

ONTARIO  
SUPERIOR COURT OF JUSTICE

B E T W E E N:

**BRIAN PAYNE on his own behalf and on behalf of all members of  
COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA  
and JUDY DARCY on her own behalf and on behalf of all members of  
CANADIAN UNION OF PUBLIC EMPLOYEES**

Applicants

- and -

**JAMES WILSON and  
HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO**

Respondents

**APPLICATION UNDER Rule 14.05(3)(d) of the *Rules of Civil Procedure***

**A F F I D A V I T**

I, **CECIL MAKOWSKI**, of the City of Toronto, in the Province of Ontario, **MAKE  
OATH AND SAY** as follows:

1. I am the Ontario Region Vice-President with the applicant Communications, Energy and Paperworkers Union of Canada ("CEP") and accordingly have knowledge of the matters deposed to in this affidavit.
2. This affidavit is sworn in support of an application by CEP and Canadian Union of

Public Employees, for a declaration that the respondents do not have the legal authority to offer for sale the common shares of Hydro One Inc., or otherwise relinquish public control of the corporation.

#### **CEP**

3. CEP has an interest in the issue of the privatization of Hydro One Inc. for the following reasons.

4. CEP has approximately 150,000 members across Canada. Approximately 50,000 of our members live and work in Ontario.

5. Many of our members are employed in large-scale manufacturing operations such as pulp and paper mills. Many of these industries are in resource-based small communities, where the industrial employer is the dominant economic force.

6. These industries consume immense amounts of electricity and remain competitive, in large measure, because of the continued availability of a reliable and affordable source of electric energy. Our members and their families therefore are directly affected in a significant way by the electricity industry.

7. Further, like all residents in Ontario, our members expect and rely on a dependable

and affordable supply of electricity to maintain their standard of living. In 1996, a report about reforms in the electricity sector was prepared by an advisory committee chaired by the Honourable Donald S. MacDonald. In its introduction, the report states, (correctly, in my respectful view), that:

"Electricity is unlike other commodities and services because of the integral supporting role it plays in all of our lives. ... [O]ur economy and lifestyles [are] highly dependent on electricity supply ..."

8. A copy of the *Report of the Advisory Committee on Competition in Ontario's Electricity System* released in May, 1996 (the "MacDonald Report") is marked as exhibit "A" to this affidavit.

9. As a trade union, in addition to advocating on behalf of the interests of CEP's members as employees and consumers of electricity, we also have a mandate to advocate in the public interest concerning issues of social, political and economic importance.

10. For these reasons, CEP has joined with other unions, and with environmental and public interest groups to form the Ontario Electricity Coalition. The coalition opposes the deregulation and privatization of the electricity sector in Ontario, in favour of publicly owned, accountable and environmentally sound approaches to meeting the energy service needs of the people of Ontario.

## REFORM OF THE ELECTRICITY SECTOR

11. In November 1997, approximately 18 months after the MacDonald Report had been released, the provincial government published a white paper entitled *Direction for Change - Charting a Course for Competitive Electricity and Jobs in Ontario* (the "White Paper"). A copy of the White Paper, which was signed by the respondent James Wilson in his capacity as Minister of Energy, Science and Technology, is marked as exhibit "B" to this affidavit.

12. The White Paper set out the government's proposal to introduce a competitive electricity system and to dismantle Ontario Hydro, which had for most of the last century operated as a vertically integrated public sector monopoly.

13. On June 9, 1998 the government introduced Bill 35, the *Energy Competition Act 1998* for first reading. The *Energy Competition Act 1998 Act*, which implemented the white paper's key recommendations, was proclaimed in force on November 7, 1998.

14. The *Energy Competition Act, 1998* itself, which consists of only 3 sections, enacted two comprehensive statutes, which were attached as schedules, namely the *Electricity Act, 1998* and the *Ontario Energy Board Act, 1998*. These two Acts establish the broad legislative framework for a competitive electricity market.

15. The electricity sector can be divided into five principal types of operations;
- (a) **Generation** - The production of electricity at generating stations, using either hydro-electric generators or nuclear or fossil fuel.
  - (b) **Transmission** - The transfer of electricity across large high volume power lines from generating stations to local areas and large industries.
  - (c) **Distribution** - The delivery of electricity within local areas to individual homes, businesses and other enterprises such as hospitals, governments etc.
  - (d) **Retail** - The purchase of electricity from the generator and re-sale to end-users.
  - (e) **System Operations** - The management of electricity system to ensure the continuous and instantaneous matching of supply and demand for electricity, and the settlement of financial transactions related thereto.
16. Ontario Hydro was first formed (under a different name) ninety-five years ago. Prior to the reforms which are set out below it dominated the generation sector and built and operated the transmission system across Ontario. Ontario Hydro also distributed and sold electricity to individual end-users in urban and rural areas where these functions were not carried out by a municipally owned utility.
17. Under the *Electricity Act, 1998*, Ontario Hydro was reorganized into five separate corporations:
- (a) Hydro One Inc., which is responsible for electricity transmission, and

certain electricity distribution and energy services businesses.

