Ontario Energy Board | **Commission de l'énergie de l'Ontario**

EB-2010-0184

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

AND IN THE MATTER OF a motion by the Consumers Council of Canada in relation to section 26.1 of the *Ontario Energy Board Act, 1998* and Ontario Regulation 66/10.

BEFORE: Cathy Spoel
Presiding Member

Paula Conboy
Member

DECISION AND ORDER

PROCEDURAL BACKGROUND

On May 27, 2010, the Ontario Energy Board (the "Board") received an Amended Notice of Motion from the Consumers Council of Canada and Aubrey LeBlanc ("CCC") regarding the constitutionality of assessments issued by the Board pursuant to section 26.1 of the *Ontario Energy Board Act, 1998* (the "OEB Act") (the " Motion").

On May 11, 2010, the Board issued a Notice of Hearing and Procedural Order No. 1 which set out a number of preliminary questions arising from the Motion.

The following parties requested and were granted intervenor status in this proceeding: Canadian Manufacturers & Exporters (“CME”); the Industrial Gas Users Association; Toronto Hydro Electric System Limited; Vulnerable Energy Consumers Coalition

("VECC"), Enbridge Gas Distribution Inc.; Union Gas Limited ("Union Gas"); and the Association of Power Producers of Ontario. The Attorney General of Ontario (the "Attorney General") is the respondent on the Motion.

On July 13, 2010, the Board held an oral hearing to address the questions set out in the Notice of Hearing Procedural Order No. 1. On August 5, 2010, the Board issued its Decision with Reasons with respect to certain preliminary issues. The Board held that it had jurisdiction to hear the Motion and would proceed to do so.

The full record of this proceeding can be found on the Board's website under case number EB-2010-0184.

The Attorney General filed an affidavit of Mr. Barry Beale, and various intervenors cross-examined on it. The Beale evidence described what the Attorney General contends is the relevant regulatory scheme, and provided information on the two programs which are funded by the assessment recovered pursuant to section 26.1 of the OEB Act: the Home Energy Savings Plan ("HESP") and the Ontario Solar Thermal Heating Initiative ("OSTHI"). These programs are discussed in further detail below.

CCC, and a number of intervenors that supported the relief sought by CCC - namely, CME, Union Gas and VECC - filed written final arguments with the Board on September 6 and 7, 2011. On September 20, 2011, the Attorney General filed its written final argument with the Board. Board staff filed a written submission with the Board on September 26, 2011.

On October 6, 2011, the Board held an oral hearing and heard argument from the parties that had filed written submissions.

FACTS

There is little dispute concerning the facts in this case. Section 26.1(1) of the OEB Act requires the Board to issue assessments ("Assessments", or, in the case of the actual assessment issued in 2009/2010, the "Assessment") to recover specific costs of the Ministry of Energy in respect of energy conservation programs or renewable energy programs. Although section 26.1 would permit Assessments against natural gas distributors, the regulation authorizing the actual Assessment in question (Ontario Regulation 66/10) only imposed the Assessment on licensed electricity distributors

("distributors") and the Independent Electricity System Operator (the "IESO"). Section 26.1(2) of the OEB Act then authorizes the distributors to collect these Assessments from consumers or classes of consumers as prescribed by regulation and in the manner prescribed by regulation. Section 26.1(2) authorizes the IESO to collect its portion of the Assessment from market participants as further described in Ontario regulation 66/10. The Assessments, therefore, are ultimately "passed on" to market participants and to distributors' customers.

Section 26.2(2) of the OEB Act describes the "special purposes" for which amounts collected under section 26.1 relating to Assessments are paid to Ontario. They are:

1. To fund conservation or renewable energy programs aimed at decreasing the consumption of two or more of the following fuels:
   i. natural gas,
   ii. electricity,
   iii. propane,
   iv. oil,
   v. coal, and
   vi. wood.

2. To fund conservation or renewable energy programs aimed at causing consumers of fuel to change from one or more of the fuels listed in paragraph 1 to any other fuel or fuels listed in that paragraph.

3. To fund conservation or renewable energy programs aimed at decreasing peak electricity demand, while increasing or decreasing the consumption of another type of fuel.

