EB-2017-0007

ONTARIO ENERGY BOARD

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

AND IN THE MATTER OF a Notice of Intention to Make an Order for Compliance and Payment of an Administrative Penalty against Planet Energy (Ontario) Corp. (ER-2011-0409) (GM-2013-0269).

BOOK OF AUTHORITIES OF PLANET ENERGY (ONTARIO) CORP.

July 7, 2017

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EB-2017-0007

ONTARIO ENERGY BOARD

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

AND IN THE MATTER OF a Notice of Intention to Make an Order for Compliance and Payment of an Administrative Penalty against Planet Energy (Ontario) Corp. (ER-2011-0409) (GM-2013-0269).

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Ontario Energy Board

Commission de l'Énergie de l'Ontario

Ontario

EB-2011-0316

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

AND IN THE MATTER OF a Notice of Intention to Make an Order for Compliance and an Administrative Penalty against Summitt Energy Management Inc., Licence Numbers ER-2010-0368 and GM-2010-0369

BEFORE: Ken Quesnelle
Presiding Member

Cathy Spoel
Member

DECISION AND ORDER AND PROCEDURAL ORDER NO. 3

The Ontario Energy Board (the "Board"), on its own motion under section 112.2 of the *Ontario Energy Board Act, 1998* (the "Act"), issued a Notice of Intention (Notice) stating that it intends to make an Order under sections 112.3 and 112.5 of the Act requiring Summitt Energy Management Inc. ("Summitt") to comply with a number of enforceable provisions as defined in section 112.1 of the Act and to pay an administrative penalty in the amount of $15,000 for breaches of enforceable provisions. By way of letter dated September 7, 2011, Summitt, in accordance with the opportunity provided in the Notice, requested that the Board hold a hearing on this matter. The Board is therefore holding a hearing into this matter. The parties to this proceeding are Summitt and the staff members of the Board (assisted by external counsel) assigned to bring forward this matter ("Compliance").

The Board issued Procedural Order No. 1 on November 22, 2011, which established December 22nd as a provisional date for the hearing of any motions pertaining to the hearing, as well as the schedule for filings pertaining to potential motions.

Summitt filed a Notice of Motion on December 15th, 2011. The Motion seeks various orders of the Board with respect to, among other things, the confidential treatment of certain information, requirements of the compliance staff to disclose certain information, a requirement for certain witness statements or summaries of anticipated oral evidence, contact information of intended witnesses, information pertaining to intended expert witnesses, the establishment of an interrogatory process, and the fixing of a hearing schedule according to a proposed timetable.

In response, Compliance filed its submission on December 19, 2011 addressing the matters raised in the motion and the relief sought by Summitt.

The motion was argued before the Board on December 22, 2011. Compliance agreed at the hearing to provide much of the information Summitt was requesting. The Board established January 13, 2012 as the date for the production of the "agreed to" information. Several issues, however, remained contested.

Decision on Motion

A. Additional Disclosure

Summitt's original request for additional disclosure was itemized in Schedule "A" to its Notice of Motion. Since the Notice of Motion was filed the list of requested documents has become shorter, either because Compliance has agreed to provide the documents, or because Compliance has confirmed that the documents do not exist.

Compliance's written submissions (para. 33) describe five categories of documents that it will not agree to provide absent an order from the Board:

(a) The audit working papers, investigator notes and memoranda;

(b) The names, addresses and telephone numbers of the individuals at the Board who instructed Ernst & Young ("E&Y"), to whom E&Y reported and with whom

E&Y discussed the auditor's process and findings, and from whom the auditors sought guidance and instruction (beyond Mr. Mustillo);

(c) The names, addresses and telephone numbers of the individuals at E&Y who conducted the audit of Summitt, who reviewed and commented upon the audit findings, who prepared and submitted the audit report to the Board and who discussed the audit and its findings with the Board (beyond Stephen Hack, the E&Y partner who signed the E&Y Report);

(d) Particulars of the audits of other energy retailers and marketers, including the identity of such retailers and marketers, the scope of the audit, copies of the audit reports and other materials put before decision-makers in those instances;

(e) Particulars and supporting reasons for the calculation of the administrative monetary and other penalties sought in each of the other Notices of Intention issued at or about the same time in respect of the concurrent audits of other energy retailers and marketers, as well as for the calculation of the administrative penalty sought in this proceeding.

The test

Although there was disagreement between the parties regarding what documents Compliance should be required to disclose, there was general agreement regarding the test the Board should apply in considering requests for disclosure. Both parties agreed that Summitt is entitled to disclosure that will allow it know the case against it, and thereby be provided with the opportunity to make full answer and defence.[1]

The case law is clear, however, that in an administrative process such as the current proceeding, Compliance is not necessarily required to disclose all potentially relevant material. As the Federal Court of Appeal held in *Ciba-Geigy Canada Ltd. v. Canada (Patented Medicine Price Review Board)*:

[1] See, for example, *Howe v. Institute of Chartered Accountants of Ontario* (1994), 19 O.R. (3d) 483 (C.A.) and *Ontario (Human Rights Commission) v. Dofasco Inc.* (2001), 57 O.R. (3d) 693 (C.A.) (both cited in Summitt's factum); and the Board's decision on motion in EB-2010-0221 (Re Summitt Energy Management Inc.), dated August 23, 2010 (cited in Compliance's factum).

> Certainly, the subject of an excess price hearing is entitled to know the case against it, but it should not be permitted to obtain all the evidence which has come into the possession of the Board in carrying out its regulatory functions in the public interest on the sole ground that it may be relevant to the matter at hand. [...]
>
> To require the Board to disclose all possibly relevant information gathered while fulfilling its regulatory obligations would unduly impede its work from an administrative standpoint.[2]

The test, therefore, is not whether a document is possibly relevant; the test is whether disclosure is required for Summitt to know the case to be met and to make full answer and defence.

Decision with respect to specific requests for disclosure

Names and contact information of individuals at the Board who dealt with Ernst &Young ("E&Y") with respect to this matter

Names and contact information of individuals at E&Y who worked on the audit

The Board will not require Compliance to provide any additional information regarding individuals at the Board who dealt with E&Y with respect to this matter.

As a practical matter, it appears that few if any people at the Board had substantive dealings with E&Y respecting this matter other than Mr. Lou Mustillo, who is known to Summitt and will be Compliance's first witness. Regardless, in the Board's view there is no compelling reason why Compliance should be required to provide the names of any individuals other than proposed witnesses.

Compliance is required to provide Summitt with materials sufficient to "allow it to know the case it is expected to meet with sufficient detail to enable it to mount an effective defence to the allegations contained in the notice of intention to make an order." It is not clear how the identity of persons at the Board who were involved in this case (other than the proposed witnesses) will assist Summitt in understanding the case it has to

[2] [1994] 3 F.C.J. No 884, paras. 5-8.

meet. The onus will lie with Compliance to present evidence to the Board which satisfies the Board that Summitt has breached an enforceable provision of the Act.

For the same reasons (though subject to the additional ruling below) the Board will not require Compliance to provide Summitt with any additional names and contact information of individuals at E&Y who were involved in the preparation or review of the audit. The Board finds that additional contact information is not necessary to allow Summitt to know the case it has to defend.

Particulars of audits of other energy retailers

The Board will not require Compliance to provide any additional information with respect to audits conducted of other energy retailers.

Additional information regarding audit of energy retailers would be of little to no value in the current proceeding. Information relating to many recent Board compliance activities respecting other retailers is already a matter of public record, as are several Board decisions where notices of intention to make an order were contested. Summitt submitted that this information could be relevant to any potential due diligence defence it might choose to present. The Board is not convinced by this argument. Even to the extent that other energy retailers were thought to have or found to have breached similar enforceable provisions, any information relating to their due diligence practices would be of little to no benefit in the current proceeding. In any event, Summitt would have had to be aware of the practices of other retailers to rely on them as part of the basis of a due diligence defence. Disclosure by Compliance of this information after the fact will not be relevant if Summitt was not already aware of it, and if Summitt was aware of it, disclosure is not required.

Particulars relating to the calculation of administrative penalties sought against other energy retailers

The Board will not require Compliance to provide any additional information with respect to the calculation of the administrative penalties sought against any other party in other proceedings.

Compliance has already provided Summitt with the details on how Compliance determined what it regarded as an appropriate administrative penalty against Summitt

for the alleged breaches of enforceable provisions in this case. The administrative penalties that Compliance sought against other parties is also a matter of public record. In the event that the Board determines that one or more breaches of enforceable provisions have occurred in this case, the Board will determine the quantum of any administrative penalty. Compliance will present its view of an appropriate penalty, and Summitt will present its view. Presumably Compliance's argument in any penalty submissions will include details regarding how it determined what it views to be the appropriate penalty. This will of course not be binding on the Board, although it will be considered like any other submission before the Board. Details regarding how Compliance determined what it viewed as appropriate penalties in *other* proceedings, however, has no relevance to the current proceeding.

The audit working papers, investigator notes and memoranda

Compliance has already provided Summitt with all documents in its possession relating to the audit conducted by E&Y. What remains in dispute is the status of working papers, audit notes, etc., that may have been produced by employees of E&Y, but were never provided to Compliance (and which therefore have not been provided to Summitt).

Although employees of E&Y are not, of course, employees of the Board, they were retained by Compliance and appointed as inspectors pursuant to section 106 of the Act for the purpose of conducting the audit of Summitt. They were acting on behalf of Compliance. To the extent that any materials produced by E&Y meet the tests for disclosure as described above, they should be provided to Summitt. The Board does not consider the fact that the documents (to the extent they exist) were produced by people who do not work directly for Compliance to protect them from disclosure. The Board will consider Summitt's request for disclosure of documents in the possession of E&Y no differently than it would consider a request for similar documents produced by Compliance itself.

The Board has determined that the audit working papers, investigator notes and memoranda produced by E&Y but not given to Compliance may be relevant and therefore will order that they be provided to Summitt by Compliance.

The Board will rely on Compliance to obtain the documents and provide them to Summitt.

B. Interrogatories

While the Board indicated at the end of the motions day that it would make provisions for a limited interrogatory process, now that (in a decision being released concurrently) the Notice of Intention has been amended to clarify that the alleged contravention relates to physical placement, the Board expects that such interrogatories, if any, will be very limited in scope, as they must relate specifically to the allegations of non-compliance. The Board also expects that any interrogatories posed by Summitt will generally fall within the scope of the Board's findings relating to discovery: in other words the Board will not expect interrogatories in areas where the Board has declined Summitt's request for further information from Compliance.

