

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.

SUBMISSIONS OF THE LOW-INCOME ENERGY NETWORK

November 2, 2006

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INTRODUCTION

1 Unaffordable gas and electricity rates cause great hardship to poor consumers in Ontario. Sometimes they are forced to choose between heating or eating; sometimes their supply is disconnected. The Ontario Energy Board's ("Board") statutory objective

"To protect the interests of consumers with respect to prices and the reliability and quality of gas service."

is not being met by the current rate fixing system. The interests of low-income consumers are not protected and de facto the service to them is unreliable and inadequate.

2 The Board's self-acknowledged and judicially acknowledged mandate is to regulate the province's electricity and natural gas sectors in the public interest. Low-income consumers form a substantial proportion of Ontario's population: approximately 18% of households spread throughout the province. Gas rates and service that disadvantage such a substantial segment of the public, whether

directly through rate structure or indirectly through terms and conditions, are not in the public interest.

3 Subsection 36(2) of the *Ontario Energy Board Act* ("OEBA") requires the Board to fix "just and reasonable" rates for the sale of gas. "Just and reasonable" is not defined. Case law tells us that it involves a balance between the interests of the utilities and consumers. There is nothing in the OEBA that restricts or prevents the Board in approving a rate affordability scheme for low-income consumers. In fact, ss. 36(3) tells us that the Board may adopt any method or technique it considers appropriate in fixing just and reasonable rates.

4 The Low-Income Energy Network ("LIEN") says the Board has clear jurisdiction to consider and approve a rate affordability/assistance scheme for low-income consumers.

5 If LIEN is incorrect and the OEBA is ambiguous on this point, four factors require an interpretation in favour of the Board having jurisdiction:

- (a) The words "just and reasonable" must be interpreted to accord with the Board's statutory objectives mentioned in paragraph 1 above.
- (b) The words "just and reasonable" should be interpreted to require rate fixing to be in the public interest in the sense mentioned in paragraph 2 above.
- (c) Any ambiguity must be resolved by an interpretation consistent with s. 15 of the *Canadian Charter of Rights and Freedoms*. That does not allow for the discrimination against low-income consumers which arises de facto from the operation of the current rate fixing methodology. It does allow the Board to take positive steps in favour of low-income consumers to rectify inequality under current rate structures
- (d) The ordinary meaning of "just" involves doing what is right or fair.

6 The Board already makes rate classes to accommodate differences between groups of customers for reasons which the Board considers fall within the meaning of "just and reasonable" rates; for example, those groups whose members have similar attributes of service. Low-income consumers also form a group whose members have interests in common that fall within the meaning of "just and reasonable" rates. It is entirely in keeping with the requirements and objectives of the *OEBA*, that low-income consumers be treated as a separate class, whether formally or informally for the purpose of rectifying the disadvantage and inequality to which they are subjected by the current rates structure.

7 It is, in any event, entirely possible that a rate affordability scheme will serve more conventional themes of what are "just and reasonable" rates. A rate affordability scheme may, for example, achieve a measure of cost saving and efficiency for the utilities. It may also benefit other customers by keeping low-income consumers in and sharing the costs of the system.

8 The Board does not have to decide those issues in making a decision on jurisdiction. It simply needs to accept that it has ample jurisdiction to consider and decide all of these matters.

9 LIEN respectfully requests the Board to acknowledge that it has full jurisdiction to consider Issue 6.5 in the Proposed Issues List in this proceeding either in a generic hearing that provides full eligibility for LIEN for a costs award, or in the alternative to admit proposed Issue 6.5 as an issue in this proceeding.

BACKGROUND

10 LIEN is the proponent of a contested low-income rate assistance issue identified as Issue 6.5 in the Proposed Issues List before the Board in this proceeding on Issues Day held October 12, 2006.

11 Proposed Issue 6.5, reads as follows:

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

12 That wording is virtually identical with the wording that was also put forward by LIEN in the Union Gas Rates Case 2007, Board File No. EB-2005-0520.

13 Proposed Issue 6.5 is a vital and urgent issue for both LIEN, and low-income consumers. It is not too melodramatic to say that, for low-income consumers, the cost of gas and the cost of electricity can mean the difference between heating or eating. Proposed Issue 6.5 is undoubtedly an unpopular item, not only with the utilities but also with some intervenors. However, unpopularity should not determine what is an appropriate issue to be heard in a rate proceeding or, for that matter, in a generic proceeding.

14 The Board acknowledged the importance of Proposed Issue 6.5 in the Union Gas Rates Case 2007:

“The evidence clearly raises policy questions. An issue of this importance demands an appropriate forum. It is not clear at this time what that forum will be, but Board Staff will develop a generic approach to the appropriate forum and timing for the Board's consideration of this important issue.”

