealing:*** SEC submits that the purpose is for research and private study of both parties and the Board, regarding the appropriateness of Toronto Hydro's proposed rates for 2015-2019. The Board has consistently stated that the benchmarking is important part of rate regulation of electricity distributors. The *SPPA*, and the Board's own rules, recognize the importance of requiring disclosure and production of relevant information. The documents are not being used for an improper motive[54], but to further the public interest mandate of the Board to ensure that rates for Toronto Hydro customers are just and reasonable. The CEA documents serve an important purpose in comparing Toronto Hydro in a number of relevant areas to other utilities.

[50] *CCH* at para. 51
[51] *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright*), 2012 SCC 37 ("*Alberta Education*") at para. 27
[52] *Alberta Education* at para. 27
[53] *CCH* at para. 51
[54] *Alberta Education* at para. 53

Contrary to the CEA's claim, the fact the CEA now reveals that an alternative version of two of the eight reports at issue can be purchased, is irrelevant to the question of the fair dealing.[55] To do so would defeat the purpose of fair dealing, which is integral to the copyright scheme: As the Supreme Court said in *CCH*:

> If a copyright owner were allowed to license people to use its work and then point to a person's decision not to obtain a license as proof that his or her dealings were not fair, this would extend the scope of the owner's monopoly over the use of his or her work in a manner that would not be consistent with the *Copyright Act*'s balance between owner's right and user's right.[56]

- ***Character of the Dealing***. SEC submits the character of the dealing is fair. The purpose of the use is not simply for a legitimate purpose, but one that is in furtherance of a specific statutory provision, to help the Board determine just and reasonable rates.

  The Board has the ability to limit the dissemination of the documents in multiple ways to ensure that the character of the dealing is fair, if required. While the Board's practice is to place all documents on the public record online through the Webdrawer, accessible electronically to anyone, that is not a requirement. For example, the document could still be public, but a member of the public would have to personally attend the Board's offices to view it. Further, the Board can treat the documents as confidential. This would limit disclosure of the documents to parties who have signed a Declaration and Undertaking.

- ***Amount of the Dealing.*** The amount of the dealing refers to the individual reproduction of work, not the aggregate amount of any reproduction. While SEC is seeking production of each of the CEA Benchmarking Studies in the possession of the Toronto Hydro, the amount is still fair because of the use of the document. In *CCH*, the Supreme Court explicitly recognized that in use of that reproduction of the whole work may be fair.[57] The amount of the dealing to be determined as fair depends on the purpose of the use.[58] It recognized that for the purposes of research or private study, it may be essential to copy an entire article or decision, whereas for other uses, it may not be fair to reproduce a the full work.[59] Here the purpose requires full use

[55] *CCH* at para. 70
[56] *CCH* at para. 70
[57] *CCH* at para. 57
[58] *Ibid*
[59] *Ibid*

of the documents. The CEA Benchmarking Studies cannot be viewed in parts, or in isolation. Parties and the Board need to review them in their entirety.

- ***Alternatives to the Dealing.*** There is no non-copyrighted equivalent to the CEA Benchmarking Studies. The alternative to be considered is not other information that may be available that is within the general scope of that contained in documents at issue, but the specific information contained within those documents. If the Board believes they are relevant to the proceeding, then they are, in and of themselves, evidence, and there can be no alternative to them. Further, since one of the important ways that Toronto Hydro's evidence can be tested is to see what specific information they had available to them, this would require that the Board see the specific documents at issue, which we know they have in their possession.

- ***Nature of the Work.*** While it is true that the dealing will be less fair where the works are confidential, it is important to understand the context in which the Supreme Court made that statement in *CCH*. It was referring there to situation where something unpublished ultimately became published.[60] This is not an issue with respect to the documents at issue here.

