EB-2010-0374
December 24, 2010

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

AND IN THE MATTER OF an Application by Natural Resource Gas Limited for an Order or Orders pursuant to Section 90(1) of the Ontario Energy Board Act 1998, granting leave to construct a natural gas pipeline and ancillary facilities in the Township of Malahide, Municipality of Thames Centre and the Town of Aylmer.

AND IN THE MATTER OF a hearing on the Board's own motion to review an order made by the Board on June 29, 2007.

INTEGRATED GRAIN PROCESSORS CO-OPERATIVE INC. and IGPC ETHANOL INC. BOOK OF AUTHORITIES

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

AND IN THE MATTER OF an Application by Natural Resource Gas Limited for an Order or Orders pursuant to Section 90(1) of the Ontario Energy Board Act 1998, granting leave to construct a natural gas pipeline and ancillary facilities in the Township of Malahide, Municipality of Thames Centre and the Town of Aylmer.

AND IN THE MATTER OF a hearing on the Board's own motion to review an order made by the Board on June 29, 2007.

I N D E X

Case Law

Legislation

EB-2010-0374
December 24, 2010

TAB 1

Case Name:

Snopko v. Union Gas Ltd.

Between
Marie Snopko, Wayne McMurphy, Lyle Knight and Eldon Knight,
Plaintiffs (Appellants), and
Union Gas Ltd. and Ram Petroleums Ltd., Defendants
(Respondents)

[2010] O.J. No. 1335

2010 ONCA 248

317 D.L.R. (4th) 719

261 O.A.C. 1

100 O.R. (3d) 161

187 A.C.W.S. (3d) 110

100 L.C.R. 137

Docket: C49977

Ontario Court of Appeal
Toronto, Ontario

R.J. Sharpe, J.L. MacFarland and D. Watt JJ.A.

Heard: January 22, 2010.
Judgment: April 7, 2010.

(32 paras.)

Civil litigation -- Civil procedure -- Disposition without trial -- Dismissal of action -- Lack of jurisdiction -- Judgments and orders -- Summary judgments -- Availability -- To dismiss action -- Appeal by Snopko and others from summary judgment dismissal of action dismissed -- Appellants contended their claim attacked validity of agreements relied upon by respondent and therefore fell

outside ambit of section 38 of Ontario Energy Board Act or, at very least, there was a triable issue as to jurisdiction that should not have been decided on a motion for summary judgment -- Section 38 of Act conferred exclusive jurisdiction on Board to decide all issues pertaining to compensation from operation of gas storage operation run by respondent, and various claims by appellants fell within that exclusive jurisdiction.

Natural resources law -- Oil and gas -- Royalties and rents -- Appeal by Snopko and others from summary judgment dismissal of action dismissed -- Appellants contended their claim attacked validity of agreements relied upon by respondent and therefore fell outside ambit of section 38 of Ontario Energy Board Act or, at very least, there was a triable issue as to jurisdiction that should not have been decided on a motion for summary judgment -- Section 38 of Act conferred exclusive jurisdiction on Board to decide all issues pertaining to compensation from operation of gas storage operation run by respondent, and various claims by appellants fell within that exclusive jurisdiction.

Appeal by Snopko and others from the summary judgment dismissal of their action against Union. The motion judge concluded that section 38 of the Ontario Energy Board Act conferred exclusive jurisdiction on the Board to decide all issues pertaining to compensation from the operation of the gas storage operation run by the respondent Union, and that the various claims by the appellants fell within that exclusive jurisdiction. On appeal, the appellants contended that as their claim attacked the validity of agreements relied upon by the respondent and alleged breach of contract, negligence, unjust enrichment and nuisance, it fell outside the ambit of section 38 or, at the very least, there was a triable issue as to jurisdiction that should not have been decided on a motion for summary judgment.

HELD: Appeal dismissed. In substance, all of the claims raised by the appellants fell within the language of section 38(2) as claims for "just and equitable compensation in respect of the gas or oil rights or the right to store gas", or for "just and equitable compensation for any damage necessarily resulting from the exercise of the authority given by the [designation] order". The position advanced by the appellants that the Board's jurisdiction could have been avoided by virtue of the legal characterization of the cause of action asserted would have defeated the intention of the legislature. As the issue of jurisdiction was an issue of pure law, the motion judge was correct in dealing with it by way of summary judgment.

Statutes, Regulations and Rules Cited:

Ontario Energy Board Act, S.O. 1998, c. 15, Sched. B, s. 19(1), s. 36.1(1), s. 36.1(2), s. 37, s. 38(1), s. 38(2), s. 38(3), s. 38(4)

Appeal From:

On appeal from the judgment of Justice John A. Desotti of the Superior Court of Justice, dated

January 6, 2009.

Counsel:

Donald R. Good, for the appellants.

Crawford Smith, for the respondents.

The judgment of the Court was delivered by

1 R.J. SHARPE J.A.:-- This appeal involves a question as to the jurisdiction of the Ontario Energy Board (the "Board"), namely, the extent of the Board's exclusive jurisdiction to deal with legal and factual issues raised by a party claiming damages arising from the use of natural gas storage pools.

Facts

2 The appellants are landowners in a rural area near the Township of Dawn-Euphemia. Their lands form part of the Edys Mills Storage Pool, one of 19 natural gas storage pools operated by the respondent Union Gas Ltd. ("Union") as part of its integrated natural gas storage and transmission system. Natural gas storage pools are naturally occurring geological formations suitable for the injection, storage and withdrawal of natural gas.

3 In the 1970s, the appellants (to be read in this judgment where necessary as including the appellants' predecessors in title or interest) entered into petroleum and natural gas leases with Ram Petroleums Ltd. ("Ram"). Those leases granted Ram the right to conduct drilling operations on the appellants' properties in exchange for a monthly royalty payment on all oil produced. In October 1987, the appellants entered into Gas Storage Leases (the "GSLs") with Ram, which ratified the earlier gas and petroleum leases and provided the appellants with a 10% profit share of all of Ram's earnings from storage operations unless the leases were assigned to a third party. The GSLs required the appellants' consent before such an assignment could be made.

4 In August 1989, the appellants agreed to Ram's assignment of the GSLs to Union. The appellants assert that they consented to the assignment on the understanding, based on representations made by Ram, that they would receive significant crude oil royalty payments from Union under the earlier leases. However, shortly after the assignment, Union ceased oil production and all royalty payments ceased.

5 In 1992, the appellant Snopko entered into an Amending Agreement pursuant to which Union acquired the right to construct certain roadways on her property. In the Amending Agreement,

Snopko acknowledged receipt of compensation in respect of these roadways while also reserving the right to make a future claim in relation to wells installed by Union.

6 On November 30, 1992, the Lieutenant Governor in Council issued a regulation designating the Edys Mills Storage Pool as a designated gas storage area. On February 1, 1993, the Board issued a Designation Order under the predecessor legislation granting Union's application for an order authorizing it to inject, store, and remove gas from the Edys Mills Storage Pool, and giving it permission to drill and construct the wells and other facilities necessary to connect the Edys Mills Storage Pool to Union's integrated natural gas storage and transmission system.

7 Between 1993 and 1999, Union paid the appellants compensation pursuant to the terms of their GSLs and, in the case of the appellant Snopko, pursuant to the 1992 Amending Agreement. Union also provided compensation to the appellants Lyle and Eldon Knight pursuant to a Roadway Agreement they had entered into, which provided for certain annual roadway payments.

8 The Lambton County Storage Association (the "LCSA"), of which the appellants were members at the relevant time, is a volunteer association representing approximately 160 landowners who own property within Union's storage system. In 2000, the LCSA brought an application before the Board seeking "fair and equitable compensation" from Union pursuant to s. 38(3) of the *Ontario Energy Board Act, 1998,* S.O. 1998, c. 15, Sched. B (the "Act"), which requires a party authorized to use a designated gas storage area to make "just and equitable compensation" for the right to store gas or for any damage resulting from the authority to do so.

9 Union argued that, in the light of the terms of their leases, the appellants had no standing to apply for compensation. In a Decision and Order dated September 10, 2003, the Board found that Snopko's standing was limited to issues not dealt with in the GSLs and that the appellant McMurphy had no standing.

10 Before the remaining issues were decided on the merits by the Board, the LCSA and Union settled on the question of just and equitable compensation for all claims arising between 1999-2008 that were or could have been raised at the hearing. On March 23, 2004, the Board approved this settlement by way of a Compensation Order.

11 Consistent with the terms of an undertaking given by Union to the Board, Union extended to all LCSA members who did not receive full standing an offer to be compensated on the same terms enshrined in the Compensation Order. Each of the appellants accepted. The agreements pertaining to the appellants Lyle and Eldon Knight extend to 2013.

12 On January 29, 2008, the appellants commenced this action in the Superior Court against both Ram and Union, alleging breach of contract, negligence, unjust enrichment and nuisance.

13 The appellants advance the following claims against Union:

* *breach of contract* - the appellants claim that Union, in breach of their GSLs, has failed to properly compensate them for crop loss and other lost income arising from Union's storage operations (statement of claim, at paras. 26-27);
* *unjust enrichment* - the appellants claim that Union has been unjustly enriched by storing gas on and in the appellants' land (statement of claim, at para. 28(b));
* *nuisance* - the appellants claim that Union's storage operations, which have decreased the profitability of their land, caused damage to their land and decreased their enjoyment of the land, constitute a nuisance (statement of claim, at para. 36);
* *negligence* - the appellants claim that due to Union's storage operations, oil has not been produced from the Edys Mills Storage Pool since 1993 and, as a result, the appellants have not received royalty payments since that time (statement of claim, at para. 37(c)); and
* *termination of contract* - the appellants seek a declaration that their GSLs were terminated in 2006, along with compensation from Union on the basis that it is storing gas without a contract (statement of claim, at paras. 34-35).

14 The claim against Ram is framed in misrepresentation, negligence, breach of contract and unjust enrichment. More importantly, the appellants plead that the agreement permitting Ram to assign the GSLs should be set aside on grounds of unconscionability.

15 In September 2008, Union moved for summary judgment dismissing the action against it on several grounds, namely: (i) that the Superior Court has no jurisdiction to entertain the claim, as it falls within the exclusive jurisdiction of the Board; (ii) that the claims are statute-barred under the *Limitations Act, 2002,* S.O. 2002, c. 24, Sched. B (the "LTA"); and (iii) that the claims are barred by the doctrines of *res judicata* or abuse of process.

16 Ram took no part in the motion for summary judgment and the claims advanced against it by the appellants remain outstanding.

Legislation

17 The Act provides as follows with respect to the regulation of gas storage areas:

Gas storage areas

36.1(1) The Board may by order,

(a) designate an area as a gas storage area for the purposes of this Act; or

(b) amend or revoke a designation made under clause (a). 2001, c. 9, Sched. F, s. 2(2).

Transition

(2) Every area that was designated by regulation as a gas storage area on the day before this section came into force shall be deemed to have been designated under clause (1)(a) as a gas storage area on the day the regulation came into force. 2001, c. 9, Sched. F, s. 2(2).

Prohibition, gas storage in undesignated areas

37. No person shall inject gas for storage into a geological formation unless the geological formation is within a designated gas storage area and unless, in the case of gas storage areas designated after January 31, 1962, authorization to do so has been obtained under section 38 or its predecessor. 1998, c. 15, Sched. B, s. 37; 2001, c. 9, Sched. F, s. 2(3).

Authority to store

38.(1) The Board by order may authorize a person to inject gas into, store gas in and remove gas from a designated gas storage area, and to enter into and upon the land in the area and use the land for that purpose. 1998, c. 15, Sched. B, s. 38(1).

Right to compensation

(2) Subject to any agreement with respect thereto, the person authorized by an order under subsection (1),

(a) shall make to the owners of any gas or oil rights or of any right to store gas in the area just and equitable compensation in respect of the gas or oil rights or the right to store gas; and

(b) shall make to the owner of any land in the area just and equitable compensation for any damage necessarily resulting from the exercise of the authority given by the order. 1998, c. 15, Sched. B, s. 38(2).

Determination of amount of compensation

(3) No action or other proceeding lies in respect of compensation payable under this section and, failing agreement, the amount shall be determined by the Board. 1998, c. 15, Sched. B, s. 38(3).

Appeal

(4) An appeal within the meaning of section 31 of the *Expropriations Act* lies from a determination of the Board under subsection (3) to the Divisional Court, in which case that section applies and section 33 of this Act does not apply.

18 In addition, s. 19 of the Act provides as follows:

Power to determine law and fact

19.(1) The Board has in all matters within its jurisdiction authority to hear and determine all questions of law and of fact.

Disposition of the motion judge

19 The motion judge granted Union's motion for summary judgment and dismissed the claim on jurisdictional grounds. The motion judge followed the decision of Pennell J. in *Re Wellington and Imperial Oil Ltd.*, [1970] 1 O.R. 177 (H.C.J.), at pp. 183-84:

> [I]n many cases where a dispute arises as to the amount of compensation, the first thing a board of arbitration has to do is to inquire what were the subsisting rights at the time the right to compensation arose; and that in some cases such inquiry would necessarily involve the interpretation of agreements in which the subsisting rights were embodied.
>
> ...
>
> It is with reluctance that I conclude that the Legislature has taken away the *prima facie* right of a party to have a dispute determined by declaration of the Court.

20 The motion judge concluded that s. 38 conferred exclusive jurisdiction on the Board to decide

all issues pertaining to compensation from the operation of the gas storage operation and that the appellants' claims fell within that exclusive jurisdiction. Accordingly, he dismissed the appellants' action.

Issue

21 While Union submits that the appellants' claims should be dismissed on several grounds, the central issue on this appeal is whether the motion judge erred in concluding that the Superior Court has no jurisdiction to entertain those claims against Union.

Analysis

22 Under the Act, the Board has broad jurisdiction to regulate the storage of natural gas, to designate an area as a gas storage area, to authorize the injection of gas into that area, and to order the person so authorized to pay just and equitable compensation to the owners of the property overlaying the storage area. Moreover, s. 38(3) provides that no civil proceeding may be commenced in order to determine that compensation.

23 The appellants concede that if their claim arose simply from an inability to agree with Union on the *amount* of compensation, s. 38(3) of the Act grants the Board exclusive jurisdiction. They submit, however, that as their claim attacks the validity of agreements relied upon by Union and alleges breach of contract, negligence, unjust enrichment and nuisance, it falls outside the ambit of s. 38 or, at the very least, there is a triable issue as to jurisdiction that should not have been decided on a motion for summary judgment.

24 I am unable to accept the appellants' submission that the legal characterization of their claims determines the issue of the Board's jurisdiction. It is the substance not the legal form of the claim that should determine the issue of jurisdiction. If the substance of the claim falls within the ambit of s. 38, the Board has jurisdiction, whatever legal label the claimant chooses to describe it. As Pennell J. stated in *Re Wellington and Imperial Oil Ltd.*, at p. 183, "whatever may be the form of the issue presented ... it is in substance a claim for compensation in respect of a gas right and damages necessarily resulting from the exercise of the authority given by virtue of the order of the Ontario Energy Board."

25 The claims advanced by the appellants in the statement of claim all arise from Union's operation of the Edys Mills Storage Pool. The claim for breach of contract asserts that Union has failed to compensate the appellants for crop loss and other lost income arising from Union's storage operations. The claim for unjust enrichment asserts that Union "is enriched by storing gas on and in the Plaintiffs' land and is enriched by having oil located in the Plaintiffs' land left in place." The nuisance claim asserts that "Union's gas storage operation unreasonably interferes with [the Plaintiffs'] enjoyment of their land." The negligence claim asserts that Union "was negligent in their gas storage operations", thereby causing harm to the appellants. Finally, the appellants alleged that Union has been storing gas without a contract.

26 In my view, in substance, these are all claims falling within the language of s. 38(2) as claims for "just and equitable compensation in respect of the gas or oil rights or the right to store gas", or for "just and equitable compensation for any damage necessarily resulting from the exercise of the authority given by the [designation] order."

27 Section 19 provides that, in the exercise of its jurisdiction, the Board has "in all matters within its jurisdiction authority to hear and determine all questions of law and of fact." This generous and expansive conferral of jurisdiction ensures that the Board has the requisite power to hear and decide all questions of fact and of law arising in connection with claims or other matters that are properly before it. This includes, *inter alia*, the power to rule on the validity of relevant contracts and to deal with other substantive legal issues.

28 In response to the court's invitation to make written submissions on the jurisdictional issue, counsel for the Board advised us that the jurisprudence of the Board supports an expansive interpretation of its jurisdiction under its enabling statute, which would include the ability to determine the validity of compensation contracts. In *The Matter of certain applications to the Ontario Energy Board in respect of the Bentpath Pool* (1982), E.B.O. 64(1) & (2), the Board held, at p. 33, that it "does have the power, as part of its broader administrative function, to determine the validity of contracts" for the purpose of determining the appropriate compensation to be paid to a landowner under what is now s. 38 of the Act. I agree with the respondent that *Bentpath* and *Re Wellington and Imperial Oil Ltd.* supersede the Board's earlier decision in *The Matter of an Application by Union Gas Company of Canada and Ontario Natural Gas Storage to inject gas into, store gas in and remove gas from the designated gas storage area known as Dawn #156 Pool* (1962), E.B.O. 1.

29 By precluding other actions or proceedings with respect to claims falling within the ambit of s. 38(2) of the Act, s. 38(3) precludes the courts from, in effect, usurping the jurisdiction of the Board by entertaining claims that it is empowered to decide. I agree with Union's submission that, to endorse the appellants' position by holding that the Board's jurisdiction could be avoided by virtue of the legal characterization of the cause of action asserted, would defeat the intention of the legislature.

30 In my view, the motion judge did not err in concluding that this was a proper case for summary judgment. The issue of jurisdiction is an issue of pure law and the motion judge was correct in dealing with it by way of summary judgment.

31 As the appeal must be resolved on the basis that the Board has exclusive jurisdiction to determine all issues of law and of fact arising from the appellants' claim against Union, it is unnecessary for me to deal with the alternative grounds for dismissal of the claim advanced by Union.

Disposition

32 For these reasons, I would dismiss the appeal with costs to the respondent fixed at $7306.73, inclusive of GST and disbursements.

R.J. SHARPE J.A.
J.L. MacFARLAND J.A.:-- I agree.
D. WATT J.A.:-- I agree.

cp/e/qllxr/qljxr/qljyw/qlhcs/qlced/qlhcs

EB-2010-0374
December 24, 2010

TAB 2

Union Gas Ltd. v. Township of Dawn
Tecumseh Gas Storage Ltd. v. Township of Dawn

[1977] O.J. No. 2223

15 O.R. (2d) 722

76 D.L.R. (3d) 613

2 M.P.L.R. 23

[1977] 1 A.C.W.S. 365

Ontario
High Court of Justice
Divisional Court

Keith, Maloney and Donohue, JJ.

February 22, 1977.

J. J. Robinette, Q.C., and L. G. O'Connor, Q.C., for appellant, Union Gas Limited.

P. Y. Atkinson, for appellant, Tecumseh Gas Storage Limited.

W. B. Williston, Q.C., and J. A. Campion, for respondent, Township of Dawn.

T. H. Wickett, for Ontario Energy Board.

The judgment of the Court was delivered by

1 KEITH, J.:-- Pursuant to leave granted by this Court on November 24, 1975, upon application made in accordance with s. 95(1) of the Ontario Municipal Board Act, R.S.O. 1970, c. 323, the following questions are submitted to this Court for its opinion:

(a) Is section 4.2.3. of By-law 40 of the Township of Dawn as amended, ultra

vires of the respondent municipality

(b) Is the Ontario Municipal Board therefore without jurisdiction to approve the respondent's By-law 40 as amended including section 4.2.3. thereof

2 The Township of Dawn in the County of Lambton, a rural agricultural township in south western Ontario, passed its first comprehensive zoning by-law on June 18, 1973 (By-law 40), and amending By-law 52 on September 3, 1974.

3 These two by-laws came before the Ontario Municipal Board on April 16 and 24, 1975, for approval. In addition to the parties appearing in this Court, two other parties interested in the effect of these by-laws were represented at the Municipal Board hearings, but the Ontario Energy Board, one of the most vitally interested parties, inexplicably was not.

4 The relevant sections of the by-law, as amended, read as follows:

1.1 Section 1 -- Introduction

Whereas the Council has authority to regulate the use and nature of land, buildings and structures in the Township of Dawn by by-law subject to the approval of the Ontario Municipal Board and deems it advisable to do so.

1.2 Now therefore the Council of the Corporation of the Township of Dawn enacts as follows:

Title

2.1 This by-law shall be known as the "Zoning By-law" of the Township of Dawn.

Penalty

3.3.1. Every person who contravenes by-law is guilty of an offence and liable upon conviction to fine of not more than three hundred (300) dollars for each offence, exclusive of costs. Every such fine is recoverable under the Summary Convictions Act, all the provisions of which apply except that the imprisonment may be for a term of not more than twenty-one (21) days.

3.3.2. Where a person, guilty of an offence under this by-law has been directed to remedy any violation and is in default of doing such matter or thing required, then such matter or thing may be done at his expense, by the Corporation of the Township of Dawn and the Corporation may recover the expense incurred in doing it by action or the same may be recovered in like manner as municipal taxes.

Section 4 -- General Use and Zone Regulations

4.1 Uses Permitted.

4.1.1. No land, building or structure shall be used or occupied and no building or structure or part thereof shall be erected or altered except as permitted by the provisions of this by-law.

4.2.3 Except as limited herein nothing in this by-law shall prevent the use of any land as a right-of-way, easement or corridor for any oil, gas, brine or other liquid product pipeline and appurtenances thereto, but no appurtenances in the form of a metering, booster, dryer, stipper or pumping station, shall be constructed closer than 500 feet to any adjacent residential or commercial zone or rural residence, except as otherwise provided. All transmission pipelines to be installed from or to a production, treatment or storage site shall be constructed from or to such site to and along, in or upon a right-of-way, easement or corridor located as follows:

(a) running northerly or southerly within 100 feet perpendicular distance from the centre line dividing the east and west halves of a concession lot;
(b) running easterly and westerly within 100 feet perpendicular distance from a concession lot line not being a township, county or provincial road or highway;
(c) across, but not along a township, county or provincial road or highway.

Nothing herein shall prevent the location of a local distribution gas service line upon any street, road or highway.

5 On May 20, 1975, the Ontario Municipal Board released its decision approving of By-law 40 as amended. The reasons are devoted almost exclusively to s. 4.2.3 as amended and the objections of the appellants thereto. To fully understand the approach taken by the Municipal Board, the

following extracts from these reasons are quoted [4 O.M.B.R. 462 at pp. 463-6]:

> The Township consists of flat agricultural land with soil rated in the Canada Land Survey as A2. The Board was advised by the representative of the Ministry of Agriculture and Food that the soil is of the Brookstone clay type which requires particular attention to drainage because the land is so flat and that this was the reason it was rated A2 rather than A1. The soil is very productive if properly drained and worked. As drainage is installed the soil responds to cash crops such as corn and soya beans. Drainage is accomplished generally by a grid system of tile drainage lines approximately 40 ft. apart throughout the whole of the Township. These feed into municipal drains which generally follow lot and concession lines and eventually drain to the south-west into the Sydenham River. An example of this method of drainage in the Township is shown on ex. 9, filed. This also indicates the position of the Union Gas Company pipeline which runs in a diagonal direction across the tile drains referred to above. Because the pipeline runs across the drains, a header line is required to direct the flow of the water into the municipal drain.
>
> The evidence indicates that in respect of the pipeline installation on a right of way that may be 60 ft. wide or more, and the header line parallel to it, the farmer in using his equipment must gear down each time before crossing these installations rather than continuing in the usual sweep of the farm land. This time-consuming and inconvenient operation is necessary every time the farmer crosses the pipeline easement area. In addition, the evidence clearly indicated that upon excavation for the pipeline, the soil composition is disturbed and impacted so that growth is hampered for several years until the soil is returned to its normal state. The company indicated in evidence that a new method for laying lines and conserving the topsoil for future development had been devised. This may alleviate the problems, but only time will tell.
>
> . . . . .
>
> The Union Gas Limited (hereinafter to be referred to as "the Company") operates in the south-west part of the Province and has important connections with Consumers Gas Company of Toronto and other systems for whom it stores gas in the summer months for delivery in the winter. The relationship of the Union Gas Limited operation to other systems in the Province are well illustrated on ex. 33, filed. The hub of their system is in Dawn Township from which all the distribution and transmission lines radiate. The importance of the Company to the municipality is illustrated by ex. 26 filed, which shows that for the years 1970 to 1974 inclusive, the Company paid taxes which formed a significant portion of

the total Township levy varying from 24.3% to 30.6% in those years.

The by-law provides that transmission lines are to be laid in corridors 200 ft. wide running along the half lot lines in a north-south direction and along concession lines in an east-west direction, "across but not along a township, county or provincial road or highway", s. 4.2.3.

This corridor concept was the chief source of objection registered by the Company which in evidence indicated that the corridor method of laying their lines would be very costly. This was particularly so when some of the existing lines are now laid in a diagonal direction. When new looping lines are required they are now planned to run generally parallel to the existing lines. If they were to follow the corridors the length of line would be increased, in some cases the diameter of the pipe would have to be greater, and perhaps they might also require additional compression facilities. The additional costs were shown to be large and would result in increased costs to the public.

The Board must weigh the possibility of incurring these increased costs against the need for protecting the farm industry against unnecessary and unplanned disturbance in future years. There was ample evidence to indicate that the need for pipeline installations would increase in the future. There was also evidence to indicate that about 50% of the existing lines are already built in a north-south and east- west direction and that the corridor concept has therefore in fact found practical use in the past (exs. 7 and 27). It was the argument of counsel for the applicant that once the corridors were established the extra cost for looping will not be as significant.

Argument of counsel for the Tecumseh Gas Storage Limited was that the use of land for pipelines was not in fact a use of land as envisaged under s. 35(1)1 of the Planning Act, R.S.O. 1970, c. 349. To bolster this argument counsel referred the Board to the case of Pickering Twp. v. Godfrey, [1958] O.R. 429, 14 D.L.R. (2d) 520, [1958] O.W.N. 230. The Board finds that the instant case can be distinguished from the quoted case which dealt specifically with the making of a quarry or gravel pit as a "land use". In addition, the Board finds that the use of land for installation of a pipeline fits the definition arrived at in the case above quoted [at p. 437] as meaning: "the employment of the property for enjoyment, revenue or profit without in any way otherwise diminishing or impairing the property itself."

The second major argument of counsel was that the municipality has no jurisdiction to deal with pipeline installation because of the existence of the Ontario Energy Board Act, R.S.O. 1970, c. 312, which creates the Ontario Energy Board and gives it jurisdiction to determine the route for a transmission line, production line, distribution line or a station (s. 40(1)). The Board was also referred to s. 57 of the Ontario Energy Board Act which reads as follows:

"57(1) In the event of conflict between this Act and any other general or special Act, this Act prevails.

(2) This Act and the regulations prevail over any by-law passed by a municipality."

In the opinion of the Board the above section provides only for the event of a conflict between the Ontario Energy Board Act and any other Act. It does not, nor can it be interpreted to mean that no other Act can be effective. It does not in the opinion of the Board prohibit the municipality from dealing with those matters referred to in s. 35 of the Planning Act.

The major considerations of the Ontario Energy Board are not directed towards planning. It is the responsibility and duty of Council to plan for the proper and orderly development of the municipality having regard to the health, safety, convenience and welfare of the present and future inhabitants of the municipality all within the framework of the Planning Act.

The Board is of the opinion that zoning by-laws must provide for all ratepayers a degree of certainty for reasonable stability. This can be accomplished by passing restricted area by-laws for land use on a planning basis with proper and responsible study and public input. The evidence indicates that the municipality has indeed acted in a reasonable and responsible manner to achieve this end. The consideration for the farming community which forms a large proportion of the municipality is a proper and reasonable one. There is no certainty as to where the Ontario Energy Board may finally decide to place the pipelines required by the criteria they have and will develop. They will, however, have the legislative document before them giving the corporate expression of the municipality to indicate where, on the basis of planning considerations, the pipelines should go.

> The Ontario Energy Board will then, on the basis of its criteria and the evidence heard, be in a position to give its decision on the ultimate route chosen.
>
> In the meantime, the municipality will by legislation inform all its ratepayers where the pipelines should be laid. The farmer will be able to proceed with the least amount of interference both during construction of pipelines on or near his lands and indeed in his everyday work. The pipeline companies will benefit from this as well. With less interference to the farmer there should be fewer difficulties experienced both in the installation of the pipelines and the servicing and maintenance of the pipelines and the tile drain systems.

6 By-law 40 as amended was enacted by the Council of the respondent in accordance with the powers given to municipal councils by s. 35 of the Planning Act, R.S.O. 1970, c. 349. The relevant portions of that section read as follows:

> 35(1) By-laws may be passed by the councils of municipalities:
>
> 1. For prohibiting the use of land, for or except for such purposes as may be set out in the by-law within the municipality or within any defined area or areas or abutting on any defined highway or part of a highway.
>
> 2. For prohibiting the erection or use of buildings or structures for or except for such purposes as may be set out in the by-law within the municipality or within any defined area or areas or upon land abutting on any defined highway or part of a highway.

7 Section 46 of the Planning Act is identical with s. 57(1) of the Ontario Energy Board Act, R.S.O. 1970, c. 312, quoted in the reasons of the Ontario Municipal Board. Fortunately, s. 46 of the Planning Act has no equivalent to s. 57(2) of the Ontario Energy Board Act or the Court might well have been forced to assert that its views prevailed over one or other or both of the statutes.

8 The appellant Union Gas operates an extensive network of natural gas transmission lines throughout south-western Ontario delivering this energy to customers, both wholesale and retail, extending from Windsor on the south-west, to Hamilton and Trafalgar on the east and Goderich and Owen Sound on the north.

9 It supplies scores of city, town and village municipalities in this extensive and heavily-populated area and its lines traverse 16 counties which contain upwards of 140 township municipalities. The municipal councils of each of these has the same power under the Planning Act to pass zoning by-laws.

10 The principal source of the supply of natural gas to Union Gas is the Trans-Canada pipeline which enters the southern part of Ontario in Lambton County just south of Sarnia and connects with a major compressor station of Union Gas in the Township of Dawn. There are four other major compressor stations operated by this appellant, one just west of London, another at Trafalgar between Hamilton and Toronto, one near Simcoe and the fourth south of Chatham. These stations are essential to maintain pressure throughout the pipeline network.

11 In addition, Union Gas lines serve as feeders for companies like the Consumers' Gas Company serving Metropolitan Toronto and another extensive area of Ontario.

12 In addition, a significant portion of the source of natural gas transmitted by Union Gas, comes from local wells found in south-western Ontario, a number of which are located in the Township of Dawn.

13 The company also maintains reserves of gas in natural underground storage fields, some but by no means all of which are also located in the Township of Dawn.

14 The local wells and the storage fields must all be connected to the distribution lines and the compressor stations.

15 The second appellant, Tecumseh Gas Storage Limited, is equally affected by the impugned by-law, but no detailed description of its operations was presented to the Court.

16 I have stressed these points to illustrate firstly how insignificant are the local problems of the Township of Dawn when viewed in the perspective of the need for energy to be supplied to those millions of residents of Ontario beyond the township borders, and to call to mind the potential not only for chaos but the total frustration of any plan to serve this need if by reason of powers vested in each and every municipality by the Planning Act, each municipality were able to enact by-laws controlling gas transmission lines to suit what might be conceived to be local wishes. We were informed that other township councils have only delayed enacting their own by-laws pending the outcome of this appeal.