4. To fund research and development or other engineering or scientific activities aimed at furthering the conservation or the efficient use of fuels.

5. To fund conservation or renewable energy programs aimed at a specific geographical, social, income or other sector of Ontario.

6. To reimburse the Province for expenditures it incurs for any of the above purposes.

Section 7 of Regulation 66/10, passed pursuant to section 26.1 of the OEB Act, sets out the formula for the determination of the amounts to be assessed from each distributor and the formula by which each distributor can recover the amounts assessed from the consumers to whom it distributes electricity. The amount of the Assessment for the 2009/2010 fiscal year was $53,695,310 . By letter dated April 9, 2010 (the "Assessment Letter"), the Board issued the Assessment to distributors pursuant to Section 26.1 of the OEB Act. Attached to the Board's letter was an invoice setting out the amount that each distributor receiving the letter was being assessed. The amounts assessed to each distributor are sometimes referred to as the "special purpose charge".

The funds collected by the Assessment were intended to fund the provincial portion of two federal energy efficiency programs: the Home Energy Savings Program ("HESP") and the Ontario Solar Thermal Heating Initiative ("OSTHI"). The HESP pays for certain building retrofits undertaken by homeowners. The OSTHI provides incentives to large commercial and industrial entities for solar installations. In November, 2010, the Minister of Energy announced in the Legislature that the government has no plans to reintroduce the Assessment for future years.

The Board's role with respect to the Assessment was essentially an administrative one. It did not set the total amount of the charge, nor did it decide against whom it should be levied. The Board also had no role in developing or administering the HESP or the OSTHI. The Board simply applied the formula as set in Regulation 66/10 to allocate the Assessment amongst distributors and the IESO.

It is the position of CCC, and the parties supporting CCC, that the Assessment amounts to an indirect tax, and is therefore outside the constitutional powers of the provincial government, and should be overturned. CCC argues that the tax is indirect because, although it is levied against distributors and the IESO, those entities are then authorized to recover those costs from ratepayers. Ratepayers, in other words, are indirectly paying the levy. CCC recognizes that a levy is not an indirect tax if it can properly be characterized as a regulatory charge; however it is CCC's position that the Assessment does not meet the test for a regulatory charge, and is therefore *ultra vires* the powers of the province, and should be overturned. The Attorney General disputes this claim, and submits that the Assessment is a regulatory charge, and therefore within the powers of the province.

ISSUES

The only real issue between the parties in this proceeding is whether or not the Assessment can properly be characterized as a regulatory charge. If it is a regulatory charge, it is not an indirect tax, and is therefore not prohibited by the *Constitution Act, 1867* (the "Constitution Act").

The provinces derive their taxation power from s. 92(2) of the Constitution Act, which states:

> **92.** In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, […]
>
> **2.** Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.

The province does not have the constitutional jurisdiction to enact or authorize the imposition of an indirect tax (as opposed to a direct tax). However, if what otherwise appears to be an indirect tax can properly be described as a regulatory charge, it is not constitutionally forbidden.

No one has argued that the Assessment is a direct tax. No one has suggested that the province has the constitutional power to impose an indirect tax. All appear to agree that if the Assessment cannot be characterized as a regulatory charge, then it must be an indirect tax and therefore *ultra vires* the constitutional powers of the province.

ANALYSIS

Tax versus Regulatory Charge

The key issue in this case is whether the Assessment is a tax (specifically, an indirect tax) or a regulatory charge.

The Supreme Court of Canada has identified five fundamental features of a "tax": (1) a tax is compulsory and enforceable by law; (2) it is imposed under the authority of the legislature; (3) it is levied by a public body; (4) it is intended for a public purpose; and (5)

it is unconnected to any form of a regulatory scheme. If a levy has all the above features, then "the levy in question will generally be described as a tax".[1]

It is the fifth feature (i.e. it is unconnected to any form of regulatory scheme) that is key in determining if a charge is a tax as opposed to a regulatory charge. The Supreme Court established a two part test for determining if a levy is connected with a regulatory scheme in Westbank: first it must be determined if there is a relevant legislative scheme. There are four indicia that should be considered in determining if there is a relevant legislative scheme:

> (i) a complete, complex and detailed code of regulation;
> (ii) a regulatory purpose which seeks to affect some behaviour;
> (iii) the presence of actual or properly estimated costs of the regulation; and
> (iv) a relationship between the person being regulated and the regulation, where the person being regulated either benefits from, or causes the need for, the regulation.[2]

If the first part of the test is satisfied (i.e. if there is a relevant legislative scheme), it must be determined if there is a relationship between the levy and the scheme itself. If both of these elements of the test are satisfied, then a levy will be considered a regulatory charge and not an indirect tax. It will therefore be *intra vires* the powers of the province.