  In the actual application of the factor to the facts in *CCH*, the Court commented that the nature of the works, which were essential to legal research, suggested the dealings were fair. The Court quoted from the Federal Court of Appeal, which stated in part, "it is generally in the public interest that access to judicial decisions and other legal resources not be unjustifiably constrained."[61] Similarly in this proceeding, there is a public interest that the Board (in pursuance of its statutory mandate) and parties have relevant information to evaluate and test Toronto Hydro's Application.

- ***Effect of the Dealing on the Work.*** CEA's claims the disclosure will cause it "irreparable commercial harm"[62] The effect on the CEA is irrelevant to this factor of the fair dealing test. This issue is not the effect of the dealing on the copyright holder, but on the work itself.[63] Since six of the eight reports are not available to the public, there would no effect on the work. While two of the reports are available to purchase, the CEA has not demonstrated that limited

[60] *Ibid*
[61] *CCH at* para. 71, quoting para. 159 from Federal Court of Appeal Decision.
[62] CEA Submissions at para. 56(e)
[63] *CCH* at para. 59

disclosure for the purpose of this proceeding would adversely affect the original work.[64] The SCC in *Alberta (Education)* discussed the need for actual evidence of economic harm to demonstrate a negative effect of the dealing on the work.[65] The CEA has provided none.

52. On balance, the factors weigh in favor of fair dealing. This is confirmed by the explicit public interest nature of the Board's mandate[66], specifically when it is undertaking its authority to protect the public by acting as the market proxy in the setting of rates of a monopoly distributor.[67] Having all available benchmarking information is central to its ability to fulfill that role.

PART VI: CONFIDENTIALITY NOT A REASON FOR NON-PRODUCTION

Confidentiality Agreements Do Not Bind the Board

53. The CEA cites a number of a decision from other provincial utility regulators, which it says have refused to compel production of copyrighted documents, including those of the CEA.[68]

54. First, in none of those decisions was the tribunal's legal authority to order disclosure and production at issue. Either i) the tribunal exercised its discretion not to order disclosure (*AltaLink, ATCO Electric*)[69] , ii) a refusal to provide requested information in interrogatory was never challenged by a party as it is in this proceeding (*Nova Scotia Power*)[70], or iii) the tribunal stated it "does not make any findings or directions" on the issue (*Enmax*).[71]

55. Second, SEC submits the regulatory landscape in Ontario is very different to the situation applicable to those other tribunals at the time they made those decisions. Each decision was released before the Board's release of the *Renewed Regulatory Framework for Electricity*, which puts benchmarking at the centre of the rate-setting process in Ontario.

[64] *Alberta Education* at para. 33
[65] *Alberta Education* at para. 35
[66] *Graywood Investments Ltd. v. Ontario (Energy Board),* 2005 CanLII 2763 at para. 34
[67] *Power Workers' Union (Canadian Union of Public Employees, Local 1000) v. Ontario (Energy Board)*, 2013 ONCA 359 at para. 38. Decision appealed to SCC and under reserve.
[68] CEA Submissions paras. 81-85
[69] *AltaLink Management Ltd. (Re)*, [2007] A.E.U.B.D. No. 12 at paras 598-607. *ATCO Electric Ltd. (Re)*, [2003] A.E.U.B.D. No. 42 at paras. 186-193
[70] *Enmax Power Corp* (Re), [2007] A.E.U.B.D. No.22 at para. 20.
[71] *Nova Scotia Power Inc. (Re)*, 2912 NSUARB 53 at paras. 125-128

56. The Board has consistently said that a confidentiality agreement entered into between a utility it regulates and a third-party is not grounds for non-disclosure ore refusal to produce. It has even made those comments regarding a utility entering into such an agreement with the CEA.[72]

57. The Board has been clear that "[d]istributors cannot limit or exclude the Board's jurisdiction by private agreements amongst themselves or with third parties."[73] Further, "distributors must be cognizant of this when entering into confidentiality agreements with third parties that extend to the provision of information and documents that the utility knows or ought to know may be reasonably required to be produced as part of the regulatory process."[74] Benchmarking materials clearly fall into a category of documents that Toronto Hydro knew or ought to have known would be required to be produced in its hearings.