The Board considers it necessary to make provision for the following procedural matters. The Board may issue further Procedural Orders from time to time.

THE BOARD THERFORE ORDERS THAT:

1. Compliance shall file any outstanding materials Ernst & Young prepared in regards to the Summitt audit with the Board, and copied to Summitt, on or before **April 16, 2012**.

2. If Summitt wishes information and material from Compliance that is in addition to the evidence filed with the Board shall request it by written interrogatories filed with the Board, and delivered to Compliance on or before **April 30, 2012**.

3. Compliance shall file with the Board complete responses to the interrogatories and deliver them to Summitt no later than **May 14, 2012.**

All filings to the Board must quote file number EB-2011-0316, and consist of two paper copies and one electronic copy in searchable / unrestricted PDF format filed through the Board's web portal at https://www.errr.ontarioenergyboard.ca/. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Please use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at www.ontarioenergyboard.ca. If the web portal is not available you may e-mail your document to boardsec@ontarioenergyboard.ca.

Those who do not have internet access are required to submit all filings on a CD in PDF format, along with two paper copies. Those who do not have computer access are required to file 7 paper copies. All communications should be directed to the attention of the Board Secretary, and be received no later than **4:45 p.m.** on the required date.

ISSUED at Toronto, April 2, 2012
ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary

TAB 2

Ontario Energy Board

Commission de l'énergie de l'Ontario

EB-2009-0308

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

AND IN THE MATTER OF a Notice of Intention to Make an Order for Compliance against Toronto Hydro-Electric System Limited.

BEFORE: Gordon Kaiser
Vice-Chair and Presiding Member

Cynthia Chaplin
Member

AMENDED DECISION AND ORDER

[1] This Decision addresses a motion brought by Toronto Hydro-Electric System Limited ("Toronto") for the production and disclosure of certain documents from: the Board; certain complainants, Metrogate Inc. ("Metrogate"), Residences of Avonshire Inc. ("Avonshire"), Deltera Inc. ("Deltera") and Enbridge Electric Connections Inc. ("Enbridge"); and the members of the Smart Sub-Metering Working Group (the "Working Group") [1].

[2] This is a compliance proceeding in which Compliance Counsel is seeking an Order under section 112.3 of the OEB Act. That section states:

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[1] The Smart Sub-metering Working Group is made up of the following members:

Carma Industries Inc.
Enbridge Electric Connections Inc.
Hydro Connection Inc.
Intellimeter Canada Inc.
Provident Energy Management Inc.
Stratacon Inc.
Wyse Meter Solutions

112.3 (1) If the Board is satisfied that a person has contravened or is likely to contravene an enforceable provision, the Board may make an order requiring the person to comply with the enforceable provision and to take such action as the Board may specify to,

(a) remedy a contravention that has occurred; or

(b) prevent a contravention or further contravention of the enforceable provision.

[3] In the Notice of Intention to Make an Order For Compliance dated August 4, 2009, the Board identified the enforceable provisions as: section 28 of the *Electricity Act, 1998* (the *"Electricity Act"*); section 53.17 of the Electricity Act; section 2.4.6 of the Distribution System Code (the "DSC"); section 3.1.1 of the DSC; and section 5.1.9 of the DSC.

[4] The foregoing provisions create a scheme under which condominium developers or corporations may opt to: (i) have a distributor smart-meter individual condominium units, in which case each unit owner becomes a customer of the distributor; or (ii) have a Board-licensed smart sub-meter provider smart sub-meter individual units, in which case the condominium corporation (through a bulk meter) continues to be the customer of the distributor and the smart sub-metering provider allocates the bulk bill to the individual unit owners.

[5] At issue in this proceeding is Toronto's practice of refusing to connect new condominium projects within its service area unless all units in the condominium are individually smart-metered by Toronto. This practice, it is alleged, effectively precludes condominium corporations or developers from the option of using services of licensed smart sub-meter providers.

[6] In this proceeding, the Board alleges that Toronto's practice violates the above-noted provisions of the *Electricity Act* and the DSC. The particulars of non-compliance are set out in the Compliance Notice:

1. Toronto's Conditions of Service, specifically section 2.3.7.1.1, states that Toronto "will provide electronic or conventional smart suite metering for each unit of a new Multi-unit site, or a condominium." By way of letters dated April 22, 2009, Toronto informed Metrogate Inc. ("Metrogate") and Avonshire Inc.

("Avonshire") that despite Metrogate and Avonshire's request that Toronto prepare a revised Offer to Connect for condominiums based on a bulk meter / sub-metering configuration, Toronto would not offer that connection for new condominiums and would not prepare a revised Offer to Connect on that basis.

2. Toronto's refusal to connect on that basis is contrary to the requirement of a distributor to connect to a building, to its distribution system as per section 28 of the Electricity Act and is contrary to section 3.1.1 of the DSC.

3. Toronto's practice is also contrary to section 5.1.9 of the DSC which states that distributors must install smart meters when requested to do so by the board of directors of a condominium corporation or by the developer of a building, in any stage of construction, on land for which a declaration and description is proposed or intended to be registered pursuant to section 2 of the *Condominium Act, 1998*.

4. Toronto's practice is also contrary to section 53.17 of the Electricity Act (and Ontario Regulation 442/07 – *Installation of Smart Meters and Smart Sub-Metering Systems in Condominiums* (made under the Electricity Act)) which contemplates a choice between smart metering and smart sub-metering.

5. Toronto's Conditions of Service are therefore contrary to section 2.4.6 of the DSC which states that Conditions of Service must be consistent with the provisions of the DSC and all other applicable codes and legislation.

[7] On August 21, 2009 Toronto wrote to Compliance Counsel requesting "disclosure and production of all information that may relate to suite metering or smart metering practices of THESL or third parties".

[8] On September 1, 2009 Compliance Counsel responded and provided counsel for Toronto with a package of documents[2] containing:

(a) Stakeholder complaints made to the Board;
(b) Compliance office communications with Toronto; and
(c) Extracts from Toronto's Conditions of Service, the Distribution System Code, and the Smart Sub-Metering Code.

[2] Affidavit of Patrick G. Duffy sworn September 22, 2009. Exhibit KM1.1.

[9] On August 28, 2009 Toronto wrote to the Working Group and requested disclosure of "all contracts made with, condominium developers with respect to the installation and operation of sub-meters for condominiums in the City of Toronto" from each member of the Working Group.

[10] On August 31, 2009, the Working Group informed Toronto by letter that it would not be providing the materials requested.

[11] In this motion, Toronto is seeking the production of:

(a) all information that may relate to suite metering or smart metering practices of Toronto or third parties, prepared, sent, received, or reviewed by or exchanged with any employee of the Board who was involved in the review and/or investigation of Toronto in relation to Toronto's smart-metering of condominium units (referred to by Toronto as "Compliance Information");

(b) all communications among the "Complainants" (Metrogate, Avonshire, Deltera, and Enbridge) and sub-meterers or condominiums developers addressing the terms on which sub-meters offer to provide sub-metering to condominium developers in the City of Toronto (referred to by Toronto as "Complainant Information"); and

(c) materials from the members of the Working Group, specifically all proposals made to, and all contracts made with, condominium developers with respect to the installation and operation of sub-meters for condominiums in the City of Toronto (the "Working Group Materials").

Disclosure By Compliance Counsel

[12] Toronto is seeking extensive disclosure and production of documents based upon the Supreme Court decision in *Stinchcombe*[3]. The *Stinchcombe* standard was summarized by Supreme Court of Canada in *Taillefer*[4].

> "The Crown must disclose all relevant information to the accused, whether inculpatory or exculpatory, subject to the exercise of the Crown's discretion to refuse to disclose information that is privileged or plainly

[3] *R. v. Stinchcombe*, [1991] 3 S.C.R. 326.

[4] *R. v. Tailleter*, [2003] 3 S.C.R. 307.

> irrelevant. Relevance must be assessed in relation both to the charge itself and to the reasonably possible defences. The relevant information must be disclosed whether or not the Crown intends to introduce it in evidence, before election or plea (p. 343). Moreover, all statements obtained from person who have provided relevant information to the authorities should be produced notwithstanding that they are not proposed as Crown witnesses…
>
> As the courts have defined it, the concept of relevance favours the disclosure of evidence. Little information will exempt from the duty that is imposed on the prosecution to disclose evidence.
>
> The Crown's duty to disclose is therefore triggered whenever there is a reasonable possibility of the information being useful to the accused in making full answer and defence."

[13] The *Stinchcombe* standard was established in the context of an indictable criminal offense and the disclosure requirements of a prosecutor. Mr. Justice Sopinka, the author of that opinion questioned at the time whether it would even extend to summary conviction offenses. *Stinchcombe* has however been applied to civil proceedings by administrative tribunals but that extension has largely been restricted to cases where an individual's livelihood is at stake.

[14] In *Re Berry*[5] the Ontario Securities Commission (the "Commission") decided that *Stinchcombe* required that documents reflecting settlement agreements between other parties should be produced. In *Re Biovail*[6] the Commission also recognized that the staff must provide disclosure similar to this *Stinchcombe* standard following the Supreme Court of Canada in *Deloitte and Touche LLP*[7]. Toronto also relies on the *Markandey*[8]decision, a disciplinary proceeding against an ophthalmologist. At paragraph 43 the Court stated

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[5] (2008), 31 O.S.C.B. 5441.

[6] (2008), 31 O.S.C.B. 7161.

[7] *Deloitte & Touche LLP v. Ontario (Securities Commission)*, [2003] 2 S.C.R. 713.

[8] *Markandey v. Ontario (Board of Ophthalmic Dispensers)* [1994] O.J. No. 484. See also *Re Suman* 32 O.S.C.B. 592 at para 38.

> "The importance of full disclosure to the fairness of the disciplinary proceedings before the Board cannot be overstated. Although the standards of pre-trial disclosure in criminal matters would generally be higher than in administrative matters (See Biscotti et al. v. Ontario Securities Commission, supra), tribunals should disclose all information relevant to the conduct of the case, whether it be damaging to or supportive of a respondent's position, in a timely manner unless it is privileged as a matter of law. Minimally, this should include copies of all witness statements and notes of the investigators. The disclosure should be made by counsel to the Board after a diligent review of the course of the investigation. Where information is withheld on the basis of its irrelevance or a claim of legal privilege, counsel should facilitate of review of these decisions, if necessary."

