

ONTARIO ENERGY BOARD

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 Payment of an Administrative Penalty against Planet Energy (Ontario) Corp. (ER-2011-0409) (GM-2013-0269)

**WRITTEN SUBMISSIONS OF BOARD ENFORCEMENT STAFF
(Planet Energy Motion for Third Party Records)**

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I. OVERVIEW

1. Planet Energy (Ontario) Corp. (“**Planet Energy**”) brings this motion seeking disclosure and production from four third parties to this proceeding: [REDACTED] (“[REDACTED]”), [REDACTED] (“[REDACTED]”), [REDACTED] (“[REDACTED]”) and [REDACTED] (“[REDACTED]”). Ontario Energy Board Enforcement Staff (“**Staff**”) anticipates calling all four of these individuals as witnesses in the upcoming enforcement hearing in this matter (together, the “**Anticipated Witnesses**”).

2. In considering Planet Energy’s motion, the Panel should consider the legal test and principles for third party production orders set out by the Supreme Court of Canada in *R. v. O’Connor*. This approach has been used by administrative tribunals in other contexts.

3. Applying the *O’Connor* approach, and based on the record as it stands, Staff opposes Planet Energy’s request for an order against [REDACTED] and [REDACTED]. There is simply no need

for an order against either of them. [REDACTED] has already delivered all relevant documents in her possession to Staff, and they have been disclosed to Planet Energy. Any relevant documents [REDACTED] had are now with [REDACTED]

4. Based on the record as it stands, Staff opposes the motion for an order that [REDACTED] provide the names of individuals referenced in his witness statement in advance of the hearing. The Board's *Rules* do not provide for this kind of third party 'discovery of information' process in advance of the hearing; indeed, the Board's pre-hearing powers are limited to ordering the production of *documents* from third parties. Planet Energy will have the opportunity to ask [REDACTED] questions on this subject once he is on the witness stand at the hearing. Staff also has some concerns about the impact of the order sought on the administrative process in this case, given the threats [REDACTED] says he has faced with respect to revealing the identities of individuals described in his witness statement.

5. Based on the record as it stands, Staff takes no position with respect to the request for a production order for the documents in the possession of [REDACTED] and [REDACTED]

II. FACTS

A. Staff's exchanges with the Anticipated Witnesses

6. On April 17, 2017, Planet Energy requested that Staff provide certain documents and information from the Anticipated Witnesses.¹ Staff advised Planet Energy that this material was not in its possession, but nevertheless agreed to make the request of the Anticipated

¹ **April 17, 2017 letter from G. Zacher**, Affidavit of Sofia Casinha sworn June 7, 2017 ("Casinha Affidavit"), Motion Record of Planet Energy ("MR"), Tab 2M

Witnesses.² Since that time, Staff has been in contact with the Anticipated Witnesses, and has repeatedly requested that they produce the material if it is in their possession.

7. Staff's exchanges with the Anticipated Witnesses indicate the following.

(a) [REDACTED] *has already disclosed all relevant documents in her possession.*

On May 5, 2017, in response to a request from Staff, [REDACTED] provided (via email) a 43-page scanned PDF containing emails, contracts, a business card, and other documentation relating to Planet Energy.³ On July 7, 2017, [REDACTED] responded to the receipt of the OEB's amended Procedural Order No. 2, stating: "Kindly be advised that, everything I had was provided and emailed on May 5, 2017."⁴

(b) [REDACTED] *has provided [REDACTED] with all relevant documents.* On June 18, 2017, in response to inquiries from Staff, [REDACTED] advised: "Everything I have received from Planet Energy and the OEB I have forwarded to Mr. [REDACTED] to ensure it is filed securely."⁵

(c) [REDACTED] *has been threatened if he provides the requested names from ACN.* On June 2, 2017, in response to a request from Staff for the names of certain individuals referenced in his witness statement, [REDACTED] stated: "I don't think I want to provide names as I have already been threatened."⁶ Similarly, in a June 9,