17 At the conclusion of the argument of this appeal I informed counsel, on behalf of the Court, that the Appeal Book had been endorsed as follows:

> The appeal will be allowed with costs. In view of the importance of the issue, which is raised in this appeal insofar as it relates specifically to the Energy Board's jurisdiction as challenged by a municipal council, and in deference to the lengthy reasons delivered by the Ontario Municipal Board, the Court will in due course, deliver considered reasons which will be the basis of the formal order of the Court.

18 It is not necessary for my purpose to trace the history and origins of the present Ontario

Energy Board Act as amended. Reference to s. 58 of the present Act will suffice to show that this industry has developed over many years under provincial legislation. Section 58 reads as follows:

> 58. Every order and decision made under,
>
> (a) The Fuel Supply Act, being chapter 152 of the Revised Statutes of Ontario, 1950;
>
> (b) The Natural Gas Conservation Act, being chapter 251 of the Revised Statutes of Ontario, 1950;
>
> (c) The Well Drillers Act, being chapter 423 of the Revised Statutes of Ontario, 1950;
>
> (d) The Ontario Fuel Board Act, 1954;
> (e) The Ontario Energy Board Act, 1960;
>
> (f) The Ontario Energy Act, being chapter 271 of the Revised Statutes of Ontario, 1960; or
>
> (g) The Ontario Energy Board Act, 1964.
>
> that were in force on the day the Revised Statutes of Ontario, 1970 is proclaimed in force shall be deemed to have been made by the Board under this Act.

19 Pursuant to s. 2 [am. 1973, c. 55, s. 2] of the Act, the Ontario Energy Board is composed of not less than five members appointed by the Lieutenant-Governor in Council. It has an official seal, and its orders which must be judicially noticed are not subject to the Regulations Act, R.S.O. 1970, c. 410.

20 By s. 14, many of the powers of the Supreme Court of Ontario are vested in this Board "for the due exercise of its jurisdiction".

21 Section 18 is important having regard to the penalty provisions of the township by-law quoted above. That section reads as follows:

> 18. An order of the Board is a good and sufficient defence to any action or

> other proceeding brought or taken against any person in so far as the act or omission that is the subject of such action or other proceeding is in accordance with the order.

22 Section 19 [am. 1973, c. 55, s. 5(1)] vests power in the Board to fix rates and other charges for the sale, transmission, distribution and storage of natural gas.

23 Under s. 23 [am. ibid., s. 8] the Board is charged with responsibility to issue permits to drill gas wells.

24 Section 25 prohibits any company in the business of transmitting, distributing or storing gas from disposing of its plant by sale or otherwise without leave, and such leave cannot be granted without, inter alia, a public hearing.

25 Section 30 provides that any order of the Board may be filed with the Registrar of the Supreme Court and is enforceable in the same way as a judgment or order of the Court.

26 Part II of the Act deals specifically with pipe lines and I quote s. 38(1), s. 39, s. 40(1), (2), (3), (8), (9) and (10), s. 41(1) and (3), and s. 43(1) and (3):

> 38(1) No person shall construct a transmission line without first obtaining from the Board an order granting leave to construct the transmission line.
>
> . . . . .
>
> 39. Any person may, before he constructs a production line, distribution line or station, apply to the Board for an order granting leave to construct the production line, distribution line or station.
>
> 40(1) An applicant for an order granting leave to construct a transmission line, production line, distribution line or a station shall file with his application a map showing the general location of the proposed line or station and the municipalities, highways, railways, utility lines and navigable waters through, under, over, upon or across which the proposed line is to pass.
>
> (2) Notice of the application shall be given by the applicant in such manner as the Board directs and shall be given to the Department of Agriculture and Food, the Department of Municipal Affairs, the Department of Highways and such persons as the Board may direct.
>
> (3) Where an interested person desires to make objection to the application,

such objection shall be given in writing to the applicant and filed with the Board within fourteen days after the giving of notice of the application and shall set forth the grounds upon which such objection is based.

. . . . .

(8) Where after the hearing the Board is of the opinion that the construction of the proposed line or station is in the public interest, it may make an order granting leave to construct the line or station.

(9) Leave to construct the line or station shall not be granted until the applicant satisfies the Board that it has offered or will offer to each landowner an agreement in a form approved by the Board.

(10) Any person to whom the Board has granted leave to construct a line or station, his officers, employees and agents, may enter into or upon any land at the intended location of any part of the line or station and may make such surveys and examinations as are necessary for fixing the site of the line or station, and, failing agreement, any damages resulting therefrom shall be determined in the manner provided in section 42.

41(1) Any person who has leave to construct a line or station under this Part or a predecessor of this Part may apply to the Board for authority to expropriate land for the purposes of the line or station, and the Board shall thereupon set a date for the hearing of such application, and such date shall be not fewer than fourteen days after the date of the application, and upon such application the applicant shall file with the Board a plan and description of the land required, together with the names of all persons having an apparent interest in the land.

. . . . .

(3) Where after the hearing the Board is of the opinion that the expropriation of the land is in the public interest, it may make an order authorizing the applicant to expropriate the land.

. . . . .

43(1) Any person who has leave to construct a line may apply to the Board for authority to construct it upon, under or over a highway, utility line or ditch.

. . . . .

(3) Without any other leave and notwithstanding any other Act, where after the hearing the Board is of the opinion that the construction of the line upon, under or over a highway, utility line or ditch, as the case may be, is in the public interest, it may make an order authorizing the applicant so to do upon such terms and conditions as it considers proper.

27 Finally, with respect to the statute itself, it may not be amiss to again quote s. 57:

57(1) In the event of conflict between this Act and any other general or special Act, this Act prevails.

(2) This Act and the regulations prevail over any by-law passed by a municipality.

28 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.

29 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 s. 40(8), s. 41(3) and s. 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. In this connection it will be recalled that s. 40(1) speaks of the requirement for filing a general location of proposed lines or stations showing "the municipalities, highways, railways, utility lines and navigable waters through, under, over, upon or across which the proposed line is to pass".

30 Persons affected must be given notice of any application for an order of the Energy Board and full provision is made for objections to be considered and public hearings held.

31 In the final analysis, however, it is the Energy Board that is charged with the responsibility of making a decision and issuing an order "in the public interest".

32 While the result in the case of Campbell-Bennett Ltd. v. Comstock Midwestern Ltd. and Trans Mountain Oil Pipe Line Co., [1954] S.C.R. 207, [1954] 3 D.L.R. 481, 71 C.R.T.C. 291, might perhaps be different today, having regard to the facts of that case and subsequent federal legislation, the principles enunciated are valid and applicable to the case before this Court.

33 In the Campbell-Bennett case, the defendant Trans Mountain Pipe Line was incorporated by a

special Act of the Parliament of Canada to construct interprovincial pipe lines. During the course of construction of a pipe line from Acheson, Alberta to Burnaby, British Columbia, some work was done in British Columbia by the plaintiff for which it claimed to be entitled to a mechanics' lien on the works in British Columbia, and to enforce that lien under the British Columbia Mechanics' Lien Act by seizing and selling a portion of the pipe line.

34 At p. 212 S.C.R., p. 486 D.L.R., Kerwin, J. (as he then was), on behalf of himself and Fauteux, J. (as he then was), said:

> The result of an order for the sale of that part of Trans Mountain's oil pipe line in the County of Yale would be to break up and sell the pipe line piecemeal, and a provincial legislature may not legally authorize such a result.

35 Then at pp. 213-5 S.C.R., pp. 487-9 D.L.R., Rand, J., on behalf of himself and the other three members of the Court, said:

> The respondent, Trans Mountain Oil Pipe Line Company, was incorporated by Dominion statute, 15 Geo. VI, c. 93. It was invested with all the "powers, privileges and immunities conferred by" and, except as to provisions contained in the statute which conflicted with them, was made subject to all the "limitations, liabilities and provisions of any general legislation relating to pipe lines for the transportation of oil" enacted by Parliament. Within that framework, it was empowered to construct or otherwise acquire, operate and maintain interprovincial and international pipe lines with all their appurtenances and accessories for the transportation of oil.
>
> The Pipe Lines Act, R.S.C. 1952, c. 211, enacted originally in 1949, is general legislation regulating oil and gas pipe lines and is applicable to the company. By its provisions the company may take land or other property necessary for the construction, operation or maintenance of its pipe lines, may transport oil and may fix tools therefor. The location of its lines must be approved by the Board of Transport Commissioners and its powers of expropriation are those provided by the Railway Act. By s. 38 the Board may declare a company to be a common carrier of oil and all matters relating to traffic, tools or tariffs become subject to its regulation. S. 10 provides that a company shall not sell or otherwise dispose of any part of its company pipe line, that is, its line held subject to the authority of Parliament, nor purchase any pipe line for oil transportation purposes, nor enter into any agreement for amalgamation, nor abandon the operation of a company line, without leave of the Board; and generally the undertaking is placed under the Board's regulatory control.

Is such a company pipe line so far amenable to provincial law as to subject it to statutory mechanics' liens The line here extends from a point in Alberta to Burnaby in British Columbia. That it is a work and undertaking within the exclusive jurisdiction of Parliament is now past controversy:

Winner v. S.M.T. (Eastern) Limited, [1951] S.C.R. 887, affirmed, with a modification not material to this question, by the Judicial Committee but as yet unreported. The lien claimed is confined to that portion of the line within the County of Yale, British Columbia. What is proposed is that a lien attaches to that portion of the right of way on which the work is done, however small it may be, or wherever it may be situated, and that the land may be sold to realize the claim. In other words, an interprovincial or international work of this nature can be disposed of by piecemeal sale to different persons and its undertaking thus effectually dismembered.

In the light of the statutory provisions creating and governing the company and its undertaking, it would seem to be sufficient to state such consequences to answer the proposition. The undertaking is one and entire and only with the approval of the Board can the whole or, I should say, a severable unit, be transferred or the operation abandoned. Apart from any question of Dominion or Provincial powers and in the absence of clear statutory authority, there could be no such destruction by means of any mode of execution or its equivalent. From the earliest appearance of such questions it has been pointed out that the creation of a public service corporation commits a public franchise only to those named and that a sale under execution of property to which the franchise is annexed, since it cannot carry with it the franchise, is incompatible with the purpose of the statute and incompetent under the general law. Statutory provisions, such as s. 152 of the Railway Act, R.S.C. (1952) c. 234, have modified the application of the rule, but the sale contemplated by s. 10 of the Pipe Lines Act is sale by the company, not one arising under the provisions of law and in a proceeding in invitum. The general principle was stated by Sir Hugh M. Cairns, L.J. in Gardner v. London, Chatham and Dover Railway (1867), L.R. 2 Ch. 201 at p. 212:--

"When Parliament, acting for the public interest, authorizes the construction and maintenance of a railway, both as a highway for the public, and as a road on which the company may themselves become carriers of passengers and goods, it confers powers and imposes duties and responsibilities of the largest and most important kind, and it confers and imposes them upon the company which Parliament has before it, and upon no other body of persons. These powers must

be executed and these duties discharged by the company. They cannot be delegated or transferred."

In the same judgment and speaking of the effect of an authorized mortgage of the "undertaking" he said:--

"The living and going concern thus created by the Legislature must not, under a contract pledging it as security, be destroyed, broken up, or annihilated. The tolls and sums of money ejusdem generis--that is to say, the earnings of the undertaking--must be made available to satisfy the mortgage; but, in my opinion, the mortgagees cannot; under their mortgages, or as mortgagees--by seizing, or calling on this Court to seize, the capital, or the lands, or the proceeds of sales of land, or the stock of the undertaking--either prevent its completion, or reduce it into its original elements when it has been completed."

36 Several further and compelling submissions were made to the Court on behalf of the appellants, but having regard to the first submission which is irresistible and of fundamental importance, I do not think it necessary to deal with all of the arguments advanced.

37 Reference should be made, however, to two of them. First, attention should be directed to "An Act to regulate the Exploration and Drilling for, and the Production and Storage of Oil and Gas", 1971 (Ont.), c. 94, commonly referred to as the Petroleum Resources Act.

38 The objects of this legislation can be readily understood by reference to s. 17(1) of the statute, which reads as follows:

17(1) The Lieutenant Governor in Council may make regulations,

(a) for the conservation of oil or gas;

(b) prescribing areas where drilling for oil or gas is prohibited;

(c) prescribing the terms and conditions of oil and gas production leases and gas storage leases or any part thereof, excluding those relating to Crown lands, and providing for the making of statements or reports thereon;

(d) regulating the location and spacing of wells;

(e) providing for the establishment and designation of spacing units and regulating the location of wells in spacing units and requiring the joining of the various interests within a spacing unit or pool;

(f) prescribing the methods, equipment and materials to be used in boring, drilling, completing, servicing, plugging or operating wells;

(g) requiring operators to preserve and furnish to the Department drilling and production samples and cores;

(h) requiring operators to furnish to the Department reports, returns and other information;

(i) requiring dry or unplugged wells to be plugged or replugged, and prescribing the methods, equipment and materials to be used in plugging or replugging wells;

(j) regulating the use of wells and the use of the subsurface for the disposal of brine produced in association with oil and gas drilling and production operations.

39 The importance of this Act is reflected in s. 18 which reads as follows:

18(1) In the event of conflict between this Act and any other general or special Act, this Act, subject only to The Ontario Energy Board Act [1964], prevails.

(2) This Act and the regulations prevail over any municipal by-law.

40 Similarly, although it was not referred to in argument, the Energy Act, R.S.O. 1970, c. 148 [since repealed by 1971, Vol. 2, c. 44, s. 32, and superseded by the Energy Act, 1971, and the Petroleum Resources Act, 1971], deals with other aspects of the natural gas and oil industry. The objects of the legislation are set out in s. 12(1) which I need not quote, but again s. 13 of this Act is identical in its wording to s. 18 of the Petroleum Resources Act, 1971, quoted above.

41 The second of the additional submissions to which reference should be made is based on a cardinal rule for the interpretation of statutes and expressed in the maxim generalia specialibus non derogant. For a discussion of the effect of this rule I will only refer to the case of City of Ottawa v. Town of Eastview et al., [1941] S.C.R. 448 commencing at p. 461 [1941] 4 D.L.R. 65 at p. 75, 53

C.R.T.C. 193, and to the Dictionary of English Law (Earl Jowitt), at p. 862.

42 In the case before this Court, it is clear that the Legislature intended to vest in the Ontario Energy Board the widest powers to control the supply and distribution of natural gas to the people of Ontario "in the public interest" and hence must be classified as special legislation.

43 The Planning Act, on the other hand, is of a general nature and the powers granted to municipalities to legislate with respect to land use under s. 35 of that Act must always be read as being subject to special legislation such as in contained, for example, in the Ontario Energy Board Act, the Energy Act and the Petroleum Resources Act, 1971.

44 In the result, therefore, and in response to the questions with respect to which leave to appeal was granted, this Court certifies to the Ontario Municipal Board:

(a) Section 4.2.3. of By-law 40 as amended, of the Township of Dawn is ultra vires the said municipality, and

(b) The Ontario Municipal Board therefore is without jurisdiction to approve the said by-law as amended in its present form by reason of section 4.2.3. thereof.

45 This Court further certifies that should the Ontario Municipal Board see fit to exercise the powers vested in it by s. 87 of the Ontario Municipal Board Act, the said By-law 40, as amended, may be approved after deleting from s. 4.2.3. the words "Except as limited herein" at the commencement of the said section and all the words after the word "thereto" in the fourth line of the said by-law as printed down to and including the words "road or highway" in subcl. (c) of the said s. 4.2.3., so that s. 4.2.3. as so approved would read:

> Nothing in this by-law shall prevent the use of any land as a right-of-way, easement or corridor for any oil, gas, brine or other liquid product pipeline and appurtenances thereto.
>
> Nothing herein shall prevent the location of a local distribution gas service line upon any street, road or highway.

46 The appellants and the Ontario Energy Board are entitled to their costs of this appeal.

Appeal allowed.

EB-2010-0374
December 24, 2010

TAB 3

1

Ontario Energy Board

2

In the matter of a hearing respecting contract carriage arrangements on The Consumers' Gas Company Ltd.'s, I.C.G. Utilities (Ontario) Ltd's, and Union Gas Limited's Ontario Distribution Systems

3

E.B.R.O. 410

4

E.B.R.O. 411

5

E.B.R.O. 412

6

REASONS FOR DECISION

7

Volume I

8

E.B.R.O. 410-II
E.B.R.O. 411-II
E.B.R.O. 412-II

9

IN THE MATTER OF the Ontario Energy Board Act, R.S.O. 1980, Chapter 332;

10

AND IN THE MATTER OF subsection 13(5) and subsection 19 of the said Act;

11

AND IN THE MATTER OF a hearing to inquire into, hear and determine certain matters relating to contract carriage arrangements on The Consumers' Gas Company Ltd.'s, ICG Utilities (Ontario) Ltd's and Union Gas Limited's Ontario distribution systems.

12

BEFORE:

13

R.W. Macaulay, Q.C., Chairman

14

J.C. Butler, Vice-Chairman

15

D.A. Dean, Member

M. Jackson, Member

C.A. Wolf, Jr., Member

March 23, 1987

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1. INTRODUCTION

59

Overview

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1.1 This Decision, consisting of two volumes, deals with the common elements of contract carriage and direct purchase arrangements so that utility-specific rates and tolls can be designed. It addresses the manner in which natural gas will be sold and transported in Ontario. This Decision has been assigned docket numbers E.B.R.O. 410-II, 411-II and 412-II, since it is a continuation of the Decisions previously issued under Board docket numbers E.B.R.O. 410, 411 and 412 for The Consumers' Gas Company Ltd. (Consumers'), ICG Utilities (Ontario) Ltd (ICG), formerly Northern and Central Gas Corporation Limited, and Union Gas Limited (Union), respectively. The previous hearings and the Decisions are described below. The design of final rates and tolls, for each local distribution company (LDC), based on this

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61

Decision, will be addressed in the utility-specific rate design proceedings during 1987.

62

The Hearings

63

1.2 On December 9, 1985, the Ontario Energy Board (OEB or the Board) called hearings, on its own motions, to inquire into matters relating to interim contract carriage arrangements on the distribution systems of Consumers', ICG and Union. The three hearings were combined. They commenced on January 27, 1986, and lasted for thirteen days. The Board issued its Reasons for Decision on April 4, 1986 (the Interim Decision) under docket numbers E.B.R.O. 410, 411 and 412.

64

1.3 The Board on its own motions, by Notices of Public Hearing dated July 24, 1986, called further hearings to inquire into, hear and determine certain matters relating to contract carriage arrangements on Consumers', ICG's and Union's distribution systems in Ontario. The three hearings were combined (the Main Hearing). The main hearing commenced on Monday, September 22, 1986 and lasted for thirteen days before being adjourned until November 12, 1986. The changes that have occurred, and the new issues that have arisen since the Interim Decision, as well as the design and feasibility of permanent contract carriage arrangements in Ontario, were

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65

considered in this hearing and are the subject of this Decision.

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1.4 The Board decided that the common elements of contract carriage and direct purchase arrangements would be dealt with before considering utility-specific rates. The bypass issue was differentiated from other generic issues because of jurisdictional concerns and its potential impact on Ontario. Bypass involves the total avoidance of the LDC's system for the transportation of gas. The bypass issue was heard first, and because of its significance, separate Reasons for Decision were issued on December 12, 1986 under Board Docket Nos. E.B.R.O. 410-I, 411-I and 412-I for Consumers', ICG and Union respectively.

67

1.5 The Board found in that Decision "... that the Province of Ontario and this Board, as its delegate, has jurisdiction over bypass within Ontario." The Board stated "that it is important to remove any uncertainty with respect to its jurisdiction and will, therefore, state a case to the Divisional Court of the Supreme Court of Ontario." The Divisional Court commenced hearing this matter on March 17, 1987.

68

1.6 The Board noted that "this jurisdiction is imperative in order for the Board to carry out its statutory duties and responsibilities to

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69

regulate the transmission and distribution of natural gas and to approve and fix just and reasonable rates therewith in Ontario." The Board is of the opinion that "a general policy opposing bypass is not in the public interest. The Board will consider each application for bypass on the basis of its individual merits."

70

1.7 Applications for Certificates of Public Convenience and Necessity pursuant to the Municipal Franchises Act were filed with the Board by Northridge Petroleum Marketing, Inc. (Northridge), ATCOR LTD. (ATCOR), Brenda Marketing Inc. (Brenda), and Consoligas Management Ltd. (Consoligas). The Certificates requested were to allow these brokerage firms to supply gas in all municipalities in Ontario, with a term of the Certificates being that the brokers not be required to obtain franchises to supply gas in these municipalities.

71

1.8 The Board, through Procedural Orders, determined that all evidence in the Main Hearing applicable to the issues raised by the Certificate applications be incorporated into the Certificate hearings. These hearings were held on December 16, 1986, immediately following the Main Hearing. The Board will issue a separate Decision on this matter under Board docket numbers E.B.C. 177, 178, 179 and 180.

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72

1.9 On October 22, 1986, the Board held a hearing with respect to paragraph 9.27 of the Interim Decision. This hearing was held to consider the necessity for the Board to continue to approve Competitive Marketing Programs (CMPs). It was ultimately decided to continue the practice on an interim basis. Those hearings dealt with memoranda of agreement between the LDCs and TransCanada PipeLines Limited (TCPL) with respect to gas costs. These Decisions are discussed later in this chapter.

73

1.10 The Main Hearing reconvened on November 12, 1986, and lasted seventeen days, ending on

December 16, 1986. Final argument was received by January 26, 1987.

74

Background

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1.11 The Governments of Canada, Alberta, British Columbia and Saskatchewan recognized, in the Western Accord of March 28, 1985, on Energy Pricing and Taxation, a need for a more flexible and market-oriented environment. Pursuant to this need the Agreement on Natural Gas Markets and Prices (the Agreement) was signed on October 31, 1985, by those governments. Although Ontario was not a signatory, the OEB supports the basic principles which underlie the Agreement. These include:

Was Page 1/6. See Image [OEB:1134W-0:13]

76

* enhanced access for Canadian buyers to gas supply;

77

* enhanced access for Canadian producers to gas markets;

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* protection for Canadian consumers for reasonable, foreseeable gas requirements; and

79

* commitment to foster a competitive market for natural gas in Canada.

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1.12 The Board supports the development of a competitive market for natural gas in Canada and believes that open access to different sources of natural gas supply is essential to the development of this competitive market.

81

1.13 The intent of the Agreement was to create the conditions necessary for market-oriented pricing. The implementation, however, was left to the affected parties:

82

It is the intention of the parties to the Agreement to foster a competitive market for natural gas in Canada, consistent with the regulated character of the transmission and distribution sectors of the industry ...

Was Page 1/7. See Image [OEB:1134W-0:14]

83

1.14 The Agreement also recognized the importance of the pipeline link between the producer and consumer when it stated:

84

Effective November 1, 1985, consumers may purchase natural gas from producers at the negotiated prices, either directly or under buy-sell arrangements with distributors, provided distributor contract carriage arrangements are available in respect of such purchases. This provision is in no sense intended to interfere with provincial jurisdiction in regard to regulation of gas distribution utilities.

85

1.15 The twelve-month period from November 1, 1985, to October 31, 1986, was designated as a transitional period to a fully market sensitive pricing regime. During this transitional period wholesale prices prescribed by governments were frozen, but industrial customers without gas

sales contracts with the LDCs were free to negotiate prices for the purchase of natural gas directly with producers. The availability of direct purchase was, however, conditional upon contract carriage arrangements being available from the LDCs. To enable TCPL producers to meet the competition of direct purchase, CMPs were permitted between the end-use customer, the LDC, TCPL and its producers, effective November 1, 1985.

Was Page 1/8. See Image [OEB:1134W-0:15]

86

1.16 Although the transitional period prescribed in the Agreement lasted until October 31, 1986, the Interim Decision remains in effect until this Decision is issued.

87

1.17 Direct purchase is an arrangement whereby an end-user of natural gas purchases gas directly from a producer or broker rather than from an LDC. The gas is transported to Ontario by TCPL and is handled by the LDC in one of two ways:

88

* Buy-Sell: Wherein the Ontario LDC purchases the direct purchaser's volumes, commingles them with other purchased gas and sells to the direct purchaser as a sales customer under the appropriate rate schedule; or

89

* Contract Carriage: Wherein the LDC does not take title to the direct purchaser's supply of gas but contracts to carry the volumes of gas from the point of receipt through the LDC's system to the direct purchaser's take-off point.

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1.18 CMP discounts are provided by system producers (i.e., those producers from whom TCPL purchases gas) to individual end-users of gas. The contractual gas supply arrangements between the system producers, TCPL and the LDCs are unaffected. The LDC delivers and sells to the individual end-users at OEB approved sales rates. The LDC provides TCPL with details each month of the volumes delivered to each customer. TCPL rebates to the LDC the discount on those

Was Page 1/9. See Image [OEB:1134W-0:16]

91

volumes and the rebate flows to the customers as a credit on the following month's invoice. The effective sales rate after the CMP discount is approved by the Board. Market Responsive Price or Distributor Market Fund (MRP) discounts are similar to CMP discounts. The MRP funds result from the revised pricing agreements between the LDCs and TCPL. The specific rate resulting from each MRP discount is approved by the Board.

92

1.19 On December 3, 1985, the Ontario Minister of Energy announced Ontario's support for the introduction of interim contract carriage arrangements during the transitional period ending October 31, 1986. The Minister expressed his intention that, during this period, rates to other customers should not be adversely affected by the introduction of contract carriage arrangements.

93

1.20 In his statement of December 3, 1985, the Minister also requested the Board to carry out intensive studies during the transitional year to determine whether contract carriage rates could be continued beyond the transitional period without adverse impact on other gas customers or on

the integrity of the gas distribution systems.

Was Page 1/10. See Image [OEB:1134W-0:17]
94

1.21 These studies, which have been carried out, considered the impact of contract carriage on the cost allocation and rate design practices of the Ontario LDCs and surveyed the requirements of industrial gas users in Ontario.

95

1.22 Since the Interim Decision, in excess of, 40 contract carriage agreements, 20 buy-sell contracts and 730 CMP and/or MRP agreements have been approved on an interim basis by the Board both with and without public hearings.

96

1.23 In May 1986, the National Energy Board (NEB) released its Decision on the availability of transportation services on the TCPL system (RH-5-85).

97

1.24 In that Decision changes were made to the tariffs of TCPL that would enhance access to its pipeline for volumes of natural gas purchased directly from producers by end-users or agents. The displacement proviso in TCPL's transportation toll schedules, which dissuaded direct purchasers from obtaining transportation services when those direct purchases would displace volumes previously supplied by TCPL, was removed. In addition, the NEB determined that the duplication of demand charges paid by direct purchasers was inappropriate.

Was Page 1/11. See Image [OEB:1134W-0:18]
98

1.25 The NEB's Decision was appealed by TCPL. On November 14, 1986, the Federal Court of Appeal issued its Decision on this matter which confirmed the jurisdiction of the NEB to implement its Decision in RH-5-85.

99

1.26 Pursuant to the Agreement, an impartial Pipeline Review Panel (the Panel) was appointed to carry out a review of the role and operation of interprovincial and international pipelines engaged in the buying, selling and transmission of gas. The Panel, in its Report submitted on July 10, 1986, found market sensitive pricing to be feasible for both government and industry by November 1, 1986.

100

1.27 The Panel also made recommendations supporting the sanctity of contracts but endorsing contract renegotiation. It recommended that the marketing function of pipeline companies be separated from the provision of transmission services. Support was also expressed for the availability of the option to bypass the LDCs' systems in the absence of reasonably competitive alternatives, subject to the approval of the provincial regulatory authority.

101

1.28 Revised pricing agreements between the system producers, TCPL and the LDCs in Ontario and Quebec were reached in September 1986. The new agreements provide for a variety of discounts

Was Page 1/12. See Image [OEB:1134W-0:19]
102

in the price of natural gas. These discounts are said to allow the LDCs to compete more effectively in the gas markets serving large volume commercial and industrial customers.

103

1.29 In December 1986, the Board issued Decisions in response to the LDCs' applications to reflect in rates the LDCs'/TCPL's memoranda of agreement with respect to revised gas costs and the pricing schemes that resulted. The memoranda provided for a 20 per gigajoule reduction in the cost of all contract gas purchased from TCPL from September 1986 to October 1988. They also provided for significantly larger discounts to be passed to certain commercial and industrial customers. These discounts would be drawn from market funds provided by the producers and administered by each LDC and TCPL. In these Decisions the Board indicated concern that the proposals could effectively result in the Board no longer fixing rates for those customers.

104

1.30 The Board also indicated concern in its Decisions that, based on the evidence before it, the proposed method of dealing with the market funds could lead to undue discrimination, which could ultimately lead to disruption in the industry. The Board concluded that it would be in the interests of all concerned if time were allowed for further negotiations of the

Was Page 1/13. See Image [OEB:1134W-0:20]

105

contracts that would allow the Board to fully exercise its jurisdictional mandate.

106

1.31 The Board initially accepted the LDCs' proposals for six months, but extended this acceptance until October 31, 1987, because TCPL and the LDCs agreed to renegotiate the respective agreements to address the Board's concerns. During this period the Board will require all CMPs or specific MRP discounts to be submitted to the Board for approval.

107

1.32 Although the Board has accepted the proposals for one year, it believes that negotiations between the parties need not necessarily take twelve months. The Board directed the LDCs to inform the Board as to the progress of the discussions with TCPL in these matters. The Board will assess the situation periodically and decide on an appropriate course of action.

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1.33 The Board established the following criteria by which the situation will be assessed:

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* gas purchased by the LDC should arrive in Ontario without being streamed to specific customers or customer groups;

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* the arrangements should permit the Board to determine the rates or end prices for customers and to give any necessary

Was Page 1/14. See Image [OEB:1134W-0:21]

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recognition to customer groups and market forces; and

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* the market for gas in Ontario should be open and there should be free access to transportation on TCPL's and the distributors' systems.

Was Page 2/1. See Image [OEB:1134W-0:22]

113

2. NATURAL GAS MARKET AND PRICES

114

Introduction

115

2.1 Prior to November 1, 1985, TCPL was essentially the sole seller and the sole transporter of Western Canadian gas to Ontario. TCPL obtained its gas supplies exclusively from approximately 650 producers in Alberta (system producers). As a result, gas producers not selling to TCPL (non-system producers) had virtually no access to the Ontario market.

116

2.2 On October 31, 1985, the Governments of Canada, Alberta, British Columbia and Saskatchewan signed the Agreement. Its stated intent was to "foster a competitive market for natural gas in Canada consistent with the regulated character of the transmission and distribution sectors of the gas industry".

Was Page 2/2. See Image [OEB:1134W-0:23]

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A Competitive Market

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2.3 In a perfectly competitive situation, market forces should drive the commodity price of gas to a level equal to the marginal cost of producing the gas. To the extent this occurs, the market will be determining an efficient allocation of resources. It is in the public interest to ensure that the most efficient allocation of resources is obtained.

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2.4 There are at least three different views or scenarios of a competitive gas market shared in the industry:

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* The traditional one seller and many buyers;

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* The limited access of some buyers to all sellers; and

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* The unlimited access by all buyers to all sellers.

