



Via Email: BoardSec@ontarioenergyboard.ca

January 7, 2015

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

Dear Ms. Walli:

**Re: Amendments to the OEB Regulatory Instruments (RRRs, Codes and Rules) and Specifying a Mandatory Record Retention Period For Regulated Entities
Board File No.: EB-2015-0247**

Summitt Energy Management Inc. ("Summitt Energy") is writing in response to the Board's Notice of Proposal to amend the Ontario Energy Board's ("OEB") Regulatory Instruments specifying a mandatory record retention period for regulated entities.

Summitt Energy submits comments related to the application and implementation of the Mandatory Record Retention Period, with a view to identifying best practices. Summitt Energy will provide comments to the specific areas identified by the Board in its Notice of Proposal;

- ***The exceptions to the record retention requirements, for example other statutory requirements that may mandate a shorter record retention period;***

Summitt Energy is concerned that the extension of time for document retention, specifically in reference to consumer contracts, could potentially result in unscrupulous consumers abusing the OEB complaints process in order to obtain documents and information to be used in a civil proceeding against a Retailer; where such information would not otherwise be available and/or compellable.

The OEB's current document retention under RRR requires a Retailer to maintain a consumer's contract and details for a period of 2 years beyond the end of the contract. The current record keeping requirements for Retailers is consistent with statute of limitations in Ontario.¹

If the revised record keeping requirements are approved by the OEB, Summitt Energy would like OEB staff to consider developing an internal policy involving the release of such documents and information

¹ <http://www.canlii.org/en/on/laws/stat/so-2002-c-24-sch-b/latest/so-2002-c-24-sch-b.html#sec15subsec1>

to a consumer, that is in excess of 2 years from the expiry, cancellation or termination of the consumer contract, when dealing with consumer complaints informally through its “informal resolution” process. This would prevent unscrupulous consumers from abusing the OEB complaints process in an effort to obtain documents and information to be used in a civil proceeding against a Retailer.

Currently the Ontario Energy Board Act (“Act”) and its regulations do not speak to the use of documents disclosed during the course of an OEB Staff informal investigation or “informal resolution” process. The Energy Consumer Protection Act (“ECPA”) is also silent on this. The ECPA does clearly state that a consumer may commence an action against a Retailer if a contract is deemed void under section 16;

“Right of action in case of dispute

27. A consumer may commence an action against the Retailer to recover the amount provided in subsection 28 (2) and in addition may seek such other damages or relief as are provided in subsection 28 (3),

(a) if the consumer has cancelled a contract under this Part; or

(b) if the contract is deemed to be void under section 16 and,

the consumer has not received a refund within such time period as may be prescribed after the effective date of cancellation or the day the contract is deemed void. 2010, c. 8, s. 27.

Action in Superior Court of Justice

28. (1) If a consumer has a right to commence an action under this Act, the consumer may commence the action in the Superior Court of Justice. 2010, c. 8, s. 28 (1).”

Summitt Energy is of the opinion that if the OEB amends the RRR record keeping requirements in order to ensure that the OEB has access to the documents required for regulatory purposes and to discharge its statutory duties; it will be unilaterally be extending the OEB’s power to investigate a consumer complaint and a consumer’s right to commence an action against a Retailer under the ECPA.

Such changes will have serious cause and effect against a Retailer in the absence of internal policies for requesting documents for inspection or investigatory purposes stemming from a consumer complaint.

For the Purposes of auditing under section 107 and 108 (inspections and audits) of the Act, a Retailer is protected from such cause and effect because the Act contains specific provisions under section 111 and 112 regarding confidentiality of documents when obtained for inspection and/or audit purposes in accordance with Part VII of the Act;

“112. No document, record or information obtained by an inspector under this Part is admissible in evidence in any proceeding except a proceeding in respect of an order of the Board or a proceeding in respect of an offence under section 126. 2003, c. 3, s. 75.”

The Act also provides similar confidentiality provisions for formal investigations where an Investigator has been appointment by the Chair under section 112;

“112.0.6 (1) All documents and records obtained by an investigator under this Part or Part IX are confidential and shall not be disclosed to any person other than a member of the Board or an employee of the Board except,

(a) as may be required in connection with the administration of this Act or any other Act that gives powers or duties to the Board or in any proceeding under this or any other Act that gives powers or duties to the Board;

*(b) to counsel for the Board or an employee of the Board; or
(c) with the consent of the owner of the document or record or the person who provided the information. 2010, c. 8, s. 38 (28).*

Same

(2) If any document, record or information obtained by an investigator under this Part or Part IX is admitted in evidence in a proceeding under this Act or any other Act that gives powers or duties to the Board, the Board may rule on whether the document, record or information is to be kept confidential. 2010, c. 8, s. 38 (28)."

Such provisions do not exist when OEB staff are handling consumer complaints informally through its "informal resolution" process without a formal inspector or investigator appointment.