[15] Compliance Counsel responds that the *Stinchcombe* level of disclosure is limited to criminal or disciplinary proceedings where the accused faces a severe sanction. He relies on the recent Supreme Court of Canada decision in *May v. Ferndale*[9] at paragraph 91:

> "It is important to bear in mind that the *Stinchcombe* principles were enunciated in the particular context of criminal proceedings where the innocence of the accused was at stake. Given the severity of the potential consequences the appropriate level of disclosure was quite high. In these cases, the impugned decisions are purely administrative. These cases do not involve a criminal trial and innocence is not at stake. The *Stinchcombe* principles do not apply in the administrative context."

[16] Compliance Counsel also relies on the Federal Court decision in *CIBA-Geigy*[10] which concerned the disclosure standards to be used by the Patented Medicine Prices Review Board. CIBA-Geigy was accused of excessive pricing and the company faced substantial fines relating to any excess profits. CIBA-Geigy requested all documents relating to all matters at issue that were or had been in the possession or control of the Board. The request was for all relevant documents whether favorable or prejudicial to the Respondent's position whether or not Board staff plan to rely upon those documents

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[9] *May v. Ferndale Institution*, [2005] 3 S.C.R. 809.

[10] *CIBA-Geigy Canada Ltd.*, (1994) 83 F.T.R. 2.

as part of its case. In that sense the claim by CIBA-Geigy for disclosure was similar to the claim by Toronto before this Board.

[17] In the trial decision Mr. Justice McKeown refused the requested disclosure stating at paragraph 32:

> "In summary, when the statutory scheme of this Board is looked at, the Board is a regulatory Board or tribunal. There is no point in the legislature creating a regulatory tribunal if the tribunal is treated as a criminal court. The obligations concerning disclosure imposed by the doctrine of fairness and natural justice are met if the subject of the inquiry is advised of the case it has to meet and is provided with all the documents that will be relied on."

[18] The Federal Court of Appeal upheld the trial decision[11] stating at paragraph 8:

> "This is where any criminal analogy to the proceedings in the case at bar breaks down. There are admittedly extremely serious economic consequences for an unsuccessful patentee at a s. 83 hearing, and a possible effect on a corporation's reputation in the market place. But as McKeown J. found, the administrative tribunal here has economic regulatory functions and has no power to affect human rights in a way akin to criminal proceedings."

[19] To require a Board to disclose all possibly relevant information gathered in the course of its regulatory activities could easily impede its work from an administrative standpoint. As Macaulay and Sprague note "there must be a reason the functions have been mandated to an administrative agency and not to a court "[12]. There is also a significant difference between disciplinary proceedings where an individual may lose his livelihood and a situation where a corporation faces a sanction by way of fine or administrative penalty. An economic regulator, such as this Board, has little ability to affect human rights in the manner of a criminal or disciplinary proceeding. No individual is at risk in this case. Counsel for Toronto suggested that there may be an analogy in that Toronto could lose its license and ability to operate. Compliance Counsel responded that he is not seeking such a remedy.

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[11] *CIBA-Geigy Canada Ltd.*, (1994) 3 F.C. 425 (CA).

[12] *Macaulay and Sprague*, Hearings Before Administrative Tribunals (Carswell 2009) at 9-1 to 9-2.

[20] Toronto argued that the Board often requires extensive disclosure from utilities it regulates and it would be wrong if the Board were to impose a broad disclosure requirement on a utility as an Applicant and not provide similar rights when the utility is a Respondent facing charges that it failed to comply with the Act or its licence. In *West Coast Energy*[13] the Board set out the standard of disclosure required of a utility and sanctioned the utility with a cost penalty for failure to comply:

> "A public utility in Ontario with a monopoly franchise is not a garden variety corporation. It has special responsibilities which form part of what the courts have described as the "regulatory compact". One aspect of that regulatory compact is an obligation to disclose material facts on a timely basis…
>
> Failure to disclose has at least two unfortunate consequences. First, it can only result in less than optimum Board decisions. Second, it adds to the time and cost of proceedings. Neither of these are in the public interest.
>
> A publicly regulated corporation is under a general duty to disclose all relevant information relating to Board proceedings it is engaged in unless the information is privileged or not under its control. In doing so, a utility should err on the side of inclusion. Furthermore, the utility bears the burden of establishing that there is no reasonable possibility that withholding the information would impair a fair outcome in the proceeding. This onus would not apply where the non-disclosure is justified by the law of privilege but no privilege is claimed here."

[21] There is no question that the Board takes a broad view of disclosure for regulated utilities but that obligation flows from the unique status of a public utility with a monopoly franchise. As indicated in *West Coast Energy* that responsibility flows from the "regulatory compact" long recognized by the courts. That is not the situation here. The law respecting disclosure is well developed. The question before us is whether Stinchcombe extends to this type of regulatory proceeding where no individual rights are at issue. We take the view that it does not.

[22] Compliance Counsel responds that he is only required to produce documents he intends to rely on. Toronto claims that it should have access to all documents

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[13] *Re West Coast Energy Inc. and Union Gas Limited* EB-2008-0304, November 19, 2008 at p.11.

necessary to meet those charges and frame its defence. In this regard Toronto sets out a very specific defence. Toronto intends to argue that it has a statutory defence which allows them to refuse to connect if there is a violation of law. Toronto argues that it is illegal for unlicensed distributors to profit from distribution activities.

[23] Accordingly, Toronto seeks information on the financial arrangements between condominium developers and sub-meterers to determine whether either or both of these are seeking to profit from distribution activities. Toronto argues that this information is relevant to its defense under section 3.1.1 of the Distribution System Code[14]. That section authorizes a refusal to connect where the customer contravenes the laws of Ontario.

[24] Fairness is always a matter of balancing different interests. As indicated, we do not accept that *Stinchcombe* applies to the disclosure requirements in this case. On the other hand, we believe Toronto is entitled to frame its defence as it sees fit and to obtain documents necessary to argue that defence. Whether they will be successful in that legal argument remains to be seen. But as a matter of fairness they are entitled to have documents required to advance a defence particularly where, as here, they have identified a specific arguable defence. Accordingly, we will order Compliance Counsel to produce all documents relating to smart metering activities at Metrogate and Avonshire.

[25] This is narrower disclosure than Toronto seeks. Toronto is seeking "all information that may relate to suite metering or smart metering practices of Toronto or third parties, prepared, sent, received, or reviewed by or exchanged with any employee of the Board who was involved in the review and/or investigation of Toronto in relation to Toronto's smart-metering of condominium units".

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[14] DSC section 3.1.1 states that: In establishing its connection policy as specified in its Conditions of Service, and determining how to comply with its obligations under section 28 of the *Electricity Act*, a distributor may consider the following reasons to refuse to connect, or continue to connect, a customer:

(a) contravention of the laws of Canada or the Province of Ontario including the Ontario Electrical Safety Code;
(b) violation of conditions in a distributor's licence;
(c) materially adverse effect on the reliability or safety of the distribution system;
(d) imposition of an unsafe worker situation beyond normal risks inherent in the operation of the distribution system;
(e) a material decrease in the efficiency of the distributor's distribution system;
(f) a materially adverse effect on the quality of distribution services received by an existing connection; and
(g) if the person requesting the connection owes the distributor money for distribution services, or for non-payment of a security deposit. The distributor shall give the person a reasonable opportunity to provide the security deposit consistent with section 2.4.20.

[26] The Notice of Intention to Make an Order issued by the Board on August 4 limits the questionable conduct to actions of Toronto with respect to Metrogate and Avonshire. No allegations are made with respect to other condominiums. Accordingly, any production of documents should be limited to documents in the possession of Compliance Counsel that relate to Metrogate and Avonshire.

[27] These documents should be produced within ten days unless there is a claim of privilege. There is no question that this Board is required to recognize claims of privilege where appropriate[15], but any claim of privilege must reference specific documents. We are not prepared to accept blanket claims of privilege.

Disclosure of Third-Party Documents

[28] Toronto is also seeking broad disclosure from third parties. Specifically they request "all communications among the "Complianants" (Metrogate, Avonshire, Deltera, and Enbridge) and sub-meterers or condominium developers addressing the terms on which sub-meters offer to provide sub-metering to condominium developers in the City of Toronto". They also request that all members of the Working Group produce *all* proposals and *all* contracts made with condominium developers relating to the installation and operation of sub-meters for condominiums in the City of Toronto. Seven companies form the Working Group.

[29] There is no question that the Board has jurisdiction to order third parties to produce documents[16] but this is an unusual step to be taken only when the documents identified are clearly relevant and no prejudice or undue burden on the third parties results from the disclosure. We do not believe that Toronto has met the burden in this case.

[30] As the Ontario Municipal Board cautioned in *Hammersmith Canada*[17] the Board "must be mindful of the possible abuse of the discovery process. We should be vigilant against any attempt to transform the right to discovery into a license to procure information from the world at large". Toronto has not identified specific documents. Rather, they request *all* seven members of the Working Group and each of the

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[15] *Blood Tribe Department of Health v. Canada (Privacy Commission)*, [2008] 2 S.C.R. 574.

[16] See s. 21(1) of the *Ontario Energy Board Act, 1998*, and ss. 5.4 and 12 of the *Statutory Powers Procedure Act*.

[17] *Hammerson Canada Inc. v. Guelph (City)*, [1999] O.M.B.D. No. 1174 at para. 7.

"complainants" to produce *all* proposals and *all* contracts with *all* condominium developers in the City of Toronto.

[31] Concern with a fishing expedition is particularly relevant here where the members of the Working Group all compete with Toronto in the supply of smart meters to condominium units. Moreover, this is not a Stinchcombe case and Toronto's conduct is being questioned regarding only two condominium units, Metrogate and Avonshire, not *all* condominium units in Toronto.

[32] We also noted that the Board has appointed an independent lawyer to act as Compliance Counsel in this case largely in response to Toronto's concerns that the Board should not be acting as both an investigator and prosecutor. Toronto originally sought an order from the board concerning the separation of those activities. That matter has been resolved by the Board appointing independent counsel and the agreement by counsel to certain joint undertakings set out in Appendix A to this decision.