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2.5 The concept of a competitive market for natural gas has not been clearly defined by any of the parties and appears to mean different things to them. Some parties believe that a competitive market means that the market is segmented in some manner and customers are only able to transact in their own segment. Some economists claim that competition can only exist in a

Was Page 2/3. See Image [OEB:1134W-0:24]

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segmented market if parties are allowed to transact across segments.

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2.6 According to the following quote from a communiqu issued on October 31, 1985, the Honourable Ms. Carney did not explicitly contemplate market segmentation:

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All customers will be able to renegotiate existing contracts during the transition period, providing all parties agree ... by November 1, 1986, all natural gas buyers and sellers in Canada will be released from

unnecessary Government intervention in their market place, ... (emphasis added)

127

2.7 Just as there is little agreement on what constitutes a competitive market, there is also a lack of agreement on what segmentation should exist and consequently, on how to define the core market. Some would like the entire market to be considered as core. Others argue that the core market consists of those end-users of gas that can not reasonably be expected to contract for their own needs. A third view is that the core market should consist of those who are either unable or unwilling to contract directly for their own needs and that the non-core market would, therefore, consist of all those prepared to accept the inherent risks of not being part of the core market. A fourth view is that there should be no market segmentation at all.

Was Page 2/4. See Image [OEB:1134W-0:25]

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2.8 The relaxation of the surplus test used to protect the domestic market's gas needs was discussed in Ottawa/Alberta discussions prior to October 30, 1986. The two governments asked their regulatory boards to consider if the core market should have protection.

129

2.9 The Board, for the specific purposes of this Decision, defines the core market as those volumes that are sold by the LDCs, excluding buy-sell volumes. The Board accepts that other definitions may be more appropriate depending upon the reasons for establishing the core/non-core separation. If the Board finds it necessary to define the core/non-core market segmentation for other purposes, it will do so and if appropriate it will seek the advice of all interested parties.

130

The Board's Findings

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2.10 The Board finds that to encourage a perfectly competitive commodity market for natural gas, at least three conditions must be satisfied. Firstly, all natural gas consumers or their agents must be free to choose from whom they purchase their natural gas supply. Secondly, transportation service on TCPL's and the LDCs' systems must be provided to all gas consumers on equal terms. That is, the tolls for non-system gas must not be more onerous than those

Was Page 2/5. See Image [OEB:1134W-0:26]

132

for system gas. Thirdly, buyers must have access to sufficient information concerning market prices for gas.

133

Access to Gas Supply

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2.11 Ironically, although the goal of the Agreement was to promote competitive market conditions, the Agreement itself has hampered the achievement of this goal by preserving the sanctity of the long term contracts between TCPL and the Ontario LDCs.

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2.12 TCPL has more than enough gas under these contracts to serve the core market through the LDCs, and as the sanctity of contracts has been preserved, the right to serve these customers essentially falls to the TCPL producers and not to other producers. The core customers thereby face a less competitive cost of gas than non-core customers who have the competitive alternative

of buying gas from some other supplier through direct purchase arrangements.

136

Access to Transportation

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2.13 This Board has no jurisdiction over the tolls charged by TCPL. Any barriers arising from TCPL's tolls are under the jurisdiction of others. The "double demand charge", which in the past has been a barrier to transportation

Was Page 2/6. See Image [OEB:1134W-0:27]

138

service, has in part been eliminated. The double demand charge arose when a customer changed to direct purchase and incurred demand charges for TCPL to transport the gas while the LDC continued to be liable for demand charges for the same TCPL capacity. In its RH-5-85 Decision, the NEB approved displacement and operational demand volumes so that those qualifying under the definition of displacement will not face double demand charges after January 1, 1987.

139

2.14 This Board has the mandate to determine the rates charged by the Ontario LDCs and it intends that non-core end-users be relatively unencumbered in Ontario with respect to entering into direct purchase and transportation arrangements. However, core customers face the potential for undue discrimination and, as such, it is the need to protect the core market customers which requires the OEB's continued involvement in the regulation of the LDCs' cost of gas supplies.

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The Board's Findings

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2.15 The Board will continue to monitor the cost of gas for the core market. Innovations, such as the introduction of a "tender" purchasing system, may have to be considered.

Was Page 2/7. See Image [OEB:1134W-0:28]

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2.16 The Board finds that those buyers who choose to become part of the non-core market, and accept whatever risks are inherent therein, should be allowed to do so.

143

Access to Market Information

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2.17 The lack of market information was claimed by some to be a barrier to a competitive market. However, others argued that there is the potential for harm to the LDC, the broker and the customer if sensitive information is made public.

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2.18 The Board currently receives certain price-related information from the LDCs on a confidential basis. This is useful, but incomplete, since not all competitive pricing information is available to the Board.

146

The Board's Findings

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2.19 The Board finds that any person engaged in the sale of gas in Ontario shall provide to the Board, monthly, on a confidential basis, on a customer basis (indicating the customer's identity), for those customers or customer groups purchasing directly from brokers, or those customers receiving CMP or distributor market fund discounts, data showing the volume

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of gas contracted for and the customer's corresponding net price of gas.

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2.20 The Board may require and may request, from time to time, other information.

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2.21 The Board finds that the dissemination of some aggregated pricing information will be essential to the development of a competitive market for gas in Ontario. It will exercise discretion in determining the nature, format and frequency of the publication of this information.

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2.22 To enhance the completeness of its data base the Board requests that when gas is purchased directly, with the sale taking place outside of Ontario, and transportation is provided by the Ontario LDCs, the customers provide information as outlined in paragraph 2.19. This information will be kept on a confidential basis, but included in the dissemination of data noted in paragraph 2.21 in such an aggregated manner that the identity of customer-specific information is protected from public disclosure to competitors.

152

Reregulation

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2.23 Prior to what is commonly referred to as deregulation, but which might more appropriately be called reregulation, TCPL and the LDCs have had

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a monopoly over the sale and transportation of gas. Direct purchase has introduced a competitive element into the gas supply market, breaking TCPL's and the LDCs' monopoly to sell gas. The monopoly to transport gas still exists, reflecting the principles of the public utility concept. The public interest and the public utility concept are discussed in Appendix G.

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2.24 As the monopoly to transport gas will remain, the need for regulation will continue.

156

2.25 The LDCs will continue to require a reasonable rate of return on their utility investments. The LDCs' return is based on its capital investment. The ownership of the gas has minimal impact on the LDCs' return. As a result, direct purchase poses no threat to the LDCs' financial well-being. To this extent, an LDC should be concerned with the loss of market to non-gas competition, but it ought not to be concerned with the loss of market to alternative suppliers of gas.

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2.26 However, because core customers will have no gas supply alternatives to the LDC and TCPL, there is a potential for undue discrimination. Discrimination in this context is the practice of exacting different charges for different service rendered at the same marginal cost; or,

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failing to impose higher charges for services rendered at markedly higher marginal costs.

159

2.27 Within a regulated environment some discrimination can occur. The regulator's mandate is to ensure that any discrimination, if present, is not undue. In the context of a natural monopoly, discrimination may arise in the allocation of costs to customers but is not necessarily undue.

160

The Board's Findings

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2.28 The Board is aware of the uncertainty that has existed since the Agreement was signed on October 31, 1985. Evolving circumstances, including the issuance of this Decision, will have helped to dispell some of the uncertainties that existed when many of the interim CMP and MRP arrangements were entered into. To qualify for a CMP or MRP discount a customer must have a gas sales contract with the LDC. The Board encourages renegotiation of these gas sales arrangements by the LDC and end-users, to allow the end-users to fully participate in the more competitive market in light of the new circumstances relevant to transportation arrangements.

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2.29 The Board has endorsed the development of a competitive market in Ontario which requires that there be equal opportunity among potential

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suppliers. In addition, the Board endorses the concept from its Interim Decision that "the end-user shall have a choice of services and directs each utility to structure its proposals to end-users such that the terms and conditions will not favour one type of service over another."

164

3. ISSUES

165

Introduction

166

3.1 This chapter deals with the 12 major issues identified in the Board's Procedural Orders.

167

Part A Brokers

168

Introduction

169

3.2 The Brokers issue involves several sub-issues that will be dealt with in this Part. These include a definition of broker, the core/non-core issue, contracting directly with the LDC, and broker operation and regulation in Ontario.

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3.3 The legal issues related to brokers operating in Ontario are dealt with in chapter 4, Legal Matters.

The Certificate applications of Northridge, ATCOR, Brenda and Consoligas will be dealt with in a separate Decision issued under Board Docket numbers E.B.C. 177, 178, 179 and 180 respectively.

171

Definition of a Gas Broker

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3.4 A gas broker, narrowly defined, is an entity that brings together buyers and sellers of gas without taking title to any gas. Thus the broker acts as an agent or consultant. An entity which takes title and acts as a principal in the transaction is referred to as a marketer of gas. In this Decision, the term "broker" will be used broadly to include the term marketer as defined above.

Was Page 3/3. See Image [OEB:1134W-0:35]

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Core/Non-Core

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3.5 The Board in this proceeding heard at least five different definitions of the core market. As noted earlier, the Board considers the core market as those volumes that are sold by the LDCs, excluding buy-sell volumes.

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3.6 A major issue may be security of supply insofar as it relates to the brokers' ability to fulfill their obligations to customers who have left the core, particularly with respect to:

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* Impact of supply failure (hospitals, schools, nursing homes, etc.)

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* Financial stability of the supplier and/or broker

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* Term of the contract

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* Assessment of supply sources

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The core/non-core issue as it relates to the security of supply is dealt with later in the Decision.

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Contracting Directly with an LDC

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3.7 A critical issue with respect to brokers operating in Ontario is their ability to contract directly with an LDC for pipeline capacity. Associated with this direct contracting is the right to sell gas in Ontario. Until now, brokers have been prevented from doing both, in

Was Page 3/4. See Image [OEB:1134W-0:36]

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part, because the LDCs have insisted on individual contracts with the end-user and because the brokers have not yet met the necessary statutory requirements, imposed by current legislation, to operate as marketers in Ontario.

184

Positions of the Parties

185

The LDCs

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3.8 Consumers' submitted that it is concerned about allowing brokers totally unimpeded access to operate as principals. Consumers' argued that its contact with the marketer would be far more impersonal than with the end-user. It also argued that brokers do not need to control pipeline space on either the interprovincial transmission system or the Ontario distribution systems to provide benefits to Ontario gas consumers.

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3.9 Union submitted that the LDCs should be left in a position of being able to refuse to contract with brokers for the provision of transportation service and to require that title to the gas and the transportation contract be held by the end-user.

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3.10 Union also submitted that all of the primary benefits to be provided by brokers can be achieved without the disadvantages of brokers,

Was Page 3/5. See Image [OEB:1134W-0:37]

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if brokers continue to act only as agents for end-users in their relationships with the LDCs.

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3.11 Union argued that brokers do not contribute to the efficiency of the LDCs' distribution systems by providing wellhead to burner tip service.

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3.12 ICG submitted that it has no objection to dealing with brokers who are acting as intermediaries or agents for end-users. It argued, however, that it is not in the public interest for brokers to sell gas in Ontario as principals, but if they were permitted to sell gas in Ontario, they should be regulated in the same manner as the LDCs. ICG also submitted that if brokers are allowed to sell gas in Ontario, particularly to the core market, then the price at which gas is sold should be regulated in the public interest.

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The Brokers

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3.13 Northridge, ATCOR, Brenda and Consoligas argued that brokers must have the freedom to sell gas to end-users at the plant gate. They submitted that although there is the buy-sell option, there is no substitute for the ability of brokers to offer a complete service package for sale at the plant gate.

Was Page 3/6. See Image [OEB:1134W-0:38]

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3.14 These brokers also submitted that since few end-users are in the gas business, and others do not want to acquire expertise in gas marketing, the presence of brokers would allow a direct purchase to be a single contract transaction from the end-user's perspective.

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3.15 These brokers also submitted that their ability to sell gas at the plant gate would allow end-users with complementary loads to be grouped together to make the most efficient use of transportation service. End-users, especially those with alternative fuel capability, are reluctant to enter into long term contracts for the supply of gas. A broker could take advantage of its diverse customer base and contract for long term transportation service that may be required if capacity becomes scarce.

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Industrial Gas Users and Producers

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3.16 Polysar supported the activities of brokers in Ontario in all aspects of gas marketing.

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3.17 Canadian Petroleum Association (CPA) argued that, to the extent transportation arrangements are available on the LDCs' systems, they should be reasonably open and available to any responsible party, including brokers.

Was Page 3/7. See Image [OEB:1134W-0:39]

199

3.18 Industrial Gas Users Association (IGUA) submitted that a broker acting as an agent for a disclosed principal should be eligible to acquire transportation services from an Ontario LDC. IGUA also submitted that if it is in the public interest of Ontario for brokers to assist direct purchases outside Ontario, then surely it is in the public interest to permit brokers to assist within Ontario.

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3.19 Cyanamid Canada Inc. (Cyanamid) argued that brokers are an essential component of the full implementation of market responsive gas pricing. It submitted that it is essential that brokers have the right to contract directly with the LDCs rather than just act as advisers to customers in Ontario.

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3.20 C-I-L Inc. (CIL) and Nitrochem Inc. (Nitrochem) argued that it would be in the public interest to allow brokers to enter into transportation and storage contracts particularly for groups of end-users.

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Other Groups

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3.21 The Director of Investigation and Research (The Director) argued that marketers and groups should be given access to the distribution system because it will ensure the most effective and efficient means of connecting buyers and

Was Page 3/8. See Image [OEB:1134W-0:40]

204

sellers of gas. He also submitted that most individual end-users do not have the knowledge or inclination to understand the gas transportation business. The Director submitted that, to prevent marketers or groups who have this expertise from gaining access to the system, would result in a significant barrier to the evolution of a competitive gas supply market.

205

3.22 Energy Probe submitted that the establishment of a truly competitive gas supply market in

Ontario requires that all gas brokers, including gas marketing arms of the LDCs, compete on an equal footing within the Province. It also would require the LDCs to function as common carriers with respect to the transportation system.

206

3.23 The City of Kitchener submitted that permitting brokers to contract directly with end-users will not solve the main problem faced in this hearing, which is to provide non-discriminatory access to a competitive supply market. It argued that permitting brokers to contract directly with end-users will introduce inefficiencies.

207

Special Counsel

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3.24 Special Counsel submitted that brokers ought to be allowed to act as principals. Brokers must

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be able to hold title to and sell gas in the Province and be able to contract directly with the Ontario LDCs. Special Counsel also submitted that it is necessary, recognizing the many barriers beyond the jurisdiction of the Board, to achieve the benefits of market responsive pricing for the widest possible group of natural gas users in Ontario.

210

The Board's Findings

211

3.25 The Board finds that, subject to complying with all legal requirements in Ontario, brokers should be allowed to contract directly with the Ontario LDCs. It is only in this manner that open access to T-service can be achieved so that market responsive gas prices can be broadly obtained.

212

Broker Operation and Regulation in Ontario

213

3.26 Participants to the hearing expressed concerns regarding the operation of brokers within Ontario. These concerns related to financial integrity, security of supply, unregulated mini-distribution systems and "cream-skimming" or "cherry-picking".

214

Positions of the Parties

215

The LDCs

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3.27 Consumers' submitted that contact with the broker would be far more impersonal than contact with the end-user. Consumers' questioned who would be held contractually obligated if the client used more gas than the broker delivered on its behalf. Consumers' argued that in combining loads and acquiring distribution services, brokers would be usurping diversity benefits derived from the utility's physical assets.

217

3.28 Union argued that brokers' activities in repricing and repackaging services would involve a loss of control of the system. Union also argued there would be increased complexity of administering and enforcing contracts by interjecting a broker between the distributor and end-user. As well, Union argued that its operating demand volume might not be reduced for all broker volumes, and thus there will be an increased probability of unabsorbed demand charges. Union submitted that the brokers are seeking all of the benefits of controlling the distribution system without the responsibility of the associated obligations.

218

3.29 ICG submitted that there are no savings to be made on an overall basis in transportation costs in Ontario. To the extent that a broker was able to arrange transportation on the LDC's system, which resulted in lower cost to a group of end-users, greater costs would be incurred by the remaining customers. ICG argued that a broker will be able to "cream-skim" ICG's customers to the detriment of its remaining sales customers by judiciously combining loads and exercising diversion rights.

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The Brokers

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3.30 Northridge, ATCOR, Brenda and Consoligas submitted that no justification was given for treating brokers in any different manner from end-users insofar as financial integrity is concerned. They argued that even if a broker were a legitimate credit risk, a guarantee of two months payment would be sufficient. They submitted that brokers should have no obligation to serve because, unlike LDCs, they would have no corresponding monopoly aspect to their business. The brokers submitted that the "cream-skimming" argument is not unique to the broker issue, but would also occur if sales customers become transportation customers. They submitted that the method to avoid "cream-skimming" is to have the rates in line with the costs to serve.

221

Industrial Gas Users and Producers

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3.31 CPA argued that the LDCs' concerns expressed about the creation of mini-distributors are unfounded. CPA submitted that to the extent that brokers can be more efficient, via diversions or group billing, in the long run such increased efficiency can only benefit the overall operations of the LDCs.

223

3.32 IGUA submitted that it is not in the public interest for sales of gas by brokers to be subject to regulated sales rates. This would add nothing to the market sensitivity of gas prices in Ontario.

224

3.33 Cyanamid submitted that some form of minimal licensing may be required for those brokers who wish to operate in the residential and small commercial markets. This need not be onerous and would consider the brokers' experience in the gas industry and the brokers' financial stability. Cyanamid submitted that regulation of brokers should not extend to regulating the price they charge, nor the return they earn. It also submitted that the brokers should not have an obligation to serve any particular customer because the broker would not have a monopoly with respect to its services.

225

3.34 Cyanamid submitted that "cherry-picking" can easily be avoided by rates which reduce the mark-up to high load factor customers so that rates are in line with the costs to serve. Cyanamid argued that if brokers are able to combine loads to different types of customers, this will create more overall system efficiency, not less, and claimed that there is no reason to believe that the existing systems are at the optimum size as to load, geography, or customer mix.

226

Other Groups

227

3.35 The Director submitted that a reasonable form of licensing can take care of the financial integrity concern that the LDCs have about brokers. The Director submitted that the entry of brokers who have access to diverse supplies of gas will contribute to the secure supply of gas to consumers. He also submitted that regulating the price of gas sales by brokers would entirely defeat the purpose of market responsive pricing.

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3.36 The City of Kitchener argued that the broker, by selecting its customers in a way that maximizes the efficiency of its service, reduces the efficiency of the franchised service. It also argued that the Board can make up for the financial fall-out of having brokers operating

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in Ontario in respect of Union's, Consumers' and ICG's financial integrity. The City of Kitchener said that this Board does not have the obligation to protect The City of Kitchener's or Kingston's financial integrity and thus ought not to recommend changes which impair it.

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Special Counsel

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3.37 Special Counsel argued that a guarantee or two month's deposit covering the billing cycle, as well as the ability of the LDC to discontinue service to the broker, resolved all concerns about financial integrity.

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3.38 Special Counsel submitted that there were no incidents disclosed during the hearing of a customer going without gas because of a broker's supply failure.

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3.39 Special Counsel argued that to the extent the existing rates are not cost-based, the "cherry-picking" phenomenon may lead to higher rates for remaining customers. Special Counsel submitted that regardless of that fact, if contract carriage rates are to be implemented successfully on a permanent basis, the LDCs' cost allocation practices must be thoroughly reviewed and altered, at least in part. Special Counsel submitted that it is not reasonable to expect that an LDC would necessarily be able to

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supply gas to a customer which has left its system for T-service.

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The Board's Findings

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3.40 The Board finds that, if in compliance with Ontario legal requirements, brokers would be consistent with and will assist in the development of a competitive gas supply market in Ontario.

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3.41 The Board deals with the Ontario legal requirements in Chapter 4.

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3.42 The financial soundness of brokers will be considered as part of the review undertaken by the Board before it issues a Certificate of Public Convenience and Necessity. The question of security of supply is dealt with later in this Decision.

Was Page 3/16. See Image [OEB:1134W-0:48]

239

Part B Bundled versus Unbundled Rates

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Introduction

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3.43 A bundled rate covers a combination of services such as storage, transportation and load-balancing. Unbundled rates entail separate rates for each of these services enabling a customer to contract and pay for only those services desired.

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3.44 The Interim Decision provided for the application of a formula to determine contract carriage rates. This formula was based on existing sales rates and was constructed as follows: T-rate = sales rate - avoided costs + added costs. The avoided costs were gas costs, while added costs were the TCPL demand charges. The resulting T-rate was a bundled rate since it included all the services previously provided under sales service except for gas supply, i.e. transportation, load-balancing, storage and back-stopping. The composition of this bundle varies with the individual LDC. The separation of gas cost from the sales rate was only a partial unbundling of rates.

Was Page 3/17. See Image [OEB:1134W-0:49]

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Positions of the Parties

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The LDCs

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3.45 The LDCs were united in the position that all services could not be unbundled, but their positions varied on the extent to which they could unbundle and which services they would offer on this basis.

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3.46 Union proposed to unbundle sales from contract carriage service. It would also unbundle storage service for contract carriage customers. T-service would provide for a competitive market through the use of range rates. Storage service would be unbundled into space, injection and withdrawal components with an overrun charge for customers exceeding contract use. Union did not propose a firm back-stopping service, but it would offer a best efforts back-stopping service

available under the Rate M2 schedule. Union favoured rate determination using a round up approach.

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3.47 Consumers' proposed that it would offer two services: a full T-service which would include transportation, storage, load-balancing and best efforts back-stopping; and

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a bare T-service. The cost of the full service would be calculated by backing out the average

Was Page 3/18. See Image [OEB:1134W-0:50]

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cost of gas from the sales rate and the bare T-service would be set on a fully allocated cost study. Consumers' indicated that it had no storage other than that contracted for with Tecumseh and Union, but would contract with Union on behalf of customers for storage.

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3.48 ICG proposed to offer sales service and T-service based on bundled rates. Contract carriage customers would be transportation customers only, with no separate load-balancing or storage services offered. The cost for such a transportation service would be calculated by deducting gas costs from the sales rate. Load-balancing and storage costs are considered minimal and too difficult to separate by ICG and, therefore, would be included in the bundled rate.

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The Brokers

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3.49 Northridge, ATCOR, Consoligas and Brenda considered that there was a need for complete unbundling of transportation, load-balancing, back-stopping and storage. They claimed that the LDCs gave no firm evidence as to why services could not be totally unbundled. Unbundling is necessary to facilitate the efficient operation of a competitive gas supply market. According to these brokers, both

Was Page 3/19. See Image [OEB:1134W-0:51]

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bundled and unbundled rates should be available to permit the customer a range of selection.

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Industrial Gas Users and Producers

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3.50 Industrial gas users such as Cyanamid, CIL, Nitrochem and Polysar, as well as the associations, IGUA and CPA, all advocated the need for unbundling of services but there were variations as to the degree to which these services could or should be unbundled. Cyanamid, CIL, Nitrochem, IGUA and CPA submitted that transportation, storage and load-balancing with back-stopping on a best efforts basis should be offered as separate services. CPA submitted that peaking service should be offered as well.

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3.51 They argued that rate design should be cost based with all cost items allocated to particular services being clearly identified. Cyanamid felt that this rate design period would be the best time to eliminate the over-contribution of the industrial classes. Polysar stressed that both bundled and unbundled rates should be available to the customer to permit selection of the services required.

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Other Groups

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3.52 Energy Probe and the Director considered that the LDCs must fully unbundle all services. They saw a need for a full cost allocation study with rates built from the ground up. The City of Kitchener stressed the difference between each utility and argued that the unbundling of services should only include what is feasible for the utility concerned.

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Special Counsel

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3.53 Special Counsel submitted that the Board ought to order as many separately costed unbundled services for each LDC as is possible in their respective circumstances. Within a contract carriage environment, he considered that unbundled rates would allow for a more efficient use of society's resources and that the best approach to unbundle rates is to perform cost allocations from the ground up. He saw separate cost allocations for transportation and other unbundled services as assisting in establishing a clear distinction between the transportation and sale of gas.

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3.54 Special Counsel submitted that it was clearly within the capability of Consumers' and ICG to completely unbundle their rates. The Board should order both these utilities to prepare

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separate cost allocations for each unbundled service, and present these in the utility-specific rate hearings. Special Counsel submitted that the Board should adopt Union's unbundling proposal. Union's current storage rate is based on a separate cost allocation study. The Board should order Union to perform a separate cost allocation for the unbundled storage proposal to be presented in the utility-specific rate hearing. A firm back-stopping provision should also be investigated and presented by Union and Consumers'.

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The Board's Findings

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3.55 The Board finds that unbundled services are a necessary part of the movement toward a more competitive commodity market for natural gas. The Board, in its Interim Decision, recognized the need to quickly implement interim transportation service, and the complexity of designing unbundled rates and consequently opted for a partially unbundled interim solution.

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3.56 The Board finds that it is now appropriate to unbundle rates to the maximum extent possible. The Board recognized that rates should be properly designed to reflect costs, including a return component. Rate proposals, submitted in the utility-specific rate hearing, must be

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supported by cost allocation studies. These studies should be performed from first principles, identifying where possible the cost relationship between the provision of services and the incurrence of costs (often referred to in the Main Hearing as a "bottom up" approach). The Board directs the utilities to segregate the cost of gas and develop cost studies for transportation, storage, load-balancing and best efforts

back-stopping services separately.

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Part C Distance-Based/Postage Stamp/Value of Service Rates

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Introduction

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3.57 Distance-based rates vary with the distance between a specified geographic points. Postage stamp rates are uniform in a specified area and are charged per volumetric commodity unit transported or sold. Value of service rates are rates which reflect an economic benefit to a customer of using one service or energy source over an alternate source.

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Positions of the Parties

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The LDCs

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3.58 The three LDCs all favoured postage stamp rates over distance-based and value of service rates. Although they considered the argument that distance-based rates are cost-related, they identified several factors that work against them. They argued that distance-based rates create administrative problems due to the complexity of the pipeline network and that this makes it difficult to derive and apply these rates. Distance-based rates were claimed to be discriminatory by the LDCs in that they give preference to accidents of geography, i.e. to those situated near pipelines. The LDCs noted

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that distance-based rates are contrary to public policy which encourages a balanced economic development throughout the Province. They argued that distance-based rates would encourage regionalism as a result of industry locating near TCPL's pipelines.

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3.59 The LDCs recognized that range rates which permit value of service consideration would be useful in competing with alternatives such as bypass.

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The Brokers

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3.60 Northridge, Consoligas and Brenda argued that distance-based rates reflect the cost of transportation and therefore must be adopted. They saw postage stamp rates as being insensitive to competitive alternatives. These brokers argued that rates should reflect the customers' alternatives, i.e. bypass. Value of service rates were seen by these brokers as discriminatory since they penalize the captive customer who has no other alternate energy source. ATCOR saw postage stamp rates as being generally consistent with a competitive market.

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Industrial Gas Users and Producers

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3.61 The industrial gas users and producers generally argued that distance should be a component of

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rates. They varied, however, in the degree to which they recommended distance be reflected in the rate. CPA argued that distance-based rates most accurately reflect cost causation. IGUA, however, considered that zonal rates should apply within zones approved for TCPL. It saw no way of rationally introducing value of service into rate design. Polysar, CIL and Nitrochem submitted that distance should be factored into rates, perhaps through a combination of postage and distance-based elements. In this way, distributors may be forced to segregate costs that vary by distance. Cyanamid argued that the cost of the next best alternative should be considered in establishing a range rate.

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Other Groups

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3.62 Energy Probe, in principle, preferred cost-based rather than cost-related rates and advocated distance-based rates. It would, however, defer to the judgement of the LDCs as to circumstances under which distance or value of service factors should apply. The Board should scrutinize the LDCs' decisions, if necessary. The City of Kitchener saw uniform rates as an important feature in Ontario's attempt to encourage industry to locate widely across the Province. The Director expressed no opinion on whether rates should be distance-based or postage stamp

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based, but was opposed to any system based on value of service rates.

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Special Counsel

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3.63 Special Counsel submitted that distance was fundamental to the cost of transportation and that distance-based rates should lead to a more efficient use of the LDC's system, at least for incremental loads. He submitted that as the nature of the Ontario natural gas commodity market becomes more competitive, the transition for the LDCs and end-users will be significant without imposing further changes through the system of designing rates. Special Counsel noted that range rates do impose an element of value of service on postage stamp rates. These rates provide competitive flexibility, but the potential for discrimination as well.

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3.64 Special Counsel recommended that the Board order the LDCs to design a distance-based rate to create an effective alternative to bypass.

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The Board's Findings

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3.65 In order to meet the dual objectives of administrative simplicity and operational efficiency, the Board finds that postage stamp rates are appropriate at this time.

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3.66 The Board in its Bypass Decision recognized the need to design rates to address the potential for

bypass. The flexibility needed to compete with a credible bypass application may be provided through the application of value of service criteria or through the incorporation of distance factors in rate design. Such flexibility would introduce the potential for discrimination, but depending on the circumstances, it may not be considered undue.

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Part D Group Billing and Multiple Location Billing

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Introduction

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3.67 Due to the new regulatory environment in Ontario, it is necessary to again consider the issue of group and multiple location billing. The essential change in the environment is the existence of unbundled services where a bundled service used to exist. The transportation and sale of the commodity are now separated.

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3.68 In past Decisions the Board has disallowed group billing to prevent a customer from qualifying for a preferred rate classification through "grouping", and hence a reduced total bill. Group billing was also rejected by the Board because the lower rates to certain customers would not allow for full recovery of the cost imposed on the system by those customers. The Board, however, has allowed group billing in relation to contiguous properties to ease administrative billing problems.

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Positions of the Parties

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The LDCs

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3.69 Consumers' argued that each separate location should be billed separately. Group billing is

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only appropriate with respect to multiple meters at a single plant site. Consumers' argued that access to direct purchase gas for groups can be, and is being, accommodated through buy-sell arrangements.

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3.70 Union accepted that under certain conditions group billing should be allowed. Each plant must, however, be under common ownership and must qualify for T-service on its own. Union would require separate contractual commitments for transportation to each individual plant, but is willing to do so through separate clauses within one contract.

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3.71 ICG argued that the basic principle should be a separate bill for each location. ICG is, however, prepared to group bill for administrative convenience on a limited basis.

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The Brokers

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3.72 Northridge, ATCOR, Brenda and Consoligas argued that group billing should be used wherever practical for the administrative convenience of both the customer and the utility.

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Industrial Gas Users and Producers

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3.73 Polysar submitted that group billing should be permitted in tandem with the activities of brokers.

Was Page 3/30. See Image [OEB:1134W-0:62]

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3.74 CPA submitted that group billing should be consistent between the LDCs' respective sales and transportation service groups.

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3.75 Cyanamid submitted that a group need not have any special purpose, as long as the group covers its cost of service. Cyanamid also argued that industries with plants at different locations should have the opportunity of combining their loads under a single contract.

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3.76 CIL and Nitrochem support in principle the right of a single corporate entity to contract for, and be billed for, the delivery of gas at a number of non-contiguous locations.

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3.77 IGUA argued that if group and multiple location billing can be justified on cost to serve grounds, they ought to be permitted.

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Other Groups

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3.78 The Director argued that group billing should be allowed to increase the availability of transportation services to groups of end-users.

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3.79 Energy Probe argued that group billing and multiple location billing should be provided by the LDCs, if requested by customers. It submitted that, if such billing practices caused additional costs to be incurred, those costs

Was Page 3/31. See Image [OEB:1134W-0:63]

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should be passed on to those customers who benefitted.