**Ontario Energy Board Transcript (Decision), May 23, 2006
EB-2005-0520, pp. 86, line 18 [Book of Authorities of the
Low-Income Energy Network, Tab 5].**

ANALYSIS

A. THE BOARD'S WIDE DISCRETION IN FIXING RATES

15 The Board's discretion is very wide and, of itself, gives the Board jurisdiction to consider proposed Issue 6.5.

16 Subsection 36(3) of the *OEBA* provides that:

“In approving or fixing just and reasonable rates, the Board may adopt any method or technique that it considers appropriate.”

Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Schedule B, ss.36(3) [Book of Authorities of the Low-Income Energy Network, Tab 3]

17 The judgment in *Union Gas Ltd. v. Ontario (Energy Board)*, expresses an unequivocal view about the breadth of the Board’s discretion in determining rates that are just and reasonable:

“That in balancing these conflicting interests and determining rates that are just and reasonable, the OEB has a wide discretion is not in issue or in doubt.” (Emphasis Added)

Union Gas Ltd. v. Ontario (Energy Board) (1983), 1 D.L.R. (4th) 698, 1983 CarswellOnt 919, p. 6, para. 32 [Book of Authorities of the Low-Income Energy Network, Tab 2].

B. “JUST AND REASONABLE” RATES

18 Subsection 36(2) of the *OEBA* provides that:

“The Board may make orders approving or fixing just and reasonable rates for the sale of gas by gas transmitters, gas distributors and storage companies, and for the transmission, distribution and storage of gas.”

Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Schedule B, ss.36(2) [Book of Authorities of the Low-Income Energy Network, Tab 3]

19 The *OEBA* does not define the expression “just and reasonable” nor its component words.

20 In *Union Gas Ltd. v. Ontario (Energy Board)*, the Ontario Supreme Court dealt with a similar statutory provision under the then *Ontario Energy Board Act, 1980*.

“The phrases ‘just and reasonable’ or ‘fair and reasonable’, ‘rate base’, and ‘used’ and ‘useful’ have been used to describe the principles and methodology to be used by public utility boards and commissions in fixing public utility rates in the United States and

Canada for many years. See, for example, *Northwestern Utilities Limited v. City of Edmonton*.

“The duty of the Board was to fix fair and reasonable rates, rates which under the circumstances would be fair to the consumer, on the one hand, and which, on the other hand, would secure to the company a fair return for the capital invested.

“By ‘a fair return’ is meant that the company will be allowed as large a return on the capital invested in its enterprise which will be net to the company as it would receive were it investing the same amount in other securities possessing an attractiveness, stability and certainty equal to that of the company's enterprise.” (Emphasis Added)

Union Gas Ltd. v. Ontario (Energy Board) (1983), 1 D.L.R. (4th) 698, 1983 CarswellOnt 919, p. 6, para. 32 [Book of Authorities of the Low-Income Energy Network, Tab 2].

21 Therefore, the expression “just and reasonable” requires the Board to be fair to the consumer when setting a rate as well as giving a fair return to the utility on its investment.

22 The judgment continues as follows:

“The general background in considering the rate-making function performed by the OEB, it is useful to consider a quotation from the ‘Principles of Public Utility Regulation’ by A.J.G. Priest.

“At page 4 the learned author quotes the speaker on this subject in the following terms: In the United States private enterprise operates a larger share of these vital industries than almost any other country because our balance system of regulation by public authority.

“This system is designed to protect consumers against exploitation where competition is inherently unavailable, inadequate, and to ensure that these industries will serve the public interest. At the same time, it provides these companies necessary assurance of the opportunity to earn a reasonable rate of return on their investment and to attract capital for expansion.

“Put another way, it is the function of the OEB to balance the interest of the appellants in earning the highest possible return on the operation of its enterprise, a monopoly, with the

conflicting interest of its customers to be served as cheaply as possible."

Union Gas Ltd. v. Ontario (Energy Board) (1983), 1 D.L.R. (4th) 698, 1983 CarswellOnt 919, p. 10, para. 41 [Book of Authorities of the Low-Income Energy Network, Tab 2].

23 The expression "just and reasonable" therefore requires that the consumer shall be served as cheaply as possible.

C. ENTITLEMENT OF LOW-INCOME CONSUMERS TO A JUST AND REASONABLE RATE

24 The legislation is silent on a definition of "just and reasonable." The Board is given a wide discretion in determining what is "just and reasonable." The *OEBA* contains no restrictions on fixing a separate rate for low-income consumers. Four things tell the Board that the expression "just and reasonable" must be interpreted to avoid disadvantage to low-income consumers:

(a) Public Interest

25 What is "just and reasonable" must be interpreted in the light of the public interest. Low-income consumers represent approximately 18% of households through Ontario. It is not in the public interest to disadvantage a substantial segment of the public such as low-income consumers.

