

K.10

Outline of Submissions by the Canadian Electricity Association

EB-2014-0116

Motion Concerning CEA Reports

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Overview

- The CEA Reports
- **The Board is Without Jurisdiction in Light of the *Copyright Act***
 - Copyright applies to the Ontario government and its agencies
 - Copyright subsists in the CEA Reports
 - CEA owns the copyright in the CEA Reports
 - CEA's copyright interests conflict with the relief sought by SEC
 - The relief sought by SEC is not a fair dealing
- **The Board Should Not Order the CEA Reports Disclosed**
 - The right question is crucial
 - Balancing disclosure and confidentiality

The CEA Reports

Report Name	Property of CEA?	Confidential?	Benchmarking?
2014 National Attitudes Report	Yes	Yes	No
2013 Public Attitudes Research Report	Yes	Yes	No
2012 Public Attitudes Research Report	Yes	Yes	No
2011 Public Attitudes Research Report	Yes	Yes	No
2014 Multi-Client Budget Benchmark Report (Information Technology)	Partial	Yes	Yes
2013 Service Continuity Data on Distribution System Performance in Electrical Utilities	Yes	Yes	Unreliable working draft
2012 Annual Service Continuity Report on Distribution System Performance in Electrical Utilities	Yes	No, available for sale	Yes
2011 Service Continuity Data on Distribution System Performance in Electrical Utilities	Yes	No, available for sale	Yes

Value Proposition for CEA Reports

- **Limited availability is the business model**
 - Less valuable to members if available to others
 - Inducement to membership
 - Revenue source
 - Not designed for regulatory purposes
 - CEA does publish some data for regulatory purposes (FA, para. 34 - SAIDI, SAIFI, CAIDI)
 - If available to regulator, the business will be ruined
 - Unusual situation

Copyright

- **Essence is s. 3(1) of *Copyright Act***
 - Only the owner can **authorize** reproduction
- **Infringement**
 - Section 27 of the *Copyright Act*
 - Section 42(c) of the *Copyright Act* (offence)
- **Fair Dealing is not infringement**
 - Section 29 of the *Copyright Act*
- ***CCH v. Law Society* key decision (CEA Tab 3)**
 - CCH relied on extensively by SCC as recently as 2012
 - Key lesson: Law reports and other legal materials considered by principled copyright analysis
 - Not a free-floating public interest analysis
 - Paragraphs 2, 8-13, 16, 30-33, and 38

Canadian Solar Solutions v. RA Solar

- **Facts**
 - Receivership
 - Receiver was seeking access to records in database
 - Associated company claimed it held copyright in the records
 - So records did not have to be disclosed
- **Court**
 - Issue was disclosure, not copying (SEC Tab 11, para. 38)
 - Copyright law prevents copying, not disclosure
- **SEC is seeking **copies** of CEA Reports**

S.S. v. D.S.

- **Nova Scotia Superior Court Case**
 - Section 96 court (federally appointed)
- **Child protection context**
- **Psychologist did not want to disclose notes**
- **Court's analysis examined privacy, disclosure and secrecy**
- **No reasoning provided about copyright**

Millar and Oosterman Cases

- Criminal context
- Justices of the Peace
- Predates *Manitoba v. Access Copyright*
- No authority cited or reasoning provided

Copyright Law Applies to the Board

- New Development
- ***Manitoba v. Access Copyright*, 2013 FCA 91 (CEA Tab 10)**
 - Copyright Board decided it had jurisdiction to establish a copyright tariff with respect to reproduction by the federal and provincial governments
 - Highly invasive
 - FCA agreed that *Copyright Act* binds the provincial and federal government (para. 48)
 - New development
 - Contrary to *Vaver 2011*, page 219: “Federal and provincial governments and their agencies need not observe copyright because, unlike the *Patent Act* or *Plant Breeders Rights Act*, the *Copyright Act* does not expressly bind the Crown and may not do so impliedly either.”