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3.80 The City of Kitchener accepted the position of Union Gas on the issue of group billing.

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Special Counsel

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3.81 Special Counsel submitted that group billing must be allowed to permit more end-users to benefit from direct purchase by allowing end-users to be grouped for gas purchases. Special Counsel submitted that the Board must ensure that the groups only obtain a less expensive commodity price and not a less expensive transportation price.

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The Board's Findings

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3.82 The Board finds that groups should be permitted to be formed for the purpose of improving gas purchasing power. End-users may group together to purchase gas.

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3.83 The Board recognizes that transportation is a separate function from the supply of the commodity. The full costs of transportation must still be recovered from each location served. The Board will require that there be a separate contractual agreement with the LDC for

Was Page 3/32. See Image [OEB:1134W-0:64]

317

T-service. However, more than one service location may be covered in one document.

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3.84 The Board finds that combined bills for solely administrative purposes are acceptable as long as rates are based on the principle that the customer that causes costs to be incurred pays rates reflecting such costs of service.

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3.85 The question of grouping for the purpose of storage, load-balancing and back-stopping will be dealt with at the utility-specific hearings.

Was Page 3/33. See Image [OEB:1134W-0:65]

320

Part E Demand Charges

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Introduction

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3.86 Prior to the introduction of the direct purchase option customers bought their gas from one of the LDCs, which in turn purchased most of its gas supplies under long term gas supply contracts with TCPL. One part of the supply contract with TCPL is a demand charge to reserve pipeline capacity for firm transportation.

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3.87 When an existing gas customer arranges to purchase gas directly, it must arrange for transportation on TCPL's system, and in doing so, the end-user commits to pay a demand charge for firm service. The LDC is contractually obligated to pay the demand charge associated with the same pipeline capacity. This resulted in the so-called "double demand charge".

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3.88 The NEB, in its RH-5-85 Decision, introduced the concepts of displacement and operational demand volume (ODV) where the LDC nominates an ODV to adjust for the firm T-service contract with TCPL. The LDC's demand charge is reduced accordingly and the volume of gas that qualifies as displacement no longer gives rise to a double demand charge. The outstanding issue is what will happen when the displacement definition is not met.

Was Page 3/34. See Image [OEB:1134W-0:66]

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3.89 When a direct purchase volume does not qualify under the NEB's displacement definition an unabsorbed demand charge may result. There are primarily three instances where such an

unabsorbed demand charge would arise. Unless the NEB rules otherwise, unabsorbed demand charges occur when,

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* a direct purchaser takes interruptible service on TCPL's system for all or part of its load where the LDC used to contract for the volumes under firm service on TCPL;

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* a direct purchaser imports its gas from the U.S, thus circumventing TCPL's system; and

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* A customer switches to an alternative energy form and leaves the system.

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The third situation can occur at any time and is not a result of deregulation.

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Positions of the Parties

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The LDCs

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3.90 The LDCs argued that because it is the contract carriage customer's choice to take interruptible service on TCPL or to purchase a foreign supply, thus causing the unabsorbed demand charge, the contract carriage customer should pay.

Was Page 3/35. See Image [OEB:1134W-0:67]

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3.91 Consumers' has taken the position before the NEB in RH-3-86, the latest TCPL toll hearing, that interruptible as well as firm services on TCPL should be included for the purposes of defining displacement. Union argued that, until the expiry of its long term supply contracts, a direct purchaser should not be entitled to displace the LDC's supplies other than by a firm contract on TCPL. In Union's view the sharing of unabsorbed demand charges by all customers implicitly assumes that a benefit to a small number of large customers should be gained at a substantial cost to a larger number of smaller customers. Union states that the ability of a direct purchaser to obtain interruptible service on TCPL would either lead to increased unabsorbed demand charges, a reduction in Union's ability to access discretionary purchases, or increased contributions to fixed costs of TCPL. Union submitted that discretionary purchases are a means by which the LDC optimizes its gas purchases and that these are virtually the only access an LDC currently has to non-TCPL gas.

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3.92 ICG recommended that with regard to interruptible service on TCPL, the Board defer a decision to the utility-specific hearing after the NEB will have ruled.

Was Page 3/36. See Image [OEB:1134W-0:68]

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The Brokers

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3.93 Northridge, ATCOR, Brenda and Consoligas argued that any remaining unabsorbed demand charges should be shared by all sales and T-service customers.

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The Industrial Gas Users and Producers

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3.94 IGUA submitted that any term or condition that operates to limit a shipper's right to use the full range of T-services available on TCPL's system is unduly discriminatory. This would impose an obligation on a transportation customer to indemnify a distributor for unabsorbed demand charges created by using interruptible service on TCPL. The obligation would also tend to favour system gas and give the buy-sell alternative a preference over T-service. IGUA argued that this Board should not be influenced by the fact that the NEB is currently considering adjustments to its definition of displacement.

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3.95 CIL and Nitrochem argued that whether or not any of the LDCs' demand charge payments to TCPL will be unabsorbed will depend in large measure on the future sales of the LDCs. CIL and Nitrochem pointed out that in only one circumstance where unabsorbed demand charges occur do the LDCs seek to pass the imputed portion of

Was Page 3/37. See Image [OEB:1134W-0:69]

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the LDCs demand charge on to the former sales customer as a surcharge. CIL, Nitrochem and Cyanamid argued that demand charge obligations of the LDCs to TCPL arise out of contracts entered into by the LDCs for all their customers, without earmarking specific volumes. They argued that it is arbitrary and unfair to presume that all interruptible volumes on the LDCs were served from firm service on TCPL.

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3.96 Cyanamid noted Consumers' claim that it would not charge the customer the unabsorbed demand charges if the customer would remain on gas as opposed to switching to oil. Cyanamid questioned why a customer with access to U.S. gas and fuel oil alternatives should have an advantage over customers who want to use Alberta gas.

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3.97 CPA argued that the Board need not await the results of the NEB proceedings, and that contract carriage should be made available on the LDCs' systems regardless of the mode of transportation on TCPL. Unabsorbed demand charges that are incurred should not, according to CPA, be borne by individual T-service customers, since these customers would be forced to bear the brunt of the LDCs' forecasting errors with regard to the LDCs' firm requirements.

Was Page 3/38. See Image [OEB:1134W-0:70]

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3.98 Polysar submitted that any unabsorbed demand charges resulting from a direct purchase can be categorized as a cost of a competitive system and ought to be attributed to the whole system.

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Other Groups

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3.99 The City of Kitchener argued that the Board should permit the regulated LDCs the right to refuse to transport gas delivered to it from TCPL on an interruptible basis.

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3.100 The Director argued that the unabsorbed demand charges arising from interruptible service on TCPL result from a previous regulatory environment, and thus should be shared by all users of the system. The Director also pointed out that the interruptible shipment may displace a

discretionary purchase by the LDC, and thus the LDC will incur no unabsorbed demand charge.

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Special Counsel

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3.101 Special Counsel submitted that it is not the contract carriage customer's choice which creates the unabsorbed demand charges, but rather the long term contractual obligations between the LDCs and TCPL. Thus, a fair solution is a form of sharing by all customers. To encourage the LDCs to minimize these charges, Special Counsel argued that the Board should

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review at annual rate hearings the charges accumulated over the past period in deferral accounts and pass on through rates only those charges reasonably incurred.

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3.102 Special Counsel also argued that the philosophy underlying the system-wide sharing of unabsorbed demand charges should also apply to the allocation of Petrosar costs in Union's circumstances. That is, Union should allocate the Petrosar premium costs, allowed in rates, to all transportation customers and customer classes, except Rate M13. Rate M13 (Special Transportation Rate for Locally Produced Gas of Consumers') customers would pay a fair share through Rate M12 (Storage and Transportation). Rate M12 customers should only contribute on the "easterly" flow.

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The Board's Findings

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3.103 The Board finds that any unabsorbed demand charges resulting from a current gas sales customer switching to T-service should be accumulated and deferred with interest for disposition at the LDC's next full rate proceeding. The LDCs are directed to submit the proposed accounting to the Board for approval.

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3.104 At the time of disposition, the Board will consider whether, in order to encourage the LDCs' efforts to mitigate such costs, it is appropriate to provide for full cost recovery in rates. The Board will also consider whether those costs that are to be recovered through rates should be recovered from all customers, or only certain customers.

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3.105 The Board notes that the Petrosar SNG premium costs have been explored thoroughly in previous hearings and although not a demand charge problem, it is important that it be dealt with here in order to permit Union to develop T-Rates. The Board finds that such costs should be recovered from all customers, including all transportation customers. The Board directs Union to submit revised rate schedules for consideration by the Board, within 30 days of receipt of this Decision, to allow for the recovery of Petrosar SNG premium costs from all customers including rate M12 and M14 customers. Rate M13 customers will pay an appropriate share of Petrosar premium costs through rate M12. Rate M12 customers should only contribute on the "easterly" flow to avoid duplication of recovery.

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Part F T-Rate Criteria

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Introduction

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3.106 This section deals with the eligibility criteria for T-service. The criteria include: T-service contracts, minimum volume, length of contract, customer's obligation to deliver, penalty charges, capacity interruptible service, minimum bill, delivery points and classes of service and priority.

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T-service Contracts

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Position of the Parties

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The LDCs

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3.107 Consumers' submitted that a written contract is necessary for T-service and that the contract must be held by the end-user.

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3.108 Union submitted that it has not yet completed the design of standard contractual provisions for permanent T-service.

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3.109 ICG submitted that, to be eligible for T-service, a customer must enter into a transportation contract with the LDC. It argued that a contract is necessary to protect the utility and its other customers by ensuring

Was Page 3/42. See Image [OEB:1134W-0:74]

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that parties are aware of their rights and obligations.

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The Brokers

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3.110 Northridge, ATCOR, Brenda and Consoligas argued that the terms and conditions of T-service should be set out in their entirety in published rate schedules approved by the Board. Northridge submitted that it is not possible to effectively negotiate with monopolies. As well, it submitted that the LDCs, themselves, have testified that contract negotiation is an administrative burden.

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Industrial Gas Users and Producers

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3.111 CPA argued that a full examination of the terms and conditions of the various services to be offered by the LDCs, must of necessity, await the Board's Decision in this proceeding. CPA submitted that inasmuch as terms and conditions of service include the execution of a contract between the distributor and its customer, the contracts must be presented to the Board for approval. It submitted that Consumers' proposed standard contract is confusing, unduly

complicated and inappropriate for facilitating expeditious negotiations of T-service arrangements.

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3.112 Polysar submitted that the draft contracts submitted by Consumers' and Union will only discourage direct purchases. Polysar argued that there should be no restriction on the number or kinds of simultaneous sales or transportation contracts that a particular end-user can have with one or more LDCs.

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3.113 IGUA argued that the Board should reject terms and conditions proposed by Union and Consumers' in their draft contracts. It submitted that the Board should direct Union and Consumers' to revise and simplify their proposed contracts so that sales service or buy-sell arrangements are not preferred to T-service.

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3.114 Cyanamid argued that Consumers' insistence that the end-user be the owner of the gas and the shipper on TCPL is inappropriate. Cyanamid submitted that the complexity of the T-service document alone will discourage any potential T-service customers.

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3.115 CIL and Nitrochem submitted that the problem with requiring a contract as a condition of service is that the contracts proposed include onerous and unacceptable terms and conditions that make T-service an unattractive proposition for customers. CIL and Nitrochem indicated that it would be desirable for the Board to be able, in appropriate circumstances, to require

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service on basic terms ordered by the Board, pending mutual agreement between the disputing parties.

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Other Groups

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3.116 The Director argued that virtually all terms and conditions of service for each class of customers should be capable of publication in the tariff schedule. Thus, he acknowledged that a short contract is necessary only for such items as the volume, the TCPL delivery point, the end-use points to be served, and the names of the parties.

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3.117 The Director submitted that transportation arrangements need not be for the end-users' full requirements. That is, end-users should have the option of combining gas purchased on a direct basis with gas purchases from the LDC.

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3.118 Energy Probe argued that all system gas sales handled by the merchant arm of an LDC be delivered by the transportation arm of the LDC on the same terms and conditions as are made available to all other contract carriage parties.

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Special Counsel

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3.119 Special Counsel argued that a contract carriage customer, or a broker on its behalf must enter

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into a transportation contract. Each contract should be filed confidentially with the Board for approval. Special Counsel submitted that a separate contract ought not to be required for each T-service delivery location.

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The Board's Findings

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3.120 The Board will require that there be a separate contractual agreement with the LDC for T-service. Several locations can be individually covered in one contract. The Board adopts the view that most of the terms and conditions of service for each class of customers should be capable of publication in the rate schedule. A contract will be necessary only for such items as the names of the parties, the volume, the end-user points to be served and the TCPL delivery point(s). In all cases contracts should be in a form that facilitates, rather than impedes, understanding.

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3.121 The Board will continue to require that each T-service contract be submitted to the Board for approval, at least for the time being.

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3.122 The various steps necessary for brokers to operate in Ontario are dealt with in Chapter 4, Legal Matters. The Board recognizes that, until a broker has complied with all of those steps,

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it will be unable to contract for T-service with an Ontario LDC.

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3.123 The Board also finds that the transportation arrangements need not be for the end-users' full requirements for gas at any location.

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Minimum Volume

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Introduction

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3.124 Minimum volume is the lowest volume for which an end-user can contract and be eligible for T-service.

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Positions of the Parties

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The LDCs

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3.125 Consumers' submitted that a minimum annual volume requirement is intended to make T-service availability consistent with sales service. Consumers' minimum annual volume requirement is

3,000,000 m(3).

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3.126 Union submitted that its minimum annual volume requirement is 700,000 m(3), however, it also includes a minimum daily demand of 4,800 m(3).

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3.127 ICG did not submit that a minimum volume should be a requirement for T-service.

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The Brokers

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3.128 Northridge, ATCOR, Brenda, and Consoligas submitted that there was no need to set arbitrary minimum volumes because economic and practical limitations will establish them.

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Industrial Gas Users and Producers

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3.129 CPA argued that minimum volumes are unnecessary as they are arbitrary and possibly discriminatory.

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3.130 Polysar argued that there should be no minimum volume.

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3.131 IGUA submitted that there has been no persuasive evidence to suggest that minimum volumes for T-service should be higher than those stipulated in the companion sales rate schedules.

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3.132 Cyanamid argued that Consumers' minimum volume was an unnecessary restriction.

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Other Groups

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3.133 The Director submitted that volume limitations might be established but should be subject to review as the market evolves.

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3.134 Energy Probe argued that a minimum volume criterion is arbitrary.

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3.135 The City of Kitchener submitted that the Board's findings in its Interim Decision with respect to minimum volumes should still apply.

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Special Counsel

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3.136 Special Counsel submitted that minimum volume provisions are a hindrance to direct purchase. He argued that neither operational nor economic constraints are the basis of Consumers' or

Union's proposals and as such there should be no minimum volume provision.

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The Board's Findings

409

3.137 The Board finds that on the basis of the evidence before it in these proceedings minimum volumes are not required for T-service.

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Length of Contract Term

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Introduction

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3.138 Length of contract term is the minimum term for a transportation agreement.

Was Page 3/49. See Image [OEB:1134W-0:81]

413

Positions of the Parties

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The LDCs

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3.139 Consumers' submitted that the contract must be for a minimum term of 30 days.

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3.140 Union submitted that a minimum term of one year for a T-service contract be accepted by the Board. Union submitted that this would be consistent with the minimum contract term for transportation on TCPL and for Union's sales rate customers. Union argued, however, that a term less than one year should be permitted but it should be at the LDC's discretion.

417

3.141 ICG requested a minimum term of five years and submitted that it will require up to twenty-five months notice from customers seeking to return to sales service. During cross-examination, ICG revised its minimum term to one year with no fixed notice period for return, as ICG will use best efforts to obtain capacity on TCPL.

418

The Brokers

419

3.142 Northridge and Consoligas argued that although contracts are normally for periods of one year or longer, there should be no restriction on shorter terms if that is consistent with the requirements of the customer.

Was Page 3/50. See Image [OEB:1134W-0:82]

420

3.143 ATCOR submitted that a contract should be for a period of one year or longer.

421

3.144 Brenda submitted that the length of contract should be determined by the needs of the end-user. Brenda submitted that it may be practical to have T-service contracts for as short as one month to

accommodate spot contracts or summer interruptible contracts.

422

Industrial Gas Users and Producers

423

3.145 CPA submitted that the contract length should be at least equivalent to that of the sales customers.

424

3.146 Polysar argued that there should be no minimum term.

425

3.147 Nitrochem submitted that although ICG dropped its requirement to a one year contract and no notice period at all, it is not clear why ICG even requires a one year minimum period. Nitrochem argued for a thirty day period, with no notice period for return to sales service.

426

Other Groups

427

3.148 The Director argued that the minimum term should be consistent with the minimum term for transportation arrangements available on connecting

Was Page 3/51. See Image [OEB:1134W-0:83]

428

facilities.

429

3.149 The City of Kitchener submitted that T-service should terminate on October 31, 1987, unless, by that time, the supply contracts between TCPL and the LDCs contain provisions which ensure that the prices under those contracts are market driven.

430

Special Counsel

431

3.150 Special Counsel submitted that a minimum term of thirty days is appropriate with the length of the contract being negotiable.

432

3.151 Special Counsel submitted that there should be no fixed period of notice to return to the sales service. Special Counsel pointed out that if insufficient notice is given, there may be a problem of obtaining capacity on TCPL's system and that the Board should consider imposing a re-entry fee for sales customers who leave the LDC for T-service and then wish to return.

433

The Board's Findings

434

3.152 The Board finds that the imposition of a minimum term should not be employed as a mechanism to frustrate direct purchase. The Board also finds that although the minimum term would

Was Page 3/52. See Image [OEB:1134W-0:84]

435

normally be expected to be one year, the Board would not necessarily deny approval if the parties agree to a shorter term.

436

3.153 The Board cannot guarantee that a T-service customer will be able to return to the LDC's sales service. This will depend, in part, on the NEB Decision with respect to an LDC nominating up its operating demand volume if a direct purchaser wishes to return to sales service. As a result, establishment of a required period for return to sales service would be meaningless at this time.

437

3.154 The Board at this time will not require either a standby or a re-entry fee. Should the LDC believe that such a fee or fees are necessary it should propose both the quantum and the criteria for application in its utility-specific rate hearing. Such fees should be directly related to costs imposed or expected to be imposed on the LDC's system.

438

Customer's Obligation to Deliver

439

Introduction

440

3.155 The customer's obligation to deliver refers to the LDC requiring that the customer delivers its gas supply to the LDC each and every day regardless of the level of the end-users

Was Page 3/53. See Image [OEB:1134W-0:85]

441

consumption. Some LDCs claim that they rely on this gas being available for load-balancing purposes.

442

Positions of the Parties

443

The LDCs

444

3.156 Consumers' submitted that, absent a customer's obligation to deliver, it is doubtful that it would be able to provide load-balancing without building additional facilities or without contracting for more peaking service, if it were available.

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3.157 Union submitted that, under current circumstances, it requires its transportation customers to guarantee the gas supply. Union argued that its system is such that the failure of one customer's supply may mean that a different customer will be unable to be supplied. Union argued that it is unacceptable to put some customers at risk for the failure of another customer.

446

3.158 Union agreed that the obligation to deliver is not a desirable long term condition and it outlined proposals to alter its system and eliminate this need. Union submitted that it will incur certain costs in adapting its system in this manner and argued that these costs

Was Page 3/54. See Image [OEB:1134W-0:86]

447

should be borne by all customers.

448

The Brokers

449

3.159 Northridge, ATCOR, Brenda and Consoligas argued that the security of a T-service customer's supply is solely the responsibility of the T-service customer.

450

3.160 CPA submitted that a direct purchaser must bear the responsibility of its own security of supply.

451

3.161 Polysar argued that there should be no obligation to deliver.

452

3.162 IGUA submitted that an obligation to deliver should not be a pre-requisite to a T-service relationship, and that there is an onus on the LDC to prove the need for such an obligation. An obligation cannot be justified so that an LDC can provide service to other interruptible customers. The LDC should only require the obligation to deliver to prevent curtailment of its other firm customers. In IGUA's view, Consumers' has failed to demonstrate the need for an obligation to deliver the mean daily volume each and every day of the year.

453

3.163 Cyanamid argued that T-service customers want to buy transportation, not to become gas

Was Page 3/55. See Image [OEB:1134W-0:87]

454

suppliers to the LDC. As such, Cyanamid questioned the necessity of imposing such an onerous obligation on all customers throughout the year.

455

3.164 CIL and Nitrochem argued that T-service customers should not be required to enter into supplier-type obligations, and that it is sufficient if T-service customers, whose gas does not arrive, accept the consequences of the LDC discontinuing their service.

456

Other Groups

457

3.165 The Director observed that bundled T-service will involve an obligation to guarantee supply to the LDC on an average daily basis.

458

Special Counsel

459

3.166 Special Counsel argued that the obligation to deliver should only be considered in the context of interruptible T-service. Special Counsel submitted that there should be neither an obligation to deliver, nor a penalty for failure to deliver. Special Counsel submitted that it may be the case that without the assurance of having the gas available on a day of curtailment, the rate for the interruptible service will be higher than would otherwise be the case.

Was Page 3/56. See Image [OEB:1134W-0:88]

460

The Board's Findings

461

3.167 The Board will not require a customer to be obligated to deliver in any form as a condition of a T-service contract. The Board also believes that since best efforts or reasonable efforts both imply some obligation, these terms should not be used.

462

3.168 The Board finds that without such an obligation, the failure of a direct purchaser on a peak day to deliver its gas could result in a penalty to the direct purchaser, unless matched with an equivalent reduced take. The Board finds that there should be no difference in this regard between a T-service contract and a buy-sell arrangement.

463

Indemnification Provisions

464

Introduction

465

3.169 This issue concerns the T-service customer's responsibility to indemnify the LDC against any damages.

466

Positions of the Parties

467

The LDCs

468

3.170 Consumers' Union and ICG proposed indemnification clauses in their draft T-service contracts for damages arising out of a T-service customers contract.

469

Industrial Gas Users and Producers

470

3.171 CPA submitted that liability and penalty provisions, clearly, should not be any more onerous in respect of a T-service customer than a sales customer.

471

3.172 Polysar argued that no penalties should exist for a breach of contract but merely a reasonable assessment of foreseeable damages, thus avoiding indemnities.

472

3.173 IGUA submitted that any penalty provisions or indemnification clauses contained in T-service relationships should be no more onerous than the penalty provisions in sales service contracts and that the broad indemnification clauses contained in the proposed T-service contracts submitted by Union and Consumers' ought to be rejected.

473

3.174 CIL and Nitrochem submitted that the LDCs do have their remedies in the courts if contracts are breached and, as such, the indemnification clauses are not appropriate.

474

The Board's Findings

475

3.175 The Board finds that, as outlined in the Interim Decision, it continues to be inappropriate to include wide indemnification clauses of the type proposed by the LDCs in their buy-sell and T-service draft contracts.

476

Capacity Interruptible Service

477

Introduction

478

3.176 Capacity interruptible service relates to the interruption of transportation because of capacity limitations.

479

Positions of the Parties

480

The LDCs

481

3.177 Consumers' submitted that it requires an interruptible T-service customer's gas supply on curtailment days to supply its firm sales customers. Capacity interruptible service is of little or no value to Consumers' at this time.

Was Page 3/59. See Image [OEB:1134W-0:91]

482

3.178 Union submitted that where a customer requests interruptible T-service, Union proposes that the customer be required to have an alternate fuel system available consistent with its interruptible sales customers.

483

3.179 ICG submitted that the only condition under which interruptible transportation service would be offered by ICG, would be if there were capacity constraints. ICG does not anticipate any capacity constraints on its system which would affect the quality of T-service.

484

Special Counsel

485

3.180 Special Counsel argued that the LDCs should offer firm and interruptible T-service. If the system requires additional capacity then capacity interruptible T-service should also be made available.

486

The Board's Findings

487

3.181 The Board finds that capacity interruptible service should be offered by an LDC only if it can be demonstrated that there is a value to the LDC and to its other customers through the offering of this service. If offered, it should be priced so as to reflect its benefit to the system.

488

3.182 The Board will not deal, at this time, with the necessity for a customer requiring an alternate fuel system in order to qualify for interruptible T-service. As circumstances will differ among the LDCs, it is appropriate that this be deferred until the utility-specific rate hearing.

489

Minimum Bill

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Introduction

491

3.183 The minimum bill requirement relates to the imposition of a level of minimum financial contractual obligation on the part of the user.

492

Positions of the Parties

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The LDCs

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3.184 Consumers' argued that the minimum bill provisions ensure recovery of a reasonable amount of Consumers' fixed costs but only for a period of one year. It it <is> also to ensure that customers give due regard to their contracting practices. Consumers' proposed requirement is to make T-service consistent with the minimum contractual obligation for sales service.

495

3.185 ICG submitted that to ensure recovery of its fixed costs, and to protect both the utility

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and its other customers, a minimum monthly and annual bill must be established.

497

The Brokers

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3.186 Northridge, ATCOR, Brenda, and Consoligas submitted that for contracts of one or more years# minimum bills should recover allocated fixed costs of the LDC, as determined by the Board. For shorter term contracts, a pro-rata basis can be used. ATCOR submitted that interruptible service should be charged based on a cost-based commodity charge rather than a fixed cost basis.

499

Industrial Gas Users and Producers

500

3.187 Cyanamid continues to object to Consumers' minimum bill provision in its T-service contract. Cyanamid submitted that the direct purchaser's exposure to minimum bills is much higher than on system gas because the customer becomes exposed to a minimum bill from NOVA and from TCPL. Cyanamid also submitted that minimum bills remove the obligation of the LDC to mitigate the damages involved with a breach of a contract.

501

Special Counsel

502

3.188 Special Counsel argued that the Board should confirm its Findings on the minimum bill provision from the Interim Decision.

503

The Board's Findings

504

3.189 The Board finds that if an LDC proposes to introduce any minimum bill in its transportation rate schedules, it should do so in the utility-specific rate hearing, including the proposed quantum. At that time, the purpose of the minimum bill must be explained and justified by the LDC. The Board has not heard sufficient evidence in this proceeding to encourage it to prescribe a minimum bill or any general principles that would apply in developing a minimum bill.

505

Delivery Points

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Introduction

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3.190 The delivery point issue relates to the contracted point at which the delivery from TCPL will take place.

Was Page 3/63. See Image [OEB:1134W-0:95]

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Positions of the Parties

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The LDCs

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3.191 Consumers' submitted that delivery points shall be determined by mutual negotiation and agreement.

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3.192 Union argued that the nomination of the delivery point is only of relevance to a customer if it has some impact upon its contract terms or its rate. Union claimed that this is not currently the case and as the delivery point is a major concern to Union, it should decide on the delivery point. Union submitted that only if a distance-based rate is in place would the delivery point become relevant to the customer. On the other hand, Union submitted that it could possibly incur large losses in revenue from the Dawn-Trafalgar system if certain customers were allowed to nominate the delivery point at Dawn.

512

3.193 ICG submitted that it will reserve the right to determine, in conjunction with TCPL, the point or points at which it receives the customer's gas into its system.

Was Page 3/64. See Image [OEB:1134W-0:96]

513

The Brokers

514

3.194 Northridge and Consoligas submitted that the delivery points should be as designated by the utility provided that would not result in extra cost to the end-user.

515

3.195 ATCOR and Brenda submitted that delivery point locations should be determined by mutual agreement between the utility and the customer.

516

Industrial Gas Users and Producers

517

3.196 CPA argued that delivery point locations should be negotiated and not set arbitrarily by the LDCs. CPA also submitted that any delivery point location available to the LDC should be available to a customer. If the costs do differ, these could be reflected in the transportation toll.

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3.197 IGUA submitted that the Board should follow its Interim Decision with respect to delivery point designation.

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3.198 CIL submitted that the delivery point nomination would make no difference if the conditions of service from each delivery point were the same. It also argued that the Board should order Union to accept delivery at the Dawn end of the system for those T-service customers west of Dawn.

520

Other Groups

521

3.199 The Director submitted that the delivery point of the TCPL system should be a matter of contractual agreement between the parties.

522

Special Counsel

523

3.200 Special Counsel argued that the Board should confirm its Interim Decision.

524

The Board's Findings

525

3.201 The Board finds that the delivery point should be negotiated between the LDC and the direct purchaser. Absent agreement following negotiations, the Board will determine, upon request, the delivery point.

526

Classes of Service and Priority

527

Introduction

528

3.202 This issue relates to the type of service to be offered and the hierarchy of access to those

services.

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Positions of the Parties

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The LDCs

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3.203 Consumers' submitted that bare T-service would be available on a very restricted basis and at the sole discretion of Consumers'. Otherwise, bundled T-service will be available according to Consumers' companion rates schedules.

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3.204 Union submitted that where a customer requests interruptible T-service, Union will require the customer to have an alternative fuel system available as it does for interruptible sales customers.

533

3.205 ICG submitted that T-service customers be accorded equal priority to that of firm service customers up to their contracted daily demand in their transportation contract. It argued that where a customer wishes to split its requirement between T-service and sales services, a sales rate adjustment may be necessary if ICG is left with the responsibility to service the higher cost, lower load factor portion.

534

The Brokers

535

3.206 Northridge, ATCOR, Brenda and Consoligas submitted that transportation customers should enjoy

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the same priority of service as the LDC's sales services. They submitted that any curtailment should be on a pro rata basis between these classes of services.

537

Industrial Gas Users and Producers

538

3.207 IGUA submitted that the Board ought to affirm the finding from its Interim Decision that all customers be given equal priority for similar type services.

539

3.208 Cyanamid argued that Consumers' should not be able to interrupt the T-service customer's firm gas service under the circumstances it outlines in its contract. Cyanamid also argued that Consumers' should have to give Cyanamid twenty-four hours notice for curtailment as opposed to four hours notice.

540

3.209 CIL and Nitrochem submitted that there is no justification for imposing the restriction that an interruptible T-service customer must have an alternate fuel supply.

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Other Groups

542

3.210 The Director submitted that transportation services should be provided with the same priority regardless of the ownership of the gas transported in the system.

Was Page 3/68. See Image [OEB:1134W-0:100]
543

Special Counsel

544

3.211 Special Counsel argued that the Board should confirm its Interim Decision.

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The Board's Findings

546

3.212 The Board finds that all customers shall be given equal priority for similar types of services: interruptible T-service customers and interruptible sales customers must be treated equally; as must firm T-service customers and firm sales customers.

547

3.213 The Board has heard no evidence in these proceedings that the priorities outlined in the Board's Interim Decision ought to be changed. The Board finds that, in times of emergency or gas supply shortage, the allocation priorities must be based on the specific circumstances at that time.

Was Page 3/69. See Image [OEB:1134W-0:101]
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Part G Diversions

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Introduction

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3.214 In the Interim Decision the Board defined diversion as:

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"... occurring when gas is delivered at a different [TCPL] delivery point than contracted for. Such a diversion is generally undertaken to assist in the balancing of a transmission system or of supply and demand."

552

Positions of the Parties

553

The LDCs

554

3.215 The LDCs varied in their approach to this issue. The differences related to their respective definitions of diversion.

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3.216 Union considered diversion as a redirection of gas to another plant owned by the end-user or to another location for resale at the end-user's discretion. Union was concerned that this latter

situation would give rise to increased unabsorbed demand charges, as the customer who had excess gas supply would provide it to other T-service customers.

