

Ratepayers Challenge the Constitutionality of Parts of Ontario's Green Energy Law

Robert B. Warren and Catherine Powell

An important part of Ontario's green energy initiative is legislation that seeks to levy a so-called special purpose charge ("SPC") on ratepayers. The Consumers Council of Canada ("CCC") says that the SPC is unconstitutional as an indirect tax. It has brought a motion before the OEB asking it, among other things, to determine whether the Ontario Energy Board ("OEB") has the jurisdiction to issue the assessment pursuant to unconstitutional legislation, and to cancel the assessment.

The Ontario government recently passed *Ontario Regulation 66/10* (the "Regulation") to the *Ontario Energy Board Act, 1998* (the "OEB Act"). This new regulation mandates the OEB to assess the SPC against licensed electricity distributors ("LDCs") and the Independent Electricity System Operator (the "IESO"), in the amount of \$53,695,310. On April 9, 2010, the OEB, pursuant to section 26.1 of the OEB Act and the Regulation, issued an assessment against all LDCs and the IESO.

The SPC is a key building block to the *Green Energy and Green Economy Act, 2009* (commonly referred to as the "*Green Energy Act*"). According to the Regulation, the SPC relates to "the expenses incurred and expenditures made by the Ministry in respect of its energy conservation programs or renewable energy programs". Section 26.2 of the OEB Act sets out a broad and all-encompassing list of the special purposes for which the assessment is collected, such as "to fund research and development or other engineering or scientific activities aimed at furthering the conservation or the efficient use of fuels".

The controversy, with respect to the Regulation, lies not in requiring LDCs and the IESO to fund the province's green energy initiatives. Rather, it arises from the fact that the Regulation permits LDCs to recoup the amount of the SPC assessment from their customers – Ontario ratepayers.

The province of Ontario derives its taxation power from section 92(2) of the *Constitution Act, 1867*. The province does not have the constitutional jurisdiction to enact an indirect tax, unless it can properly be qualified as a regulatory charge imposed under one of the province's heads of power under the *Constitution Act, 1867*. If the SPC is found to have the attributes of a tax, is indirect, and is not found to be connected to any form of regulatory scheme, it is unconstitutional, and of no force or effect.

It is argued that the SPC has the attributes of a tax: (i) it is compulsory and enforceable by law; (ii) it is imposed under the authority of the legislature; (iii) it is levied by the OEB, which is a public body; (iv) it is intended for a public purpose, namely energy conservation programs in Ontario; and (v) it is unconnected to any form of regulatory scheme, as the broad and all-encompassing purposes set out in section 26.2 of the OEB Act make clear. Because the assessment is issued against the LDCs and the IESO but ultimately paid by ratepayers, it amounts to an indirect tax, and will be deemed unconstitutional, unless the government can discharge its burden and establish that the SPC is in fact a regulatory charge.

The implications of CCC's motion are significant: if section 26.1 of the OEB Act is found to be constitutionally valid, it is expected that the OEB will next issue an assessment against gas distributors, an assessment which could exceed \$100 million. The costs of this assessment would also be recouped from ratepayers, thereby increasing the cost of energy to Ontario ratepayers by more than \$150 million over a short period of time, above and beyond the increases already planned by LDCs and gas distributors, and authorized by the OEB.

CCC's motion has generated a significant amount of interest. The following parties have asked for, and been granted, status as intervenors: Canadian Manufacturers & Exporters; Enbridge Gas Distribution Inc.; Industrial Gas Users Association; Toronto Hydro-Electric System Limited; the Vulnerable Energy Consumers Coalition; and Union Gas Limited. The Ontario Ministry of the Attorney General and the Ministry of Energy and Infrastructure will also be appearing. The OEB will be hearing submissions on certain preliminary issues on July 13, 2010.