On these basic principles the parties are in substantial agreement. Where they disagree is how the facts of this case apply to the legal principles.

CCC's position

CCC notes that the indicia of a regulatory scheme as identified in Westbank were not intended to be exhaustive, and that what constitutes a regulatory scheme must be determined on the particular facts of each case.

The thrust of CCC's argument appears to be that the Board exercises little or no real control over the Assessment and the two programs that the Assessment supports, and that it therefore is not a regulatory scheme. CCC provides various examples of

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[1] *Westbank First Nation v. British Columbia Hydro and Power Authority*, [1999] 3 S.C.R. 134 ("Westbank"), para. 43; *620 Connaught Ltd. v. Canada (Attorney General)*, [2008] 1 S.C.R. 131 ("Connaught"), para. 25.
[2] Westbank, para. 24.

existing undertakings pursuant to the OEB Act that do, in its view, constitute a detailed code of regulation: for example, the Board's powers to approve the rates charged by distributors, and the Board's powers to issue codes.

CCC also noted that since the Board has no real discretion with respect to how the Assessment is levied, it cannot perform its traditional role in a rate setting type exercise: in other words ensure that the costs for underlying programs are appropriate. Given its lack of discretion, the Board also has essentially no ability to exercise its objectives pursuant to section 1 of the OEB Act. CCC further states that the programs supported by the Assessment are markedly different from the types of conservation programs typically approved by the Board, for which the Board requires a detailed cost/benefit analysis.

CCC observes that the regulatory schemes recognized by the Supreme Court in *Ontario Home Builders Association v. York Region Board of Education*[3] and Connaught cases share certain elements. For example, both involved an exercise of discretion by a regulator, in both cases those against whom the charge was levied benefited from the regulation that imposed the charge, in both cases those against whom the charge was levied operated a business which required them to abide by a complex set of rule, and in both cases the Court found that the levies were proper estimates of the cost of regulation.

In summary, CCC addresses the 4 elements to the test for a regulatory scheme as follows:

> (i) **There is no complex or detailed code of regulation**: the programs are merely manifestations of government policy. The programs were created specifically to avoid regulatory oversight. The programs do not create rules or obligations.
> (ii) **There is no specific regulatory purpose**: the programs do not attempt to affect behaviour. They are voluntary. In addition, there is no assessment as to the extent to which, or if at all, they influence energy conservation.
> (iii) **There are no proper estimates of the cost of regulation**: there is no regulation surrounding the programs, and as such their costs are related to the reimbursement of subsidies. The Assessment has been calculated to offset only

[3] [1996] 2 S.C.R. 929 ("Ontario Home Builders")

the costs of the programs. However, no such constraint is found in section 26.1 of the OEB Act.

(iv) **The ratepayers against whom the charge is ultimately levied do not benefit or cause the need for the programs or Assessment**: the purposes of the programs and resulting Assessment are so broadly defined by the Attorney General as to benefit the entire population – not only the ratepayers liable to pay the charge. Moreover, ratepayers are liable to pay for the charge regardless of their participation in the programs

CCC's position was substantially supported by the three intervenors: Union, CME, and VECC.

Union submits that the Assessment does not meet any of the elements of the test to be considered a regulatory charge. Union argues that, although there may be a regulatory scheme associated with conservation and renewable power, the Assessment is in no way connected to that scheme. It notes that previously the provincial share for HESP and OSTHI were funded from general revenues; however the programs are unchanged and there is no clear reason why they should now be funded through a regulatory charge. The Attorney General was unable to show that the HESP and OSTHI programs actually resulted in a reduction in peak demand, improved grid reliability or reduced greenhouse gas emissions.