58. The Board has provisions with respect to confidential treatment of materials, if required. It wrote regarding a request to limit disclosure of a document by Hydro One Networks Inc, "…the Board is not bound by confidentiality agreements entered into by the utilities it regulates, and regulated utilities may be ordered to produce documents that are the subject of such agreements. The *Practice Direction* provides adequate mechanisms for the protection of confidential material."[75]

59. While the CEA's submissions and the Affidavit of Mr. Bradley discuss the considerable business and policy rationale for why the disclosure and production should be refused, those reasons are at best rationales for treating the CEA Benchmarking Studies as confidential pursuant to the *Practice Direction*. The submission provides no justification to refuse production of the information to the Board and parties.

60. On the face of it, the documents at issue may need to be treated as confidential. Until the Board and the parties see the documents, neither the parties nor the Board can assess that issue, but there are certainly indicators that might be the case. The financial harms claimed by the CEA, if justified by the contents of the documents, could be legitimate reasons for confidentiality, consistent with the list of considerations in Appendix A of the *Practice Direction*.

[72] Motion Hearing Transcript, dated October 23 2012 (EB-2012-0031 Hydro One Transmission 2011-12) at p. 28.
[73] *Procedural Order No. 4* (EB-2013-0115 Burlington 2014), dated March 19 2014 at p.4
[74] *Procedural Order No. 4* (EB-2013-0115 Burlington 2014), dated March 19 2014 at p.4
[75] *Decision on Phase 1 Partial Decision and Order: Production of Documents* (EB-2011-0140 East-West Tie Designation), dated June 14 2012 at p.3

61. SEC submits there can be no legitimate business or policy harm that can be claimed to prevent the CEA Benchmarking Studies from being produced at all.

62. The Board should quite skeptical of evidence through unsworn self-serving letters by CEA members who in some cases have threatened that they *may* reconsider their participation if the motion is granted. It has been SEC's experience that regulated utilities (whose information makes up the CEA documents) are often opposed to benchmarking, unless they believe it will benefit them before a regulator, in which case they are more than willing to proffer such evidence themselves.

63. A close read of each of the letters does not actually reveal a reason why the information should not be disclosed on a confidential basis, besides the fact that the participants entered into a confidentiality agreement. It is not clear what affect, if any, disclosure in an Ontario regulatory proceeding would have on any single one of these distributors. SEC notes that it appears, at least with respect to any of the studies in which Brookfield participated, that the information is "behind a masked identification system that protects the identity of the patriating company".[76]

Not About Third-Party Disclosure

64. Contrary to the claim of the CEA, this is not a motion in form or substance to seek disclosure of third-party materials which requires a much higher standard for a production order. This motion is not an akin to Rule 30.10 of the *Rules of Civil Procedure*[77], which provides for the authority for the court to require disclosure with leave for of a document of a third-party. SEC is only seeking disclosure of documents in the possession of the applicant Toronto Hydro consistent with Rule 26.02(d).[78] Toronto Hydro has confirmed that the requested documents are in its possession.[79]

65. In the cases cited by the CEA, documents sought from third-parties were not in the possession of a party to the proceeding. It is for that reason they each sought disclosure order from a court or tribunal for an order requiring a third-party to disclose the information. A third parties' copyright of a document in the possession of a party to a proceeding, does not turn that document into one that is under the possession of the third-party. Copyright creates a set of intellectual property rights to the

[76] Letter to Francis Bradley (CEA) from David Boni (Brookfield), dated March 19 2014 at Exhibit B of Schedule 1 to the Affidavit of Francis Bradley (Sword January 21, 2015).
[77] *Rules of Civil Procedure*, RRO 1990, Reg 194, Rule 30.10
[78] Ontario Energy Board, *Rules of Practice and Procedure*, (last revised, April 24 2014), Rules 26.02(d). Also see *Decision and Order on Motions, Issues List and Confidentiality, and Procedural Order No. 9* (EB-2013-0321 OPG 2014-15), dated May 16, 2014 at p.4
[79] Technical Conference Transcript, dated November 18 2014 at p.159 (See Appendix B to the Notice of Motion)

holder, primarily control of the physical owners' rights to reproduction of that information. Regardless, disclosure and production of relevant documents to the Board and parties does not require the party in the possession of the document to also have, unrestricted power and control over the intellectual property to do whatever it may wish.