556

3.217 Consumers defined diversion as a redirection of gas from one location to another for the same customer. As such, a diversion was allowable when a distributor and a customer could mutually negotiate such an arrangement through individual contracts for each plant. Consumers' are opposed to brokers, should they be granted the right to operate in the Province, unilaterally diverting between customers. It argued that diversion should only occur with the distributor's leave.

557

3.218 ICG argued that diversions occur when gas, which is contracted to be delivered at one location is, at the request of the distributor or end-user, delivered at one or more different locations with the concurrence of the LDC. On this basis, ICG would allow diversion as long as there was an appropriate fee charged to do so and that such a redirection of gas would not inconvenience others.

558

The Brokers

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3.219 Northridge, ATCOR, Brenda and Consoligas, submitted that diversions are necessary for the effective operation of brokers. The brokers felt that the LDC should recognize that diversions allow for the efficient operation of the system, as gas which is not needed at a contracted location can be transported on the

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system to another location where it is needed. Diversion should be subject to capacity constraints.

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Industrial Gas Users and Producers

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3.220 IGUA, Cyanamid, CIL, Nitrochem, Polysar and CPA were unanimous in their endorsement of diversions. Cyanamid submitted that diversions should be allowed unconditionally between different locations and different customers to assist the direct purchaser in obtaining 100 percent load factor. IGUA and CPA argued that a diversion should be allowed as long as it can be reasonably accommodated by a distributor's system, which implies that the shipper and carrier agree on terms and conditions. CIL and Nitrochem submitted that diversions among T-service customers be allowed. Polysar argued further that a contract could be set up so that whoever is diverting is not a seller of gas, therein addressing Union's concerns.

563

Other Groups

564

3.221 The Director and Energy Probe were of the opinion that shippers should be able to divert between customers and approval by the distributors should not be unreasonably withheld. The City of Kitchener submitted that diversions should be done at the utility's discretion.

565

Special Counsel

566

3.222 Special Counsel submitted that the Board should maintain its current position vis vis diversions. That is, diversions should be subject to the LDCs' approval with such approval not being unreasonably withheld. This would address the concerns of the LDCs with respect to capacity requirements and their ability to maintain control of their systems.

567

The Board's Findings

568

3.223 Due to the peculiarities of each specific circumstance with respect to a direct purchase customer, the Board finds that the rights with respect to diversion must be negotiated between the LDC and the customer. The Board finds that if diversions are requested by an end-user who has multiple plants, and the utility can accommodate such diversions, then the conditions for and cost of diversions should be included in the negotiations. Approval of diversions should not be unreasonably witheld by the LDCs.

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3.224 The Board does not object to the diversion of surplus gas, but it cannot under current legislation endorse the sale of gas from one direct purchaser to a different end-user. The LDC must track the overages and shortages resulting from

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load-balancing, with the objective of establishing a zero balance at the end of the contract term.

571

Part H Security of Supply

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Introduction

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3.225 Security of Supply is considered to be the reasonable assurance of gas supply in the required volumes and rate of delivery over the life of the contractual arrangement, outside a condition of force majeure. This issue can be divided, for purposes of consideration, into three subsections:

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* Daily Security of Supply which can encompass firm T-service, interruptible T-rate service and Union's Dawn-Trafalgar System design;

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* The annual/seasonal security of supply; and

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* The long term security of supply.

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Positions of the Parties

578

The LDCs

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3.226 The LDCs submit that the responsibility for daily security of supply rests with the T-service customer/end-user and therefore the T-service customer/end-user should be prepared to have their supply reduced to the extent of supply failure. The LDCs were concerned that

Was Page 3/75. See Image [OEB:1134W-0:107]

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if there were a failure of gas supply by a firm T-service customer, it could result in a very costly impact on the end-user, thus creating intense pressure on the LDC to somehow maintain service. To deal with the daily security of supply problem, Consumers' and Union submitted that a customer obligation to deliver is required. Consumers' and Union agreed to offer a best efforts back-stopping service and price it accordingly.

581

3.227 Union specifically addressed its system configuration problem claiming it would be unable to meet its firm market requirements if the direct purchase delivery of an interruptible customer on its system did not arrive on peak days when Union calls for an interruption. A second problem is the capacity of the Dawn-Trafalgar system to serve Ontario and other Eastern Canadian markets in the absence of a guaranteed delivery of gas at Trafalgar through the northern leg of the TCPL line.

582

3.228 Union submitted that if the first problem stated above is not solved, all its direct purchase customers, both firm and interruptible, must be obligated to deliver. If only the second problem is not solved, interruptible direct purchasers must be obligated to deliver.

Was Page 3/76. See Image [OEB:1134W-0:108]

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The Brokers

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3.229 Northridge, ATCOR, Brenda and Consoligas submitted that security of supply is the T-service customer's responsibility and that the utility should not have the right or the responsibility to address that security. The brokers also commented on Union's system problems. They outlined two options that are available to Union: first, a change to the system configuration that would require additional capital expenditures, and secondly, renegotiation of TCPL contracts. The brokers argued that if current negotiations with TCPL fail, Union should fully disclose the details of their arrangement so that the Board may assist Union in finding a solution.

585

Industrial Gas Users and Producers

586

3.230 IGUA, Cyanamid, CIL, Nitrochem, Polysar and CPA were consistent in their argument that the risk of security of supply should be borne by the T-service customer. CPA and Cyanamid argued that the T-service customer must make its own arrangements for backstop with the LDCs offering as well, a best efforts back-stopping service. CPA had reservations as to the seriousness of Union's system problems. It argued that if it was a question of facility changes, then Union should be assured that it would be allowed to

587

include the costs of such changes in its rate base.

588

Other Groups

589

3.231 The Director submitted that security of supply is the responsibility of the end-user. Energy Probe argued that T-service customers, for the most part, would be industrial and commercial end-users and are sophisticated enough to understand the consequences of not having firm backstop in place.

590

Special Counsel

591

3.232 Special Counsel submitted that T-service customers should be responsible for security of supply and the resulting consequences should supply fail. Special Counsel went on to say that where the impact of supply failure is severe, the end-user should define and provide for an acceptable quality of daily security of supply. If the firm T-service customer is in the core market then daily security of supply should be demonstrated.

592

3.233 Special Counsel submitted that there is a remote possibility of needing all the interruptible customers' supplies to meet firm commitments. There must be a reasonable definition of the quality of backstop supply required to offset this risk.

593

3.234 Special Counsel also addressed the Dawn-Trafalgar system problem. He argued that the possibility of failure of the T-service customer's gas supply on a peak design day due to system configuration problems is very low. He submitted that there should be no customer obligation to deliver. The Board should encourage Union to seek contractual solutions with TCPL since it would be the least costly and most effective solution.

594

3.235 Special Counsel submitted that the direct purchaser must be responsible for its seasonal or annual security of supply. The LDCs should undertake investigation of firm backstopping arrangements. If the supply is for the core market there must be stringent regulations governing the security of this supply.

595

3.236 The Board also should, with input from the LDCs, establish guidelines, for long term security of supply. Special Counsel argued that expert opinions on security of supply should be given by a third party until the Board gains expertise in this area.

596

The Board's Findings

597

3.237 The Board finds that the supply to the core market, as previously defined in Chapter 2, should be protected by the LDC making whatever

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contractual arrangements are prudent and necessary to ensure that gas will be available. Back-stopping may be a requirement depending upon the source of supply and contractual arrangements that the LDC chooses.

599
3.238 In order to serve the public interest, the Board will continue to have responsibilities with respect to the core market. It will be necessary for the Board to ensure that the LDCs have exercised due diligence in entering into core market supply contracts with suppliers. The Board will reserve the right to examine contractual arrangements involving brokers or producers who wish to sell to existing core market customers. Criteria used by the Board in assessing a supply contract would differ, depending upon circumstances, but a requirement may be an independent professional evaluation of the ability to meet the contractual commitments.

600
3.239 The Board finds responsibility for security of supply with respect to deliveries to the non-core market rests with the direct purchasers. This is consistent with the Feedstock Reference (E.B.R.L.G. 26) and the Interim Decision.

601
Part I Storage

602
Introduction

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3.240 The use of storage is an important component of natural gas distribution due to the varying load profiles of end-users. Union is the only Ontario LDC currently using storage for more than operational requirements. Union sells storage to others.

604
3.241 In a deregulated environment, the list of potential customers extends to include T-service customers on both Union's and other LDCs' system, as well as brokers. The unbundling of rates will allow direct purchasers to contract for specific storage requirements they deem necessary for their own operations after consideration of their individual supply arrangements.

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3.242 The description and location of specific storage operations are dicussed <discussed> in Appendix E.

606
Positions of the Parties

607
The LDCs

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3.243 Each of the three LDCs presented different storage proposals as each has different capacities.

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3.244 Union would operate its storage service on a first come, first served basis, invoking a priority list only in the event of insufficient storage for everyone. Its storage list would give priority to sales

customers over franchise T-service customers. Ontario LDCs are third in priority, with T-service customers on their systems following. Union outlined specific contract parameters that must be negotiated with the customer.

610

3.245 Consumers' stated that it has no storage capacity available to offer to direct purchasers. To allocate existing storage to specific customers would lead to a potential disruption in their integrated system by affecting the load-balancing which would lead to a decline in diversity benefit. Consumers' suggested that direct purchasers who wish to control their own storage can contract directly with Union. Consumers' noted that, over time, rationalization between sales service and T-service may result in it being able to offer separate storage services.

611

3.246 ICG submitted that it cannot dedicate storage to T-service customers as it needs the storage for its heat sensitive customers.

Was Page 3/82. See Image [OEB:1134W-0:114]

612

The Brokers

613

3.247 Northridge, ATCOR, Brenda and Consoligas submitted that T-service customers should have the same access to storage as sales customers. It should be on a first come, first served basis. When a customer switches from sales to direct purchase its allocated storage quantity should be available for transfer. Storage should be available under terms and conditions set out in a posted rate schedule approved by the Board.

614

The Industrial Gas Users and Producers

615

3.248 The industrial gas users and producers argued that there should be equal priority for services of the same type, i.e. interruptible T-service customers should have the same priority as interruptible sales customers. Cyanamid submitted that the T-service customer should balance his load either by purchasing load balancing services from LDCs or by buying storage and doing it itself. CIL and Nitrochem argued that there should be equal priority of customers among all three utilities to storage. They also submitted that it is necessary that the Ontario customers should have more information available in order to plan their storage needs. For instance, information as to the amount of storage entitlement, injection and withdrawal rights, the rates for storage service and the

Was Page 3/83. See Image [OEB:1134W-0:115]

616

assignability of storage rights should all be available. Polysar and CPA argued that Union should advise each end-user of its imputed storage. CPA further submitted that imputed storage should be available to the end-user itself, or its supplier.

617

Other Groups

618

3.249 The City of Kitchener submitted that Union should provide storage service in bundled and unbundled forms. The Director argued that the storage space should be assignable. Energy Probe

submitted that the LDC should provide load-balancing to the extent possible.

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Special Counsel

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3.250 Under Union's priority list Special Counsel argued there was discrimination between the end-users choosing to take advantage of market sensitive rates via contract carriage and those choosing CMPs. He argued that discrimination in favour of those choosing CMPs is an artificial impediment to the use of T-service and should not be allowed. He also considered that if brokers are allowed greater freedom in Ontario, Union should prepare storage rate criteria which meet brokers' needs for storage on an equitable basis, while accepting that core customers should be protected and receive

Was Page 3/84. See Image [OEB:1134W-0:116]

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top priority. Special Counsel submitted that Consumers' and ICG should be directed to provide draft contracts explicitly setting out terms and conditions which would allow contract carriage customers to obtain storage.

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The Board's Findings

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3.251 The Board accepts Union's priority list with respect to storage subject to the proviso that unused storage is available on a first come, first served basis and that a priority list only applies to simultaneous requests for storage from new customers.

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3.252 The Board finds that sales customers who change to T-service should be allowed to retain their existing storage entitlement. Renewal of storage contracts by existing customers would have priority over new customers. The latter is subject, however, to the need for pro-rationing of storage capacity in the event of a shortage.

Was Page 3/85. See Image [OEB:1134W-0:117]

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Part J Variation Accounts

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Introduction

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3.253 Variation accounts are used to defer the treatment of certain revenues or expenses pending disposition by the Board. These accounts are sometimes referred to as deferral accounts.

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3.254 The Board has been reluctant in the past to encourage variation accounts. The Board fixes or approves rates on the basis of forecast revenues and costs, using a prospective test year. Variation accounts can tend to move a utility closer to a guaranteed return, thus reducing the incentive to be cost efficient.

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Positions of the Parties

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The LDCs

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3.255 Consumers argued that variation accounts with respect to gas costs should be established since variations in these costs, which are beyond the control of the company, should result in neither a benefit nor a loss to the shareholders. Consumers' noted that customers opting for T-service give it the ability to divest itself of some portion of CD volume, its highest cost of supply. Consumers' position is that the number of customers choosing T-service

Was Page 3/86. See Image [OEB:1134W-0:118]

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is difficult to predict, and largely beyond Consumers' control. Consumers' submitted that a customer's choice between T-service or sales service should have no effect on Consumers' earnings.

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3.256 Consumers' submitted that if the Board finds that all system users should share unabsorbed demand charges, these costs should be accumulated in a deferral account for future disposition.

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3.257 Union submitted that deferral accounts are necessary where events are unforeseeable or unpredictable to an extent that forecasting is sufficiently inaccurate that there would be unreasonable risks of losses or gains. Union argued in favour of deferral accounts for the following items: heat content variations; unabsorbed demand charges; revenue losses associated with changes to TCPL contracts necessary to accomodate T-service, and backstopping charges. Union argued that unabsorbed demand charges could result in $12 million per year of unrecovered costs.

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3.258 ICG argued for the limited use of variation accounts to accommodate the effects of abrupt and significant changes in LDCs' costs or revenues which are beyond the control of the

Was Page 3/87. See Image [OEB:1134W-0:119]

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utility. ICG submitted that gas costs cannot be predicted with certainty because of the inability of the LDC to predict the number of customers that will choose transportation service.

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The Brokers

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3.259 Northridge and Consoligas argued that variation accounts should be allowed only where the lack of a variation account will result in an injustice to the LDC. Using variation accounts to avoid business risk is not legitimate. Northridge and Consoligas submitted that protecting the integrity of the utilities during the transition to a competitive market does not mean immunizing them from all the risks of a competitive market. It is these risks that will motivate the utilities to operate efficiently.

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3.260 ATCOR and Brenda argued that variation accounts should be allowed if required to protect the integrity of the utilities.

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Industrial Gas Users and Producers

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3.261 CPA argued that there are benefits that exist from having variation accounts for significant costs or revenues which the distributor cannot

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control nor reasonably forecast. CPA objected to the approval of "contingency" deferral accounts for potential costs exposures that are not known to exist at a time of filing.

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3.262 Polysar submitted that if the Board deems certain deferral accounts necessary their use should be temporary and restricted.

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3.263 Cyanamid submitted that it is generally opposed to variation accounts. Cyanamid argued that if the Board should allow any variation accounts they must be presented for disposition at rate hearings.

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3.264 CIL and Nitrochem argued that because variation accounts move the distributor closer to a guaranteed rate of return and diminish its incentive to reduce costs the onus is on the distributor to demonstrate that the proposed deferral accounts are for items where variances will be significant and beyond the LCDs' <LDCs'> control.

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3.265 CIL argued that Union's heat content, demand charge, foregone TCPL transportation revenue and backstopping accounts should be rejected.

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3.266 IGUA submitted that the issue is whether the uncertainties associated with the new market sensitive gas pricing regime in Ontario merit

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the creation of variation accounts, specifically with respect to transportation rates and gas costs. IGUA noted that variation accounts with respect to some gas costs have already been established in Board Decisions E.B.R.O. 430-1 and E.B.R.O. 414-1.

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3.267 IGUA argued that it may be appropriate to include any unabsorbed demand charges that might arise as a result of shippers using interruptible services on TCPL's system or shippers who use an imported supply.

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Other Groups

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3.268 The City of Kitchener supports Union position with respect to variation accounts.

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Special Counsel

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3.269 Special Counsel argued that the existing criteria of financial significance, unpredictability and

uncontrollability, used in establishing variation accounts are still valid. Thus, no new variation accounts should be established at this time, except for unabsorbed demand charges as outlined in that Section.

Was Page 3/90. See Image [OEB:1134W-0:122]
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The Board's Findings

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3.270 Other than the unabsorbed demand charge account already referred to, the Board will not specify any additional variation accounts at this time. The Board will continue to consider each specific variation account proposal on the basis of its merits.

Was Page 3/91. See Image [OEB:1134W-0:123]
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Part K Separation of Marketing and Transportation Functions

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Introduction

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3.271 The monopoly to sell gas no longer exists. Without the separation of the transportation and marketing functions, there is a potential for cross-subsidization between the two functions and undue discrimination with respect to access on the LDC's transportation systems. Cross-subsidization could occur if the LDC underprices services in markets where it faces competition and makes up the difference by overpricing service for captive customers. Discrimination would occur if the utility treated gas shipped on behalf of others differently than it treated its own gas.

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3.272 The Pipeline Review Panel, in its July 10, 1986 Report recommended:

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Distribution companies review their corporate alternatives and move to the appropriate degree of separation between unregulated gas purchase and marketing activities on the one hand and the regulated transportation activity and their full service to residential, commercial and non-direct sales customers on the other hand. (Section 5.2.3.)

Was Page 3/92. See Image [OEB:1134W-0:124]
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3.273 This separation of marketing and transportation can be accomplished on three levels. Firstly, there is the most extreme scenario of corporate divestiture. Secondly, there is divisional separation within one company. Thirdly, there is division of costs as accomplished through accounting procedures.

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Position of the Parties

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The LDCs

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3.274 Union and Consumers' submitted that it is unnecessary to separate the marketing and transportation functions. They argued that there are certain economies of scale resident in

providing multi-services. There would be significant costs to the LDCs in separating transportation and marketing that would outweigh any potential benefit to the customers. Union argued that it is premature to consider such separation and, moreover the Board has no jurisdiction in this area and would need legislation to enforce it.

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3.275 ICG submitted that if deregulation of marketing activities in relation to a non-core market were to occur, then it might be appropriate to establish a separate marketing company to deal with these activities.

Was Page 3/93. See Image [OEB:1134W-0:125]

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The Brokers

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3.276 Northridge, ATCOR, Brenda and Consoligas submitted that there is a need for a corporate separation of marketing and transportation functions of the LDCs. Each function would be a separate subsidiary under a common holding company, each would have its own Board of Directors and complete separation of policy making, management and accounting. This complete separation would eliminate cross-subsidization as well as discrimination in access to transportation services.

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Industrial Gas Users and Producers

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3.277 Cyanamid and Polysar argued that cross-subsidization possibilities make it imperative that marketing and transportation functions be separated. Cyanamid was unsure as to degree and implementation timetable. Polysar supported separation in that it would refocus the utilities mental attitudes towards direct purchase. IGUA submitted that separation was premature at this stage and more experience was needed before taking such action. CIL and Nitrochem argued that this Decision should be deferred if it holds up the unbundling of rates. CPA submitted that division was not necessary if there were open and non-discriminatory access to transportation systems.

Was Page 3/94. See Image [OEB:1134W-0:126]

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Other Groups

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3.278 The Director, Energy Probe and The City of Kitchener submitted that organizational separation would make cross-subsidization difficult. The Director stated that without organizational divestiture there should be separation into different divisions. Failing that, separation of costs would be desirable. The City of Kitchener submitted that separation is appropriate where government has regulatory control over transportation but has eliminated regulation over marketing.

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Special Counsel

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3.279 Special Counsel submitted that ideally, under a totally open access scenario, complete corporate separation would be most consistent with the concept of a truly competitive commodity market

for the sale of gas. In the more limited access scenario, where the distinction of core/non-core markets is made, some level of separation is necessary in order to address the issues of cross-subsidization and equal access. In order to maintain full service with respect to core customers, complete corporate separation cannot be advocated. A separate broker arm of the utility could be established to contract with non-core customers. The broker arm would have to be relieved of the obligation to serve in

Was Page 3/95. See Image [OEB:1134W-0:127]

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order to remain on the same "level playing field" with other sellers of gas. Under this limited access scenario the Board must weigh the administrative costs of separation against the desire to have marketing and transportation costs segregated.

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The Board's Find

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3.280 The Board finds that the separation of marketing and transportation is necessary. The objective of the separation would be to improve the competitive environment by ensuring that the LDCs market gas on equal terms with brokers and producers.

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3.281 The Board accepts that separating the functions would involve a cost and finds that this should be allocated between the two functions on the basis of cost causality. For example, all gas related advertising costs should go directly to the marketing function. The costs of handling the contracts and legal aspects of transportation rates should be borne by the transportation division of the company.

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3.282 The Board finds that separation of costs by division should be accomplished by the time of the utility-specific rate hearing arising from these proceedings. If this is not possible, the LDC must explain at that hearing why it has

Was Page 3/96. See Image [OEB:1134W-0:128]

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not achieved this separation of costs. The LDCs should also propose a timetable for separation of these functions at the divisional level.

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3.283 The LDCs, as part of their submissions, should propose a timetable and approach to achieving separation of these functions through to the level of separate corporate entities. The criteria to be met with respect to the separation will be specific to each utility and as such these will be decided following utility-specific rate hearings rather than in this Decision.

Was Page 3/97. See Image [OEB:1134W-0:129]

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Part L Affiliate Transactions

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Introduction

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3.284 Affiliate transactions involve the sale of goods, services or information, including gas purchases, or the conferring of a benefit between a regulated utility and any associate or affiliate of that

utility.

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Positions fo <of> the Parties

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The LDCs

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3.285 Union agreed with Special Counsel that these hearings were not the appropriate forum for discussing the issue of affiliate transactions. Consumers' argued that these transactions could be dealt with through the Undertakings and therefore needed no comment in this Decision. ICG argued that affiliate transactions were permissible as long as it was demonstrated that they were comparable to arms length transactions.

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The Brokers

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3.286 Northridge, Brenda and Consoligas submitted that review of affiliate transactions should be done through public tender and be audited by independent accounting firms. In Ontario a

Was Page 3/98. See Image [OEB:1134W-0:130]

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third party should be engaged to assist in determining which supplier gets the contract. ATCOR differed in its submission, stating that if the utility could prove that purchases from affiliates were not in excess of market price they could be allowed.

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Industrial Gas Users and Producers

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3.287 CIL, Nitrochem, Polysar and IGUA submitted that the Board should review the results of all the LDCs' affiliate transactions to ensure that they represent competitive transactions. The LDC must prove to the Board that each transaction is as beneficial as if at arms length. CPA submitted that affiliate transactions should be allowed as long as open and non-discriminatory access to the distribution system is available. Affiliate transaction should not benefit nor prejudice LDCs or affiliates.

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Other Groups

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3.288 The City of Kitchener submits that all affiliate transactions should be permitted, subject to Board scrutiny. Energy Probe has no objection to affiliate transactions if they are demonstrated to be at arm's length. The Director submitted that such direct sales transactions should be done through a separate and unregulated affiliate.

Was Page 3/99. See Image [OEB:1134W-0:131]

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Special Counsel

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3.289 Special Counsel submitted that no decision with respect to affiliate transaction should be made as

a result of these proceedings. Affiliate transactions are being dealt with through the Undertakings of Consumers', ICG and Union.

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The Board's Findings

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3.290 The Board is less concerned with affiliate gas transactions in market segments where significant competition has been achieved. In the market segments in which workable competition has not been achieved, such as the core market, affiliate gas transactions are of greater concern.

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3.291 Affiliate transactions have been, or are currently being, addressed in the negotiation of Undertakings with the LDCs and related parties. The Board finds that its prior approval will be required for all affiliate transactions aggregating $100,000 or more annually, other than the sale and transportation of gas by the LDC.

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3.292 The separation of the LDCs' transportation and marketing functions does not of itself assure that discrimination will not occur. Concurrent with the timetable for the establishment of a

Was Page 3/100. See Image [OEB:1134W-0:132]

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separate marketing entity, the LDC should present in the utility-specific rate hearings, its proposed procedures which will assure that all shippers will have equal access to pipeline and storage capacity.

Was Page 4/1. See Image [OEB:1134W-0:133]

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4. LEGAL MATTERS

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Introduction

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4.1 This chapter deals with the three main legal issues and proposals for legislative change.

Was Page 4/2. See Image [OEB:1134W-0:134]

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Part A The Board's Jurisdiction to Control the Operation of Brokers

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Introduction

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4.2 The Board has found, as stated in Chapter 3, Part A Brokers, that it is desirable that brokers of gas be allowed to act as agents or as principals to sell gas in Ontario. To accomplish this, brokers who act as principals must make contracts with the LDCs, storage companies, producers and TCPL in order to sell gas to the end-user.

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4.3 The issue in this section is: what legal constraints does the present legislative scheme impose upon brokers operating in Ontario.

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The Legislative Scheme

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4.4 There are three pieces of legislation which, when read together, provide a comprehensive scheme to ensure the orderly and equitable provision of natural gas to Ontario consumers. These are the Ontario Energy Board Act, R.S.O. 1980, c.332 (the OEB Act), the Municipal Franchises Act, R.S.O. 1980, c.309 (the MF Act) and the Public Utilities Act, R.S.O. 1980, c. 423 (the PU Act).

Was Page 4/3. See Image [OEB:1134W-0:135]

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4.5 The three controls on a person wishing to supply natural gas to a consumer in Ontario are:

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* A section 19 OEB Act order;

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* A certificate of public convenience and necessity obtained from the OEB; and

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* A by-law from a municipality, approved by this Board, which enables the person to supply gas in that municipality.

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A Broker is a Supplier of Gas

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4.6 This Board is of the opinion that a broker is:

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* a company within the purview of Part V of the PU Act;

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* a person who supplies gas under the MF Act; and

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* a distributor as defined in the OEB Act.

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4.7 Therefore, in order for brokers to supply gas in Ontario, a broker would obtain a section 19 OEB Act order; a certificate of public convenience and necessity (section 8 of the MF Act); and a municipal by-law approved by the OEB (Part V of the PU Act and sections 3 and 9 of the MF Act).

Was Page 4/4. See Image [OEB:1134W-0:136]

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4.8 A fundamental rule in construing statutes is that words should be given their grammatical and ordinary meaning. When interpreting a series of statutes which form part of the same legislative scheme, there is a rule of statutory interpretation which provides that the use of parallel words ought to be interpreted consistently unless there is an indication to the contrary. Similarly, the general principle underlying statutory interpretation applies in that words ought to have attributed to them, as far as is logically possible, their plain and unambiguous meaning unless a contrary intention appears.

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4.9 The OEB Act, the PU Act and the MF Act all rely on the concept of supply". These three Acts all seek to control any person who carries out a particular function - the act of supplying gas. The definition of who is such a supplier is a functional definition. It is the act of supplying gas that

triggers the imposition of the regulatory scheme upon a person.

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4.10 It was argued that brokers were encompassed under all, or none, or portions of the three relevant statutes. The different interpretations exist largely because of the concepts contained in the legislative scheme concerning who ought to be regulated. As noted above, the

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act of supplying gas has traditionally invoked the regulatory process.

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4.11 The industry structure has changed over recent years. Prior to this evolution, there was no differentiation between parties who carried out the sales function and the gas works functions (transportation, storage, metering, etc.). "Supply" was therefore an appropriate mechanism for the imposition of regulation.

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4.12 In the new environment, the sales function is being severed from the gas works and transportation functions leaving the latter as a true natural monopoly.

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4.13 It was submitted to the Board that the legislative scheme did not contemplate the regulation of parties who only sold gas in Ontario and that it was meant only to encompass those who owned and operated the physical gas works. In the opinion of the Board, this is incorrect. The legislative scheme intended to regulate any person who supplied gas in Ontario. The Board finds that the supply of gas in this scheme means passing title and/or physically delivering the commodity to a place in Ontario. This is consistent with the general meaning afforded to "supply" in regulatory schemes.

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4.14 By regulating suppliers, the legislative scheme regulates any person who sells gas and/or who owns and operates the gas works. Therefore, the scheme captures an LDC which delivers gas by means of gas works owned and operated by the LDC and also those who store gas, transport another's gas or their own gas for sale.

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4.15 A broker is someone who supplies gas directly to an end-user in Ontario using an LDC's or TCPL's gas works system without constructing, owning or operating any physical works. As the scheme regulates persons who supply gas, brokers are captured when they sell gas in Ontario to an end-user.

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4.16 The Board has been given a broad mandate to control the supply of natural gas in the public interest: Union Gas Limited v. Township of Dawn (1977), 76 D.L.R. 613. We find that to fulfill this mandate the Board must have control over all avenues of the supply of gas, including supply through brokers.

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4.17 The Legislature intended to grant to the Board a comprehensive overseeing function to ensure an efficient natural gas system in Ontario. There are no exemptions from this duty. The Board finds that it would be contrary to the legislative intent if the Board did not control a person who sells

gas in Ontario, merely

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because that person did not own the physical works to effect that sale.

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4.18 If this were not the situation, and if as submitted, the Board were not able to compel service by those who control the physical works, any person could sell gas in the Ontario market; the only control on a person's ability to do so would be the owners of the physical works. As a result, brokers would be regulated, not by the OEB, but by the LDCs. The brokers' primary competitors would control the brokers' ability to sell by controlling their access to the system. This would create an industry structure ripe for abuse by the monopoly position of the LDCs. The Board finds that such a result would be contrary to the public interest.

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The Source of the Municipal By-Law Requirement

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4.19 It was argued that the requirement of a municipal by-law approving the supply of gas is mandated by section 3 of the MF Act not by section 57 in Part V of the PU Act. However, we find that the effect of the by-law requirement is not altered by the section which mandates it.

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4.20 We find that brokers are suppliers within the purview of Part V of the PU Act. Therefore, it

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is not necessary to determine whether the by-law requirement stems from section 57 of the PU Act or from section 3 of the MF Act. The effect on brokers is the same.

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4.21 The Township of Nelson v. Dominion Natural Gas Co. Ltd. (1930), 66 D.L.R. 271 (Ont. H.J.); aff'd [1931] 2 D.L.R. 229 (O.C.A.), was cited both for and against the proposition that section 3 of the MF Act requires a by-law before gas may be supplied within a municipality. At trial, Wright J. took the position that section 3 of the MF Act requires a by-law without relying upon section 57 of the PU Act. It appears to this Board that the appellate court did not disapprove of Mr. Justice Wright's ground of decision. Upon appeal the decision was affirmed in result, and both section 3 of the MF Act and Part V of the PU Act were cited. Therefore, this Board is of the opinion that the Nelson decision did not decide the issue whether it is section 3 of the MF Act or Part V of the PU Act which requires a gas supplier to have a by-law.

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4.22 Therefore, a person who wishes to supply gas to a municipality or to an inhabitant of the municipality is required to obtain a by-law.

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The Municipal By-Law Requirement

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4.23 It was submitted to the Board that a broker is not a "company incorporated for the purpose of supplying any public utility" under section 56, Part V of the PU Act. The PU Act defines "public utility" to include gas. There were two primary arguments advanced in support of this position:

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* The Board ought not attempt to modernize the words "company incorporated for the purpose" in section 56 by giving them a liberal interpretation which would look to the subjective intention of the incorporators rather than the objective evidence of the stated corporate purposes in the corporate constitution; and

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* The intention of the Legislature was not to require a franchise for a supplier who uses the physical works of another person.