Similar confidentiality and use of document provisions exist in a number of other Ontario Provincial Acts that fall under the authority of the Statutory Powers Procedure Act, RSO 1990, c S.22 when dealing with formal investigation processes with the objective of proceeding to a hearing with the licensee, namely;

- Regulated Health Professions Act, 1991, SO 1991, c 18, section 36 1.5²
- Ontario College of Teachers Act, 1996, SO 1996, c 12, section 48³
- Chartered Accountants Act, 2010, SO 2010, c 6, Sch C, section 61⁴
- Early Childhood Educators Act, 2007, SO 2007, c 7, Sch 8, section 51⁵

These regulatory authorities responsible for the administration of these Ontario Provincial Acts all have developed internal policies for inspector and investigator appointments and disclosure of information when handling formal investigations in order to ensure that documents obtained in the course of the investigation can be relied upon at a hearing.

These regulatory authorities have also developed robust informal complaints resolution processes for resolving consumer complaints that are deemed to be less serious in nature by utilizing alternative dispute resolution processes.⁶ These processes are voluntary with the objective of the licensee and the consumer resolving the complaint on mutually agreeable terms.

These alternative dispute resolution processes are based on the principle that discussions and materials shared during the alternative resolution process are kept confidential. Participation in the process occurs without prejudice to the licensee. Information shared during the process in order to resolve the complaint

² <http://www.canlii.org/en/on/laws/stat/so-1991-c-18/latest/so-1991-c-18.html?autocompleteStr=regulated%20heal&autocompletePos=1>

³ <http://www.canlii.org/en/on/laws/stat/so-1996-c-12/latest/so-1996-c-12.html?resultIndex=1>

⁴ <http://www.canlii.org/en/on/laws/stat/so-2010-c-6-sch-c/latest/so-2010-c-6-sch-c.html?autocompleteStr=Chartered%20Accountants%20Act%20of%20Ontario&autocompletePos=1>

⁵ <http://www.canlii.org/en/on/laws/stat/so-2007-c-7-sch-8/latest/so-2007-c-7-sch-8.html?autocompleteStr=%E2%80%A2%09Early%20Childhood%20educators%20%20Act%20&autocompletePos=1>

⁶ <http://www.oct.ca/-/media/PDF/Complaint%20Resolution/201420CompResENweb.pdf>

is kept confidential and is not allowed to be used if either party withdraws from the alternative dispute resolution process or the matter proceeds to a formal complaint process.

These alternative dispute resolution processes have proven to effectively address consumer issues, protect the licensee from unscrupulous consumers, alleviate staffing resources for the regulator and protect the public interest.

Part VII of the Act explicitly allows the OEB to use mediation or other methods as appropriate, to resolve consumer complaints;

“105. The Board may,

(a) receive complaints concerning conduct that may be in contravention of an enforceable provision whether the conduct constitutes an offence or not; and

(b) make inquiries, gather information and attempt to mediate or resolve complaints, as appropriate, concerning any matter that comes to its attention that may be in contravention of an enforceable provision whether the matter constitutes an offence or not. 2010, c. 8, s. 38 (22).”

Part I of the ECPA even inexplicitly provides the OEB the authority to offer an alternative dispute resolution process for handling consumer complaints involving the supply of energy;

“ (2) The Minister may,

(a) disseminate information for the purpose of educating and advising energy consumers; and

(b) provide information to energy consumers about the use of alternate dispute resolution techniques as a means of resolving disputes arising out of contracts for the supply of energy and other related transactions. 2010, c. 8, s. 1 (2).”

The current OEB complaints process⁷ is absent on the use of alternative dispute resolution for handling consumer complaints involving the supply of energy.

Development of alternative dispute resolution policies and processes by OEB staff would provide for an effective process for handling informal complaints and address concerns about disclosure of documents and materials to consumers that may be used for alternative purposes.

It is important to note that such policies and processes should address the need for an inspector or Investigator appointment in order for OEB staff to request documents or things pertaining to the consumer complaint if either party withdraws from the alternative dispute resolution process or the matter proceeds to a formal complaint process.

This would ensure that the documents (obtained either through the alternative dispute resolution process or are the formal complaint process) remain confidential and will avoid unscrupulous consumers abusing the OEB complaints process in order to obtain documents and information to be used in a civil proceeding against a Retailer where such information would not otherwise be available and/or compellable.

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<http://www.ontarioenergyboard.ca/oeb/Consumers/Contact%20Consumer%20Relations/Have%20a%20Question%20or%20Complaint>

Alternatively, the OEB could permanently appoint select staff to exercise and perform the powers and duties of an inspector for the purposes of handling consumer complaints. This would permanently invoke the confidentiality provisions under section 112 of the Act.

In absence of such revisions to the OEB complaints process or the permanent inspector appointment of select OEB staff, Summitt Energy may have to consult with counsel for any future document requests involving an informal complaint.