26 The Courts have held that legislative scheme is subject to the public interest:

"In my view this statute makes it crystal clear that all matters relating to or incidental to the production, distribution, transmission or storage of natural gas, including the setting of rates, location of lines and appurtenances, expropriation of necessary lands and easements are under the exclusive jurisdiction of the Ontario Energy Board and are not subject to legislative authority by municipal councils under the Planning Act.

These are all matters that are to be considered in the light of the general public interest and not local or parochial interests. The words "in the public interest" which appear, for example, in ss.40(8), 41(3) and 43(3) which I have quoted, would seem to leave

no room for doubt that it is the broad public interest that must be served.”

Union Gas Ltd. v. Township of Dawn (1977), 15 O.R. (2d) 722, paras. 29 and 29 [Supplementary Book of Authorities of the Low-Income Energy Network, Tab 1].

27 The Board has acknowledged that its mandate is to regulate the province's electricity and natural gas sectors in the public interest:

“Our Mandate

The Ontario Energy Board regulates the province's electricity and natural gas sectors in the public interest. Our mandate is determined by the provincial government, and is embodied in legislation and regulation.”

Ontario Energy Board Website.

28 LIEN submits that, in fixing rates for public utilities, the Board must consider the general public interest and that the general public interest includes the significant interest of low-income consumers.

(b) Protection of Consumers

29 The Board's statutory objectives for its responsibilities in relation to gas and electricity include the following objective:

“To protect the interests of consumers with respect to prices and the reliability and quality of gas service.”

S. 2 OEBA.

30 What constitutes “just and reasonable” rates is subject to the Board's statutory objective to protect the interests of consumers with respect to prices and service. Without a rate affordability/assistance program, the interests of low-income consumers are not protected.

(c) Equality Rights

31 In the absence of a clear statutory provision to the contrary, the requirement for a just and reasonable rate 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
[Supplementary Book of Authorities of the Low-Income
Energy Network, Tab 2].

32 In *R. v. Rodgers*, the Supreme Court of Canada has held:

“It has long been accepted that courts should apply and develop common law rules in accordance with the values and principles enshrined in the Charter: *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, at p. 603; *Cloutier v. Langlois*, [1990] 1 S.C.R. 158, at p. 184; *R. v. Salituro*, [1991] 3 S.C.R. 654, at p. 675; *R. v. Golden*, [2001] 3 S.C.R. 679, 2001 SCC 83, at para. 86; *R. v. Mann*, [2004] 3 S.C.R. 59, 2004 SCC 52, at paras. 17-19. However, it is equally well settled that, in the interpretation of a statute, Charter values as an interpretative tool can only play a role where there is a genuine ambiguity in the legislation. In other words, **where the legislation permits two different, yet equally plausible, interpretations, each of which is equally consistent with the apparent purpose of the statute, it is appropriate to prefer the interpretation that accords with Charter principles.**” (Emphasis Added)

***R. v. Rodgers*, [2006] 1 S.C.R. 554, para. 18 [Supplementary**
Book of Authorities of the Low-Income Energy Network,
Tab 4].

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

34 In *Eldridge v. British Columbia* the Supreme Court of Canada has held:

“This Court has consistently held, then, that discrimination can arise both from the adverse effects of rules of general application as well as from express distinctions flowing from the distribution of benefits. Given this state of affairs, I can think of no principled reason why it

should not be possible to establish a claim of discrimination based on the adverse effects of a facially neutral benefit scheme. Section 15(1) expressly states, after all, that “[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination...” (emphasis added). The provision makes no distinction between laws that impose unequal burdens and those that deny equal benefits.

The principle that discrimination can accrue from a failure to take positive steps to ensure that disadvantaged groups benefit equally from services offered to the general public is widely accepted in the human rights field.”

Eldridge v. British Columbia (Attorney General), [1977] 3 S.C.R. 624, paras. 77 and 78.

(d) The Natural Meaning of the Words

35 Finally, direction can be taken from the ordinary meaning of the word “just”. The Concise Oxford Dictionary of Current English includes the following in its definition of “just”.

“‘Just’ means acting or done in accordance with what is morally right or fair.”

The Concise Oxford Dictionary of Current English, 8th ed. - definition of “just” [Book of Authorities of the Low-Income Energy Network, Tab 4].

36 LIEN submits that, in considering what is "just and reasonable", there is a different balance to be made between Enbridge and its low-income customers and between Enbridge and, for example, an industrial group of consumers. It is an appropriate question for the Board to consider exactly how that balance should be weighed in respect of the low-income consumers.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

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