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4.24 The first of these arguments would result in all companies which do not have a stated corporate purpose of supplying gas being exempt from the by-law requirement. This means that virtually no one would be required to obtain a by-law. Section 56 evidences a clear intention to encompass every company supplying gas. Under the old corporate law regime, all objects of a corporation had to be expressly stated. Under

Was Page 4/10. See Image [OEB:1134W-0:142]

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present corporate law, a corporation has the capacity to engage in whatever activities it wishes.

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4.25 To fulfill the obvious legislative intent, this Board finds that section 56 must be interpreted as encompassing anyone who supplies, or attempts to supply, gas. This is not to be accomplished through reference to the subjective intentions of the incorporators but by reference to the objective fact of supply.

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4.26 The second submission regarding the non-application of section 56 of the PU Act to brokers fails for reasons similar to those discussed in A Broker is a Supplier of Gas. The brokers' submission that the by-law requirement is not suitable for those who do not construct, own or operate gas works may be correct. However, the Legislature made the scheme applicable to a person who supplies gas, not only to one who constructs, owns or operates the gas works to facilitate the supply of gas.

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4.27 It was further submitted by the brokers that the powers referred to in section 57 of the PU Act, which a company cannot exercise without a by-law, must be limited to those related to the construction, ownership or operation of gas works, rather than the power of supply. Otherwise, it was submitted, the result would be to

Was Page 4/11. See Image [OEB:1134W-0:143]

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require a by-law to enable a gas station to sell propane or a company to sell bottled water.

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4.28 The Board is of the opinion that the "powers" to which section 57 refers are the corporate powers which a private utility gains by standing in the place of a municipally-owned utility through the acquisition of a by-law. The corollary of this is that they are the powers which a company could not exercise unless it is a municipally-owned utility or a person operating under a by-law. The PU Act was written with municipally-owned utilities as the primary focus. Part V of the PU Act allows a private company to take the place of a municipally-owned utility. A municipal corporation may supply gas to its inhabitants under subsection 18(1) of the PU Act. The powers

referred to in section 57 of the PU Act are not all the powers of a corporation. That section deals only with those powers which the corporation would be prohibited from exercising unless it had a municipal by-law.

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4.29 Reading sections 18(1), 56 and 57 together, it is apparent to the Board that the legislative intent in enacting the PU Act was to reserve the right to supply gas to the municipally-owned utility unless the municipality waived this right by passing a by-law to enable a private company to take its place. This

Was Page 4/12. See Image [OEB:1134W-0:144]

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suggests that Part V of the PU Act should only be applied where municipally-owned utilities operate, or would logically operate, because of the existence of a monopoly. Part V would, therefore, not apply to the sale of bottled water or propane sold at service stations. it does apply to the supply of natural gas because that is an active area of operation for a municipally-owned utility.

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4.30 The Board is of the opinion that brokers who wish to supply gas in Ontario are covered by Part V of the PU Act and section 3 of the MF Act and require a municipal by-law.

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Certificate of Public Convenience and Necessity

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4.31 We find that brokers, as suppliers of gas, are also required to obtain a certificate of public convenience and necessity under section 8 of the MF Act in order to supply gas within a municipality.

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4.32 There are three questions which relate to certificates of public convenience and necessity:

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* Can one certificate apply to more than one municipality?

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* May the Board attach terms and conditions to a certificate? and

Was Page 4/13. See Image [OEB:1134W-0:145]

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* Does the Board have the power to grant declaratory relief to brokers exempting them from the by-law requirement?

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4.33 First, can a certificate cover multiple municipalities? A certificate has been traditionally granted upon the application of an LDC for an area in which it has or will be obtaining a by-law from the municipality. The scope of such a certificate has therefore been limited to the particular municipality to which the by-law pertains.

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4.34 The Board's issuance of certificates of public convenience and necessity is limited by the terms of section 8 of the MF Act. The standard applied by the Board in granting a certificate is one of public convenience and necessity. This standard places a burden on the applicant to demonstrate that the benefits to the public would outweigh the costs of allowing the activity. The opinion of

the Board as to when the standard of public convenience and necessity is satisfied is determinative of the issue: Union Gas Co. v. Sydenham Gas and Petroleum Co., Ltd. (1957), 7 D.L.R. (2d) 65 (S.C.C.). We find that if brokers meet this standard for the municipalities for which the certificate is requested, then the Board may grant the certificate.

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4.35 The Board finds it may issue a certificate covering more than one municipality since there is no restriction in the legislation, either expressly or by implication. Since there is a requirement for a municipal by-law, the principle of municipal control over those who operate in the place of a municipally-owned utility would not be affected. Even if the Board did not choose to issue a multiple-municipality certificate, it could achieve exactly the same result through one hearing from which many certificates could be issued.

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4.36 The second question deals with the Board's power to attach terms and conditions to a certificate of public convenience and necessity. In order to execute its duty of ensuring that certificates meet the standard of public convenience and necessity, the Board reaffirms its position that it may attach appropriate terms and conditions to protect the public interest.

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4.37 This jurisdiction arises by virtue of the implied and express powers in subsection 8(3) of the MF Act:

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The Ontario Energy Board has and may exercise jurisdiction and power necessary for the purposes of this section ...

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4.38 It is supported by the Board's general discretionary power to impose terms and conditions as the Board considers proper pursuant to section 16 of the OEB Act.

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4.39 The third question is whether the Board can exempt brokers from the requirement of having to obtain a municipal by-law. As stated previously in this chapter, the Board finds that if a broker is going to supply gas within a municipality, a municipal by-law must be obtained. It is the Board's opinion that it cannot grant an exemption from this statutory requirement.

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Brokers and Section 54 of the PU Act

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4.40 It was submitted that if brokers are suppliers of gas under the legislative scheme, including Part V of the PU Act, then brokers must also be encompassed by section 54, Part IV of the PU Act:

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54. Where there is a sufficient supply of the public utility, the corporation shall supply all buildings within the municipality situate upon land lying along the line of any supply pipe, wire or rod, upon the request in writing of the owner, occupant or other person in charge of any such building.

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4.41 Section 54 is the mechanism by which a LDC can be forced to supply gas. This section is

enforceable by way of an application to the Supreme Court of Ontario, which, if successful, will result in the LDC being ordered to provide gas to the applicant.

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4.42 It was submitted that brokers, if captured by Part V of the PU Act as persons who supply gas, are subject to the obligation to supply any person with a building situated along a pipeline.

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4.43 It is the Board's opinion that this section does not mean that a supplier of gas is responsible for the supply of gas to a person situated upon any pipeline, but that a supplier of gas is responsible for the supply of gas to a person situated upon any pipeline owned by that supplier of gas. Otherwise, any LDC or municipal utility could be ordered to supply gas to a person situated along a pipeline owned or operated by another LDC or municipal utility regardless of the distance of service or whether the pipeline owner will cooperate.

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4.44 An additional reason why a broker is not encompassed by section 54 of Part IV of the PU Ac t is found by comparing section 48, which limits the application of Part IV of the PU Act, to

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section 56, which limits the application of Part V of the PU Act.

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48. This Part applies to all municipal or other corporations owning or operating public utilities.

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56. This Part applies to every company incorporated for the purpose of supplying any public utility.

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4.45 The Board is of the opinion that a broker would not necessarily be encompassed by Part IV of the PU Act since it is limited to those corporations which own or operate public utilities. Although the PU Act defines "public utility" as meaning "gas"; the words "public utilities" in section 48 do not, in the Board's opinion, refer to the commodity which is gas, rather they refer to the physical works and business institution which owns or operates the physical works to supply the gas. Brokers do not own and operate the physical works to supply gas and are therefore not a corporation owning or operating public utilities.

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Are "Direct Purchasers" Suppliers

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4.46 It was submitted that if brokers are found to be suppliers of gas under the PU Act and the MF Act and distributors under the OEB Act, then all direct purchasers of gas (end-users of gas who buy gas outside of Ontario for their own

Was Page 4/18. See Image [OEB:1134W-0:150]

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use and arrange the transportation of that gas to their plant) would also be suppliers of gas. If so, a direct purchaser would be encompassed by the regulatory scheme and would require a certificate of public convenience and necessity and a by-law of the municipality in which it resides in order to make direct purchases.

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4.47 The Board is of the opinion that these propositions arise from an erroneous interpretation of the meaning of supplier of gas. As discussed before, a supplier is one who sells gas in the province and/or delivers gas to a place in Ontario. A direct purchaser does not sell or deliver the gas to an end user in Ontario and therefore is not a supplier.

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4.48 However, if a direct purchaser has an excess supply of gas and wishes to sell this gas within Ontario, then that direct purchaser would become a supplier of gas and would fall under the legislative scheme.

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4.49 The Board believes that system efficiency could be improved through such diversions and that a direct purchaser should have the opportunity to divert. The Board will recommend changes to the legislation to permit such diversions.

Was Page 4/19. See Image [OEB:1134W-0:151]

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The Section 19 OEB Act Order Requirement

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4.50 A distributor is defined in the OEB Act as "a person who supplies gas ... to a consumer...". As discussed above, it is the act of supplying gas which triggers the imposition of the regulatory scheme upon a broker.

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4.51 An LDC argued that the Board has a broad mandate to control the supply and distribution of natural gas in the public interest, and therefore, the Board has a duty to approve just and reasonable rates for the sale of gas by brokers. The Board finds that although it has a broad mandate to act in the public interest, the regulation of sales prices by brokers, who act in a competitive yet controlled market, would not be in the public interest.

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4.52 However, subsection 19(8) prohibits a distributor, which by definition includes a broker, from selling gas except in accordance with a Board order:

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Subject to the regulations, no transmitter, distributor or storage company shall sell gas or charge for the transmission, distribution or storage of gas except in accordance with an order of the Board, which is not bound by the terms of any contract.

Was Page 4/20. See Image [OEB:1134W-0:152]

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4.53 The Board is given the power to make rate orders by virtue of subsection 19(1):

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Subject to the regulations, the Board may make orders approving or fixing just and reasonable rates and other charges for the sale of gas by transmitters, distributors and storage companies, and for the transmission, distribution and storage of gas.

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4.54 It is the opinion of the Board that a subsection 19(1) order fixing just and reasonable rates for the sale of gas by brokers may not be appropriate under the circumstances.

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4.55 Subsection 19(8) provides that the prohibition is subject to regulations made under the OEB Act. It is the Board's opinion that legislative amendments to permit brokers to operate in the province, subject to any controls the Board would consider proper, would be the preferred solution. If such legislative changes are not immediately forthcoming, the Board may request the Minister to propose appropriate regulations to the Lieutenant Governor in Council (pursuant to clause 35(1)(h) of the OEB Act) to exempt brokers from the operation of section 19.

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4.56 Should an LDC wish to compete as a broker, the Board would hear applications by the affiliate corporation of an LDC to act as a broker. Such an application should include details of what

Was Page 4/21. See Image [OEB:1134W-0:153]
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controls would be implemented to avoid unfair dealing between that broker and the LDC.

Was Page 4/22. See Image [OEB:1134W-0:154]
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Part B Compelling Service and Approval of Contracts

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Introduction

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4.57 The issues in this section are whether the Board has the jurisdiction to order that LDCs provide a given service and to approve contracts.

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4.58 The Board dealt with these issues in the Interim Decision in paragraphs 9.107 to 9.112 and 9.24 to 9.30. The Board held that rates include more than monetary terms and include many conditions of service. The Board has the jurisdiction to determine or approve any term of a contract which is directly or indirectly rate-related. The Board found that it had the jurisdiction to review the terms of any transportation contract to ensure that the contracts were not imprudent or contrary to the public interest. The Board did not decide whether it had the power to order service at that time because there were no instances where such an issue had arisen. However, the Board did state, at para. 9.112:

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... that the overall scheme of the legislation in Ontario implicitly confers on it the jurisdiction to require service to a customer that qualifies for such service.

Was Page 4/23. See Image [OEB:1134W-0:155]
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The Board's Opinion

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4.59 The Board finds that it has the power to compel the provision of services by an LDC to any qualifying customer, including entry into a Board-specified contract. This is part of the inherent jurisdiction which the Board has as a regulator of gas monopolies.

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4.60 It is also the opinion of the Board that it can require Board approval of contracts between an LDC and any other person, both as a prerequisite to entry and ex post. Any contract between an LDC and another party for the sale, transmission, storage, or metering etc. of gas affects the costs and revenues of the LDC; the Board finds that such contracts are reviewable through the Board's

power to determine just and reasonable rates.

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4.61 To suggest that the Board can review rate terms but not other conditions of service is to ignore the fact that they are two sides of the same equation. The Board cannot review the fairness of prices charged unless it can review the level and nature of service provided. Similarly, the Board cannot review the degree to which monopolists are fulfilling their public stewardship unless it can review discriminatory practices of LDCs between their customer classes or customers within a class.

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4.62 This concern is accentuated because LDCs are now competing with brokers for sales as well as controlling services essential to successful brokerage sales or direct purchases. The Board, as part of its inherent public interest jurisdiction, must be able to review and compel adjustments to the conduct of LDCs in their position of dominance.

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Why the OEB May Compel Service and Approve Contracts

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4.63 The Board's opinion is that it has the jurisdiction to compel service by a LDC which refuses to co-operate with a broker or direct purchaser, and to require Board approval of contracts, is based upon:

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* The OEB Act providing the mechanisms to accomplish this role.

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* The doctrine of jurisdiction by necessary implication;

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* The inherent role of a regulator;

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* The role of the OEB in Ontario;

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The Mechanisms to Approve Contracts and Compel Service

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4.64 The first factor leading this Board to find that it has the jurisdiction necessary to approve contracts and compel service is that the Board can utilize its existing powers to

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effect the necessary regulation within the present statutory framework.

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4.65 The Board will not at this time attempt to decide the issue of how it will carry out and enforce its power to approve contract terms or compel service. The Board will decide each case on the facts as they arise.

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4.66 The Board has the power to set just and reasonable rates under section 19. The Board may

initiate a review of the rates of a LDC under subsection 19(12) of the OEB Act. This power to set rates includes all non-monetary but rate-related terms of service. Section 16 of the OEB Act allows the Board to attach whatever terms and conditions it considers proper in the exercise of its jurisdiction. This could include the requirements of information filing, contract approval or entry into service contracts on a fair basis. The Board considers all terms of service to be rate-related. Therefore, should a LDC discriminate in the provision of services at reasonable rates, the Board would have the power to set rate/service combinations which the LDC must provide. Any rate order could be made conditional upon the LDC following procedures which the Board set out. The Board could also fix rates and corresponding terms of service to facilitate the provision of services to a broker or direct

Was Page 4/26. See Image [OEB:1134W-0:158]

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purchaser who cannot reach an agreement with an LDC upon application to the Board.

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4.67 Board orders are enforceable under the OEB Act and the Statutory Powers Procedure Act, R.S.O. 1980, c. 484. Violation of an order could lead to the revocation of the LDC's ability to charge rates for its services or to an injunction to force the provision of those services. It is also an offence under section 34 of the OEB Act to contravene any provision of that Act or any Board order.

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Jurisdiction by Necessary Implication

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4.68 The doctrine of jurisdiction by necessary implication is explained in 36 Halsbury 3rd ed., page 436, para. 657:

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The powers conferred by an enabling statute include not only such as are expressly granted but also, by implication, all powers which are reasonably necessary for the accomplishment of the object intended to be secured.

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4.69 This doctrine has been applied in Canada to ensure that regulatory tribunals have the jurisdiction necessary to accomplish their mandates.

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4.70 In Re Interprovincial Pipeline Ltd. and National Energy Board (1977), 78 D.L.R. (3d) 401, the

Was Page 4/27. See Image [OEB:1134W-0:159]

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Federal Court of Appeal had to decide whether an NEB order for the production of documents was within the NEB's jurisdiction, although the NEB did not have express statutory authority to make the order. The Court looked beyond the exact words of the statute to its purpose. It found that the necessary jurisdiction to make such an order ought to be implied since such an order was clearly in furtherance of the legislative purpose and was necessary to enable the Board to function.

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4.71 This same doctrine of jurisdiction by necessary implication was pleaded by the successful parties in Re Canadian Broadcasting League and Canadian Radio-Television Commission et al (1982), 138 D.L.R. (3d) 512. Here the Federal Court of Appeal accepted the argument that despite the

absence of a statutory provision enabling the CRTC to regulate rates of cable companies, the authority to do so should be found to exist as a natural and necessary part of the CRTC's control of a monopoly in order to achieve the legislative objectives.

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4.72 In Ref. Re National Energy Board Act (1986), 19 Admin. L.R. 301 (F.C.A.), it was argued that the NEB had jurisdiction by necessary implication to award costs. In rejecting the submission, the Court imposed two limitations on the doctrine. First, it must be a matter of

Was Page 4/28. See Image [OEB:1134W-0:160]

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necessity that the jurisdiction exist for the regulator to accomplish the legislative purpose. This qualification is not met if the tribunal can and has accomplished this purpose without this jurisdiction. Second, the jurisdiction sought must not be jurisdiction to do an act which Parliament clearly addressed its mind to, as would be indicated by past conduct, since to do so would be to usurp the function of Parliament.

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4.73 The doctrine of jurisdiction by necessary implication should be implied when:

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* the jurisdiction sought is necessary to accomplish the objectives of the legislative scheme and is essential to the Board fulfilling its mandate;

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* the enabling act fails to explicitly grant the power to accomplish the legislative objective;

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* the mandate of the Board is sufficiently broad to suggest a legislative intention to implicitly confer jurisdiction;

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* the jurisdiction sought must not be one which the Board has dealt with through use of expressly granted powers, thereby showing an absence of necessity; and

Was Page 4/29. See Image [OEB:1134W-0:161]

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* the Legislature did not address its mind to the issue and decide against conferring the power upon the Board.

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The Inherent Role of a Regulator

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4.74 The third factor upon which the Board's ability to compel service and approve contracts is based is the inherent role of a regulator. This underlies the invocation of the doctrine of jurisdiction by necessary implication to ensure that the Board has the power to approve contracts and compel service. This doctrine attempts to ensure that a regulator with a broad mandate will have the tools to fulfill that mandate.

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4.75 The role of the modern regulatory tribunal evolved from common law courts which entertained claims of improper conduct by common carriers. Canadian jurisprudence recognizes the obligations of a common carrier or provider of a utility service.

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4.76 In Red Deer v. Western General Electric (1910), 2 A.L.R. 145 at 152 (Alt. S.C.) the court stated, after reviewing the common law principles relating to common carriers, that:

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... there is an implied obligation upon the franchise holder to render

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such services or supply such commodities on request and without unfair discrimination to every inhabitant who is ready and willing to pay in advance therefor, and whose place at which the obligation is required to be performed lies along the line of the franchise holder's operations, and who accords to the franchise holder all reasonable facilities to admit of the convenient performance of the obligation. That, in my opinion, is the obligation in general terms.

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4.77 Modern rate regulation developed from these common law principles. Technological advances resulted in more natural monopolies with larger scale operations to maximize efficiency. To ensure that rates and services would be fair and reasonable and operate in the public interest, regulatory tribunals such as the OEB were constituted.

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4.78 Canadian jurisprudence has recognized the broad mandate which the modern regulator of utilities has been given. For example, in Re T.A.S. Communication Systems Ltd. and Newfoundland Telephone Company (1983), 2 D.L.R. (4th) 647 at 649, the Newfoundland Court of Appeal summarized the purpose of modern regulatory schemes as follows:

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The Public Utilities Act [R.S.N. 1970], as with similar statutes in all other Canadian jurisdictions, was enacted

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for the purpose of controlling and regulating companies providing essential services ... in order to ensure that those services are properly and fairly provided to the public, and that the charges for such services are fair and reasonable.

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4.79 The role of the regulator is not simply to set rates to provide a fair return after legitimate costs of service. Rates must be set in relation to the expected level and quality of service; service must be provided in a non-discriminatory fashion.

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4.80 As Webber stated in Principles of Public Utility Regulation, at page 101:

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The grant of special privileges to public service corporations imposed upon them certain obligations and public duties. They are required:

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(1) To supply reasonably adequate facilities

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(2) To render service on reasonable terms (3) To refrain from unjust discrimination

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The function of the state in utility regulation is to prescribe rules that will attain certain objectives.

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(1) The insurance of fair remuneration to private property used in the public service (2) The prevention of extortion (3) The securance of substantial equality of treatment under similar circumstances

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(4) The promotion of public safety, good order, and convenience

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4.81 Webber further stated, with the support of State ex rel. Wood v. Consumers' Gas Trust (1901) 61 Ne 674, that:

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The common and equal right of the public to reasonable service at reasonable compensation governs all situations where public service is involved. No statute is deemed necessary to aid the courts in holding such to be the law.

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4.82 Webber is supported by other authorities on regulatory law such as Jones, Cases and Materials on Regulated Industries, (2nd ed, 1976) at page 288, and A.J.G. Priest in his work, Principles of Public Utility Regulation (1969), concerning the service obligation (pages 227-46) and the prohibition against discrimination (page 285 and pages 300-311).

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The Role of the OEB

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4.83 The public interest mandate given to the Board in the OEB Act is the fourth factor which leads this Board to conclude that it can compel service and approve contracts. This mandate is premised on a legislative intention to grant the Board the necessary jurisdiction to regulate the natural gas industry in Ontario.

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4.84 Section 64 provides that the OEB Act prevails in the event of a conflict with any general or special Act. Section 13 grants the Board the power to determine all questions of fact and law within its jurisdiction (subsection 1) and grants the Board exclusive jurisdiction over all matters in which it has jurisdiction (subsection 6). The legislative intent was to create an administrative, regulatory and adjudicative tribunal to oversee the energy industry, particularly the natural gas industry, in Ontario.

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4.85 This broad mandate was discussed in Union Gas v. Dawn (supra); the Divisional Court stated at page 625:

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... it is clear that the Legislature intended to vest in the Ontario Energy Board the widest powers to control the supply and distribution of natural gas to the people of Ontario "in the public interest" and hence must be classified as special legislation.

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and, at page 622:

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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

Was Page 4/34. See Image [OEB:1134W-0:166]

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under the exclusive jurisdiction of the Ontario Energy Board ...

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These are matters that are to be considered in the light of the general public interest and not local or parochial interests.

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In the final analysis, however, it is the Energy Board that is charged with the responsibility of making a decision and issuing an order in the public interest.

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4.86 The Ontario Divisional Court in Re Ontario Energy Board (1985), 51 O.R.(2d) 333 at 336 stated:

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The jurisdiction of the Ontario Energy Board is very broad. It is charged with the regulatory and quasi-judicial functions covering the entire field of energy within the Province of Ontario.

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4.87 This broad mandate and jurisdiction have not been disputed in the courts. The cases of Re Kimpe and Union Gas Ltd. (1985), 52 O.R. 112 and Re Ontario Energy Board (1985), 51 O.R. 333 were cited to the Board as examples of how the courts have limited the Board's jurisdiction to powers expressly delineated in the OEB Act. In the opinion of the Board, these decisions limit the Board's jurisdiction where the Legislature has clearly directed its mind to the issue and decided to withhold a procedural power from the OEB. The procedural powers withheld in these

Was Page 4/35. See Image [OEB:1134W-0:167]

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two cases were not essential to the accomplishment of the Board's mandate.

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4.88 The Board finds that the powers to compel service and approve contracts, are essential to the Board's mandate as a regulator and are not matters explicitly addressed by the Legislature.

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4.89 It has been suggested to the Board that the existence of section 22 of the OEB Act, which allows the Board to compel storage service and to approve storage contracts, and section 54 of the PU Act, which allows a person to apply to a court to order an LDC or municipally-owned utility to supply gas, shows that the Legislature directed its mind to whether the Board should have the ability to compel service and approve contracts. In the opinion of the Board, this is not indicative of a legislative intention to preclude the Board.

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4.90 When the legislative scheme was enacted it was not foreseen that brokers and direct purchasers

would place new demands on the regulatory scheme. The relationship between these parties and LDCs raises the possibility of discriminatory practices or abuse of dominance. Notwithstanding that the Legislature did not address its mind to this possibility, it is necessary that the public interest be served.

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4.91 This role could be fulfilled by the courts which presently oversee section 54 of the PU Act. However, it is the opinion of the Board that these new relationships are best left to regulation by the Board since it already deals with brokers, direct purchasers and LDCs. The required regulation will necessitate ongoing monitoring, administration and enforcement; regulation is best suited to an administrative tribunal. Further, the jurisdiction of the Board in section 22 of the OEB Act over the similar issue of storage matters indicates to the Board that had the Legislature contemplated the new industry structure, it would have expressly granted this jurisdiction to the OEB.

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4.92 It was submitted that the Board had narrowly interpreted its jurisdiction in its Reasons for Decision, E.B.R.O. 377-1 (Union). The Board held (at page 15) that it did not have the jurisdiction to set the rates for the supply of gas to an LDC or to cause an LDC and its supplier to terminate or renegotiate a contract. It is the Board's opinion that this did not suggest that the Board did not have the power to review the prudence and the costs involved with supply contracts. However, the Board did state that it could not interfere in a normal LDC/supplier relationship and this is still the case, provided the supply does not implicitly set a rate or is not imprudently contracted for.

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4.93 The Board does not wish to unnecessarily interfere in a competitive market for the supply of gas to LDCs. Such interference is not essential or necessary for the Board to fulfill its mandate; nor is part of the inherent jurisdiction of a regulator to regulate free market purchases by a regulated utility.

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4.94 It was submitted that it would be a violation of the autonomy of the management of a utility for the Board to compel service and to review and approve contracts. An LDC cited the New York Public Service Commission case of Re Promotional Activities by Gas and Electric Corporations (1967), 68 PUR (3d) 162. However, after stating a general principle of management autonomy at page 167:

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... it is a well-recognized principle of such regulation that considerable discretion must be afforded the management of a utility in the conduct of the utility's business,

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the Commission set out relevant exceptions to this rule which this Board finds instructive:

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Even in such areas of management discretion, sales promotion and other expenditures related to the conduct of the business are subject to scrutiny and investigation by the commission, but the commission may not substitute its judgment for management unless

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there is a showing of unlawfulness, improvidence, or inefficiency.

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4.95 And, at page 168:

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... its [the utility's] charges shall not be unjust or unreasonable, and that it shall not unjustly discriminate so as to give undue preference or disadvantage to customers similarly circumstanced,

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4.96 The Board finds that the powers to review the cost of service and to ensure that fair and adequate services are provided are not a violation of the principle of management autonomy. The Board agrees with the New York Commission that the potential for unjust charges and discrimination are legitimate reasons for reviewing the activities of management.

Was Page 4/39. See Image [OEB:1134W-0:171]

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Part C Assignment of Contracts

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4.97 The Board is of the opinion that the assignability of contracts is primarily a matter of negotiation between the parties. However, the Board reiterates its concerns expressed under the preceding section. Where an LDC unreasonably refuses to allow assignability of contracts without valid business reasons and attempts to use its position of dominance to further its own business interests to the detriment of those who rely on those services, with the result that the public interest is harmed, then the Board may use its powers as a legitimate exercise of its jurisdiction to remedy the situation.

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4.98 The Board will hear applications concerning unreasonable refusals to allow contract assignability and will decide each case on the facts. The Board notes that it would not be unreasonable for LDCs to charge more for assignable service contracts, as compared to non-assignable contracts, provided the excess is an accurate reflection of the additional costs involved. Nor would it be unreasonable for the parties to negotiate notice of assignment provisions and even third party insurance to make the assignment of contracts more acceptable.

Was Page 4/40. See Image [OEB:1134W-0:172]

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Part D Conclusion and Proposals for Legislative Change

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4.99 This section summarizes the conclusions reached on legal matters discussed in this part of the Decision and highlights the need for amendments to the legislation.

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4.100 Brokers engage in the supplying of gas. Supplying gas means the selling of gas, that is, the passing of title at any point in Ontario and/or the delivery of the gas. Therefore, brokers are suppliers of gas under the MF Act, the PU Act and the OEB Act.

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4.101 As suppliers of gas, brokers require:

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* A certificate of public convenience and necessity for the municipality in which they wish to supply gas;

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* A by-law from the municipality to enable them to supply gas, and

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* An order of the Board to overcome the subsection 19(8) OEB Act prohibition.

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4.102 The certificate required under section 8 of the MF Act can be used as a form of licensing by attaching terms and conditions to it. The test of public convenience and necessity must be

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satisfied for each municipality covered by the certificate.

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4.103 The by-law requirement exists by virtue of Part V of the PU Act and section 3 of the MF Act. The broker must obtain a by-law before it supplies gas. It may be procedurally expeditious for municipalities to have the Board act as a screening mechanism of brokers (financial integrity, supply dependability, management ability etc.) through the certificate process. It would likely be a term of every certificate that the brokers would never own, operate or construct any works to supply gas, thereby preserving the legitimate municipal interest in controlling physical works.

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4.104 It was submitted that the by-law requirement could be facilitated through the Board requesting each municipality to pass a standard form by-law to enable brokers to supply to the municipality and the inhabitants of the municipality. The Board will not make this request at this time. If brokers and municipalities wish the Board's assistance, the Board will attempt to be of service. The Board believes that it would be in the interests of the municipalities to facilitate brokerage and that the enactment by each municipality of a standard form by-law to allow brokers to operate would

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be an expeditious manner of implementing brokerage in the province.

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4.105 The subsection 19(8) prohibition against unauthorized gas sales may be overcome by a Regulation made by the Lieutenant Governor in Council pursuant to clause 35(1)(h) of the OEB Act

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4.106 The Board reiterates its position stated in the Interim Decision, paragraphs 9.24 to 9.30 regarding the Board's power to approve customer contracts and paragraphs 9.107 to 9.112 regarding the jurisdiction of the Board to compel service and approve contracts of service between an LDC and the user of its services. The Board will hear applications if an LDC and the user of the LDC's services cannot come to an agreement. Since the non-discriminatory provision of services at fair rates is rate-related, the Board has the jurisdiction to decide the terms of the contract. The Board will fix rates and terms of service to facilitate brokerage and direct purchases where necessary.

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4.107 The assignment of contracts should be negotiated by the parties. In the event the parties are

unable to reach agreement, the Board will entertain applications concerning unreasonable refusals to allow contract assignability.

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4.108 The Minister, the Honourable Vincent Kerrio in his statement of November 3, 1985, indicated in support of legislative change:

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... should it prove necessary at any stage, the government is prepared to introduce legislation ...

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4.109 In the Board's opinion certain aspects of the legislative scheme require the attention of the Legislature, specifically:

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* We have found that the existing regulatory scheme is inappropriate for brokers. The Board recommends that the OEB Act be amended to provide regulatory mechanisms for brokers;

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* Section 54 of the PU Act should be clarified to exclude brokers;

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* The legislative scheme precludes diversion and sale by a direct purchaser to another end-user. The Board recommends that amendments be made to the legislation to facilitate such sales;

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* The Board's jurisdiction to compel service by an LDC and approve contract terms should be reaffirmed; and

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* It is the opinion of the Board that for purposes of clarity and simplicity, all the legislation affecting gas regulation be reviewed and consolidated in one piece of legislation.

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5. TIMING

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Introduction

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5.1 The issue of timing has two components. First, the LDCs require some time to prepare and submit to the Board rate proposals incorporating the principles and decisions outlined in this Decision. Secondly, there may be time required to fully implement final contract carriage rates. Nevertheless, there is an urgency to open the Ontario gas market so that market responsive pricing can be achieved.

