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

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:

[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

[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

[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

[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 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 14, 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