- ***The format of records that must be retained, i.e. electronic v. paper formats***

Summitt Energy is of the opinion that documents or records to be retained should not be restricted to one format. Part VII (Inspectors and Inspections) section 108 of the Act clearly implies that the retention of documents or records can either be in paper format or in electronic form. More specifically, subsection (6) identifies how an inspector can obtain documents in electronic form;

“Documents in electronic form

108 (6) If a document or record is kept in electronic form, the inspector may make a copy of it or require that a copy of it be provided to him or her on paper or in a machine-readable medium or both. 1998, c. 15, Sched. B, s. 108 (6); 2003, c. 3, s. 71 (5); 2010, c. 8, s. 38 (27).”

Summitt believes that the Board should not be concerned as to what format the document or record is retained in, only that it is retained in its original condition, as the case may be. Courts have widely accepted electronic formats of original documents for the purposes of regulatory investigations and proceedings. In fact Part VII (Inspectors and Inspections) section 108(7) of the Act confirms the admissibility of copies of electronic documents or records obtained by an inspector;

“Evidence

(7) Copies or extracts from documents or records removed under this section and certified as being true copies or extracts from the originals by the person who made them are admissible in evidence to the same extent as and have the same evidentiary value as the originals. 1998, c. 15, Sched. B, s. 108 (7).”

Additionally, the Electronic Commerce Act, 2000, SO 2000, c 17 (“ECA”) is abundantly clear that the legal requirement that documents are kept in writing is met if the documents are kept electronically, are accessible and capable of being retained;

“Legal requirement that information or document be in writing

5. A legal requirement that information or a document be in writing is satisfied by information or a document that is in electronic form if it is accessible so as to be usable for subsequent reference. 2000, c. 17, s. 5.

Legal requirement to provide information or document in writing

6. (1) A legal requirement that a person provide information or a document in writing to another person is satisfied by the provision of the information or document in an electronic form that is, (a) accessible by the other person so as to be usable for subsequent reference; and (b) capable of being retained by the other person. 2000, c. 17, s. 6 (1).”

The ECA further defines a “legal requirement as;

“Extended meaning of “legal requirement”

(2) In this Act, a reference to a legal requirement includes a reference to a provision of law, (a) that imposes consequences if writing is not used or a form is not used, a document is not signed or an original document is not provided or retained; or (b) by virtue of which the use of writing, the presence of a signature or the provision or retention of an original document leads to a special permission or other result. 2000, c. 17, s. 1 (2).”

Therefore, Summitt Energy is of the opinion that restricting the format of the documents or records to be retained could have a significant financial effect on a Retailer and other licensee’s current document retention policies and operational procedures and would be in conflict with the Act and the ECA.

- **The types of records to which the retention policy is applicable, i.e. records required to be retained for regulatory purposes vs. corporate/business/operational records that are not required to be retained for regulatory purposes;**

In relation to electricity retailers and gas marketers, Summitt Energy is of the opinion that the retention policy should only be applicable to documents or records required to be retained in accordance with the Act and the ECPA. Requiring electricity retailers and gas marketers to retain documents or records that are not within the scope of the Act and the ECPA would be out of the OEB’s jurisdiction and not enforceable.

- **The types of records to be retained to demonstrate compliance with Regulatory Instruments, i.e. provisions in regulatory instruments that do not contain specific retention requirements;**

Summitt Energy suggests that OEB staff develop a process by where staff provide ongoing guidance and direction as to the types of records to be retained. This guidance and direction would be based on OEB staff experience with inspections and audits and would not be an enforceable provision but rather a “best practices” direction from the OEB due to the lack of specific retention requirements in the Act, ECPA or the applicable Codes.

- **The temporal application of the Mandatory Record Retention Period, i.e. whether it should be applied only prospectively or retrospectively in some cases as well;**

Summitt Energy is of the opinion that the OEB cannot take an enforceable action against a licensee for failing to retain a document or record if the licensee was not legally required to retain it at the time of disposal or destruction. Courts have long recognized that cases in which legislation has retrospective effect must be exceptional. This was further upheld in the Supreme Court of Canada decision, *R. v. Dineley*, 2012 SCC 58, [2012] 3 S.C.R. 272 PARA 10⁸.

“Finally, where the former legislation does not contemplate the gathering of evidence that is required by the new legislation, the new legislation can only be prospective.”

Summitt Energy submits that the changes to the record retention period extend the ability of OEB staff to gather evidence for the purposes of determining if an offence has been committed; and therefore can only be applied prospectively based on the then existing legal requirement to retain such document or record.

- **Implementation (in force) date for the Mandatory Record Retention Period and the duration of the transition period, i.e. the date that amendments are in force and the recommended transition period.**

Summitt Energy requests that the OEB provide substantial lead time and notice for when the amended provisions will come into effect. This will allow licensees to ensure that, at the time of implementation, any documents or records that would then fall under the new provisions respecting consumer contracts (i.e. any documents or records that are not in excess of 2 years from the expiry, cancellation or termination of the consumer contract at the time of implementation) would be retained in accordance with the new record retention requirements.

Respectfully submitted,



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