PALIARE ROLAND
BARRISTERS

Richard P. Stephenson
T 416.646.4325 Asst 416.646.7419
F 416.646.4301
E richard.stephenson@paliareroland.com
www.paliareroland.com

File 95498

November 8, 2018

VIA EMAIL: BoardSec@oeb.ca

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

Dear Ms. Walli:

Re: EB-2018-0165 - Application by Toronto Hydro-Electric System Limited ("Toronto Hydro") for an Order or Orders approving or fixing just and reasonable distribution rates and other charges, effective January 1, 2020 to December 31, 2024

This is the PWU's response to Toronto Hydro's correspondence to the Board dated November 5, 2018 which raises the issue of the access of PWU representatives who have executed the Board's Declaration and Undertaking to certain "confidential" information filed by it with the Board.

The PWU submits that the Toronto Hydro's position regarding the PWU's access to confidential information pursuant to an undertaking should be rejected. There are two main reasons for doing so.

First, assuming the Board accepts that the information in question is truly confidential, the proposed restriction on access for union counsel should not be imposed because it is unnecessary. The Board mandated Confidentiality Declaration and Undertaking (the "Undertaking") provides the Applicant with complete protection of all its legitimate interests. Note that amongst the requirements of the Undertaking are the following:

1. I will use Confidential Information exclusively for duties performed in respect of this proceeding.

2. I will not divulge Confidential Information except to a person granted access to such Confidential Information or to the Board.

So long as these obligations (together with the other obligations contained in the Undertaking) are fulfilled, there is no risk to the Applicant of misuse of this information. For the Board to deny access to information to PWU counsel, notwithstanding the fact that the Undertaking has been executed, can only

suggest one thing – the Board is satisfied that there is a real risk that PWU counsel will not fulfill its undertaking.

Such a conclusion is harmful, and unwarranted. It is a conclusion made in the complete absence of any evidence that PWU counsel's undertaking is unworthy of credit. Moreover, it ignores the fact that (in addition to Board ordered sanctions) it is an act of professional misconduct for a solicitor to breach his or her undertaking.

What is even more problematic is the fact that the Board has singled out union counsel for this unique treatment. We understand that the rationale for the Board's position is not that union counsel are unworthy of its trust, but rather that union counsel may have an ongoing role in representing his or her client in other matters, including labour relations. The potential existence of that future role may (or may not) be true, but it does not justify this unique treatment.

It assumes that this future role could not be performed without breaching the Undertaking. Again, an assumption that anyone, and particularly a solicitor, would breach his or her undertaking is an unwarranted and unjustified assumption. Second, it ignores the fact that solicitors regularly "compartmentalize" information. One simple example of this is the "deemed undertaking" rule contained in Ontario's *Rules of Civil Procedure*. The Rule provides as follows:

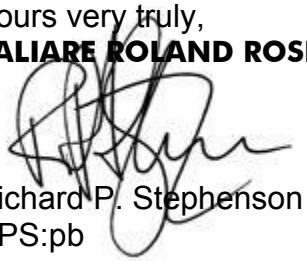
> ***Deemed Undertaking***
>
> **30.1.01 (3) All parties and their lawyers are deemed to undertake not to use evidence or information to which this Rule applies for any purposes other than those of the proceeding in which the evidence was obtained. O. Reg. 61/96, s. 2; O. Reg. 575/07, s. 4.**

Critically, the Rule (a) does not preclude counsel of access to the information in the first instance; and (b) does not preclude that counsel from acting in subsequent matter where the same information may be relevant. Rather, the Rule imposes an obligation on the solicitor not to use that information in the subsequent proceeding. That restriction is precisely what the Board's undertaking requires. The difference between the *Rules of Civil Procedure* and Board's proposed action is that the Rules recognize and accept that a solicitor is able to fulfill those obligations. The Board should do likewise.

In certain prior cases, the Board has determined that the appropriate resolution is to permit the union's representatives to have access, but only if they execute an affidavit, confirming that he or she will not participate in any manner in future collective bargaining on behalf of the union. The PWU submits this requirement is inappropriate, for three reasons. First, for the reasons outlined above, it is unnecessary. Secondly, it acts as a material restriction on a client's ability to retain its counsel of choice. Thirdly, it is also inappropriate because it seeks to single out the union and its representatives for unique treatment.

Logically, if there was any legitimate basis for Toronto Hydro to have a concern that persons would violate the undertakings that they execute, that concern should extend equally to all persons who do so. The information in question concerns Toronto Hydro's costs for contracting certain services. Presumably, Toronto Hydro should be concerned that information should not fall into the hands of prospective bidders for that work. Notwithstanding this risk, Toronto Hydro is not seeking any order that representatives of other parties having access to this information provide affidavits attesting that they will not accept any future engagement to act on behalf of a prospective bidder for Toronto Hydro construction services. If Toronto Hydro were serious about this issue, it would be consistent. The absence of that consistency reveals that Toronto Hydro must be motivated by something other than a genuine concern for the protection of its confidential information.

Yours very truly,
PALIARE ROLAND ROSENBERG ROTHSTEIN LLP



Richard P. Stephenson
RPS:pb

cc. Charles Keizer/Crawford Smith – Counsel to Toronto Hydro

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