Union argues that the Assessment is too broad to be "necessarily incidental" to a discrete and identifiable "regulatory scheme" within the meaning of the case law.

It argues that the purposes for which the Assessment can be used are extremely broad, and that it is simply not possible to identify a discrete regulatory institutional enterprise that is enabled or furthered by the Assessment.

CME argues that in order for a charge to be considered a regulatory charge, it must be connected to a regulatory scheme. CME argues that that there is in fact no comprehensive or cohesive scheme. CME further argues (like Union) that HESP and OSTHI were previously funded from general revenues, and should be considered an effort to replenish program spending overruns.

VECC submits that the Assessment cannot be considered a regulatory charge, as it is not part of a regulatory scheme. VECC submits that there is insufficient evidence of a

complex and detailed code, no regulatory purpose to affect behaviour, and no properly estimated costs.

The Attorney General's Position

The Attorney General offered a detailed response to CCC's arguments, and put forward its analysis as to why it believed the Assessment meets the Westbank test and should be considered a regulatory charge. The Attorney General agrees with CCC in that the Westbank indicia are a guide and not necessarily exhaustive. The critical point, however, is that there must be a regulatory scheme and that it must be relevant to the parties being regulated.

i. Complete and detailed code of regulation

The Attorney General argues that a regulatory scheme will often be comprised of multiple statutes and regulations. In Ontario Home Builders, for example, there were nine different statutes that comprised parts of the "comprehensive regulatory framework" governing land development and land use planning in Ontario to which the educational development charges were related. The Court stated:

> While the regulatory scheme of which [education development charges] are only a small part is clearly very complex, the complexity is necessitated by the very scope of the matter regulated – urban planning. It is to be expected that a variety of provincial actors would be involved in the various phases of the scheme's operation. However, this fact does not serve to invalidate the regulatory nature of the scheme. In my view, the appellants impose an artificial and rigid distinction between the school board and the municipality. The distinction fails to reflect the true nature of the regulatory framework.[4]

The Attorney General further submits that the "narrow" approach referred to in Ontario Home Builders was again rejected in Connaught. In that case, although the appellants argued the regulatory scheme in question related solely to the regulation of alcoholic beverages or of business in the park, the Court held that the regulatory scheme was in fact much broader, and included the administration and operation of the whole of Jasper National Park.

[4] Ontario Home Builders, para. 65

The Attorney General argues that it is not surprising that the regulatory scheme in this case (which it states governs electricity, energy and energy conservation) is comprised of multiple statutes and associated regulations. The OEB Act (and the Board) are not the only components to the scheme, but this in no way detracts from the existence of the scheme, and is in fact very similar to the situation in Ontario Home Builders. The HESP and OSTHI programs are authorized by the *Ministry of Energy Act, 2011*. The section of the OEB Act authorizing the Assessment specifically refers to conservation programs under the *Ministry of Energy Act, 2011* (and the *Green Energy and Green Economy Act 2009* as well). The Attorney General submits that they are not "stand alone" programs as alleged by CCC, but are in fact part of a comprehensive scheme involving multiple statutes and regulations.

ii. A specific regulatory purpose which seeks to affect some behaviour

In Westbank, the Court described the second part of the test as follows:

> A regulatory scheme will have a defined regulatory purpose. A purpose statement contained in the legislation may provide assistance to the court in this regard. […] [A] regulatory scheme usually "delineates certain required or prohibited conduct". […] In sum, a regulatory scheme must "regulate" in some specific way and for some specific purpose.[5]

The Attorney General notes that a regulatory purpose that seeks to change behaviour may be based on incentives that encourage voluntary behaviour – for example, a deposit-refund charge on bottles.[6]

The Attorney General argues that HESP and OSTHI clearly seek to affect the behaviour of individuals. In particular, the programs provide financial incentives to conserve energy and reduce reliance on non-renewable energy sources.

iii. Actual or properly estimated costs of regulation

The amount of the Assessment ($53,695,310) was the Ministry of Energy's best estimate of the total electricity related cost of the HESP and OSTHI programs for the