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Positions of the Parties

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The LDCs

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5.2 Consumers' submitted that it has been developing and working on its new rate proposal and it will require enough time to make appropriate changes

Was Page 5/2. See Image [OEB:1134W-0:178]

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to reflect this Decision. Consumers' best estimate of the time required is twelve weeks.

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5.3 Consumers' envisages implementation to take place after the standard regulatory procedures with regard to the utility-specific rate hearing are completed and a Board Decision is issued.

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5.4 Union argued that the time required to design now rates depends entirely on the Board's Decision. Union submitted that the implementation could take place within sixty days of the rate order following the Decision.

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5.5 ICG argued that the time required to design new rates depends on the Board's Decision. ICG estimates that it could file new rate proposals within three to eight months after the release of Board's Decision in E.B.R.O. 411 and E.B.R.O. 430. ICG submitted that permanent T-service rates be implemented in 1988.

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The Brokers

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5.6 Northridge, ATCOR, Brenda and Consoligas argued that the utilities should be required to file rate proposals within one month of the Board's Decision. They also argued that permanent T-service rates should be implemented within one month of the Decision from the utility-specific rate hearing.

Was Page 5/3. See Image [OEB:1134W-0:179]

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Industrial Gas Users and Producers

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5.7 CPA argued that it is critical that final rates be presented for Board approval as soon as possible.

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5.8 Polysar argued that four to six weeks should be permitted for the LDCs to prepare the new rates. Polysar submitted that permanent rates should be implemented immediately following the Board's Decision in the utility-specific rate hearing. Polysar also submitted that these rates should be retroactive and apply to all existing direct purchase contracts.

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5.9 IGUA argued that the utilities be directed to design and implement new rates as quickly as possible.

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5.10 CIL and Nitrochem argued that the Board should consider issuing its Decision in two Parts. They submitted that the most urgent issue is the unbundling of services. CIL and Nitrochem submitted that T-rates designed on a fully allocated cost study could be completed by April 15, 1987. They submitted that permanent T-service rates could be implemented immediately following a Board

Decision approving such rates.

Was Page 5/4. See Image [OEB:1134W-0:180]
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Other Groups

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5.11 The Director submitted that adequate time must be given between the preparation of detailed cost studies and the submission of rate proposals for the utility specific hearings and that the implementation of these rates should take place within a short period of time following the decision.

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5.12 Energy Probe argued that the six-month estimate provided by ICG appears reasonable for the designing of new rates. Energy Probe submitted that implementation should occur in the last quarter of 1987.

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5.13 The City of Kitchener argued that T-service rates should continue on an interim basis until October 31, 1988. This would allow the LDCs to have access to the competitive gas supply market for at least one quarter of their supplies by that time.

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Special Counsel

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5.14 Special Counsel argued that the LDCs should be required to submit their proposals reflecting the Board's Decision no later than two months following the date of this Decision. Special Counsel argued that final rates should be implemented as soon as possible.

Was Page 5/5. See Image [OEB:1134W-0:181]
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The Board's Findings

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5.15 The Board finds that it has been evident for some time that permanent T-service rate proposals would be required and it expects that substantial progress has been made to this end. However, since it is not practical to hold three utility-specific hearings at the same time, different filing dates have been established for each LDC. Consumers' and Union are directed to file their proposals no later than June 1, 1987. ICG is directed to file its proposals no later than July 1, 1987.

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5.16 Union, Consumers' and ICG are hereby directed by the Board to submit Proposals to the Board for permanent contract carriage rates, consistent with the Findings contained in this Decision.

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5.17 Upon receiving the LDCs' proposals the Board will set a date for the utility-specific rate hearings. The Board expects that final contract carriage rates will be implemented following the Board's Decisions arising from those proceedings.

Was Page 6/1. See Image [OEB:1134W-0:182]
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6. COSTS

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Introduction

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6.1 The Board requested that the participants provide their submissions with respect to costs in argument. Under section 28 of the OEB Act, the Board is empowered to award costs.

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Positions of the Parties

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6.2 The LDCs were unanimous in claiming that costs should not be awarded. The other participants who referred to costs were generally in favour of costs being awarded. Special Counsel submitted that the LDCs should each pay one third of the Board's costs and that only Energy Probe should be awarded costs.

Was Page 6/2. See Image [OEB:1134W-0:183]

940

6.3 The following participants requested costs:

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ATCOR Brenda CIL City of Kitchener Consoligas IGUA Nitrochem Northridge Polysar

942

The Board's Findings

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6.4 The Board finds that the criteria set out in E.B.O. 116 are appropriate in this case. In that Report, the Board differentiated between a generic hearing and other proceedings. In this proceeding the Board is satisfied that a portion of costs should be categorized as generic. The Board has concluded that 50 percent of these proceedings, including the bypass portion, were of a generic nature. As a result, 50 percent of the reasonably incurred costs of the eligible participants will be considered.

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6.5 With respect to eligibility for cost awards E.B.O. 116 set forth the following criteria which the Board will consider in the exercise of its discretion to award costs. Awards may be made to an intervenor who:

Was Page 6/3. See Image [OEB:1134W-0:184]

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* Has or represents a substantial interest in the proceeding to the extent that the intervenor or those it represents will be affected beneficially or adversely by the outcome;

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* Participates responsibly in the proceeding; and

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* Contributes to a better understanding of the issues by the Board.

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6.6 Having considered the request of the participants against these criteria, the Board finds that each of those requesting costs is eligible to receive an award of costs.

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6.7 The Board finds that all of the participants made a valuable contribution to its understanding of the issues involved. It also notes that each of the participants had a self-serving interest in appearing, in that, a direct benefit could result. Taking into consideration all of the circumstances and the difficult nature of assessing the relative contributions from each of the participants, the Board has concluded that an award of 50 percent of the 50 percent of the reasonably incurred costs, as assessed by the Assessment Officer, will be made. Within ten days of the release of this Decision with Reasons, eligible participants shall submit a

Was Page 6/4. See Image [OEB:1134W-0:185]
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statement of costs to the Board Secretary, complete with all substantiating documents in accordance with E.B.O. 116.

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6.8 Following assessment, the Board will issue appropriate cost orders directing the LDCs to pay such costs, together with the Board's costs and expenses of and incidental to this proceeding as soon as they are fixed.

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6.9 The proportion of all costs shall be borne by each of the three LDCs equally; one-third, one-third, one-third.

Was Page 7/1. See Image [OEB:1134W-0:186]
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7. COMPLETION OF PROCEEDINGS

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7.1 Consumers', Union and ICG are directed to submit rate proposals as outlined in Chapter 5.

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7.2 The Board will issue its cost order with respect to these proceedings in due course.

Was Page 7/2. See Image [OEB:1134W-0:187]
956

DATED at Toronto this 23rd day of March, 1987.

957

<signed>
R.W. Macaulay, Q.C.
Chairman and Presiding Member

958

<signed>
J.C. Butler
Vice Chairman

959

<signed>
D.A. Dean
Member

960

<signed>
M. Jackson

Member

<signed>
C.A. Wolf, Jr.
Member

EB-2010-0374
December 24, 2010

TAB 4

2007 CarswellOnt 4637, 37 M.P.L.R. (4th) 42, 56 O.M.B.R. 391, 228 O.A.C. 1

C

2007 CarswellOnt 4637, 37 M.P.L.R. (4th) 42, 56 O.M.B.R. 391, 228 O.A.C. 1

Menkes Lakeshore Ltd. v. Toronto (City)

KRAFT CANADA INC. (Moving Party) and MENKES LAKESHORE LTD., AMEXON HOLDINGS INC., PETRO J. DEVELOPMENTS LIMITED, 36 PARK LAWN ROAD INC., CITY OF TORONTO, PROUDFOOT MOTELS LTD. and SOUTH ETOBICOKE INDUSTRIAL EMPLOYERS ASSOCIATION (Responding Parties)

Ontario Superior Court of Justice (Divisional Court)

Himel J.

Heard: June 27-28, 2007
Judgment: July 18, 2007
Docket: 548/06

Proceedings: refusing leave to appeal *Menkes Lakeshore Ltd. v. Toronto (City)* (2006), 54 O.M.B.R. 257, 2006 CarswellOnt 6458 (O.M.B.) [Ontario]

Counsel: Timothy M. Lowman for Kraft Canada

Mary Flynn-Guglietti, Gina Rogakos for Amexon Holdings

Alan B. Dryer, Adam Brown for Menkes Lakeshore Ltd.

Eileen P. Costello for Petro J. Developments Limited

Mark R. Flowers for 36 Park Lawn Road Inc.

Subject: Public; Civil Practice and Procedure; Torts

Municipal law --- Zoning — Rezoning land — Practice and procedure on rezoning

City approved applications by developers to amend official plans and zoning by-laws to permit mixed residential and commercial use designation of their lands — K Inc. owned large bakery adjacent to developers' lands and opposed development on grounds that residential use was not compatible with bakery — Intervening properties were located on same block and requested that re-designation apply to them as well — Ontario Municipal Board held that mixed use designation should apply to entire block of land — K Inc. brought motion for leave to appeal — Motion dismissed and leave refused — Board had jurisdiction to modify and approve proposed official plan amendments under s. 17(50) of Planning Act — Board acted properly on evidence before it respecting land

use planning in considering block as whole — Jurisdiction to modify official plan included power to extend or enlarge boundaries of land being considered.

Municipal law --- Planning appeal boards and tribunals — Judicial review — Leave to appeal — Miscellaneous

City approved applications by developers to amend official plans and zoning by-laws to permit mixed residential and commercial use designation of their lands — K Inc. owned large bakery adjacent to developers' lands and opposed development on grounds that residential use was not compatible with bakery — Intervening properties were located on same block and requested that re-designation apply to them as well — Ontario Municipal Board held that mixed use designation should apply to entire block of land — Board granted procedural orders prior to hearing respecting expert evidence and witness statements — Board excluded additional sound level evidence that existed before hearing, but which K Inc. chose not to introduce at that time — K Inc. did not bring motion to introduce additional evidence, nor did it challenge board's rulings when they were made — K Inc. brought motion for leave to appeal — Motion dismissed and leave refused — No breach of rules of natural justice occurred in board's decision to exclude evidence where K Inc. chose not to comply with procedural orders — No good reason existed to doubt correctness of board's decision — Proposed appeal was not of sufficient importance to justify granting leave to appeal.

Municipal law --- Planning appeal boards and tribunals — Practice and procedure — Costs

City approved applications by developers to amend official plans and zoning by-laws to permit mixed residential and commercial use designation of their lands — K Inc. owned large bakery adjacent to developers' lands and opposed development on grounds that residential use was not compatible with bakery — Intervening properties were located on same block and requested that re-designation apply to them, as well — Ontario Municipal Board held that mixed use designation should apply to entire block of land — Board granted procedural orders prior to hearing respecting expert evidence and witness statements — Board excluded additional sound level evidence that existed before hearing, but which K Inc. chose not to introduce at that time — K Inc. did not bring motion to introduce additional evidence, nor did it challenge board's rulings when they were made — K Inc. brought motion for leave to appeal — Motion dismissed and leave refused — K Inc. was ordered to pay costs of motion of $61,000 to developer M Ltd., costs of $40,783.24 to developer A Inc. and costs of $17,000 and $9,000 to intervening parties — Costs were fixed on partial indemnity scale and were payable within 30 days.

Cases considered by *Himel J.*:

Ash v. Corp. of Lloyd's (1992), (sub nom. *Ash v. Lloyd's Corp.)* 8 O.R. (3d) 282, 1992 CarswellOnt 1099 (Ont. Gen. Div.) — referred to

Avro Quay Ltd. v. Toronto (City) (2002), 28 M.P.L.R. (3d) 316, (sub nom. *Toronto (City) v. Avro Quay Ltd.)* 159 O.A.C. 274, 2002 CarswellOnt 1189 (Ont. Div. Ct.) — referred to

Boothman v. Newcastle (Town) (1993), (sub nom. *Newcastle (Town) Zoning By-law 89-103, Re)* 29 O.M.B.R. 26, 1993 CarswellOnt 4631 (O.M.B.) — considered

Canadian Egg Marketing Agency v. Sunnylea Foods Ltd. (1977), 3 C.P.C. 348, 1977 CarswellOnt 238 (Ont. H.C.) — referred to

Central Park Lodges Ltd. v. Caregard Group (2000), 13 M.P.L.R. (3d) 204, 2000 CarswellOnt 2281 (Ont.

S.C.J.) — referred to

Clark v. Essa (Township) (2007), 2007 CarswellOnt 1987, 55 O.M.B.R. 257, 33 M.P.L.R. (4th) 78, 223 O.A.C. 72 (Ont. Div. Ct.) — referred to

Clergy Properties Ltd. v. Mississauga (City) (1996), 1996 CarswellOnt 5704, 34 O.M.B.R. 277 (O.M.B.) — considered

Cloverdale Shopping Centre Ltd. v. Etobicoke (Township) (1966), [1966] 2 O.R. 439, 57 D.L.R. (2d) 206, 1966 CarswellOnt 103 (Ont. C.A.) — referred to

Concerned Citizens of King Township Inc. v. King (Township) (2000), 38 C.E.L.R. (N.S.) 199, 19 M.P.L.R. (3d) 103, 42 O.M.B.R. 3, 2000 CarswellOnt 5279 (Ont. Div. Ct.) — referred to

Klein v. American Medical Systems Inc. (2006), 2006 CarswellOnt 2306 (Ont. Div. Ct.) — referred to

Lafarge Canada Inc. v. 1341665 Ontario Ltd. (2004), 2004 CarswellOnt 1507, 47 O.M.B.R. 7, 185 O.A.C. 35 (Ont. Div. Ct.) — referred to

Lawson Estates Ratepayers Assn. (Trustee of) v. Grace Communities Corp. (July 29, 1993), Doc. 244/93 (Ont. Div. Ct.) — referred to

Maplehurst Bakeries Inc. v. Brampton (City) (1998), 1998 CarswellOnt 5565, 2 M.P.L.R. (3d) 228 (Ont. Div. Ct.) — referred to

Neebing (Municipality) v. Dale (2003), 2003 CarswellOnt 3844, 46 O.M.B.R. 26, 43 M.P.L.R. (3d) 263 (Ont. S.C.J.) — referred to

Rankin v. McLeod, Young, Weir Ltd. (1986), 57 O.R. (2d) 569, 1986 CarswellOnt 463, 13 C.P.C. (2d) 192 (Ont. H.C.) — referred to

South Etobicoke Residents Ratepayers Assn. Inc. v. Toronto (City) (June 27, 2001), Doc. 102/2001 (Ont. S.C.J.) — referred to

Syndicat des employés professionnels de l'Université du Québec à Trois-Rivières c. Université du Québec à Trois-Rivières (1993), (sub nom. *Université du Québec à Trois-Rivières v. Larocque)* 101 D.L.R. (4th) 494, (sub nom. *Université du Québec à Trois-Rivières v. Syndicat des employés professionnels de l'Université du Québec à Trois-Rivières)* 148 N.R. 209, (sub nom. *Université du Québec à Trois-Rivières v. Syndicat des employés professionnels de l'Université du Québec à Trois-Rivières)* 53 Q.A.C. 171, 1993 CarswellQue 142, 1993 CarswellQue 154, 11 Admin. L.R. (2d) 21, (sub nom. *Université du Québec à Trois-Rivières v. Larocque)* [1993] 1 S.C.R. 471, (sub nom. *Université du Québec à Trois-Rivières v. Larocque)* 93 C.L.L.C. 14,020 (S.C.C.) — referred to

Zellers Inc. v. Royal Cobourg Centres Ltd. (2001), 42 O.M.B.R. 193, 2001 CarswellOnt 3362, 22 M.P.L.R. (3d) 122, 156 O.A.C. 133 (Ont. Div. Ct.) — referred to

Statutes considered:

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 131 — referred to

Ontario Municipal Board Act, R.S.O. 1990, c. O.28

s. 37(a) — referred to

s. 91 — referred to

Planning Act, R.S.O. 1990, c. P.13

s. 3 — referred to

s. 3(5) — referred to

s. 17(50) — referred to

s. 22(11) — referred to

Statutory Powers Procedure Act, R.S.O. 1990, c. S.22

s. 15 — referred to

s. 25.0.1 [en. 1999, c. 12, Sched. B, s. 16(8)] — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 57.01(1) — referred to

MOTION by property owner for leave to appeal decision of municipal board reported at *Menkes Lakeshore Ltd. v. Toronto (City)* (2006), 54 O.M.B.R. 257, 2006 CarswellOnt 6458 (O.M.B.), approving applications to amend official plan and zoning by-laws.

***Himel J.*:**

1 Kraft Canada Inc. ("Kraft") seeks leave to appeal a decision of the Ontario Municipal Board issued on October 18, 2006. That decision approved applications by Menkes Lakeshore Ltd. and Amexon Holdings Inc. to amend the Official Plans and zoning by-laws to permit a mixed residential and commercial use designation of lands owned by each of the companies on Park Lawn Road in Toronto. The project consists of a ten storey office building, three residential towers with 1,200 units and a commercial podium on the Menkes lands and two residential towers with 588 units and a commercial podium on the Amexon lands. Kraft takes the position that the decision of the OMB is incorrect in law, that the Board breached principles of natural justice and that Kraft was denied a fair hearing.

Factual Background

2 Kraft has operated a large bakery adjacent to the Park Lawn Block in Toronto since 1948. The entire block comprises the land on the west side of Park Lawn Road between Lakeshore Boulevard West and the CN Railway lines. The Park Lawn Block lies within the South Etobicoke area, which is characterized by a mix of in-

dustrial and residential uses.

3 Menkes Lakeshore Ltd. ("Menkes") applied to the City of Toronto on May 2, 2002 and Amexon Holdings Inc. ("Amexon") applied to the City on October 28, 2002 proposing amendments to the Official Plans and zoning by-laws to permit the development of a number of residential buildings in a mixed use concept. The City deferred consideration of the amendments being sought on the basis that a comprehensive assessment of the area should be done.

4 The parties appealed to the OMB. During that proceeding, two parties were added: Petro J. Developments, which owns 42 Park Lawn Road, and 36 Park Lawn Road Inc., which owns 36 Park Lawn Road. Petro J. and 36 Park Lawn did not file applications with the City and had not appealed the City's designation. However, on October 20, 2005, the OMB agreed to consider extending the same Official Plan treatment sought by Menkes and Amexon to the two "Intervening Properties". The Board accepted the opinions of the market and planning experts who testified that it would be most appropriate for all properties on the Park Lawn Block to have the same designation. Petro J. and 36 Park Lawn each support the changes sought by Menkes and Amexon and ask that the decision of the OMB stand, extending those changes to their properties as well.

5 Kraft, which owns a neighbouring property located on the east side of Park Lawn Road, used primarily for the bakery operation, received party status for the hearing before the OMB. Kraft opposed the development claiming that residential use was not compatible with its bakery operation.

6 The hearing before the Board took place over fifty days. The evidence called addressed matters concerning land use planning including potential fiscal, traffic, noise and odour impacts. On April 28, 2005, the Board heard submissions from the parties and issued a procedural order requiring that experts have the opportunity to review each other's reports by delivering them prior to May 31, 2005, and reply and meet prior to the hearing so that the parties would know the case they had to meet. Kraft attempted to introduce evidence concerning the noise issue after the experts of Menkes and Amexon produced their reports and without following that procedure. The Board did not allow Kraft to proceed in this fashion. Kraft did not seek to appeal or have that order reviewed at that time.

7 The Board did not sit during the period November 2005 to April 2006. It issued a procedural order that new evidence or new studies would not be admissible when the hearing resumed. Following the hiatus, the Board refused to admit new reports adduced and refused to allow Kraft to cross-examine using new measurements from the expert. No challenge was taken at the time. No evidence was led regarding any study supporting City Council's decision to identify the area as an "employment district".

8 The OMB issued a decision allowing the appeals in part and permitting the redevelopment with a mixed use concept consisting of residential and commercial uses over the entire Park Lawn Block including the Intervening Properties.

Positions of the Parties

9 Kraft takes the position that the proposed redevelopment threatens the viability of the bakery operation. Kraft submits that the OMB erred in law in interpreting, and failing to apply the relevant legislation, regulations, policies, guidelines, and by-laws concerning mixed use designation. Between the time of the original applications and the hearing, the 2005 Provincial Policy Statement had come into force and the City of Toronto adopted the proposed new Official Plan. Kraft says the Board failed to consider and apply these documents. Furthermore,

the Board violated principles of natural justice and denied Kraft a fair hearing. Kraft says the result is that it will face operating the Christie Bakery directly across the street from a large number of new residential units. Kraft filed a notice of appeal but then failed to perfect it in time. The parties moved to dismiss for delay but Ferrier J. granted an extension and set a timetable.

10 Menkes and Amexon take a joint position that there is no reason to doubt the correctness of the decision of the OMB and that this matter is simply a dispute between neighbouring landowners as to the appropriateness of certain land uses to be permitted on private properties. The matter is not one of sufficient importance to merit the attention of the Divisional Court. They say that Kraft has not met the test for leave and the motion for leave to appeal should be dismissed. The two Intervening Properties support the decision of the OMB to amend the Official Plan and zoning by-laws to permit mixed commercial and residential uses. They ask that the approved changes apply to them as well. The remaining parties to the OMB hearing did not call a case or participate in the hearing and did not participate in the motion for leave to appeal to the Divisional Court.

Analysis and the Law

Applicable General Principles

11 The standard to be applied on a motion for leave to appeal a decision of the OMB to the Divisional Court is that leave should only be granted where: (1) there is some reason to doubt the correctness of the Board's decision on a point of law and (2) the point of law is of sufficient importance to merit the attention of the Divisional Court: see *Avro Quay Ltd. v. Toronto (City)*, [2002] O.J. No. 1470 (Ont. Div. Ct.) at para. 22; *Concerned Citizens of King Township Inc. v. King (Township)*, [2000] O.J. No. 3517 (Ont. Div. Ct.) at para. 10; *Zellers Inc. v. Royal Cobourg Centres Ltd.*, [2001] O.J. No. 3792 (Ont. Div. Ct.) at para. 9.

12 On a leave application, the onus is on the party seeking leave: see *Neebing (Municipality) v. Dale*, [2003] O.J. No. 3973, 43 M.P.L.R. (3d) 263 (Ont. S.C.J.) at para. 12 and 6. Appeals are on questions of law alone and the court must give deference to the Board's decision in keeping with the degree of independence and expertise of the Board and its members.

13 Good reason to doubt the correctness of the decision does not mean that the decision is wrong or probably wrong. It is sufficient to show that the correctness of the order is open to very serious debate: see *Ash v. Corp. of Lloyd's* (1992), 8 O.R. (3d) 282 (Ont. Gen. Div.); *Canadian Egg Marketing Agency v. Sunnylea Foods Ltd.* (1977), 3 C.P.C. 348 (Ont. H.C.) at 350. Furthermore, good reason to doubt the correctness of a decision means there is good reason to doubt the correctness of the *entire* order.

14 In addressing the issue of sufficient importance, the court must be mindful that matters of importance must be general and relate to matters of public rather than private importance or matters must be relevant to the development of the law and administration of justice: see *Rankin v. McLeod, Young, Weir Ltd.* (1986), 57 O.R. (2d) 569 (Ont. H.C.) at 575. For example, disputes about the use of specific properties may not be of sufficient importance to merit the attention of the court: see *Central Park Lodges Ltd. v. Caregard Group* (2000), 13 M.P.L.R. (3d) 204 (Ont. S.C.J.) at para. 18.

Did the Board fail to apply the 2005 Provincial Policy Statement or the new Official Plan in reaching its decision and, thereby, commit an error of law?

15 Kraft argues that the OMB erred in law by failing to apply to these applications the 2005 Provincial

Policy Statement (PPS) which came into effect between the time of the original applications and the first hearing before the Board. The Policy Statement had been issued under section 3 of the *Planning Act*, R.S.O. 1990, c. P. 13, and, according to the moving party, the statement and amendments introduced fundamental changes. In particular, the 2005 PPS provided that the OMB must promote economic development and competitiveness by "...planning for, protecting and preserving employment areas for current and future use." The Board determined that the 2005 PPS did not apply to the proceeding because the applications were brought before it came into force. Instead, it applied the 1996-7 PPS.

16 Kraft argued that, by considering the related applications of the Intervening Properties and consolidating their requests with the earlier applications in order to treat the Park Lawn Block as a whole, the Board was required to apply the new Policy Statement. Policy 4.1 of the 2005 PPS stated that it applies to "all applications, matters or proceedings commenced on or after March 1, 2005."

17 In my view, the Board was correct in its interpretation that the applications before the Board were those submitted by Amexon and Menkes in 2002. The Board based its decision upon the principle outlined in the case of *Clergy Properties Ltd. v. Mississauga (City)*, [1996] O.M.B.D. No. 1840 (O.M.B.), which held that the decision should be based upon relevant policies and legislation in place at the time of the application. The Board also based its decision on the clear language of the 2005 PPS.

18 In counsel's argument on this motion for leave, counsel relied upon Section 3(5) of the *Planning Act*, which states as follows:

> A decision of the council of a municipality, a local board, a planning board, a minister of the Crown and a ministry, board, commission or agency of the government, including the Municipal Board, in respect of the exercise of any authority that affects a planning matter,
>
> (a) shall be consistent with the policy statements issued under subsection (1) that are in effect on the date of the decision; and
>
> (b) shall conform with the provincial plans that are in effect on that date, or shall not conflict with them, as the case may be.

19 This provision, however, came into effect on January 1, 2007. I note the earlier provision used the words "having regard to". In any event, a proper interpretation of the use of a Policy Statement is that the OMB is required to consider and take into account a policy statement but is not required to adopt it. The Board is also entitled to deference on planning matters.

20 I do not see any basis to find that the Board erred in its consideration of the 1996-7 PPS and not the 2005 document. It did not err in finding that the 2005 PPS did not apply and that the Board's jurisdiction was triggered by the appeals filed by Menkes and Amexon, which pre-dated the 2005 document. Adding the two Intervening Properties and modifying the Plan did not trigger the application of the 2005 PPS.

21 Kraft takes the position that the Board erred in not considering the new proposed City of Toronto Official Plan. The Board, in its decision, considered the application of the MetroPlan, the City of Etobicoke Official Plan and the Park Lawn Road/Lakeshore Boulevard Secondary Plan and found that there was appropriate compliance with these documents. It stated that it was also considering the new Official Plan because the City was in

the process of developing it at the time. It applied the principle enunciated in *Boothman v. Newcastle (Town)*, [1993] O.M.B.D. No. 442 (O.M.B.), that the new Plan is "admissible, relevant but not determinative." It considered the new Plan concerning the Park Lawn Block "as part of the Board's practice to have regard to the decisions of Council."

22 Kraft also argues that the OMB erred by not giving weight to the City's decision to identify the Park Lawn Block as an "Employment District" and designate it as an "Employment area". Kraft says that that designation is strong evidence of its decision to protect the long-term future of the Park Lawn Block for employment purposes. The Board held that the fact that City Council designated the Park Lawn Block as an Employment Area in the new City of Toronto Official Plan was not a relevant consideration in that there was no evidence led supporting that designation nor any comprehensive review or analysis that set out the planning merits of that designation. Rather, it was Kraft that had sought the designation of the Park Lawn Block as an employments area and a decision was made without supporting planning analysis.

23 In my view, there is no good reason to doubt that the Board's application of relevant policy statements, legislation, and the various Official Plans was correct. The Board was satisfied that the proposed amendments conformed to the governing documents, from the perspective of impact upon employment, transit, traffic, density, compatibility with existing industry, noise, air quality, and odour. The Board held that a mixed use designation is an employment generating designation and supports economic development, all of which is consistent with the Provincial Policy Statement. Although the new City of Toronto Official Plan is not determinative in this case, the Board considered elements of the Plan that addressed the Park Lawn Block. The Board considered the issue of land use for employment purposes when considering the proposed amendments, accepted the market evidence and the expert opinion and held that "the proposals to redesignate to, and redevelop as, mixed — use are consistent with the Provincial Policy Statement."

24 In summary, the Board considered the applicable documents and attached weight to those which it deemed relevant to the case before it and there is no good reason to doubt the correctness of the Board's decision in this regard.

Did the Board err in extending the re-designation applications to the two Intervening Properties?

25 Kraft argues that the OMB erred in law and exceeded its jurisdiction by applying a mixed use (residential and commercial) designation to the Intervening Properties and amending the Official Plan relating to those properties, although Petro and 36 Park Lawn did not file a proposal for future use with the City nor did they make an application to the OMB to redesignate the properties as mixed use, or appeal the designation in the Official Plan. Kraft says that the Board erred in law by making a decision without having a comprehensive planning study available and by expanding Official Plan amendments to the Intervening Properties.

26 In its decision, the Board noted that all of the expert planning witnesses who appeared before it agreed that the Park Lawn Block should "be considered as a whole" and agreed that the properties had similar characteristics. Kraft opposed the re-designation of the two Intervening Properties for the same reasons that it opposed the re-designation of the Menkes and Amexon properties.

27 The Board's decision to modify and approve the proposed Official Plan amendments is permitted under section 17(50) of the *Planning Act*. The Board had the jurisdiction to modify and approve all or part of the proposed Official Plan amendments before it: see section 22(11). The term "modify" has a broad definition providing a power to vary or amend: see *Cloverdale Shopping Centre Ltd. v. Etobicoke (Township)*, [1966] 2 O.R. 439

(Ont. C.A.) at 454. In that case, the court held that modify included the concept of "extend or enlarge". Restricting the Board's power to modify is not limited to the boundaries of the land being considered: see *Lawson Estates Ratepayers Assn. (Trustee of) v. Grace Communities Corp.*, [1993] O.J. No. 1808 (Ont. Div. Ct.) at 4. The Board has general jurisdiction to modify Official Plan amendments, which includes expanding boundaries of an Official Plan amendment and a change of use: see *Maplehurst Bakeries Inc. v. Brampton (City)*, [1998] O.J. No. 6092 (Ont. Div. Ct.). The Board is not required to undertake a planning study before modifying an Official Plan amendment.

28 In my view, the Board acted properly on the evidence before it concerning land use planning and accepted that the Park Lawn Block should be considered as a whole. It was sensible and practical to consider the use of the Intervening Properties at the same time as the Amexon and Menkes proposals and to address the question of Official Plan amendments in a comprehensive manner. What the Board did is precisely what is contemplated in the powers provided in the legislation.

Did the Board breach the rules of natural justice?

29 Kraft says that the OMB violated the rules of natural justice by refusing to allow it to lead evidence showing that its operation would be adversely affected by the residential uses proposed by Menkes and Amexon. In particular, Kraft was not permitted to call further noise expert evidence addressing the sound impact of Kraft truck delivery activities and the question of truck banging.

30 Under the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S. 22 (*SPPA*), s. 25.0.1, the Board, as an administrative tribunal exercising a statutory power of authority, maintains absolute jurisdiction and control over its own procedure. It has the power to determine its own procedures and practices and to make procedural orders: see *Ontario Municipal Board Act*, R.S.O. 1990, c. O. 28, ss. 37(a) and 91; *Ontario Municipal Board Rules of Practice and Procedure.* Section 15 of the *SPPA* gives administrative tribunals the express statutory power to exclude evidence that is unduly repetitious.