[33] It is important in considering this aspect of the motion to note that paragraph 37 of the factum filed by Compliance Counsel states that "the complainant information and Working Group materials [requested by Toronto directly from the third parties] have not been shared with Board compliance staff and will not be relied upon by compliance counsel in this proceeding". We would also note that of the production ordered with respect to Metrogate and Avonshire goes beyond the bare minimum that Compliance Counsel offered, namely that he produce only those documents that he intended to rely upon.

[34] In the circumstances we believe that the production ordered with respect to Metrogate and Avonshire materials held by Compliance Counsel meets any fairness concerns. Accordingly, no production will be ordered against third parties.

Role of Prosecution Staff

[35] In addition to orders for the production of various documents, Toronto also sought certain orders from the Board relating to procedural matters. The purpose of these requests was to ensure that sufficient separation was maintained between the members of Board staff (along with their external counsel) that were and had been working on the file from a compliance perspective to bring the case against Toronto

("Compliance Staff") and the members of Board staff that were and had been assisting the Board panel in this matter ("Board Staff").

[36] Prior to the commencement of the oral hearing on the motion, the parties reached an agreement on an appropriate procedural protocol, which was approved by the Board. A copy of this protocol, which has been signed by the counsel which are bound by it, is attached as Appendix A to this decision.

IT IS THEREFORE ORDERED THAT:

1. Compliance Counsel will within ten days produce all information that may relate to suite metering or smart metering practices of Toronto in relation to Metrogate or Avonshire, or Metrogate or Avonshire, prepared, sent, received, or reviewed by or exchanged with any employee of the Board who was involved in the review and/or investigation of Toronto in relation to Toronto's smart-metering of condominium units.

DATED at Toronto, October 23, 2009.

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary

Appendix A

Procedural Protocol

By Notice of Motion dated September 4, 2009, the Defendant Toronto Hydro Electric System Limited ("THESL") requested an order from the Board establishing a process for this proceeding, and in particular, governing how the Board will ensure that the Board Staff Team (consisting of individuals listed below) and the Panel hearing this proceeding (the "Panel") will govern their interactions with the Compliance Team (consisting of individuals listed below).

The Board Staff Team consists of persons who are assisting the Panel in this matter, specifically Michael Millar, Lenore Dougan and Adrian Pye.

The Compliance Team consists of persons who have been engaged in the investigation, compliance or prosecution of this application, specifically: Maureen Helt, MaryAnne Aldred, Joanna Rosset, Martine Band, Mark Garner, Brian Hewson, Jill Bada, (no longer an employee of the OEB) Fiona O'Connell, Lee Harmer, and Paul Gasparatto.

The Board Staff Team agrees to support the following protocol for the Panel's endorsement:

1. Members from each Team will have no contact with each other about matters relevant to this proceeding, except through the public hearing process or through correspondence copied to all other parties. Members of the Compliance team will have no contact with Board members on matters relevant to this proceeding, except through the public hearing process.

2. No member of either Team will place any files relevant to this proceeding that are not on the public record (computer or otherwise) in a place that can be accessed by the other team or anyone not on their Team.

3. The Team lists will be circulated to everyone at the Board, with instructions that no person at the Board that is not on one of the Teams may communicate with any member of either Team about this case except as specifically authorized in writing from the Board. If it is discovered that a person at the Board has either assisted the panel in this matter or engaged in the investigation and prosecution

of this matter throughout the course of this proceeding, or if, during the course of this proceeding, any additional persons either assist the panel in this matter or engage in the investigation and prosecution of this matter, then the Board Staff Team will immediately inform THESL and such person will be added to the appropriate list of persons.

4. The Board Staff Team will only provide advice to the Panel on questions of facts, law, policy or some combination thereof on the public record so that all other parties can respond. This restriction applies to substantive procedural matters. However, it does not apply to administrative procedural issues, such as advice on where items are addressed in the Board's Rules of Practice and Procedure or other matters that are similarly not contestable.

5. Point 4 (above) applies to advice on questions of facts, law policy or some combination thereof in communications between the Board Staff Team and the Panel after the hearing has concluded (including in discussing or reviewing a draft decision) so that the Board Staff Team will not provide any such advice unless the hearing is re-opened and all parties have an opportunity to hear staff's submissions and make their own submissions.

I undertake to abide by the protocol described above, to the extent that it applies:

Original signed by
Michael Millar

Original signed by
Maureen Helt

Original signed by
Glenn Zacher

Original signed by
Patrick Duffy

TAB 3

2001 CarswellOnt 4049
Ontario Court of Appeal

Ontario (Human Rights Commission) v. Dofasco Inc.

2001 CarswellOnt 4049, [2001] O.J. No. 4420, 109 A.C.W.S. (3d) 462, 14 C.C.E.L. (3d) 165, 151 O.A.C. 201, 208 D.L.R. (4th) 276, 39 Admin. L.R. (3d) 199, 41 C.H.R.R. D/237, 57 O.R. (3d) 693

Ontario Human Rights Commission, Applicant/Appellant and Dofasco Inc., Catherine Jeffrey and The Board of Inquiry (Human Rights Code), Respondents/Respondents in Appeal

Morden, Abella, Rosenberg JJ.A.

Heard: June 14, 2001
Judgment: November 16, 2001
Docket: CA C35181

Counsel: *Naomi Overend* and *Jennifer Scott*, for appellant
Michael Hines, for respondent Dofasco Inc.
Fiona Campbell, for complainant Catherine Jeffrey
Margaret Leighton, for Board of Inquiry

Subject: Constitutional; Employment; Civil Practice and Procedure

Headnote

Human rights --- Practice and procedure — Judicial review — Availability — General

Complainant brought complaint of discrimination before Human Rights Commission — Employer moved before board of inquiry for order compelling complainant to produce documents — Motion was granted in part — Commission applied for judicial review of board's order — Application dismissed — Commission appealed — Appeal allowed in part — Paragraph 5 of board's order meant that complainant was obliged to produce only those documents for which no claim of privilege or no claim to withhold production on ground of irrelevance had been asserted in affidavit of documents — Regardless of whether applicable standard was reasonableness or correctness, paras. 1, 3, and 5 of board's order were within its authority and para. 2 was not — Paragraphs 1, 3, and 5 did not infringe right of complainant to privilege, but instead protected her right to keep from employer documents that were arguably not relevant — Paragraph 2 required complainant to give employer's counsel documents listing all other medical practitioners she has seen since injury, their area of speciality, dates of visits, and ailments or conditions treated — Paragraph 2 carried with it risk that complainant would be providing employer with intimate information unrelated to her claims — Paragraph 2 contained no terms or conditions to protect complainant's privacy interests and exceeded powers of board under Statutory Powers Procedure Act and its own rules — Statutory Powers Procedure Act, R.S.O. 1990, c. S.22.

Human rights --- Practice and procedure — Commissions and boards of inquiry — Evidence — Production of documents

Complainant brought complaint of discrimination before Human Rights Commission — Employer moved before board of inquiry for order compelling complainant to produce documents — Motion was granted in part — Commission applied for judicial review of board's order — Application dismissed — Commission appealed — Appeal allowed in part — Paragraph 5 of board's order meant that complainant was obliged to produce only those documents for which no claim of privilege or for which no claim to withhold production on ground of irrelevance had been asserted in affidavit of documents — Regardless of

whether applicable standard was reasonableness or correctness, paras. 1, 3, and 5 of board's order were within its authority and para. 2 was not — Paragraphs 1, 3, and 5 did not infringe right of complainant to privilege, but instead protected her right to keep from employer documents that were arguably not relevant — Paragraph 2 required complainant to give employer's counsel documents listing all other medical practitioners she has seen since injury, their area of speciality, dates of visits, and ailments or conditions treated — Paragraph 2 carried with it risk that complainant would be providing employer with intimate information unrelated to her claims — Paragraph 2 contained no terms or conditions to protect complainant's privacy interests and exceeded powers of board under Statutory Powers Procedure Act and its own rules — Statutory Powers Procedure Act, R.S.O. 1990, c. S.22.

Table of Authorities

Cases considered by *Morden J.A.*:

Christian v. Northwestern General Hospital (1993), (sub nom. *Ontario (Human Rights Commission) v. House)* 67 O.A.C. 72, (sub nom. *Ontario (Human Rights Commission) v. Ontario (Board of Inquiry into Northwestern General Hospital))* 115 D.L.R. (4th) 279, (sub nom. *Ontario (Human Rights Commission) v. Ontario (Human Rights Board of Inquiry))* 20 C.H.R.R. D/498 (Ont. Div. Ct.) — referred to

Cie Financière du Pacifique v. Peruvian Guano Co. (1882), 11 Q.B.D. 55, 52 L.J.Q.B. 181 (Eng. Q.B.) — referred to

Cook v. Ip (1985), 52 O.R. (2d) 289, 5 C.P.C. (2d) 81, 22 D.L.R. (4th) 1, (sub nom. *Cook v. Washuta)* 11 O.A.C. 171 (Ont. C.A.) — referred to

Howe v. Institute of Chartered Accountants (Ontario) (1994), 19 O.R. (3d) 483, 74 O.A.C. 26, 118 D.L.R. (4th) 129, 27 Admin. L.R. (2d) 118 (Ont. C.A.) — referred to

MacPhayden v. Employers Liability Assurance Corp., [1933] O.W.N. 72 (Ont. H.C.) — referred to

McInerney v. MacDonald, 137 N.R. 35, 126 N.B.R. (2d) 271, 317 A.P.R. 271, 93 D.L.R. (4th) 415, 7 C.P.C. (3d) 269, 12 C.C.L.T. (2d) 225, [1992] 2 S.C.R. 138 (S.C.C.) — referred to

Statutes considered:

Human Rights Code, R.S.O. 1990, c. H.19
Generally — referred to

s. 5 — referred to

s. 5(1) — referred to

s. 9 — referred to

s. 17 — referred to

s. 17(1) — referred to

s. 17(2) — referred to

s. 35(1) — referred to

s. 35(5) — referred to

s. 39(1) — referred to

s. 39(2)(a) — referred to

s. 39(2)(b) — referred to

s. 39(2)(c) — referred to

s. 39(2)(d) — referred to

s. 39(4) — referred to

Statutory Powers Procedure Act, 1971, S.O. 1971, c. 47
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s. 2 — referred to

s. 5.4 [en. 1994, c. 27, s. 56(12); am. 1997, c. 23, s. 13] — referred to

s. 5.4(1) [en. 1994, c. 27, s. 56(12); am. 1997, c. 23, s. 13(11)] — referred to

s. 5.4(1)(e) [en. 1994, c. 27, s. 56(12)] — referred to

s. 5.4(1.1) [en. 1997, c. 23, s. 13(12)] — referred to

s. 5.4(2) [en. 1994, c. 27, s. 56(12)] — referred to

s. 8 — referred to

s. 12(1)(b) — referred to

s. 25.0.1 [en. 1999, c. 12, Sched. B, s. 16(8)] — referred to

s. 25.1 [en. 1994, c. 27, s. 56(38)] — referred to

s. 32 — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

Generally — referred to

R. 30.01-30.05 — referred to

R. 30.06(d) — referred to

Forms considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
Form 30A — referred to

APPEAL by provincial Human Rights Commission from judgment reported at 2000 CarswellOnt 2921 (Ont. Div. Ct.), dismissing commission's application for judicial review of board of inquiry's order requiring complainant to disclose documents.