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[5] Westbank, paras. 24 and 26.
[6] Westbank, para. 29; *Cape Breton Beverages v. Nova Scotia (Attorney General)* (1997), 144 D.L.R. (4th) 536 (N.S.S.C.) ("Cape Breton Beverages")

fiscal year 2009/2010. The actual cost for these programs, determined at the end of the fiscal year, was $51,253,901 – which is within 5% of the estimated costs. The Attorney General notes that perfection is not required in the cost estimation process, and that given the small margin of error it is clear that program costs were properly estimated.

iv. A relationship between the regulation and the person being regulated, where the person being regulated either causes the need for the regulation or benefits from it

The Attorney General submits that the fourth part of the test is disjunctive; in other words, that all that is required for the indicium to be satisfied is that a fee payor "either" cause the need "or" derive a benefit from the regulation. Further, the fee payors need not be the sole group that obtains a benefit or causes the need for the regulation. The Attorney General cites the Ontario Home Builders, Connaught and *Allard Contractors Ltd. v. Coquitlam (District)*[7] cases in support of this contention.

The Attorney General submits that in this case all those that are subject to the Assessment – consumers, distributors, and the IESO – either cause the need for the programs or derive a benefit from the programs. In short, customers cause the need for the programs through their consumption of electricity and the consequent strains this can place on the reliability of the electricity grid. The Attorney General argues that relatively modest reductions in electricity consumption can improve system reliability. Consumers also benefit from the programs through improved grid reliability, and possibly by the deferral of costs for certain system upgrades.

Although the distributors and the IESO do not ultimately bear the cost of the Assessment (which is passed on to consumers), the Attorney General argues that they too receive a benefit from HESP and OSTHI – largely through improved grid reliability.

The Attorney General further submits that the actual effectiveness of the programs in attaining the objectives of the scheme is irrelevant to the constitutional analysis. In *Reference re Firearms Act*, the Supreme Court stated: "The efficacy of a law, or lack thereof, is not relevant to Parliament's ability to enact it under the division of powers analysis."[8]

Relationship between the Charge and the Scheme

[7] [1993] 4 S.C.R. 371 ("Allard")
[8] [2000] 1 S.C.R. 783, Para. 18.

The Westbank and Connaught cases established that a relationship between the charge and the scheme will exist where there is a nexus between the revenues raised and the costs of regulation.[9] Citing Allard, the Attorney General argues that it is not the role of a tribunal to undertake rigorous analysis of a government's accounts, and that the government is permitted reasonable leeway in determining a fee structure intended to recover the costs of a regulatory scheme.[10]

The Attorney General submits that there is a clear nexus between the revenues raised through the charge and the costs of the HESP and OSTHI programs. As described above, the amount recovered through the Assessment was based on an estimate of the programs' costs, and that estimate proved to be reasonably accurate.

In summary, the Attorney General stated as follows:

> In conclusion, it is clear that the cost recovery charge established under s. 26.1 of the *OEBA* and Regulation 66/10 constitutes a regulatory charge ancillary to a regulatory scheme governing electricity consumption and distribution, and not a tax. The first step of the *Westbank/Connaught* test is met in this case, as the indicia of a regulatory scheme are clearly satisfied:
> (1) The HESP and OSTHI programs form part of a "complete, complex and detailed code of regulation" governing electricity, energy, and energy conservation. This code comprises multiple statutes, and the regulations, rules and codes thereunder.
> (2) The HESP and OSTHI programs funded by the regulatory charge provide financial incentives to homeowners and institutions, seeking to alter their energy consumption behaviour. There is a clear regulatory purpose of encouraging energy conservation and reducing reliance on non-renewable energy sources.
> (3) The electricity-related costs of these programs were properly estimated; and
> (4) Consumers, LDCs and the IESO all benefit from and/or cause the need for the energy conservation programs.

Board staff largely supported the position of the Attorney General. Board staff submitted that the regulatory scheme as described by the Attorney General very likely meets the four criteria for a regulatory scheme as set out in Westbank. Board staff

[9] Westbank, para. 44; Connaught, para. 27.
[10] Allard, para. 72-73

disagreed with the contention of CCC that the scheme in question is limited to the OEB Act, and submitted that the courts have rejected such a narrow approach. Board staff reviewed all of the Supreme Court cases dealing with this issue, and submitted that the Court has taken a broad approach in determining what constitutes a regulatory scheme.