66. There are certain circumstances where parties are legally restricted from producing relevant documents and information, which may be in their possession, in Board proceedings. For example, under the *SPPA*, parties are not required to produce privileged documents[80] and under the *Canada Evidence Act* parties are highly restricted in information that may ever be disclosed if it may harm national defence or national security.[81] There is no such statutory restriction applicable to the CEA Benchmarking Studies.

67. In this situation, Toronto Hydro is the owner of the documents, has paid for them (either directly or through its CEA membership fees), and is being asked to disclose them to its regulator to be used for the precise purpose for which Toronto Hydro acquired them, i.e. benchmarking Toronto Hydro against other utilities.

PART V: CROSS MOTION

Should Confidentiality Be Granted?

68. SEC submits that the Board should not make a determination as to confidentiality until the CEA Benchmarking Studies have been provided, unredacted, to the Board and the parties who sign the Declaration and Undertaking. To do so would allow the CEA and Toronto Hydro to make submissions on this issue with information that is not available to the Board or the opposing parties.

69. While SEC recognizes that, on the face of the record, there is a reasonable possibility that the documents should be treated as confidential (or at least some parts of them), the Board has followed a fairly consistent practice of allowing documents to be treated as confidential on an interim basis, then hearing submissions, and then making a determination with all of the information and submissions available to it. SEC submits that the Board should follow that practice in this case as well. The Board has in the past ordered benchmarking documents to be placed on the public record, even when faced

[80] *SPPA*, 5.4(2)
[81] *Canada Evidence Act,* R.S.C., 1985, c. C-5, s.38.02

arguments of requests for confidentiality based in part on copyright or and other similar arguments raised by the CEA.[82]

Not Automatic Stay Should Be Granted Pending Appeal

70. The CEA requests that if the Board orders the CEA Benchmarking Studies to be copied or even disclosed to SEC, in whole or in part, either publically or on a confidential basis, the Board should also issue an immediate stay of its decision so that it may exercise its right to appeal under section 33 of the *OEB Act*.

71. SEC submits that this request should be denied. Pursuant to section 33(6) of the *OEB Act*, there is no automatic stay upon appeal of a Board decision. While SEC does not oppose a very limited suspension of any order the Board may make so that the CEA may bring a proper motion for a stay, it should not grant an automatic one. Granting such a request would not be consistent with the legislative intent that there is no automatic stay, and it would relieve the CEA of having to fulfill the well-known test for a stay pending appeal.[83] This is especially important since a stay pending appeal could well require the Board to delay the proceeding. The CEA should not be permitted to derail the entire proceeding, unchallenged and without meeting the legal tests normally applicable to such a request.

PART VI – ORDER REQUESTED

72. SEC request that its motion be granted, and the cross-motion be denied.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Original signed by

_____

Mark Rubenstein
Counsel for the School Energy Coalition

[82] *Decision on Confidentiality* (EB-2011-0099 E.L.K. 2012), dated March 19 2013 at p.6. *Decision and Order on Confidentiality* (EB-2013-0115/159/174 Burlington/Oakville/Veridian 2014), dated May 29 2014

[83] The test for a stay pending appeal is set out in *RJR - MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, which the Board confirmed in *Decision* (EB-2012-0414 EDA Stay), dated March 7 2013. It requires the party seeking a stay to show: (1) There is a serious question to be tried, (2) it will suffer irreparable harm if a stay is not granted?; and (3) an assessment of the balance of convenience favours granting a stay.