The judgment of the court was delivered by *Morden J.A.*:

1 This appeal is concerned with the nature and extent of the power of a board of inquiry under the *Human Rights Code*, R.S.O. 1990, c. H.19, to order a complainant, who alleges that she was discriminated against in her employment on the basis of a physical handicap, to disclose medical and other documents relating to her.

2 I shall, shortly, describe what has taken place in this proceeding but say now that the board of inquiry ("the board"), which is composed of one person, Matthew D. Garfield, made an order, on a motion by Dofasco Inc., requiring the complainant, Catherine Jeffrey, to disclose certain documents. I shall set out the terms of the order, which are considerably more complex than this brief statement indicates, later in these reasons.

3 The appellant, the Ontario Human Rights Commission ("the commission"), brought an application to the Divisional Court for judicial review of the board's order, which the court dismissed. The commission, with leave, appeals to this court from this decision.

The Underlying Facts Relating to the Disclosure Order

4 The facts relating to the board's disclosure order and to the judicial review proceeding, which is before the court, are, in the main, those set forth in the pleadings filed with the board. Pleadings are provided for in the R. 35 to 37 of the board's Rules of Practice.

5 The commission's pleading alleged that the complainant was employed by Dofasco from 1976 to 1994. She worked as a crane operator. She was injured in 1988 and reinjured in 1990. She was diagnosed with chronic pain disability/ fibromyositis/fibromyalgia. This condition made her incapable of working as a crane operator.

6 The complainant was off work between 1990 and 1994 but continued to have contact with Dofasco Inc. from time to time. On March 1, 1994, Dofasco, for the first and only time, raised the possibility of assigning her reasonably suitable alternative work, as a switchboard operator. Her response was to defer the decision on whether or not to accept this work until after she had consulted with her specialist doctor. She informed Dofasco of this. Because of her doctor's absence, she was unable to see him until April 26, 1994.

7 Dofasco was unwilling to wait for this and demanded that the complainant report to Dofasco Medical Services on

March 11 and report for work on March 14. She did report to Dofasco Medical Services on March 11. Despite knowing that she was unable to see her specialist until April 26, Dofasco Inc. terminated her employment forthwith after she did not report for work on March 14, claiming that her contract of employment had been frustrated because of her "prolonged and ongoing refusal to report for available and suitable work."

8 The commission alleged that the facts disclosed the following issues:

> (a) The complainant was terminated because of her handicap, which constitutes *prima facie* discrimination;
>
> (b) Dofasco did not attempt to accommodate the needs arising from the complainant's handicap to the point of "undue hardship," and therefore cannot establish that the complainant was "incapable" of her essential duties;
>
> (c) In fact, Dofasco was not engaged in a good faith process of accommodation, given the timing of its job offer, its refusal to wait for the complainant to get required medical advice, and its refusal to consider any other options.

(The commission raised additional issues in its pleading relating to harassment and reprisals on the part of Dofasco. They are not relevant to the proceeding before the court.)

9 This is followed by the general allegation that Dofasco discriminated against the complainant on the ground of handicap contrary to ss. 5 and 9 of the *Human Rights Code.*

10 The commission sought the following remedies:

> (a) Compensation for lost wages and benefits for the complainant for the period March 15, 1994, to the present, less any amounts of such compensation the complainant received for this period from the WSIB or CPP;
>
> (b) Compensation for the intrinsic value of the rights infringed in the amount of $10,000;
>
> (c) Compensation for mental anguish suffered because of the wilful or reckless manner of infringement in the amount of $10,000;

11 Dofasco's pleading is relatively long and detailed. A summary set forth in para. 37 reads:

> To summarize, for four years the Complainant consistently asserted inability to perform productive work for Dofasco, apparently supported by her physicians, while failing to provide relevant medical information and emphasizing her desire for WCB vocational training. In the four years between her second accident and her termination, the Complainant never stated she was ready to return to work or that her physicians had cleared her to return to work. During that time period, she never suggested there were any particular jobs or bundles of duties that she could productively perform, nor, to the Respondent's knowledge, did any of her physicians. During her four year absence from work, the Complainant repeatedly took the position that (initially) she was not ready to return to work, and (later) that she was unlikely to ever be able to return to work at Dofasco. The Commission's Pleadings do not refer to any indication from the Complainant that she was, either prior to or subsequent to her termination, medically fit to return to any productive job at Dofasco. This background, coupled with her refusal to even attempt an ultra-light duty job, the WCB's concurrence that she could do the work and her clear focus on maintaining WCB eligibility, constituted ample grounds for terminating the employment relationship. For four years, the Complainant had not fulfilled the basic "essential duty" of an employee to, ie., perform productive work. Apart from wishful thinking, there was no reason to believe that, whatever accommodation Dofasco made for her, she ever would. A "window of opportunity", arising out of the broader corporate restructuring process, became accessible for a short period of time [earlier in Dofasco's pleading it was alleged that there was a "pressing" need to fill the switchboard operator's vacancy]. Dofasco acted reasonably in stating its preparedness

to accept medical clearance from a doctor other than the absent specialist and its readiness to physically modify the worksite. The Complainant declined to take advantage of this, and the window "closed". There was no prospect that such an opportunity would arise again in the foreseeable future. Dofasco then proceeded to exercise its rights of termination under Section 17 of the Code.

Dofasco also pleaded:

Dofasco has now learned that in August, 1993, the Complainant was awarded disability benefits under the Canada Pension Plan. Dofasco has requested but has not yet received documents explaining why this decision was reached despite the findings of Dr. Darracott in November, 1992 [that "from a physical point of view, there [was] no clinical evidence to suggest she has physically disabling pathology"].

Under the Canada Pension Plan, an applicant can only receive a CPP Disability Pension if they are "incapable regularly of pursuing any substantially gainful occupation" and their disability is "likely to be long continued and of indefinite duration".

12 Dofasco then raised the following issues:

At the time of her termination, was the Complainant capable of performing any work, or was she "incapable of pursuing any substantially gainful occupation", as her CPP Disability Pension status would suggest?

If the Complainant now claims to have been capable of performing work in March, 1994, should the Board of Inquiry dismiss this Complaint as an abuse of process, given the fact that such a position directly contradicts the position she has successfully taken before the Canada Pension Plan i[n] respect of the same time period?

If, as her CPP status would suggest, the Complainant was totally unemployable in March, 1994, did Dofasco have any obligation at all to accommodate her "needs"?

Assuming the Complainant was capable of some work in March, 1994, was she capable of the switchboard duties?

Assuming the Complainant's needs were such that some measure of accommodation would have permitted her to perform work in March, 1994, were Dofasco's efforts at accommodation sufficient to accommodate those needs?

Did the Complainant, herself, take all reasonable steps available to her to participate in the accommodative process?

The Motion before the Board

13 After the exchange of pleadings, Dofasco brought a motion for:

An Order compelling production of the files of Dr. Leong, Dr. Buckley, Dr Kean and Dr. Forrest relating to the Complainant during the period between March 22, 1990 and the present date;

An order compelling production of the files of any other medical practitioner who examined or treated the Complainant during the period between March 22, 1990 until the present date;

An order compelling production of all files maintained by the Workplace Safety and Insurance Board regarding the Complainant;

An order compelling production of the Complainant's medical file maintained by the Medical Department of Dofasco Inc.

An order compelling production of the Complainant's disability pension file maintained by the Canada Pension Plan;

An order compelling production of true copies of the Complainant's income tax returns from 1993 until the present as well as true copies of any documents received by the Complainant from Revenue Canada which confirm or correct any of those returns.

Alternatively, an order requiring the Complainant's written consent to the disclosure of each of the foregoing documents to the Respondent's counsel.

Such further and other relief as to this Board of Inquiry seems just.

14 The board heard the motion on December 16, 1999, and gave its decision orally that day. It stated the competing submissions of the parties as follows:

Dofasco brings a motion for production of medical files, WCB file, CPP file and income tax returns (T1s and notices of assessment) from the Complainant. Dofasco argues that it should have the same degree of access to original documents in a file as the Complainant. Dofasco also submits that it is being denied the ability to know the case it has to meet, prepare its defence under section 17 of the Code, and deal with central issues in this case including the quantum of damages. Dofasco has highlighted instances of imperfect disclosure in these proceedings including sequentially numbered documents not produced by the Complainant.

The Commission opposes the motion and argues that the relief sought is too wide and that Dofasco is not entitled to the production of files *per se* and documents not relevant to the handicap of the Complainant (chronic pain disability, fibromyositis, fibromyalgia). The Commission argues that the Board's rules do not contemplate such a wide net of disclosure - a "fishing expedition".

Though not present, the Complainant, through letters by her counsel in the motion materials, indicates that she has met her disclosure obligations under the Rules.

15 After stating that "[t]he motion is granted in part," the board gave the following reasons:

The test for production is arguable relevance. Section 5.4(1) of the *Statutory Powers Procedure Act* and Board of Inquiry Rule 42 give me a broad power to order disclosure. Rule 42 confers on me the power to order disclosure of " . . . anything else the panel considers appropriate for a full and satisfactory understanding of the issues in the proceeding."

The threshold for disclosure here, as in the courts, is not a very high one. There must be some relevance and the production must have some nexus to issues before the Board. The general movement is toward greater disclosure. This is reflected by the Ontario Court of Appeal's comments in *Cook v. Ip* (1985), 5 C.P.C. (2d) 81 (Ont. C.A.), at 86:

> There can be no doubt that it is in the public interest to ensure that all relevant evidence is available to the Court. This is essential if justice is to be done between the parties . . . The production of medical records is thus fundamental to a Court's determination of the nature, extent and effect of the injuries which may have been suffered and the appropriate measure of damages flowing from them.

Dofasco has satisfied me that the nature of the documents sought (some of which are known and some of which are not known) are crucial to knowing its case to be met and preparing its key defence under section 17 of the Code. The motion materials clearly show that production by the Complainant has been incomplete. My goal is to balance the needs of Dofasco to know and prepare its case and the confidentiality of the Complainant inherent in such disclosure.

The Commission argues against an order of disclosure of documents from medical practitioners not enumerated by Dofasco and those parts of the file of Dr. Leong (the Complainant's family doctor) dealing with medical conditions not

enumerated above. I find that ailments other than those listed above are arguably relevant to Dofasco's section 17 accommodation defence and the quantum of damages. Dofasco should not be prevented from presenting such arguments.

I find further that information contained in the Complainant's files at the WSB and CPP will arguably be relevant to the issues in this proceeding. Employment related income is clearly relevant to issues in this proceeding, including the quantum of damages. Information in the Complainant's file at Dofasco's medical department will no doubt be relevant to key issues in this proceeding.

16 Following this, the board made its "order" as follows:

1. The Complainant shall provide to her counsel an executed Consent to the disclosure of the file of Dr. Leong, Dr. Buckley, Dr. Kean and Dr. Forrest relating to the Complainant during the period between March 22, 1990 and the present date. Complainant's counsel shall then provide said Consents to the doctors and request production by January 15, 2000.

2. The Complainant shall provide a list to Mr. Hines [counsel for Dofasco] by January 31, 2000 of any other medical practitioner who examined or treated her during the period between March 22, 1990 until the present date, the doctor's area of expertise or specialty, the dates of said visits, and the ailment or condition treated.

3. The Complainant shall provide to her counsel executed Consents to the disclosure of her files maintained at the Workplace Safety and Insurance Board, at the Canada Pension Plan regarding her disability and her medical file maintained by Dofasco's medical department, all for the period between March 22, 1990 until the present date. Complainant's counsel shall then provide said Consents to the above entities and request production by January 15, 2000.

4. The Complainant shall produce to Mr. Hines true copies of her T1 income tax returns and notices of assessment from 1993 until the present. Said documents may be edited by the Complainant so that non-employment income parts are expunged. Production of the income tax documents as above shall be given by January 31, 2000.

5. The Complainant shall provide a sworn Affidavit of Documents as stipulated in the Rules of Civil Procedure dealing with documents obtained from the above sources. The Affidavit shall also include a section listing those documents not provided to Dofasco for reason of not being arguably relevant. Said affidavit, including copies of productions shall be provided to Mr. Hines by January 31, 2000. Mr. Hines may see the originals of productions upon request to the Complainant's counsel.

6. Disbursements of the productions above shall be borne by Dofasco.

7. The Complainant's counsel shall get Mr. Hines' approval as to the form and content of the Consents and letters of request.

The Application for Judicial Review

17 The commission brought an application for judicial review of the board's decision before the Divisional Court. It sought, in the notice of application, an order quashing the board's order and remitting the matter to the board for "a decision in accordance with proper legal principles to be specified" and stated the following grounds:

In making this order, the Board of Inquiry:

i) Made an error of law in its interpretation of s. 17 of the *Human Rights Code*;

ii) Made an error of law in its interpretation of the Rules of Practice of the Board of Inquiry in placing even more onerous procedural and substantive obligations on the complainant with respect to disclosure than would the *Rules of Civil Procedure*, despite the fact that the Rules of Practice of the Board of Inquiry specify, for parties other than the Human Rights Commission, only that disclosure must be made of documents on which that party will rely;

iii) Exercised its discretion unreasonably, or patently unreasonably, in requiring disclosure concerning medical conditions unrelated to the handicaps alleged in the complaint, in the absence of any evidence that the complaint had *any* such conditions which might have affected her ability to work. This constitutes, almost by definition, a "fishing expedition" [emphasis in original].

18 The Divisional Court (Hartt, Carnwath and Matlow JJ.) dismissed the application. Carnwath J. gave the following reasons for the court orally at the conclusion of the hearing:

We all agree the application fails. We find it would be unreasonable to interfere with the interim decision of the Board, a decision devoid of exceptional or extraordinary circumstances. The hearing before the Board should not be fragmented and should be permitted to run its course. The section 17 issue should receive a full hearing by the Board. Any aggrieved party may appeal, based on a full evidentiary record. Moreover, records are arguably relevant to the determination of a remedy and quantum of damages.

We find the Board's decision was a reasonable exercise of its discretion at this preliminary stage. In carrying out the balancing of the fourth part of the test in *A.M.*, [1997] 1 S.C.R. 157, we find the Board's exercise of discretion to be reasonable, particularly in the light of the acknowledgment of counsel that the usual undertaking of Mr. Hines to maintain confidentiality is in effect.

The panel, in the exercise of its discretion, awards party-and-party costs of $3,500.00, inclusive of fees and disbursements, plus G.S.T. to Dofasco Inc. The costs are awarded solely against the Commission.

Legislative Provisions

19 Before setting forth the issues argued before this court and my reasons relating to them, I set forth the relevant legislative provisions in the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended, the Rules of Practice made by the Board of Inquiry, and the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, as amended.

Human Rights Code

5.(1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, same-sex partnership status, family status or handicap.

. . . . .

9. No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part.

. . . . .

17.(1) A right of a person under this Act is not infringed for the reason only that the person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of handicap.

(2) The Commission, the board of inquiry or a court shall not find a person incapable unless it is satisfied that the needs of the person cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

. . . . .

35.(1) There shall be a board of inquiry for the purposes of this Act composed of such members as are appointed by the Lieutenant Governor in Council.

. . . . .

(5) The board of inquiry may make rules regulating its practice and procedure and generally for the conduct and management of its affairs and such rules are not regulations within the meaning of the *Regulations Act.*

. . . . .

39.(1) The board of inquiry shall hold a hearing,

(a) to determine whether a right of the complainant under this Act has been infringed;

(b) to determine who infringed the right; and

(c) to decide upon an appropriate order under section 41,

and the hearing shall be commenced within thirty days after the date on which the subject-matter of the complaint was referred to the board.

(2) The parties to a proceeding before the board of inquiry are,

(a) the Commission, which shall have the carriage of the complaint;

(b) the complainant;

(c) any person who the Commission alleges has infringed the right;

(d) any person appearing to the board of inquiry to have infringed the right;

. . . . .

(4) Where the board exercises its power under clause 12(1)(b) of the *Statutory Powers Procedure Act* to issue a summons requiring the production in evidence of documents or things, it may, upon the production of documents or things before it, adjourn the proceedings to permit the parties to examine the documents or things.

Rules of Practice - Ontario Board of Inquiry - Effective November 1, 1996

1. These Rules apply to all proceedings of the Board of Inquiry . . . .

MUTUAL DISCLOSURE

40. The Human Rights Commission, shall provide full disclosure of the results of its investigation including, but not limited to, witness statements, documents, and evidence relating to the complaint, to all parties and to any other person the panel directs, at least ten (10) days prior to the first scheduled mediation date or thirty (30) days before the case management-prehearing if no mediation is scheduled.

41. All other parties except the Human Rights Commission, shall deliver to all parties full disclosure of the information and evidence including, but not limited to, witness statements and documents it will rely on to support its case at least ten (10) days prior to the first scheduled case management-prehearing.

42. At any time in a proceeding, a panel may order any party to deliver to any other party further particulars, physical or documentary evidence, expert(s)' reports, lists of witnesses and witness statements for the purposes of the hearing, and

anything else the panel considers appropriate for a full and satisfactory understanding of the issues in the proceeding.

43. If a party fails to disclose in accordance with these Rules or an order of the panel, the party may not refer to or enter the document or physical evidence at the hearing without an order or a ruling of the panel which may be on such conditions as the panel considers appropriate.

Statutory Powers Procedure Act

2. This Act, and any rule made by a tribunal under section 25.1 shall be liberally construed to secure the just, most expeditious and cost-effective determination of every proceeding on its merits.

. . . . .

5.4(1) If the tribunal's rules made under section 25.1 deal with disclosure, the tribunal may, at any stage of the proceeding before all hearings are complete, make orders for,

(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.

(1.1) The tribunal's power to make orders for disclosure is subject to any other Act or regulation that applies to the proceeding.

(2) Subsection (1) does not authorize the making of an order requiring disclosure of privileged information.

. . . . .

8. Where the good character, propriety of conduct or competence of a party is an issue in a proceeding, the party is entitled to be furnished prior to the hearing with reasonable information of any allegations with respect thereto.

. . . . .

12.(1) A tribunal may require any person, including a party, by summons,

. . . . .

(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 an oral or electronic hearing.

. . . . .

25.0.1 A tribunal has the power to determine its own procedures and practices and may for that purpose,

(a) make orders with respect to the procedures and practices that apply in any particular proceeding; and

(b) establish rules under section 25.1.

25.1(1) A tribunal may make rules governing the practice and procedure before it.

(2) The rules may be of general or particular application.

(3) The rules shall be consistent with this Act and with the other Acts to which they relate.

(4) The tribunal shall make the rules available to the public in English and in French.

(5) Rules adopted under this section are not regulations as defined in the *Regulations Act*.

(6) The power conferred by this section is in addition to any power to adopt rules that the tribunal may have under another Act.

. . . . .

32. Unless it is expressly provided in any other Act that its provisions and regulations, rules or by-laws made under it apply despite anything in this Act, the provisions of this Act prevail over the provisions of such other Act and over regulations, rules or by-laws made under such other Act which conflict therewith.

The Issues Raised by the Commission

20 The basic issues raised by the commission are that the Divisional Court erred in applying the review standard of reasonableness rather than correctness and that the board committed jurisdictional error in ordering extensive disclosure and productions of records that (a) were in the hands of non-parties to the proceeding and (b) were privileged. The commission also argued that the Board erred in ordering disclosure of documents that were not arguably relevant to the proceeding and documents other than those on which the disclosing party intended to rely.

What the Board and the Divisional Court Decided

The Board's Order

21 Before the issues raised by the commission can be properly addressed, it is essential to have an accurate understanding of the meaning and scope of the board's order. No doubt, and I say this with respect to the board, its order could be expressed more clearly than it is. Following the hearing of this appeal, we sought further submissions in writing from counsel for each party on particular questions relating to the meaning of the order. On the basis of all the submissions made, I now express my opinion on what the board did order insofar as it relates to the issues in this proceeding.