(b) Ontario Power Generation Inc., which owns and is responsible for operating many of the generation assets of the former Ontario Hydro.

(c) Ontario Electricity Financial Corporation, which is the continuation of Ontario Hydro itself. It is responsible for managing and retiring its outstanding indebtedness and remaining liabilities.

(d) Independent Electricity Market Operator, a non-profit corporation without share capital which is responsible for the central market operations formerly carried out by Ontario Hydro. The demand for electricity fluctuates continuously, and because electricity can not be stored or stockpiled, there is a constant and on-going need to monitor and match the supply and demand for electricity across the province.

(e) Electrical Safety Authority, as a non-profit corporation without share capital which performs the electric installation inspection function previously conducted by Ontario Hydro.

18. As the successor to Ontario Hydro's transmission, distribution and energy services businesses, Hydro One Inc. owns and operates substantially all of Ontario's electricity transmission system which provides high voltage power supply to local distribution utilities and dozens of large industrial customers. Through its distribution businesses, Hydro One Inc. also distributes electricity directly to over a million rural and urban end-users, in areas where there is local distribution utility.

19. As part of the reforms, in addition to breaking up Ontario Hydro, provisions were enacted to open the market for full wholesale and retail competition for the generation and sale (but not the transmission) of electricity. This application is *not* concerned with the "opening" of the electricity market, whereby there will be competition for wholesale and retail generation of electricity. This has been postponed on two earlier occasions and is now scheduled to take place on May 1, 2002.

#### STATUTORY PROVISIONS IN ISSUE

20. This application is concerned with the proper interpretation of subsection 48(1) of the *Electricity Act, 1998* and subsection 86(1) of the *Ontario Energy Board Act, 1998*. Both of the provisions of these statutes which form the subject of this application were enacted with the passage of the *Energy Competition Act, 1998*.

21. Section 48 of the *Electricity Act, 1998* provides as follows:

48. (1) The Lieutenant Governor in Council may cause two corporations to be incorporated under the *Business Corporations Act* and shares in those corporations may be acquired and held in the name of Her Majesty in right of Ontario by a member of the Executive Council designated by the Lieutenant Governor in Council.

(2) The Lieutenant Governor in Council may make regulations,

(a) designating one of the corporations incorporated pursuant to subsection (1) as the Ontario Electricity Corporation for the purposes of this *Act*;

(b) designating the other corporation incorporated pursuant to subsection (1) as the Ontario Electric Services Corporation for the purposes of this *Act*.

(3) No corporation shall be designated under subsection (2) unless, at the time of the designation, all voting securities of the corporation are held by or on behalf of Her Majesty in right of Ontario or an agent of Her Majesty in right of Ontario.

22. I am advised by Sean Dewart, one of the applicants' counsel in this matter, and verily believe that he has caused inquiries to be made of the office of the Executive Council and determined that the respondent James Wilson, who as noted above is the Minister of Energy Science and Technology, is the member of the Executive Council designated to hold the shares referred to in subsection 48(1) of the *Electricity Act, 1998* in the name of Her Majesty in right of Ontario.

23. I am advised further by Sean Dewart, and verily believe, that he has reviewed the applicable regulations and determined that the corporation now known as Ontario Power Generation was designated under subsection 48(2)(a) of the *Electricity Act, 1998* and that the corporation now known as Hydro One Inc. was designated under subsection 48(2)(b) of the *Electricity Act, 1998*.

24. That is, and as set out above, the corporation now called Hydro One Inc. is the successor to the electricity transmission, distribution and retail operations formerly carried out by Ontario Hydro.

25. Subsection 86(1) of the *Ontario Energy Act, 1998*, provides as follows:

86. (1) No transmitter or distributor, without first obtaining from the [Ontario Energy]



Board an order granting leave, shall sell, lease or otherwise dispose of,

- (a) a transmission or distribution system as an entirety or substantially as an entirety; or
  - (b) that part of a transmission or distribution system that is necessary in serving the public.
- (2) No person, without first obtaining an order from the Board granting leave, shall,
- (a) acquire such number of voting securities of a transmitter or distributor that together with voting securities already held by such person and one or more affiliates or associates of that person, will in the aggregate exceed 20 per cent of the voting securities of the transmitter or distributor; or
  - (b) acquire control of any corporation that holds, directly or indirectly, more than 20 per cent of the voting securities of a transmitter or distributor if such voting securities constitute a significant asset of that corporation.

#### **PRIVATIZATION OF HYDRO ONE INC.**

26. By a preliminary prospectus, which became public for the first time shortly before midnight on March 28, 2002, details were published of a proposal that the respondent Her Majesty the Queen in right of Ontario (the "Crown") privatize Hydro One Inc., by offering for sale all the common shares of Hydro One Inc. held by it, to private individuals and institutions. A copy of the preliminary prospectus is marked as exhibit "C" to this affidavit.

27. The preliminary prospectus does not specify the price at which, (or even the price range within which) common shares will be offered for sale and does not indicate what proportion of the shares presently held by the Crown will be sold. It would appear that the

intention is to entirely privatize Hydro One Inc. In particular, the prospectus provides as follows as page 4:

The Province currently owns 100% of our common shares. The Province is offering % of these common shares in this offering, and the remaining % of these common shares will be subject to the underwriters' over allotment option. If this option is exercised in full, the Province will no longer own any of our common shares. ...

28. The issues in these proceedings is whether or not the respondents are authorized by any statute to sell the Crown's shares in Hydro One Inc., and whether or not it is lawful for the Province to sell its shares in the absence of any such provisions. As well, there is an issue as to whether or not the sale of the shares can proceed without leave of the Ontario Energy Board in any event, in light of provisions of subsection 86(1) of the *Ontario Energy Board Act* set out above.

29. A true copy of an excerpt from Hansard, being the record of the proceedings before the Legislature of Ontario on June 17, 1998, when the bill which was later enacted as the *Energy Competition Act, 1998* was introduced for second reading is marked as exhibit "D" to this affidavit.

30. The respondent James Wilson, moved second reading of the bill and made a statement which included the following:

Mr. Wilson moved second reading of the following bill:

Bill 35, An Act to create jobs and protect consumers by promoting low-cost energy through competition, to protect the environment, to provide for pensions and to make related amendments to certain Acts / ...

**Hon Jim Wilson (Minister of Energy, Science and Technology):**

...

As a shareholder in Ontario Hydro, **we don't talk about privatization** because, first of all, that company needs a number of years, and the successor companies will need a number of years to get their value back up, to enhance their value. Ontario Hydro is a badly devalued and demoralized entity right now. We do not want a fire sale, so we are not talking about privatization. We're talking about introducing competition and commercializing, making sure that the new successor companies have to, by law, act in a prudent manner and in a business-like manner.

But one of the reasons **we're not talking about privatization** is my dream for Ontario Hydro is that, once again, it will begin to return a healthy profit back to the shareholder - and **the shareholder is the people of Ontario** - that money in the future could be used to either lower electricity rates again or, once the debt is paid off, clearly that's money that could go into general revenues that can support health care and education and other priorities that the government of the day might have. That's one vision of where the money should go once Ontario Hydro is again a major player in the North American market. [Emphasis added]

31. Now shown to me and marked as exhibit "E" to this affidavit is a true copy of a letter written by the respondent James Wilson and published in the *Financial Post* newspaper on December 3, 1998 under the title "Ontario's Plan is not to Privatize Power". In this letter, Mr. Wilson wrote, *inter alia*, as follows:

Hello! Is anybody listening? ... The Mike Harris Government introduced the *Energy Competition Act* to bring it at customer choice, lowest possible prices and investment for Ontario - **not privatize the utility**. [Emphasis added]

32. The statements set out above are consistent with the government position articulated in the White Paper (Exhibit B). In particular, the White Paper offers no discussion of, or rationale for relinquishing public control of the new companies that would be formed to succeed Ontario Hydro. To the contrary, the ongoing role for government as owner and

shareholder of these new entities is referred to on several occasions in the White Paper.

33. For example, the White Paper explains the governments intentions with respect to Ontario Power Generation Inc, and Hydro One Inc. in this manner:

New governance structures would be created. ***The Government would exercise control through its role as owner and shareholder***, focusing its attention on general policy directions and bottom line financial results. It would greatly reduce its involvement in the individual business decisions of the companies. ***As a responsible shareholder***, the Government would establish expectations for performance, using such industry benchmarks as dividend yields, return on equity, interest coverage, capital ratios, and so forth. Management would be held strictly accountable for meeting the targets.

.....

First, ***the Government, as shareholder*** of the new companies, would ensure that they operate as efficiently as possible, and that the potential stranding problem is dealt with in the first instance through cost savings. As described earlier, the Government is proposing that Ontario Hydro be restructured into two commercial companies with new business mandates in order to improve business performance. ***The Government, on behalf of taxpayers, would insist that prudent assumptions are used in investment planning and budgeting, and that tough performance targets are met.*** The Government recognizes that cost reduction will be a major challenge, but it will nevertheless be looking for significantly improved cost performance in the years immediately ahead.