DECISION

The Board finds that the Assessment is a regulatory charge. It is therefore not an indirect tax, and it is not u*ltra vires* the constitutional powers of the province.

As noted above, there is essentially no dispute amongst the parties regarding the test to be employed or the relevant cases. The central issue before the Board is whether or not the Assessment is a regulatory charge, and therefore within the constitutional powers of the province.

Although there is no real dispute about the test, there is disagreement amongst the parties regarding the application of the test to the facts in this case. The Board largely accepts the arguments of the Attorney General and Board staff in this regard.

The Board must determine whether the Assessment is in "pith and substance" a regulatory charge or a tax - it is the levy's primary purpose that is determinative.[11]

The first step in the Westbank test is to determine if there is a relevant legislative scheme. There are four indicia to consider in making this assessment (although the list is not exhaustive):

> (1) a complete, complex and detailed code of regulation; (2) a regulatory purpose which seeks to affect some behaviour; (3) the presence of actual or properly estimated costs of the regulation; (4) a relationship between the person being regulated and the regulation, where the person being regulated either benefits from, or causes the need for, the regulation.[12]

[11] Westbank,, para. 30.
[12] Westbank para. 43

Complete, complex, detailed code of regulation

The Board finds that there is a complete, complex and detailed code of regulation with respect to energy (including energy conservation). The Attorney General argued that there are numerous statutes and regulations which comprise the regulatory scheme: for example the *Electricity Act, 1998*, the *Green Energy and Green Economy Act, 2009*, and the OEB Act itself (including Regulation 66/10). Taken together, the Board accepts that these statutes and regulations comprise a complete, complex and detailed code of regulation, of which energy conservation is a part. As Board staff noted, the Supreme Court has taken a broad approach to it consideration of the existence of a regulatory scheme, most notably in the Ontario Home Builders and Connaught decisions. In Ontario Home Builders, for example, the Supreme Court accepted that education development charges were a component of a very broad integrated regulatory scheme that covered the entirety of planning, zoning, subdivision and development of land in the province.[13] The Board finds that the provincial regulatory scheme with respect to energy (and energy conservation) is at least as complete, complex and detailed as the provinces land development scheme as recognized in Ontario Home Builders.

The Board does not accept the arguments of CCC that the entire code of regulation is (or must be) contained in the OEB Act. The Supreme Court has adopted a much broader approach in determining the existence of a code of regulation, and has accepted that the code can comprise of multiple statutes and regulations. Similarly, the fact that HESP and OSTHI are not themselves specifically described in a statute or regulation (as argued by Union) does not appear to be relevant to the analysis.

Is there a regulatory purpose that seeks to affect behaviour?

The Board accepts that there is a regulatory purpose behind the programs supported by the Assessment that seeks to affect behaviour. Although HESP and OSTHI are voluntary, this does not mean they do not seek to affect behaviour. As noted by the Attorney General, the *Cape Breton Beverages* case (where the levy in question was upheld as a regulatory charge) was similarly a voluntary program. The HESP and OSTHI programs provide incentives to encourage consumers to reduce their energy usage. The effectiveness of these programs is not an issue for the Board to consider. The Board finds that their clear intent is to affect behaviour.

[13] Ontario Home Builders, para. 57.

Are there actual or properly estimated costs of regulation?

As described by the Attorney General, the government engaged in a "thorough and rigorous cost estimation methodology"[14] to determine the costs of the OSTHI and HESP programs in advance. This estimate ($53,695,310) was included in Regulation 66/10. The actual costs for the programs was $51,253,901. As noted by the Attorney General, the courts have not required precision with respect to this indicium, and the Board accepts that there was a properly estimated cost for the regulation.

Is there a relationship between the regulation and the person regulated?

The Board accepts that there is a relationship between the regulation and the persons regulated.

The Attorney General provided several reasons why the person being regulated (largely consumers, the IESO and distributors as well) derive a benefit from the HESP and OSTHI programs: improved grid reliability, reduced overall costs, and environmental benefits. Although not all consumers will participate in the HESP and OSTHI programs, consumers cause the need for these programs through their use of electricity.