² May 9, 2017 letter from J. Safayeni, Casinha Affidavit, MR, Tab 2E at p. 38

³ May 5, 2017 email from [REDACTED] Affidavit of Ephry Mudryk sworn July 13, 2017 ("Mudryk Affidavit"), Responding Motion Record of Enforcement Staff ("RMR"), Tab 1A

⁴ July 7, 2017 email from [REDACTED] Mudryk Affidavit, RMR, Tab 1B

⁵ June 26, 2017 email from [REDACTED] Mudryk Affidavit, RMR, Tab 1C

⁶ June 2, 2017 email from [REDACTED] Mudryk Affidavit, RMR, Tab 1D

2017 call with Staff, [REDACTED] stated that he would provide Staff with the documents requested by Planet Energy's counsel, but:

...the only thing that I'm not comfortable with doing is naming names at ACN, because I've already been threatened, so that's going to be out of the question... There's some people that are ACN IBOs and a couple of them involved are very high up in ACN, and I think that if this comes out, there's a couple of people who would probably be in jeopardy of losing their licence...

8. All of these communications with Anticipated Witnesses have been disclosed by Staff to Planet Energy on or before July 11, 2017.⁷

III. LAW AND ARGUMENT

A. The Board's jurisdiction to order third party production

9. Section 12 of the *Statutory Powers Procedure Act*, RSO 1990, c. S.22, and Rule 21 of the *Rules of Procedure for Enforcement Proceedings* ("Rules"), govern the Board's jurisdiction in this motion.

10. Rule 21.01 provides that if a party requires a witness to give evidence at a hearing and to provide in evidence a document or thing, that party may obtain a Summons from the Board Secretary.

11. Section 12 of the *Statutory Powers Procedure Act* is similar in effect to Rule 21.01 and permits a tribunal to require a person, by summons, "to give evidence on oath or affirmation" at a hearing or to produce documents or things in evidence at a hearing, but it does not authorize a tribunal to order prehearing production by a third party of documents or information.

⁷ Mudryk Affidavit, RMR, Tab 1 at para. 7

12. Where a party wishes production of documents from a third party, the party must bring a motion under Rule 21.01A on notice to that person, which is returnable before the panel that is seized with hearing the proceeding. The third party shall not be required to produce any documents before the start of the hearing unless the Panel orders otherwise.

13. Importantly, Rule 21.01A, which empowers a Board panel to order a non-party to make prehearing production, applies only to documents. There is no provision in the *Rules* or in the *Statutory Powers Procedure Act* for the Board to compel a non-party to disclose information or other evidence prior to a hearing. A licensee in enforcement proceedings has no general right to prehearing discovery of third parties.

14. A third party production motion is an exceptional motion. It is Board enforcement Staff, not third parties, that is obligation to make disclosure to the subject of enforcement proceedings. Unless Planet Energy persuades the Panel that a production order is appropriate, it cannot obtain prehearing disclosure of documents from third parties.

15. However, that does not leave Planet Energy without recourse to the evidence it needs in the hearing – Planet Energy can, in the ordinary course, summons witnesses under Rule 21.01 (including the Anticipated Witnesses) and require them to produce relevant documents in evidence at the hearing.

B. The legal test for ordering third party production

16. In determining whether to order a third party to produce records, administrative tribunals often apply a version of the two-stage *O'Connor* test.⁸ At the first stage of that test, the moving party must establish that the documents or information sought are likely to be relevant in the proceeding.⁹

17. The Supreme Court described the “likely relevance” inquiry as follows:

The burden on an accused to demonstrate likely relevance is a significant one. For instance, it would be insufficient for the accused to demand protection simply on the basis of a bare, unsupported assertion that the records might impact on “recent complaint” or the “kind of person” the witness is. Similarly, the applicant cannot simply invoke credibility “at large”, but must rather provide some basis to show that there is likely to be information in the impugned records which would relate to the complainant’s credibility on a particular, material issue at trial. Equally inadequate is a bare, unsupported assertion that a prior inconsistent statement might be revealed, or that the defence wishes to explore the records for “allegations of sexual abuse by other people”. Such requests, without more, are indicative of the very type of fishing expedition that this court has previously rejected in other contexts.¹⁰

18. If “likely relevance” is established, the tribunal can inspect the documents to consider the second stage of the analysis, but the materials are not yet produced to the parties. At the second stage of the analysis, the tribunal reviews the documents and determines to what

⁸ Named after the Supreme Court of Canada’s decision in *R. v. O'Connor*, [1995] 4 S.C.R. 411, OEB Enforcement Staff Book of Authorities (“OEB BOA”), Tab 1.

For examples of administrative tribunals applying similar principles, see: *Law Society of Upper Canada v Resetar*, 2015 ONLSTH 103 at paras 35-36, OEB BOA, Tab 2; *Ontario College of Teachers v. Shaikh*, 2014 LNONCTD 116 at para. 10, OEB BOA, Tab 3; *Hanna v. College of Physicians & Surgeons (Saskatchewan)*, 1999 CarswellSask 331 (SCQB) at para. 15, OEB BOA, Tab 4 (“The *O'Connor* case sets out the common law procedure to be followed by a tribunal in dealing with requests for access to confidential records in the possession of a third party.”)

⁹ *SA Capital Corp. v. Mander Estate*, 2012 ONSC 2800 at para. 35, OEB BOA, Tab 5.

¹⁰ *O'Connor*, OEB BOA, Tab 1 at para. 124. See also paras. 193-194 (*per* McLachlin J, as she then was).

extent, if any, production should be ordered in the interests of justice, keeping in mind the following principles:

- (a) production should only be granted when it is shown that the information sought cannot be obtained by any other reasonably available and effective alternative means;
- (b) production which infringes upon a right to privacy must be as limited as reasonably possible; and
- (c) there must be a proportionality between the salutary effects of production on the right to mount a defence, as compared with the deleterious effects on privacy dignity or security of the person.¹¹

19. The *O'Connor* regime provides a general mechanism for ordering production of any record beyond the possession or control of the prosecution. The regime is not limited to cases where the third party has an expectation of privacy in the targeted documents.¹²

20. Staff submits that the *O'Connor* test is the appropriate legal framework for the Board to apply when considering whether to order third party records produced in the context of enforcement proceedings.

21. In applying the *O'Connor* framework to Board enforcement proceedings, the scope of “likely relevance” (at stage one) and the balancing analysis (at stage two) must be calibrated according to the disclosure obligations set out in the Board’s *Rules of Practice and Procedure*

¹¹ *Ibid.* at paras. 36, 38.

¹² *R. v. Oleksiuk*, 2013 ONSC 5258 at para 6, OEB BOA, Tab 6, summarising the propositions set out by the Supreme Court of Canada in *R v McNeil*, [2009] 1 SCR 6.

in *Enforcement Proceedings*¹³, as well as the Board's own recognition that a respondent in an enforcement proceeding before an administrative tribunal is not necessarily entitled to the production of all potential relevant material.¹⁴

C. Staff's position on the material requested

22. Based on the record as it stands, Staff's position in response to Planet Energy's requested orders for third party production is as follows.

(a) [REDACTED] Staff opposes Planet Energy's requested order against [REDACTED]. She has promptly and repeatedly produced all relevant documents in her possession, and there is no basis to believe she is 'holding back' any further relevant documents. This request fails at stage one of the *O'Connor* test: there are no "likely relevant" documents that have not been produced.

(b) [REDACTED] Staff opposes Planet Energy's requested order against [REDACTED]. He has already explained that any relevant documents he had are in [REDACTED] possession. An order against [REDACTED] if granted, would be a "reasonably available and effective alternative means" of obtaining the information. Accordingly, there is no need for an order against [REDACTED] nor does it appear such an order would serve any practical purpose.

¹³ Rule 16.02 requires Staff to disclose "any other document in the possession or control of the enforcement team that is relevant to a response to be made, proposed to be made, or that can reasonably be expected to be made by the regulated entity in respect of the matters at issue in the enforcement proceeding."

¹⁴ *In the Matter of Summitt Energy Management Inc.* (EB-2011-0316), Decision and Order and Procedural Order No. 3 at pp. 3-4, OEB BOA, Tab 7.

(c) [REDACTED] Staff takes no position with respect to Planet Energy's request that [REDACTED] be ordered to produce further documents. However, Staff does oppose the request that [REDACTED] disclose prior to the hearing the identities of individuals referred to in his witness statements, for several reasons:

- (i) Planet Energy seeks disclosure of information that is not contained in any document. On a plain reading of Rule 21.01A and s. 12 of the *Statutory Powers Procedure Act*, the Panel has no authority to order [REDACTED] to produce information other than documents prior to the hearing.¹⁵
- (ii) [REDACTED] statements to Staff that he has been threatened are a cause for concern and should be given serious consideration in the balancing exercise at stage two of the *O'Connor* test. Witnesses who fear for their own safety as a result of their participation in Board proceedings may be disinclined to participate, undermining the Board's ability to discharge its important public interest mandate.
- (iii) The information will be available to Planet Energy at the hearing, which is how this kind of information is accessed in the ordinary course. When [REDACTED] testifies at the hearing, Planet Energy can ask him to identify the individuals and the Board may require him to answer. Planet Energy will have that information prior to calling its case.


¹⁵ *LSUC v Resetar*, *supra*, at para 35, OEB BOA, Tab 2.

(iv) Staff also notes that at least some of the information requested from [REDACTED] may be available through ACN's records. For example, [REDACTED] often references "the person who signed me up for ACN"¹⁶ – an individual who would certainly be known to ACN. There is no evidence that Planet Energy has made any efforts to obtain this information from ACN.

(d) [REDACTED] Staff takes no position with respect to Planet Energy's requested order against [REDACTED]

ALL OF WHICH IS RESPECTFULLY SUBMITTED

July 14, 2017



Stockwoods LLP
Andrea Gonsalves / Justin Safayeni
Counsel to OEB Enforcement Staff

¹⁶ [REDACTED] Witness Statement dated January 11, 2017, Casinha Affidavit, MR, Tab 2G at pp.47-48 (paras. 5, 8)

SCHEDULE “A”

LIST OF AUTHORITIES

1. *R. v. O'Connor*, [1995] 4 S.C.R. 411
2. *Law Society of Upper Canada v Resetar*, 2015 ONLSTH 103
3. *Ontario College of Teachers v. Shaikh*, 2014 LNONCTD 116
4. *Hanna v. College of Physicians & Surgeons (Saskatchewan)*, 1999 CarswellSask 331 (SCQB)
5. *SA Capital Corp. v. Mander Estate*, 2012 ONSC 2800
6. *R. v. Oleksiuk*, 2013 ONSC 5258
7. *In the Matter of Summitt Energy Management Inc.* (EB-2011-0316), Decision and Order and Procedural Order No. 3

SCHEDULE “B”
STATUTES AND REGULATIONS

Statutory Powers Procedure Act, RSO 1990, c. S.22

Summonses

12. (1) A tribunal may require any person, including a party, by summons,
- (a) to give evidence on oath or affirmation at an oral or electronic hearing; and
 - (b) to produce in evidence at an oral or electronic hearing documents and things specified by the tribunal,
- relevant to the subject-matter of the proceeding and admissible at a hearing. R.S.O. 1990, c. S.22, s. 12 (1); 1994, c. 27, s. 56 (23).

Form and service of summons

- (2) A summons issued under subsection (1) shall be in the prescribed form (in English or French) and,
- (a) where the tribunal consists of one person, shall be signed by him or her;
 - (b) where the tribunal consists of more than one person, shall be signed by the chair of the tribunal or in such other manner as documents on behalf of the tribunal may be signed under the statute constituting the tribunal. 1994, c. 27, s. 56 (24).

Same

- (3) The summons shall be served personally on the person summoned. 1994, c. 27, s. 56 (24).

Fees and allowances

- (3.1) The person summoned is entitled to receive the same fees or allowances for attending at or otherwise participating in the hearing as are paid to a person summoned to attend before the Superior Court of Justice. 1994, c. 27, s. 56 (24); 2006, c. 19, Sched. C, s. 1 (1).

Bench warrant

- (4) A judge of the Superior Court of Justice may issue a warrant against a person if the judge is satisfied that,
- (a) a summons was served on the person under this section;

- (b) the person has failed to attend or to remain in attendance at the hearing (in the case of an oral hearing) or has failed otherwise to participate in the hearing (in the case of an electronic hearing) in accordance with the summons; and
- (c) the person's attendance or participation is material to the ends of justice. 1994, c. 27, s. 56 (25); 2006, c. 19, Sched. C, s. 1 (1).

Same

(4.1) The warrant shall be in the prescribed form (in English or French), directed to any police officer, and shall require the person to be apprehended anywhere within Ontario, brought before the tribunal forthwith and,

- (a) detained in custody as the judge may order until the person's presence as a witness is no longer required; or
- (b) in the judge's discretion, released on a recognizance, with or without sureties, conditioned for attendance or participation to give evidence. 1994, c. 27, s. 56 (25).

Proof of service

(5) Service of a summons may be proved by affidavit in an application to have a warrant issued under subsection (4). 1994, c. 27, s. 56 (26).

Certificate of facts

(6) Where an application to have a warrant issued is made on behalf of a tribunal, the person constituting the tribunal or, if the tribunal consists of more than one person, the chair of the tribunal may certify to the judge the facts relied on to establish that the attendance or other participation of the person summoned is material to the ends of justice, and the judge may accept the certificate as proof of the facts. 1994, c. 27, s. 56 (26).

Same

(7) Where the application is made by a party to the proceeding, the facts relied on to establish that the attendance or other participation of the person is material to the ends of justice may be proved by the party's affidavit. 1994, c. 27, s. 56 (26).

ONTARIO ENERGY BOARD
Rules of Practice and Procedure for Enforcement Proceedings April 24, 2014

16. DISCLOSURE

...

16.02 A party to an enforcement proceeding shall serve on all other parties:

- (a) a copy of every document that the party intends to produce or enter into evidence in the enforcement proceeding;
- (b) a list of the witnesses that the party intends to call;
- (c) for each witness that the party intends to call, a witness statement or a summary of the anticipated oral evidence of the witness, prepared in accordance with Rule 17.01; and
- (d) any document the disclosure of which is required by decision or order of the Board.

21. SUMMONS

21.01 A party who requires a witness to give evidence at an oral or electronic hearing in an enforcement proceeding and, if applicable, to produce in evidence a document or thing at that hearing may obtain a Summons from the Board Secretary.

21.01A A party seeking the production of documents from third parties in connection with an enforcement proceeding shall bring a motion, on notice to the person from whom production is sought, returnable before the panel of the Board that is seized with hearing the proceeding, and shall not require the production of any documents prior to the commencement of the hearing unless the Panel orders otherwise.

21.02 Unless the Board directs otherwise, the Summons shall be served personally and at least 48 hours before the time fixed for the attendance of the witness or production of the document or thing by the witness.

21.03 The issuance of a Summons by the Board Secretary, or the refusal of the Board Secretary to issue a Summons, may be brought before the Board for review by way of a motion.

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Proceeding commenced at Toronto

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