Doctrine of Paramountcy

- **Copyright is a federal head of power**
 - *Constitution Act, 1867, s. 91(23)*
- **Respect for the constitutional division of powers**
 - *Reference Re Securities Act (CEA Tab 12, paras. 61 and 62)*

Doctrine of Paramountcy

- **Impossibility of dual compliance**
 - *Rothmans v. Saskatchewan* (CEA Tab 11, paras. 11 and 12)
- **Right to exclude under copyright is fundamental to IP rights**
 - *Warner Music* (CEA Tab 13, paras. 30 and 32)
 - Case where two federal statutes read together
- **The conflict here**
 - Only the copyright owner can authorize copying
 - The relief sought is for the Board to order (authorize) Toronto Hydro to copy works owned by CEA without its consent
 - Inoperative
 - Copying as a method of disclosure is still reproduction

CEA Reports Are Original

- **Some amount of skill and judgment required**
 - *CCH*, para. 16
 - Compare CEA Reports to case headnotes and arrangement of cases
- **Evidence of originality**
 - Intellectual output of Francis Bradley (*SA*, para. 5)
 - Reports designed by CEA (*SA*, para. 4)
 - Contain careful selection and arrangement of data, observations, analyses and conclusions (*SA*, para. 4)
 - Titles of CEA Reports (*FA*, para. 3)
 - Reports about public attitudes on questions chosen by CEA (*FA*, para. 14)
 - Benchmarking reports use the CEA Data Models
 - The product of analysis, methodology and modelling (*FA*, para. 20)

CEA Owns the CEA Reports

- **Evidence**

- CEA owns the copyright interests in the CEA Reports (SA, paras. 6-9 and FA, para. 12, 18 and 26)
 - Part of Gartner Report is the exception
- CEA Survey Reports
 - Copyright interests assigned by consultants (FA, para. 18 and SA, Exhibits)
 - *Copyright Act*, s. 13(4)
- CEA service continuity reports
 - Authored by employees of CEA (FA, para. 20, 21 and 22, and SA, para. 8)
 - No restrictions on CEA copyrights (SA, para.)
 - *Copyright Act*, s. 13(3)
- Gartner Report
 - Gartner and CEA divided ownership
 - CEA employees authored 8 pages

Fair Dealing Does Not Apply

- Use of materials must be analyze in light of fair dealing
 - CCH
- Not general right for tribunal use
 - Vaver text out of date

Fair Dealing Does Not Apply

- **Two part test**
 - Listed type of dealing (e.g. research and private study)
 - Fairness

- **Read *Copyright Act* as a whole**
 - Parliament gave government specific rights
 - Sections 45(1), 32.1, 29.4 and 30.3
 - Informs meaning of “research” and “private study”

- **See CCH (CEA Tab 3, paras. 51)**
 - Real purpose

- **US jurisprudence not helpful for copyright**
 - *SOCAN v. Bell Canada* (CEA Tab 9, paras. 24 and 25)

Fair Dealing Does Not Apply

- **Private study is not the purpose of the dealing**
 - Sought for public interest regulatory purposes
 - Fishing (SEC does not even know contents of material)
- **Research is not the purpose of the dealing**
 - Fishing
 - Not akin to using preview of song to decide whether to purchase music (CEA Tab 9, para. 34 and 35)
- **Board staff submits purpose is administration of justice or public interest**
 - The real purpose
 - Not a type of qualified dealing under s. 29 of *Copyright Act*

Fair Dealing Does Not Apply

- CCH (CEA Tab 3, paras. 54-59)
- **Fairness**
 - Purpose
 - Character
 - Amount
 - Alternatives
 - Nature
 - Effect

Conflict Between Copyright and Relief

- **SEC seeks copies**
 - Interrogatory 1B-SEC-8 (FA, para. 2)
- **Distinguish disclosure and copying**
- **Paramountcy test**
 - *Rothmans* (CEA Tab 11, paras. 11 and 12)
- **Owner cannot simultaneously have the sole right to copy and authorize copying, but have the Board authorize copying**
- **Value of CEA Reports is in limiting copies**
 - Refusal to consent possible under *Copyright Act*
 - FA, paras. 37-39