Union and CCC argue that there is no evidence that HESP and OSTHI actually achieve any of the benefits described by the Attorney General. The courts have been clear, however, that the efficacy of programs is not a matter for the courts (or tribunals) to consider; that is a matter for the legislature.

The Supreme Court has adopted a broad approach in considering this indicium: for example in Connaught, the Court found that bar owners benefitted from the regulation of Jasper National Park because that regulation resulted in greater tourism.[15]

The Board therefore accepts that there is a relevant regulatory scheme. In the Board's view, many of CCC's arguments are not relevant to the test that the Supreme Court has established. Although the Board's role in assessing the Assessment is largely administrative, this does not lead to a conclusion that there is no regulatory scheme. The special purpose charge (i.e. the portion of the Assessment charged to each individual distributor) is not a "rate", and therefore the Board's section 78 just and

[14] Beale affidavit, para. 57.
[15] Connaught, para. 34.

reasonable rates mandate is not engaged. As the cases discuss, a regulatory scheme can encompass multiple governmental ministries and/or agencies. The regulatory scheme in the current case is multi-faceted, and the Board (and the OEB Act) are only a part of the scheme. CCC states that the Assessment is not part of a regulatory scheme embodied in the OEB Act. There may be some truth to this, as the OEB Act comprises only one component of the greater regulatory scheme. Ultimately, however, this is not the test, and the courts have recognized that multiple statutes and governmental actors can together form a single regulatory scheme.

Is there a relationship between the Assessment and the regulatory scheme?

The Board has considered the indicia in Westbank, and has concluded that there is indeed a relevant legislative regulatory scheme. The second part of the test is whether there is a sufficient relationship or nexus between the Assessment itself and the regulatory scheme. The Board finds that there is.

Again, the Supreme Court has adopted a broad approach to the consideration of this question. The Court has found that governments must make a reasonable attempt to match the revenues from an assessment to the costs of the regulation, and that governments will be given reasonable leeway in fixing its charges.[16] Only in cases where there appears to be no nexus whatsoever between the charge in question and the regulatory scheme has the Supreme Court found that a charge fails this portion of the test. In *Re Eurig Estate*, the Court found that the evidence failed to disclose "any correlation between the amount charged for grants of letters probate and the cost of providing the service"[17], and in Westbank the Court found that none of the costs of the regulatory scheme had even been identified.[18]

As noted by the Attorney General, the government's estimates of the programs costs were quite accurate. The amounts recovered through the Assessment more or less matched the actual costs of the programs. The Board therefore finds that there is a relationship between the Assessment and the regulatory scheme.

For the reasons provided above, the CCC Motion is dismissed.

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[16] Connaught, paras. 40; Allard, p. 411
[17] [1998] 2 S.C.R. 565, para. 22.
[18] Westbank, para. 38.

COSTS

The Board notes that eligible parties' claims for costs until April 21, 2011 in this proceeding were processed. The Board will therefore make provision for eligible parties to file their claims for costs for the period after April 21, 2011 to the end of the Oral hearing on October 6, 2011.

THE BOARD ORDERS THAT:

1. Parties that have been found eligible for an award of costs may file their cost claims for the relevant period by **December 30, 2011**. Cost claims must be filed in accordance with the Board's Practice Direction on Cost Awards.

2. All filings to the Board must quote file number EB-2010-0184, be made through the Board's web portal at www.errr.ontarioenergyboard.ca, and consist of two paper copies and one electronic copy in searchable / unrestricted PDF format. 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 email your document to the address below. 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.

3. All communications should be directed to the attention of the Board Secretary at the address below, and be received no later than 4:45 p.m. on the required date.

Address

The Ontario Energy Board:
Post:
Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, 27th Floor
Toronto, ON M4P 1E4
Attention: Board Secretary

Filings: www.errr.ontarioenergyboard.ca
E-mail: Boardsec@ontarioenergyboard.ca

Tel: 1-888-632-6273 (toll free)
Fax: 416-440-7656

DATED at Toronto **December 8, 2011**

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary