

## ONTARIO ENERGY BOARD

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

**AND IN THE MATTER OF** an Application by  
Enbridge Gas Distribution Inc. for an Order or Orders  
approving or fixing just and reasonable rates and  
other charges for the sale, distribution, transmission  
and storage of gas commencing January 1, 2007.

NOTICE MADE UNDER the *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 109

### NOTICE OF CONSTITUTIONAL QUESTION

The Intervenor, the Low-Income Energy Network ("LIEN"), intends to question the constitutional applicability of s. 36(2) of the *Ontario Energy Board Act, 1998*, S.O. 1998, c.15, Schedule B ("OEBA").

LIEN says that s.36 (2) must be interpreted consistently with s. 15 of the *Canadian Charter of Rights and Freedoms*. In particular LIEN says that the obligation of the Ontario Energy Board ("Board") under s. 36(2), to fix or approve "just and reasonable rates" must be construed so as to:

- a) require the Board to approve or fix rates that do not allow for the discrimination against low-income consumers that arises de facto from the operation of the Board's current rate fixing methodology.
- b) allow the Board to take positive steps in favour of low-income consumers to rectify inequality under current rate structures.

The question is to be argued in writing pursuant to the Board's Procedural Order No. 2 in the proceeding. The date for submissions by parties was, Monday, November 6, 2006. The date for LIEN's response is Monday, November 13, 2006. No date is fixed for the Board's decision. A copy of Procedural Order No. 2 and a copy of LIEN's written submissions in chief dated November 2, 2006 are annexed to this Notice.

**I. FACTS**

The following are the material facts giving rise to the constitutional question:

1 Enbridge Gas Distribution Inc. ("EGD") filed an Application on August 25, 2006 with the Board under section 36 of the *Ontario Energy Board Act, 1998*, S.O. c.15, Schedule. B, as amended, for an order of the Board approving or fixing "just and reasonable rates" and other charges for the sale, distribution, transmission and storage of natural gas, effective January 1, 2007.

2 By Order of the Board issued on October 20, 2006, LIEN was granted intervenor status in the proceeding.

3 LIEN is an umbrella organization of more than 60 member associations from across Ontario, including energy, public health, legal, tenant/housing, education and social and community organizations.

4 LIEN's mission is to ensure universal access to adequate, affordable energy as a basic necessity, while minimizing the impacts on health and on the local and global environment of meeting the essential energy conservation needs of all Ontarians. In particular, LIEN promotes programs and policies, which tackle the problems of energy poverty and homelessness, reduce Ontarians' contribution to smog and climate change, and promote a healthy economy through the more efficient use of energy, a transition to renewable sources of energy, education and consumer protection.

5 Among the issues to be heard by the Board, LIEN proposed the following issue to be heard in the proceeding:

*Should the residential rate schedules for EGD include a rate affordability assistance program for low-income consumers? If so, how should a program be funded? How should eligibility criteria be determined? How should levels of assistance be determined?*

6 Several parties contested LIEN's proposed issue. A number of parties questioned whether the Board had jurisdiction to hear this matter.

7 The question of the admissibility of LIEN's proposed issue in this proceeding was heard along with other issues before the Board at "Issues Day" on October 12, 2006. LIEN made oral submissions in support of hearing its proposed issue including submissions on the jurisdiction of the Board to consider LIEN's proposed issue. Those submissions did not include the constitutional question.

8 On October 20, 2006, the Board issued Procedural Order No. 2, stating that:

*"A number of parties questioned whether the Board had jurisdiction to hear this matter. A detailed argument was presented by LIEN but little substantive argument was presented by other parties. The Board believes that jurisdiction is a threshold issue and that, before proceeding further, the Board must satisfy itself that it has jurisdiction.*

*The Board therefore invites parties of this proceeding to file written submissions addressing the jurisdictional arguments made by LIEN on the record.. Those submissions should be made with in 15 days of this decision. LIEN will be allowed 5 days to file reply submissions.*

9 On November 2, 2006 LIEN filed with the Board written submissions incorporating its oral submissions made on Issues Day as supplemented by submissions including the constitutional question to which this notice relates.

## **II. LEGAL BASIS**

10 The legal basis for the constitutional question is set out in LIEN's submissions to the Board annexed to this Notice but may be summarized as follows:

- a) S. 36(2) of the *OEBA* does not define the expression "just and reasonable rates".
- b) In the absence of a clear statutory provision to the contrary, the requirement for "just and reasonable rates" must be interpreted to comply with section 15 of the Canadian *Charter of Rights and Freedoms*.

*"15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.*

*(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."*

**Canadian Charter of Rights and Freedoms, s.15.**

- c) The current rates system for gas operates to the disadvantage of low-income consumers in Ontario. As such, it is an unlawful discrimination in contravention of section 15 of the Canadian *Charter of Rights and Freedoms*.

**WILLMS & SHIER  
ENVIRONMENTAL LAWYERS LLP**  
4 King Street West  
Suite 900  
Toronto, ON M5H 1B6

**Paul Manning/Juli Abouchar**  
LSUC # AO50059P/35343K

Tel: 416-862-4843.4836  
Fax: 416-863-1938

Solicitors for the Intervenor,  
Low-Income Energy Network

**TO: THE ATTORNEY GENERAL OF ONTARIO**  
*(as required by section 109 of the Courts of Justice Act)*  
Constitutional Law Branch  
4th Floor  
720 Bay Street  
Toronto, ON M5G 2K1

Fax: (416) 326-4015

**AND TO: THE ATTORNEY GENERAL OF CANADA**  
*(as required by section 109 of the Courts of Justice Act)*  
Suite 3400, Exchange Tower  
Box 36, First Canadian Place  
Toronto, ON M5X 1K6

Fax: (416) 973-3004

**AND TO: ONTARIO ENERGY BOARD**  
P.O. Box 2319  
2300 Yonge Street  
27th Floor  
Toronto, ON M4P 1E4

Tel.: (416) 481-7605

Fax: (416) 440-7656

Email: [boardsec@oeb.gov.on.ca](mailto:boardsec@oeb.gov.on.ca)

Ms. Kirsten Walli, Board Secretary

AND TO: **AIRD & BERLIS**  
Barristers & Solicitors  
BCE Place  
Suite 1800, Box 754  
181 Bay Street,  
Toronto, ON M5J 2T9

Mr. Fred Cass  
Tel.: (416) 863-1500  
Fax: (416) 863-1515  
Email: [fcass@airdberlis.com](mailto:fcass@airdberlis.com)

Solicitors for Enbridge Gas Distribution Inc.

AND TO: **ENBRIDGE GAS DISTRIBUTION INC.**  
P.O. Box 650  
Scarborough, ON M1K 5E3

Patrick Hoey, Director, Regulatory Affairs  
Email: [Patrick.hoey@enbridge.com](mailto:Patrick.hoey@enbridge.com)

AND TO: **All Registered Participants**

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**ENVIRONMENTAL LAWYERS LLP**  
4 King Street West, Suite 900  
Toronto, ON M5H 1B6

**Paul Manning/Juli Abouchar**  
**LSUC # AO50059P/35343K**

Tel: 416-862-4843/4836  
Fax: 416-863-1938

Solicitors for the Intervenor,  
Low-Income Energy Network