22 I think that para. 5 in the order, which relates to the provision of an affidavit of documents, is the key paragraph in the order. It refers to the "documents obtained from the above sources." I take this to refer to the documents ("files") referred to in paras. 1 and 3 of the order. I do not interpret it as referring to para. 2, which does not refer to either files or documents, or to para. 4, which relates to the complainant's income tax returns and provides that they be produced to Mr. Hines, counsel for Dofasco. No argument was directed to para. 4 and I do not regard it is being a contentious matter in this proceeding.

23 The difficulty in interpreting para. 5 is that, literally, it provides that both the affidavit of documents and copies of the productions are to be provided to Mr. Hines by a certain date. In my view, the only sensible meaning of the paragraph is that the complainant is obliged to produce only those documents for which no claim of privilege (provided for in an affidavit of documents) or for which no claim to withhold production on the ground of non-arguable relevance is asserted in the affidavit. I say this because there would be no point in requiring the use of the affidavit of documents if all of the documents listed in it, including those, on proper grounds, sought to be withheld, had to be produced to the opposite party at the outset of the process. The purpose of the affidavit, as in ordinary civil litigation, is to provide a framework within which the board may subsequently determine whether claims of privilege and irrelevance should be upheld. I shall expand on this point further later in these reasons.

24 It may be noted that this interpretation is consistent with the second sentence in para. 5: "The affidavit shall also include a section listing those documents *not provided to Dofasco* for reason of not being arguably relevant" (emphasis added).

25 The commission and the complainant argue against this interpretation largely on the basis that the board had earlier said in its reasons: "I find that ailments other than those listed above are arguably relevant to Dofasco's section 17 accommodation defence and the quantum of damages." In the context of the reasons and order as a whole, I do not read this as expressing a final decision on the producability of every document. I read it as being subject to the affidavit of documents procedure contemplated by para. 5.

26 Further, it may be noted that earlier in its reasons the board stated its basis conclusion in these words: "The motion is granted in part." This meant that the moving party, Dofasco, was not successful in obtaining immediate production of the documents it sought or, at least, all of them.

27 I would also note that my interpretation of para. 5 of the board's order is in accord with the meaning contended for by counsel for the board itself. Because the correct interpretation of the order relates to the question of whether the board acted within or exceeded its jurisdiction, I think that it was appropriate for the board to make a submission on the subject (Brown and Evans, *Judicial Review of Administrative Action in Canada* (1998-), at pp. 4-49 to 4-54).

The Divisional Court's Reasons

28 It is clear that the Divisional Court did not read the board's order as I have. The court assumed that the complainant was required to produce all of the documents sought by Dofasco. For the purpose of analyzing the court's reasons, I shall accept its interpretation. The first paragraph in its reasons indicates that the commission's application was premature and that the issues respecting the production of documents should await determination until after the board had heard the complaint on its substantive merits. The court said that the "records are arguably relevant to the determination of a remedy and quantum of damages" and, further, that an aggrieved party could appeal "based on a full evidentiary record." With respect, all of this overlooks the fact that the right of the complainant to protection from production of documents that are privileged or not arguably relevant would be irreparably infringed the moment the documents were handed over to Dofasco, whether or not they were used against the complainant at the hearing.

29 I move on to the next paragraph in the Divisional Court's reasons. I do not think that it can rightly be said that the board carried out "the balancing of the fourth part of the test in *A.M. v. Ryan*, [1997] 1 S.C.R. 157." The board made no reference to this decision. The board did say that "my goal is to balance the needs of Dofasco to know and prepare its case and the confidentiality of the Complainant inherent in such disclosure." That "goal" was to be carried out at the next stage of the proceeding, before the main hearing, after the documents for which privilege and non-relevance was claimed had been identified in the affidavit of documents.

30 The Divisional Court went on to say that the exercise of the board's discretion was reasonable particularly in light of the "usual undertaking of Mr. Hines to maintain confidentiality [being] in effect."

31 There is no document in the material setting forth an undertaking and no undertaking is referred to in the order, as would be expected if an undertaking was material to the order made. The board, through its counsel, informed us that "[t]he undertaking referred to by the Divisional Court was not given to the Board. The Board has no knowledge of the specific terms of the undertaking and was not asked to consider or rule on this issue."

32 Mr. Hines informed us that he gave an undertaking "not to disclose any document (or information contained therein) to my client *or anyone else* (including, for example, potential expert witnesses) without the permission of the Board of Inquiry. It was expressly acknowledged that such permission for further disclosure could only be obtained after argument involving the commission and Mrs. Jeffrey" (emphasis in original).

33 Mr. Hines said that he could not explain why the Divisional Court referred to it as "the usual undertaking." He agreed with counsel for the commission that the undertaking was "unusual."

34 The commission informed us that, during the hearing of the motion, Mr. Hines offered an undertaking not to disclose the documents ordered produced to him to his client Dofasco but that the undertaking did not form part of the board's order on production.

35 I, of course, have no hesitation in accepting Mr. Hines' statement that, in the course of argument he offered the undertaking he described. It appears, however, that it had no effect on the board's decision. In the circumstances, I have no doubt that the undertaking should not be taken into account in determining the meaning and legal effect of the board's order.

36 I might add that the foregoing discussion shows that, if it is intended that an undertaking be material to the making of an order, the undertaking should be in writing and, also, referred to in the order.

The Board's General Powers Relating to Disclosure

37 Before addressing the specific jurisdictional issues raised by the commission, I shall deal with matters of a more general nature relating to the board's powers respecting disclosure.

38 As far as history is concerned, it was the generally held view that administrative tribunals did not have an inherent power to order pre-hearing disclosure of documents (see Mullan, *Administrative Law* (2001), at p. 242) but this could be subject to a tribunal's duty, in some cases, to order pre-hearing disclosure as part of its duty to give effect to principles of natural justice or procedural fairness: *Christian v. Northwestern General Hospital* (1993), 115 D.L.R. (4th) 279 (Ont. Div. Ct.), *Howe v. Institute of Chartered Accountants (Ontario)* (1994), 19 O.R. (3d) 483 (Ont. C.A.), Laskin J.A. in dissent.

39 When the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, as amended, was first enacted in 1971, S.O. 1971, c. 47, it conferred the right on a person whose "good character, propriety of conduct or competence was an issue" in a proceeding "to be furnished *prior to the proceeding* with reasonable information of any allegations with respect thereto" (emphasis added). This was the only right to pre-hearing disclosure conferred by the Act until 1994 and the enactment of s. 5.4 by S.O. 1994, c. 27, s. 56(12). This amendment was preceded by a proposal by the Society of Ontario Adjudicators and Regulators to amend the *Statutory Powers Procedure Act*, in several respects. The proposal respecting disclosure read as follows:

> A tribunal may require disclosure at any stage of the proceedings, including
>
> (a) the disclosure and exchange of documents;
>
> (b) the examination of a party or witness;
>
> (c) an examination by written questions;
>
> (d) the inspection of property;
>
> (e) the filing of witness statements;
>
> (f) the provision of particulars.

See Appendix III of *Administrative Law - Issues and Practice*, Anisman and Reid, eds. (1995), at p. 266.

40 The Society's brief explanation for the proposal was that it was "for greater certainty and to expedite proceedings." Before the amendment it may not have been that clear that tribunals could provide for pre-hearing disclosure, at least to the extent of having the power to order such disclosure. In any event, it can be seen from s. 5.4(1) that the Legislature did not enact a general provision conferring powers relating to disclosure on all tribunals. It restricted the power to only those tribunals that had made rules dealing with disclosure under s. 25.1.

41 Having regard to the foregoing, if a tribunal was of the view that power relating to pre-hearing disclosure was not relevant to or appropriate for its proceedings, it would not make rules dealing with disclosure. Obviously, the Board of Inquiry provided for in the Ontario *Human Rights Code* thought that power to make orders relating to pre-hearing disclosure was important to its processes because it made Rules of Practice, which included rules dealing with disclosure (R. 40-44),

which came into effect on November 1, 1996. It appears that these rules were made under both s. 25.1 of the *Statutory Powers Procedure Act* and s. 35(5) of the *Human Rights Code*. It may be noted that each of these statutory enabling provisions was enacted by the same statute, S.O. 1994, c. 27: s. 56(38) for the *Statutory Powers Procedure Act* and s. 65(10) for the *Human Rights Code*.

42 I shall now consider some of the terms in the disclosure scheme. The first observation relates to the meaning of the key word "disclosure" in s. 5.4 of the *Statutory Powers Procedure Act* and in the board's rules. As the context of s. 5.4 and the rules make clear, the word clearly extends to the obligation of a party to furnish to the other party documents in its possession for the other party's inspection. I mention this because in the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended, "disclosure" means something less: the disclosure in a party's affidavit of documents of the existence of documents and does not extend to making the documents available to the other side for inspection. This latter step is called production. Disclosure and production in the *Rules of Civil Procedure* together comprise the total process of documentary discovery. See, in particular, R. 30.01 to 30.05.

43 The foregoing analysis does not mean that under s. 5.4 and the board's rules the board cannot make orders which are part of, or a step in, the complete disclosure process as long as their purpose is to lead to the proper production of documents, e.g., an order directing the preparation and delivery of an affidavit of documents. This power would be included in the board's general power relating to disclosure. This observation is relevant to the board's order in this case, which provided for an affidavit of documents as a prelude to ruling subsequently on what documents should be produced.

44 My second observation relates to the first. It can be seen at a glance that the disclosure provisions relating to the board are substantially fewer and much less detailed that those provided for in the *Rules of Civil Procedure*. It appears to me that what is expected with respect to the board's powers is that, in many proceedings before the board, the powers would not have to be exercised because parties would voluntarily exchange all relevant documents. In other proceedings the board might be required to make any one or more of a wide range of particular orders provided that they are directed toward the ultimate proper production of documents to the party seeking production.

The Jurisdiction of the Board To Make the Orders Challenged in this Proceeding

45 I should mention at this point that, by reason of my interpretation of the board's order, which is different from that of the Divisional Court, it is not necessary to consider the appropriate standard of review. For the reasons I shall give, whether the standard be reasonableness or correctness, paras. 1, 3, and 5 in the order are within the board's authority and para. 2 is not. I now address the remaining issues raised by the appellant.