.....

The sixth action step would be to establish commercially acceptable capital structures for the new commercial companies. ... ***The Province will then receive dividends in line with private sector norms.*** [Emphasis added]

34. The MacDonald Report (Exhibit A) made more than 60 detailed recommendations about reforming the electricity sector and introducing competition in the generation and sale of electricity, but did not recommend privatizing the transmission system now owned by the Crown through Hydro One Inc. Indeed, in its 158 page report, the commission considered

the issue only once in passing, noting that "Ontario Hydro's transmission grid could remain publicly-owned ... or it could be operated under private ownership".

35. On the basis of the foregoing I do not believe that there was any public policy debate about privatizing the transmission grid and other operations of the former Ontario Hydro at the time that the reforms in the electricity sector were brought about by the enactment of the *Energy Competition Act* in 1998. On the contrary the respondent James Wilson expressly disavowed any such intention in the statements set out above.

#### **ENERGY BOARD HEARING**

36. On March 20, 2002, I sent a letter to the Chair of the Ontario Energy Board expressing CEP's concerns with the intended privatization of Hydro One, and setting out CEP's position that the Board ought to review the proposed transaction and conduct hearings, and that leave of the Board was required under section 86(1) of the *Energy Board Act*, before the transaction could proceed. A copy of this letter is marked as exhibit "F" to this affidavit.

37. By letter dated March 27, 2002, the Chair of the Ontario Energy Board responded and indicated, that in the view of the Board's legal staff, neither a hearing nor leave of the Board was required before the transaction could proceed. A copy of this letter is marked as exhibit "G" to this affidavit.

38. Since April 1999, Hydro One has acquired 88 local distribution companies, which had prior to the reforms established by the *Energy Competition Act, 1998* functioned as publicly owned municipal electrical utilities. I understand that in each of these cases, the approval of the Ontario Energy Board was obtained, as required by the *Ontario Energy Board Act, 1998*.

39. Now shown to me and marked as exhibit "H" to this affidavit is a copy of an Ontario Energy Board document entitled "Preliminary Filing Requirements for Mergers, Acquisitions, Amalgamations, and Divestitures in the Ontario Electricity Transmission and Distribution Sector. It sets out the nature of the issues canvassed by the Ontario Energy Board in determining whether or not to grant leave for (among other things) the sale, lease or other disposition of a transmission system, such as, (by way of illustration), the sale of the electricity distribution assets located within the former Town of Picton, the former Village of Bloomfield and the former Village of Wellington to Hydro One Inc.

40. The issues considered by the Board are enumerated in the *Energy Board Act, 1998* and include facilitating competition in the generation and sale of electricity, facilitating a smooth transition to competition, providing generators, retailers and consumers with non-discriminatory access to transmission and distribution systems in Ontario, protecting the interests of consumers with respect to prices and the reliability and quality of electricity service, promoting economic efficiency in the generation, transmission and distribution of electricity, facilitating the maintenance of a financially viable electricity industry, and

facilitating energy efficiency and the use of cleaner, more environmentally benign energy sources in a manner consistent with the policies of the Government of Ontario.

41. In addition to requiring that applicants address these various issues in their *preliminary* applications, the Board also requires as a preliminary matter that applicants "provide details of any public consultation process engaged in by the parties to the proposed transaction, and the details of any communication plans for public disclosure of the proposed transaction."


42. A copy of the Ontario Energy Board's decision and order in the matter of the application for board approval of the sale of the electricity distribution assets located within the former Town of Picton, the former Village of Bloomfield and the former Village of Wellington to Hydro One Inc. is marked a exhibit "I" to this affidavit.

43. As far as I am aware, there has been no consideration of any of the issues enumerated above insofar as the intended privatization of Hydro One Inc. is concerned. The privatization is estimated in media accounts to be a \$5.5 billion transaction. The respondent James Wilson is quoted as calling it "... the most complicated thing that the government will ever undertake". A copy of an article which was published on January 25, 2002 in the *Globe and Mail* newspaper in which this quote appears is marked as exhibit "J" to this affidavit.

44. A copy of correspondence sent by the applicants' solicitor to the Ontario Securities Commission on April 5, 2002 is marked as exhibit "K" to this affidavit.

SWORN BEFORE ME at the City )  
 )  
of Toronto, in the Province )  
 )  
of Ontario, this 7<sup>th</sup> day )  
 )  
of April, 2002 )

  
Cecil Makowski

  
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A Commissioner for Taking Affidavits