SEC's Central Copyright Argument

- CEA position cannot be right because it would prevent discovery from “actual litigants”
 - *in terrorem* argument
- Incorrect
 - Often copyright is not at issue and fair dealing may apply in other cases
 - Section 96 courts can balance rights (inherent jurisdiction to control process)
 - Federal tribunals can read *Copyright Act* harmoniously with other federal statutes
 - Issue only for provincial tribunals and government agencies
- *Home Office v. Harman*
 - Not instructive
 - UK is not a federal state
 - Implied undertaking case

Third Party Confidentiality

- **Answer depends on question**
 - SEC suggests that if relevant it automatically gets the documents
 - Correct question: Balancing the public interest and CEA's interests, and the advantages to the Board and harm to CEA, should the non-composite CEA Reports be disclosed to SEC?
- **OEB test for third party disclosure**
 - "...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." (CEA Tab 1, paras. 28-31)
- **Form over substance**
 - Not disclosure of Toronto Hydro's own information
 - CEA's Reports with great efforts to keep confidential
 - Not to be used in regulatory arena

Third Party Confidentiality Balancing

- **CEA Reports (non-composite) clearly confidential**
 - Surveys promote CEA membership (FA, para. 17)
 - Voluntary benchmarking requires an environment of trust (FA, para. 19)
 - Data provided to CEA on strictest confidence (FA, para. 29)
 - CEA has confidentiality policies (FA, Exhibits C and D)
- **Clear harm of disclosure**
 - Breach of trust
 - Financial harm to CEA
- **Potential relevance of CEA Reports**
 - Four reports about public attitudes
 - One draft committee report has erroneous information
 - One report narrowly focused on IT
 - Two reports are composite reports (no confidentiality)

Balancing by Other Regulators

- **Alberta board relieved Altalink of direction to file CEA benchmarking data**
 - Accepted that the CEA materials were not to be provided outside Altalink
 - Found an alternative data collection approach
 - CEA Tab 22, pages 129-131
- **Alberta board did the same in other instances**
 - CEA Tab 23, pages 8 and 9
 - CEA Tab 25, pages 39 and 40
- **Nova Scotia Board was asked by intervenor to order disclosed CEA reliability data**
 - Board did not do so
 - CEA Tab 24, pages 32 and 33

Third Party Confidentiality

- **Counter argument that Toronto Hydro should not have agreed to confidentiality**
 - Evidence is that it would not have report or data without accepting CEA confidentiality policies
- **CEA Reports require the cooperation of utilities that do not have to cooperate**
 - SEC seeking short term advantage
 - Board should look at long terms effects and opportunities of CEA's work
 - Other energy tribunals have found an alternative approach

Policy Consequences of Disclosure

- **Chilling effect on national benchmarking and surveys**
 - Toronto Hydro would lose access to future CEA benchmarking activities (FA, para. 36 and Exhibit E, Policy 7)
 - Perhaps other Ontario utilities as well (FA, para. 36)
 - Motion moved too quickly for certain determination
 - CEA members considering ban or exit (FA, Exhibit A)
 - Chilling effect and irreparable commercial harm to CEA (FA, para. 37-39)
- **Used to improve utility economic efficiency, performance and customer service**
 - Section 1(1) of OEB Act
- **Better Approach**
 - Deny motion and work cooperatively with CEA on developing acceptable approach for on-going national benchmarking

Relief Sought by CEA

- Deny SEC motion

- In the alternative
 - Treat the non-composite CEA Reports as confidential
 - Grant stay pending appeal or at least time for CEA to apply for a judicial stay
 - Evidence is before the Board already

- Renew request for costs eligibility
 - CEA is an unusual intervenor
 - Most of its member are not Ontario utilities
 - Party not regulated by the OEB defending its property