Did the board err in not confining its order only to documents on which the complainant intended to rely to support her case?

46 The commission submits that the board's order should have been confined to only those documents on which the complainant intends to rely to support her case. It relies upon R. 41 in making the submission. Rule 41, standing alone, appears to support the commission's submission. There is, however, more in the governing legislation than R. 41. Rule 42, which is backed up by s. 5.4(1) of the *Statutory Powers Procedure Act*, confers on the board the power to order any party to deliver to any other party "further . . . documentary evidence . . . for the purposes of the hearing, and anything else the panel considers appropriate for a full and satisfactory understanding of the issues in the proceeding." This would clearly include any documents in a party's possession that are relevant to an issue in the proceeding and which may be helpful to the other party.

47 This interpretation accords with one of the recognized purposes of discovery, which include not only enabling a party to know the case he or she has to meet but, also, to obtain documents "which *may* . . . enable the party requiring the affidavit [of documents] either to advance his own case or to damage the case of his adversary" (*Cie Financière du Pacifique v. Peruvian Guano Co.* (1882), 11 Q.B.D. 55 (Eng. Q.B.), at 63; and see Williston and Rolls, *The Law of Civil Procedure* (1970), at pp. 894-898). This, in turn, facilitates more accurate fact-finding at the trial or hearing, if the proceeding has not earlier resulted in a settlement. I refer, generally, to *Cook v. Ip* (1985), 52 O.R. (2d) 289 (Ont. C.A.), at 292.

48 Section 5.4(1) of the *Statutory Powers Procedure Act*, which confers power on the board to "make orders for [a] the exchange of documents," should be read as meaning the exchange of documents to carry out the basic purposes of pre-hearing disclosure and so should not be read as confined to documents on which a party intends to rely.

49 The commission has referred to R. 43, which is concerned with the sanction for failing to disclose, as being some indication that a party's disclosure rights are confined to receiving only those documents on which the other party will rely. Clearly, this sanction relates only to the case of non-disclosure of a document on which a party wishes to rely, but this consideration cannot reasonably result in the conclusion that the whole of the disclosure scheme is confined to documents on which the producing party intends to rely.

Did the board err in ordering non-parties to disclose documents?

50 The commission submits that the board had no power to order disclosure from the complainant's doctors because they are not parties to the proceeding. It is not necessary to determine whether the disclosure provisions in the board's rules and s. 5.4 of the *Statutory Powers Procedure Act* confer power to order disclosure by non-parties because I think that the order in question is confined to imposing disclosure obligations on a party (the complainant) and not on her doctors, who are not parties. The complainant has a general right of access to her medical records in the form of obtaining copies of them from her doctors: *McInerney v. MacDonald*, [1992] 2 S.C.R. 138 (S.C.C.). This is consistent with the general position in civil proceedings that a party has control over his or her doctors' records and has the obligation to produce them: Holmested and Watson, *Ontario Civil Procedure* (1984-), at pp. 30-38 to 30-39 and 30-49 to 30-62.

51 It is generally agreed that if documents under the control of non-parties are important to the fair and accurate resolution of issues it is preferable that they be produced before the hearing to avoid almost inevitable adjournments if they are produced for the first time at the hearing (see s. 39(4) of the *Human Rights Code*) and to enable each side to prepare its case more effectively. In this regard s. 2 of the *Statutory Powers Procedure Act* (which provides that the Act and rules made under it "shall be liberally construed to secure the just, most expeditious and cost-effective determination of every proceeding on its merits") may be of assistance in interpreting s. 5.4(1)(e) in a way that would support pre-hearing disclosure from third parties. This point was not argued and I express no final opinion on it.

Did the board err in ordering production of documents that are privileged or are not arguably relevant?

52 I mention at the outset that Mr. Hines conceded that the board had no power to order the production of privileged documents. This is correct (*Statutory Powers Procedure Act*, s. 5.4(2)) and, in the same vein, I think that the board has no power to order the production of documents that are not arguably relevant. The exercise of such a power would invade a party's privacy rights without any countervailing advantage to the administration of justice. This does not mean that a court should not show deference to a decision by the board that a particular document is arguably relevant but this, of course, is a different issue.

53 This is an appropriate place to deal in general terms with the question of substantive relevance in this proceeding. In its reasons, the board found that "the ailments other than those listed above [chronic pain disability, fibromyositis, and fibromyalgia] are arguably relevant to Dofasco's section 17 accommodation defence and the quantum of damages." In my view, the board had a reasonable basis for this finding. There was material before the board that the complainant had satisfied the Canada Pension Plan administrators that she was "incapable of pursuing any substantially gainful occupation."

54 Dofasco's position, accepted by the board, is that the evidence relating to this disability benefit is relevant to its defence under s. 17(1) of the *Human Rights Code* that the complainant was "incapable of performing or fulfilling the essential duties or requirements" of work at Dofasco. Further, there was a rational basis for the board's finding that the "motion materials clearly show that production by the complainant has been incomplete."

55 In dealing with the specific issues of privilege and non-relevance I shall first consider para. 5 in the board's order, which relates to the provision by the complainant of an affidavit of documents and copies of production. I have, earlier in these reasons, set forth my interpretation of this paragraph. It appears to be concerned with the documents in the possession of the doctors named in para. 1 and with the documents referred in para. 3, which are in the files of the Workplace Safety and

Insurance Board, the Canada Pension Plan, and Dofasco's medical department. I shall then consider para. 2 of the order, which requires the complainant to furnish to counsel for Dofasco the medical information referred to in it.

56 I shall not consider para. 4, which relates to the production to Mr. Hines of income tax returns and notices of assessment, because, as I have earlier noted, no complaint was made with respect to it.

57 If para. 5 were interpreted to require the complainant to provide to Mr. Hines *all* of the documents referred to in it, without any screening of them by the board to exclude those which are privileged or not arguably relevant, there would, to put it mildly, be a serious problem with respect to the validity of the order. However, as I have determined, the board's order should not be interpreted as providing for such unrestricted production. The requirement of an affidavit of documents which contains a paragraph in which privilege may be claimed for specified documents (Form 30A, para. 3) and, by virtue of the board's order, a further section in which protection may be claimed for documents which are not arguably relevant, is, in my view, within the powers of the board. Further, the requirement of the use of the procedure contemplated by the affidavit ensures that the order does not exceed the powers of the board. This procedure enables Dofasco to challenge the objections to production of identified documents on the basis of privilege and non-relevance, if it sees fit, and enables the board to deal with the challenges on a document by document basis. In carrying out this function the board, if it considers it to be helpful, could examine the document in question. Cf. R. 30.06(d) in the *Rules of Civil Procedure*.

58 The requirement merely to disclose the existence of a document in an affidavit of documents does not involve a breach of privilege (*MacPhayden v. Employers Liability Assurance Corp.*, [1933] O.W.N. 72 (Ont. H.C.), and Williston and Rolls, *op. cit.*, at p. 897). It is an essential step to enable claims to privilege to be determined in an orderly and fair way.

59 In short, para. 5 in the order and those paragraphs related to it (paras. 1 and 3) do not involve an infringement of the complainant's right to privilege or to keep from Dofasco documents which are not arguably relevant. On the contrary, they afford protection for these rights.

60 I do not think that the same can be said for para. 2 in the order. It requires the complainant to furnish to counsel for Dofasco a document setting forth all medical practitioners not mentioned in para. 1 who treated the complaint between March 22, 1990, and the present, their area of expertise or speciality, the dates of the visits, and the ailment or condition treated. It is not known what particular information would be set forth in this document but the requirement to produce it inevitably carries with it the grave risk that, in complying with the order, the complainant would be providing to Dofasco information of a most intimate nature relating to her physical and emotional condition that is completely unrelated to her claims in this proceeding from both Dofasco's and her point of view. In my view, this particular part of the order, which contains no terms or conditions to protect the privacy interests of the complainant, exceeds the board's power under s. 5.4(1) and (2) of the *Statutory Powers Procedure Act* and its own rules.

61 I appreciate that the board has, and should have, wide latitude in making procedural orders but, it appears to me, in para. 2, the board has made no attempt at all to balance the complainant's right to protect privileged or irrelevant information with Dofasco's right to obtain production of relevant material. In this respect, para. 2 stands in stark contrast to paras. 1, 3, and 5.

62 What is required to be produced by para. 2 may, of course, include information and material which is not privileged and is relevant to Dofasco's defence. If this be the case, the board has sufficient powers under s. 5.4(1) of the *Statutory Powers Procedure A*ct, and its own rules, to make an order which would require the information to be produced after the complainant's claims respecting privilege and non-relevance have been resolved.

An Observation

63 I appreciate that the foregoing will make discouraging reading for those who value the speed and efficiency of the administrative process as an alternative to the cost, delay, and apparent red tape of the procedure which is generally thought to be part of the process in the ordinary courts. The discovery process in these courts has been subjected to severe criticism as a factor contributing to increased cost and delay (see Report of the Canadian Bar Association, *Task Force on Systems of Civil Justice* (1996), at p. 43, and Andrews, *Principles of Civil Procedure* (1994), at para. 21-041) and yet, in the present case, we have a serious example of discovery undoubtedly causing substantial delay and expense in the proceedings before an

administrative tribunal.

64 No doubt, the discovery process cannot work effectively, in either civil or administrative proceedings, without substantial cooperation between the parties in voluntarily disclosing the existence of all relevant documents. This has been lacking in the present case but, in saying this, I wish to make it clear that I do not intend to criticize the parties or their counsel. This case arose relatively early in the history of a right to disclosure under the *Statutory Powers Procedures Act* and the Rules of the Board of Inquiry and it appears to me that the main cause of the difficulties has been growing pains with the new procedure.

Disposition

65 I would allow the appeal, in part, set aside the order of the Divisional Court, and in its place make an order setting aside para. 2 in the board's order but otherwise dismissing the commission's application. In the circumstances, I would not make any costs order with respect to the application, the motion for leave to appeal, or this appeal.

Appeal allowed in part.

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

EB-2017-0007

AND IN THE MATTER OF a Notice of Intention to Make an Order for Compliance and Payment of an Administrative Penalty against Planet Energy (Ontario) Corp. (ER-2011-0409) (GM-2013-0269).

ONTARIO ENERGY BOARD

BOOK OF AUTHORITIES OF PLANET ENERGY (ONTARIO) CORP.

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