31 The authorities are clear that courts should give deference to procedural orders and rulings and should be reluctant to interfere with procedural orders within a tribunal's jurisdiction: see *Zellers Inc. v. Royal Cobourg Centres Ltd., supra; Lafarge Canada Inc. v. 1341665 Ontario Ltd.*, [2004] O.J. No. 1572 (Ont. Div. Ct.); *Clark v. Essa (Township)* (2007), 156 A.C.W.S. (3d) 516 (Ont. Div. Ct.) [2007 CarswellOnt 1987 (Ont. Div. Ct.)]. A party who is dissatisfied with an order of the Board should seek leave to appeal in a timely manner before the Board commences its hearing on the merits: see *South Etobicoke Residents Ratepayers Assn. Inc. v. Toronto (City)*, [2001] O.J. No. 3182 (Ont. S.C.J.). Refusing to admit evidence is not an automatic breach of natural justice that justifies intervention of the court. Only where the refusal to admit evidence has a significant impact on the fairness of the proceeding amounting to a clear denial of natural justice should the court interfere: see *Syndicat des employés professionnels de l'Université du Québec à Trois-Rivières c. Université du Québec à Trois-Rivières*, [1993] 1 S.C.R. 471 (S.C.C.).

32 With reference to the procedural orders made by the Board in this case, I note that Kraft did not challenge the OMB rulings at the time they were made. Kraft was aware of the noise reports and witness statements from the noise experts and attended meetings in advance of the hearing as provided by the Procedural Order. Kraft could have attempted to bring a motion to seek to introduce additional evidence, a process which was provided in the Procedural Order. Kraft chose not to do so. Similarly, Kraft attempted to introduce evidence gathered during the hiatus, thus contravening the Procedural Order made on November 9, 2005. The Board ruled

that the two new reports that had not been previously disclosed would not be admitted.

33 There is no reason to interfere with the Board's decision not to permit Kraft to introduce additional sound level histories and evidence relating to truck banging that it had before the hearing, but chose not to introduce. The Board excluded evidence about noise impact studies collected during the hiatus in the proceeding after other experts had been examined and cross-examined. Kraft chose not to comply with the Procedural Orders and sought to introduce evidence after a significant portion of the hearing had been completed. There was no breach of the rules of natural justice and there is no basis for the Divisional Court to interfere with the Board's orders concerning the admission of evidence.

Decision

34 In my view, there is no good reason to doubt the correctness of the decision of the OMB. The hearing took place over fifty days and involved evidence from twenty-five experts. The judgment rendered provides a careful analysis with detailed reasons for the decision set out in forty pages. In summary, this is not a case where "the correctness of the decision is open to very serious debate." Moreover, it cannot be said that the proposed appeal is of sufficient importance to justify granting leave. There are no matters raised of broad significance which transcend the interests of the parties and warrant resolution by a higher level of judicial authority: see *Klein v. American Medical Systems Inc.*, 2006 CarswellOnt 2306 (Ont. Div. Ct.).

Result

35 For the reasons outlined, the application for leave to appeal the decision of the Ontario Municipal Board is dismissed. Having heard submissions on costs, I exercise my discretion under section 131 of the *Courts of Justice Act* and consider the factors outlined in Rule 57.01(1) of the *Rules of Civil Procedure* and fix costs of this motion for leave to appeal. Kraft, the moving party, shall pay costs in the amount of $61,000 inclusive of disbursements (which I find to be reasonable and necessary) and applicable GST to the responding party Menkes Lakeshore Ltd., costs of $40,783.24 inclusive of disbursements and GST to Amexon, costs of $17,000 inclusive of disbursements and applicable GST to 36 Park Lawn Road Inc. and costs of $ 9,000 inclusive of disbursements and applicable GST to Petro J. All costs are fixed on the partial indemnity scale and are payable within thirty days.

Motion dismissed; leave refused.

END OF DOCUMENT

EB-2010-0374
December 24, 2010

TAB 5

Case Name:

Bank of Montreal v. Lysyk

Between
Bank of Montreal, plaintiff, and
Nicholas Edward Lysyk, Jennifer Gail Lysyk,
Lillian Louise Green, Melanie Janine Dmytrow,
Sheri L. Paquette, Darrell Armond Paquette,
Stephanie Argue, Aneta Jakuszyk, Amanda Orr,
Shannon MacMillan, 960881 Alberta Ltd. John Doe,
Jane Doe, ABC Corporation and XYZ Corporation,
defendants

[2003] A.J. No. 62

2003 ABQB 47

119 A.C.W.S. (3d) 744

Action No. 0203 15754

Alberta Court of Queen's Bench
Judicial District of Edmonton

Veit J.

Heard: January 16, 2003.
Judgment: January 17, 2003.

(55 paras.)

Practice -- Applications and motions -- Motions -- Adjournments -- Discovery -- Production and inspection of documents -- Circumstances when available -- Privileged documents, third party confidentiality.

The plaintiff Bank of Montreal applied for an order requiring American Express to disclose certain credit card statements; it also moved for liquidation of the defendant Lysyk's assets, summary trial against Lysyk, the production of legal records, and other relief. The Lysyks, Green, Dmytrow,

Jakuszyk and Argue all applied for adjournments of the motions. Orr applied for an adjournment to cross- examine the bank on its affidavit. Mrs. Lyszyk applied for an adjournment based on her change of solicitors. Mr. Lyszyk sought an adjournment in order to obtain a lawyer. He claimed that he was unemployed and had been unable to retain counsel. American Express had raised concerns about the confidentiality rights of supplementary card holders with respect to disclosing the statements sought by the bank.

HELD: Application allowed. Mrs. Lysyk's request to adjourn was allowed; Mr. Lyszyk's was not. It was not realistic to expect that he would be able to obtain a lawyer within a two or three week adjournment. Further, he should have consulted legal aid about assistance. Orr's application was denied. There was no absolute right to cross-examine on an affidavit. Green's and Dymtrow's applications to adjourn were allowed. The bank's application for the additional American Express records was allowed, since the information sought did not attract the same type of privilege as medical records.

Statutes, Regulations and Rules Cited:

Alberta Rules of Court, Rules 209, 323.1.

Counsel:

Matthew R. Lindsay, Munaf Mohamed and Ward A. Hanson, for the applicant, Bank of Montreal.
Nicholas Lysyk, appeared on his own behalf with Edmond O'Neill and Beresh Depoe Cunningham as an assistant.
Richard Gariepy, for Jennifer Lysyk.
Shawn Beaver, for Lillian Green and Melanie Dmytrow.
A.S. Attia, for Aneta Jakuszyk.
Kentigern Rowan, for Ogilvie LLP.
Linda Farr, for Renwick & Stonehouse.
David R. Wray, for Amanda Orr.
Phyllis Van Campenhout, for Stephanie Argue.
American Express, was notified of application but did not appear.

MEMORANDUM OF DECISION

VEIT J.:--

Summary

1 The Bank of Montreal brings 7 motions before the court: an application for directions to the

Receiver to liquidate all assets currently in its possession in a commercially reasonable fashion; an application for directions to the Receiver to remove assets from the condominium residence where Nicholas and Jennifer Lysyk currently reside, together with a requirement for the, to pay rent at market rates at that location; an application in the nature of case management granting leave to proceed with, and the scheduling of dates and procedures for, a summary trial of this action against Nicholas Lysyk; an application pursuant to Rule 209 for the production of records from various law firms in Edmonton who received bank drafts from the Servicing Accounts; an application seeking a direction that Heritage Law Office pay $90,000 held in its trust account from Amanda Orr to the receiver for safe-keeping; an application for the Receiver to enter the residence of Stephanie Argue on the basis that she has left the jurisdiction; an application under R. 209 for additional records from American Express.

2 Applications for adjournment of the motion were made by Nicholas Lysyk, Jennifer Lysyk, Lillian Green, Melanie Dmytrow, Aneta Jakuszyk, Stephanie Argue, Amanda Orr and Heritage Law Office.

3 Nicholas Lysyk's application for an adjournment for two or three weeks in order to allow him to retain a lawyer for these proceedings is denied: in the circumstances here, Mr. Lysyk has had more than adequate opportunity to retain counsel. Mr. Lysyk's right to an adjournment should be dealt with separately from Ms. Lysyk's right to an adjournment in order to establish their separate entitlements as of this point in the proceedings; should Ms. Lysyk decide not to exercise her right to an adjournment, it should be clear that there should be no delay in proceedings simply because Mr. Lysyk does not have a lawyer.

4 There is no standard approach in our court concerning the appearance of a lawyer as an agent for, but not as a lawyer for, a party. In every such situation, the court must determine what role and responsibility such lawyer/agent must bear. Here, the R. 323.1 routing of the eventual order that may be produced as a result of this decision will be to the lawyer/agent rather than to Mr. Lysyk. Negotiations concerning the setting of future dates will be with the lawyer/agent rather than with Mr. Lysyk. The court relies on the lawyer/agent to have provided Mr. Lysyk with basic information concerning the nature of an application for an adjournment for the purpose of obtaining a lawyer.

5 Jennifer Lysyk's application for an adjournment to allow her new lawyer, retained after her previous lawyer was served with notice of this motion, is allowed; while the timing of the change of solicitors is unfortunate, that change was precipitated not as a ploy by Ms. Lysyk, not as a whim or attempt at delay by Ms. Lysyk, but as a response to the criminal charge that has now been brought against her. Her new lawyer requires some time to become familiar with these proceedings and to conduct any cross-examination of the affiant Vininsky which may be considered appropriate.

6 Lillian Green and Melanie Dmytrow's application for adjournment in order to find a more convenient time for hearing the application is allowed; in the circumstances here, where the schedules of a very large number of parties and persons interested need to be co-ordinated, and

where the requests of some of the parties may have to be taken into account in relation to the setting of hearings for other parties or persons, it was reasonable for the applicant to compel attendance at court for directions concerning the hearing process.

7 Amanda Orr's application for an adjournment in order to allow cross-examination on the affidavit filed by the Bank is denied; this application is not for substantive disposition of the $90,000 draft, but for the transfer of those funds to the Receiver. A litigant does not have an absolute right to cross-examine on affidavit: a request to adjourn to cross-examine may be refused if the cross-examination would not be productive and a request to cross-examine could be refused if an application to cross-examine is not brought promptly. Here, it is too late for the party to apply for an adjournment based on the intention to cross-examine on the affidavits filed 5 months ago. Here, any cross-examination of the affiant Vininsky would not be productive relative to the issue of whether the $90,000 draft should be safeguarded by Ms. Orr's lawyers or by the court's receiver. The principles that apply to such transfers have been dealt with in the previous application by Beresh, DePoe, Cunningham.

8 The Bank's application for additional records from American Express is allowed; prima facie, these records are not the type of record which would attract Charter-type privacy protection not only because the state is not compelling the production of the records, but also because the records themselves are not of the type which would be entitled to protection under Charter analysis. Assuming that American Express has some obligation to these card holders, American Express must do what it can to comply with its obligations, presumably by giving these supplemental card holders notice of the application and of the order. Should the supplemental card holders be parties to this litigation, the Bank will provide to those parties copies of the parties' records which the Bank receives from American Express.

9 Cases and authority cited

10 By the applicant: Rules 5.2, 5.3, 5.4

11 By the court:

> On the general background: BMO v. Lysyk [2002] A.J. No. 1056 (Q.B.); BMO v. Lysyk [2002] A.J. No. 1124 (Q.B.); BMO v. Lysyk [2002] A.J. No. 1354 (Q.B.)
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> On the issue of the obligations of a court to a self-represented litigant: R. v. Phillips, [2003] A.J. No. 14, 2003 ABCA 4; Hall v. Thorburn [1994] N.S.J. No. 195 (Sup. Ct.); Minielly v. Kristjanson [1989] S.J. No. 227 (Q.B.); Re Cowley v. Cowley (1983) 41 O.R. (2d) 696 (Prov. Ct. - Fam. Div.)

On the issue of adjournment: Darville v. R (1956) 25 C.R. 1 (S.C.C.); R. v. Bruneau [1983] 5 W.W.R. 89 (Alta. C.A.)

On the issue of right to cross-examine on an affidavit: Stevenson & Cote, Alberta Civil Procedure Handbook 2003, pp. 256 ff.; Palechek v. CIBC (1991) 79 Alta. L.R. (2d) 159; Kerrigan Ventures Corp. v. Reynolds Mirth (1996) 178 A.R. 246 (C.A.), leave denied [1996] S.C.C.A. No. 116, 193 A.R. 179

On the obligation of civility in setting down special chambers hearings: Goofers v. Goofers [2002] A.J. No. 1600 (Q.B.); Dunn v. Dunn [2002] A.J. 1603 (Q.B.)

1. Background

12 The general background to these applications has been set out in previous decisions as cited above.

2. Mr. Lysyk's application for an adjournment to find a lawyer

13 Mr. Lysyk's application for an adjournment to find a lawyer is denied. Despite the denial of the application for the adjournment, the Court repeats its advice to Mr. Lysyk that he would be well advised to make inquiries immediately about the potential for coverage by Legal Aid of his participation in these civil proceedings.

14 The court has a broad discretion about whether to grant requests for adjournment. Unfortunately, although requests to retain lawyers are commonplace, during this relatively short adjournment, I could not find a reported decision which deals with the way in which the court's discretion should be exercised. What is clear, however, is that the court's discretion in the matter of adjournments must be exercised judicially.

15 Mr. Lysyk's application was for a two or three week adjournment in order to find a lawyer. He conceded, however, that even if he were able to find a lawyer within that time, he could not hope to find a lawyer who would be ready to proceed as soon as retained. Realistically, therefore, if Mr. Lysyk were able to retain a lawyer, the court should anticipate a two or three month adjournment to allow Mr. Lysyk effective legal representation.

(i) Unlikelihood that an adjournment would produce a lawyer

16 Mr. Lysyk objected to the Bank's submission that he had not been sufficiently diligent in attempting to find a lawyer to represent him in the civil proceedings. Mr. Lysyk reminded the court that, during some of the time after these proceedings were initiated in mid-August 2002, he was in

jail and not in a position to do very much for himself in relation to a lawyer for civil proceedings. He also noted that all of his funds are frozen and that this is a severe handicap in attempting to hire a lawyer. He also stated that he had been unable to find employment and that this also negatively affected his ability to hire a lawyer. He stated, however, that two law firms did have discussions with him concerning representation in the civil proceedings, and charged him hefty fees for those discussions, even though the negotiations did not lead to a full retainer. He stated that he has since approached many lawyers but had been unsuccessful in establishing a retainer with any of them. He indicated that one of the issues on which he has attempted to obtain legal representation is the reviving of an application, originally taken on Mr. Lysyk's behalf by the Beresh DePoe firm but since abandoned, for payment by the Bank of Mr. Lysyk's living expenses and defence.

17 On the other hand, Mr. Lysyk acknowledged that he knew of the assistance of Legal Aid, and that he even knew that his wife had applied for Legal Aid. Indeed, he informed the court that even though his wife made her application for Legal Aid in mid-December, she has not yet received an answer about whether she will be covered. Since Ms. Lysyk was charged roughly in mid-December with a criminal offence related to these general proceedings, it is possible, even likely, that her application is for legal aid coverage of the criminal proceedings, since Ms. Lysyk has been represented thoughout the civil proceedings. It may be that Mr. Lysyk has not yet appreciated that Legal Aid may have different standards for granting coverage in civil matters (except perhaps in matters involving the apprehension of children by the state) from its standards for granting coverage in criminal matters.

18 For the purposes of this application, I accept Mr. Lysyk's submissions even though they are not in the form of evidence. However, relying on Mr. Lysyk's representations, and by analogy to the reasoning of the Supreme Court of Canada in Darville, I must conclude that in the circumstances here, a two or three week adjournment to find a lawyer would be unlikely to be successful. As Mr. Lysyk himself has pointed out, it is difficult to find a lawyer when you don't have access to money to pay the lawyer. That will not change in the next two or three weeks. As Mr. Lysyk himself has pointed out, even if he were to apply now to Legal Aid for coverage of the civil proceedings, he would be unlikely to have a reply from them with in 2 or 3 weeks, if his wife's situation is any guide. Because he had not even approached Legal Aid for coverage in these civil proceedings, neither Mr. Lysyk nor Mr. O'Neill was in a position to provide the court with any information about the likelihood of Mr. Lysyk receiving Legal Aid coverage if requested. As Mr. Lysyk himself has acknowledged, his lawyer in the criminal proceedings has abandoned the application brought to this court for a "Fisher-type" order; that lawyer is, in fact, the originator of Fisher applications. In light of that background, even if Mr. Lysyk were able to retain a lawyer for the limited purpose of making a new application for a "Fisher-type" order, it is extremely unlikely that such an application would be renewed or would be renewed within 3 weeks. A longer adjournment than 3 weeks to obtain a lawyer should not be granted here because Mr. Lysyk has known about the need to obtain a lawyer since August 15, 2002.

19 The reason for refusing the application is not any lack of diligence on Mr. Lysyk's part, even

though 5 months have elapsed since these proceedings were initiated. The court understands that Mr. Lysyk has been facing a multitude of problems in a multitude of different places. Rather, for the reasons that have been outlined, by Mr. Lysyk's own assessment, there is no reason to believe that he will be any more successful in getting a lawyer in the next 3 weeks than he has been in the last 5 months. Just as an adjournment is not granted under the Darville principles unless the court is satisfied that the adjournment will produce the missing witness, so an adjournment for the purpose of hiring a lawyer will not be granted a long time after proceedings have been initiated unless there is some realistic expectation that the adjournment could, in fact, produce a lawyer.

20 Finally, I should explain to Mr. Lysyk why I have dealt separately with his application for an adjournment even though, as will be seen below, I have granted his wife an adjournment. The practical effect of the adjournment granted to Ms. Lysyk may well be that Mr. Lysyk will effectively obtain an adjournment: the Bank's motion concerning liquidation of seized assets potentially affects both Mr. and Ms. Lysyk and the Bank will presumably bring the motion when all of those entitled to appear - including Ms. Lysyk - can appear. However, Mr. and Ms. Lysyk have separate positions in this litigation, which positions may in fact be antagonistic to one another. Moreover, Ms. Lysyk is not mentioned in the Bank's motion for case management of a requested summary trial against Mr. Lysyk; it is possible that Ms. Lysyk has no right to be represented on the hearing of that motion. In summary, even in matters in which both Mr. Lysyk and Ms. Lysyk have an interest, the interest of each of them must be considered separately, and there may be some matters in which Mr. Lysyk has status and his wife does not. Mr. Lysyk must understand that, insofar as all matters which affect him, he personally is not entitled to an adjournment of motions relating to those matters.

(ii) Status of lawyer who appears to help Mr. Lysyk

21 Although the applicant objects to Mr. O'Neill's appearance with Mr. Lysyk as an agent for Mr. Lysyk, but not as Mr. Lysyk's lawyer even though Mr. O'Neill is a lawyer, the court grants Mr. O'Neill a right of audience, and indeed expresses its gratitude for Mr. O'Neill's assistance. Obviously, the only status Mr. O'Neill has to address the court is as an agent of Mr. Lysyk; Mr. Lysyk confirmed at the hearing that Mr. O'Neill is his agent.

22 Nevertheless, the Bank is quite correct in stating that a statement that a lawyer is an agent is not an answer to all of the concerns that arise here. An appearance by a lawyer in these circumstances is unusual; the usual understandings concerning the status and responsibility of lawyers - even lawyers having only a limited retainer pursuant to the unbundling of services - do not necessarily apply here; therefore, the status of the lawyer/agent who is not a lawyer for a party must be specifically addressed.

23 There is no standard approach which can be taken by a court relative to a lawyer who appears as an agent for a litigant but who is not that litigant's lawyer. Mr. O'Neill has apparently informed the Bank that it is common in Edmonton in proceedings in Provincial Court for lawyers to appear as

agents of an accused but not as lawyers for that accused. In this court, it happens relatively frequently that an individual appears without a lawyer and that a lawyer who happens to be present in the courtroom volunteers to give that unrepresented person advice and to represent that person on the specific matter which the court is hearing on that date. In those situations it is not usually necessary to properly characterize that appearance; that lawyer does not, without more, become a lawyer of record for that individual. It is not necessary, therefore, to determine whether that lawyer is a lawyer with a limited retainer, or a lawyer acting as a friend of the court - an amicus curiae -, or a lawyer acting as an agent of the accused but not as the accused's lawyer. As the Bank points out, that type of summary appearance is not the type of situation we have on this application. Here, it is necessary, for Mr. Lysyk's benefit, for the benefit of the Bank, and for the benefit of the court, to characterize Mr. O'Neill's status.

(a) Confidentiality

24 The Bank's lawyers were understandably unwilling to discuss Mr. Lysyk's confidential affairs with a person who is not Mr. Lysyk's lawyer of record. However, after hearing submissions from Mr. Lysyk and Mr. O'Neill, I am satisfied that Mr. Lysyk has effectively given the bank permission to provide to Mr. O'Neill what would normally be confidential and private information about Mr. Lysyk's affairs.

(b) Vetting form of order

25 The Bank was understandably concerned about whether they should be dealing with Mr. Lysyk or Mr. O'Neill in relation to such matters as compliance with R. 323.1. After hearing from Mr. Lysyk and Mr. O'Neill, I am satisfied that Mr. Lysyk is content to have Mr. O'Neill deal with such vetting of orders and that the Bank should forward any such orders to Mr. O'Neill only rather than only to Mr. Lysyk or rather than to both Mr. Lysyk and Mr. O'Neill.

(c) Negotiating new dates

26 The Bank was understandably concerned about whether they should be dealing with Mr. Lysyk or Mr. O'Neill in relation to timing of future appearances. After hearing from Mr. Lysyk and Mr. O'Neill, I am satisfied that Mr. Lysyk is content to have Mr. O'Neill deal with such matters, and that the Bank should deal only with Mr. O'Neill on scheduling future motions.

(d) Providing legal guidance to Mr. Lysyk

27 The court was concerned about the proper characterization of Mr. Lysyk's status relative to being represented because the court has different responsibilities to a party who is represented by a lawyer than to a party who is self-represented. The recent decision of our Court of Appeal in Phillips provides a helpful outline of some of the responsibilities of a trial judge to a self-represented accused. Section 7 of the Charter may impose similar obligations relative to self-represented parties in civil proceedings. In addition, judges may well have common law

obligations to self-represented parties in civil proceedings: see citations above. Those cases also demonstrate that a judge may, in attempting to provide information to an unrepresented litigant, cross over the line that must separate the judge from the advocate. That line may sometimes be difficult to navigate. From the judge's perspective, therefore, it is extremely important to understand the status of the litigant because most judges will not want to step onto the tightrope unless they have to.

28 After discussions with Mr. Lysyk and Mr. O'Neill, and after some bare comments concerning the purpose and the elements of an adjournment application, I came to the conclusion that Mr. Lysyk had received adequate information about the nature of the proceeding.

(d) Unfair advantage

29 I acknowledge that a lay person who speaks himself and also has a lawyer to assist him may appear to the party opposite, here the Bank, to have an advantage since there are no restrictions on the type of submissions that a lay person can make whereas there are many professional restrictions on the kind of submissions that a lawyer can make. Mr. Lysyk appears to have the best of both worlds here. However, after discussions with Mr. Lysyk and Mr. O'Neill, I have concluded that there is no oblique motive for the style of representation Mr. Lysyk has requested on this hearing and that he should be entitled both to appear on his own behalf and to have Mr. O'Neill act as his agent.

3. Ms. Lysyk's application for an adjournment to give her new lawyer time to prepare

30 Ms. Lysyk is entitled to an adjournment to allow her new lawyer to be in a position to make full answer and defence to the motion.

31 The Bank states, and the fact is, that Ms. Lysyk has been represented throughout these proceedings, and that the Bank served her then lawyer with notice of these applications. The Bank takes the position that while Ms. Lysyk is entitled to change lawyers if she chooses, she should not be entitled to an adjournment when she changes lawyers after having been served with notice of an application.

32 There are situations in which a change of lawyers is a ploy to delay proceedings. When a judge is satisfied that such an abuse is occurring, the judge is perfectly justified in refusing an adjournment to accommodate that change of lawyers.

33 Here, however, there is an understandable reason why Ms. Lysyk has changed solicitors: in mid-December, for the first time, Ms. Lysyk was charged criminally in relation to the alleged fraud against the bank. Ms. Lysyk then retained a lawyer to appear for her in the criminal proceedings; that lawyer was Mr. Gariepy. It was then suggested that it might be better for Ms. Lysyk if the same lawyer represented her in both the criminal and the civil proceedings, and she agreed to that. The

laying of the criminal charge was a new event to which she had to respond; her decision to change lawyers in the civil proceedings is therefore neither whimsical nor taken for the purpose of delaying the civil proceedings.

34 It should be noted in this context that Ms. Lysyk has appeared throughout these proceedings. Moreover, in relation to the motions that are currently before the court, Ms. Lysyk has waived her privilege relative to the records held by Ogilvie & Co. As the lawyer for Ogilvie has pointed out, the waiver from Ms. Lysyk does not necessarily resolve the privilege issue on another file held by the law firm involving both Ms. Lysyk and another person. However, to the extent that she is able, Ms. Lysyk has dealt quickly and cooperatively with the privilege issue.

35 Ms. Lysyk is entitled to a sufficient adjournment to allow her new lawyer to become familiar with this relatively complicated file and to decide, for example, if there should be cross-examination of the Bank's affiant Vininsky. It is clear that Ms. Lysyk has had adequate opportunity to cross-examine the Bank's earlier affiants and has chosen not to do so; the change of lawyers does not, by itself, change that decision. However, Mr. Vininsky's affidavit will undoubtedly have to be considered by her new lawyer in the context of the Bank's motion to have Ms. Lysyk pay rent on the condominium and also in relation to the Bank's motion to liquidate assets.

36 Ms. Lysyk's lawyer indicates that, should he decide to do so, he believes that he can cross-examine the affiant Vininsky within the next few weeks, and that an adjournment of approximately one month would be sufficient for preparation to respond to the Bank's applications. Ms. Lysyk is entitled to that adjournment.

37 I observe that one of the notices of motion relates to Ms. Lysyk's obligation to safeguard some items, furniture and the like, that had been inventoried by the receiver at Ms. Lysyk's residence at 208 Darlington. If I understand what occurred during the course of that inventory, it is that Ms. Lysyk gave the equivalent of a bailee's undertaking to preserve those assets. It may be that Ms. Lysyk has moved those assets to the condominium which she now shares with her husband. At any rate, now that Ms. Lysyk has a new lawyer, the issue of the preservation of those assets can presumably be dealt with forthwith. If an agreement cannot be made between the Bank and Ms. Lysyk concerning the continued preservation of those assets, then that application by the Bank could be returned on short notice to Ms. Lysyk.

4. The application by Ms. Green and Ms. Dmytrow for an adjournment to a more convenient date

38 Ms. Green and Ms. Dmytrow will not be required to deal with the bank's motions today.

39 The lawyer for Ms. Green and Ms. Dmytrow notes that the Bank's lawyers did not, in relation to this hearing date, canvass his availability for this date; the lawyer states that while he is prepared to deal with this application now, that is he does not require an adjournment for preparation, it is not convenient for him to deal with the motion today as he has earlier commitments to other clients. He

also notes that the motion to liquidate assets is, in some ways, more serious that the motion to freeze or preserve assets and that the Bank should comply with the requirements for special chambers hearings in relation to this part of the application. It should be noted in this context that counsel for these parties has always been cooperative with the Bank and other parties in scheduling hearings and in dealing with related matters; indeed, counsel today presents a consent order in these proceedings relating to an issue not covered by the various notices of motion.

40 I mentioned during the hearing that I had recently dealt with complaints about the way in which matters had been set down for special chambers hearings. Those decisions are cited above.

41 There is no doubt that, where there are no impediments to doing so, civility requires that lawyers consult with one another and attempt to agree on a mutually convenient date for bringing applications before the court. In its turn, the court will enforce civility by awarding costs against a party, or perhaps against a lawyer personally, if a reasonable request for accommodation has been refused.

42 In these proceedings, not only do the commitments of the various lawyers have to be taken into account in the setting down of motions, but, unfortunately, so must the availability of the judge.

43 In this case, I accept that the Bank's lawyers did not make any inquiry from each of the lawyers about their availability to argue a special chambers matter on January 16. I have no doubt that, given the number of parties and given that the parties are likely to have different entitlements to adjournment and other timing issues, counsel for the Bank concluded that it would be impossible to make fair and adequate arrangements for the management of the hearing of these various motions without giving each of the parties an opportunity to make their submissions concerning timing in the presence of all other interested parties.

44 Now that the court has ruled on the various applications for adjournment, and now that counsel have received my schedule between now and the end of March 2003, the Bank and counsel for Ms. Green and Ms. Dmytrow can set mutually convenient dates for the hearing of the motions which involve those parties.

5. Ms. Orr's application for an adjournment to cross-examine the Bank's affiants

45 Ms. Orr is not entitled to an adjournment of the motion to transfer the $90,000 draft from her lawyer's office to the Receiver on the basis of her intention to cross-examine the Bank's affiant Vininsky: Vininsky's affidavit is not relevant to the disposition of that motion. See Kerrigan and other citations, including decisions from our Court of Appeal, above. The $90,000 will be transferred from Ms. Orr's lawyer's account to the Receiver.

46 Ms. Orr has been involved with these proceedings from the outset. Indeed, her transfer of funds to her law firm was effected on August 17, 2002. Despite having been made aware of the basis on which the court's previous receivership orders were made, Ms. Orr has not brought any

application to cross-examine the Bank's earlier affiants, despite her knowledge of the proceedings and her access to legal advice. It is true, as her lawyer says, that the original applications were brought by the Bank ex parte, and that if the Bank's original applications had been brought on notice, Ms. Orr would have had the opportunity of cross-examining the Bank's affiants at the outset. It is also true that the court may not have all of the pertinent information before it on an ex parte application, despite the professional obligation on a lawyer asking for such extraordinary relief to fully inform the court of everything within that lawyer's client's knowledge about the matter. However, a litigant cannot ask for an adjournment of a motion of which she has notice in order to allow her to undertake cross-examination which she could have initiated 5 months ago.

47 There is one new affidavit which has been filed by the Bank: the Vininsky affidavit, filed within the last week. However, that affidavit is not relevant to the issue that has been identified in the notice of motion relating to Ms. Orr. The Bank's request is not for payment out to itself of that money; it is merely for transfer of those funds from Ms. Orr's lawyer's account to the Receiver.

48 The actual preservation of the funds is not, of course, in issue: the $90,000 is as safe in Ms. Orr's lawyer's trust fund as it would be with the Receiver.

49 The issue is where can the benefit of that fund be maximized for the benefit of every person who may turn out to have an interest in that $90,000, whether the person with an interest turns out to be Ms. Orr or the Bank. This is essentially the same issue as was before the court in relation to the contest between the law firm of Beresh Depoe and the Bank as to who should hold the $200,000 until the court decides whether that money was the Bank's or Mr. Lysyk's or Ms. Lysyk's.

50 Mr. Vininsky's affidavit is not relevant to the issue of the place where the draft should be preserved pending further order of the court; cross-examination on that affidavit would not be helpful relative to matters before the court. Therefore, Ms. Orr is not entitled to an adjournment to examine Mr. Vininsky on his affidavit. Ms. Orr is perfectly entitled to cross-examine Mr. Vininsky, and indeed the Bank's previous affiants, after the $90,000 is transferred to the Receiver.

6. Application to enter the residence of Stephanie Argue

51 This application was originally brought by the Bank on the basis of information received by them from Ms. Argue's then lawyer to the effect that Ms. Argue had left the jurisdiction. Ms. Argue has since returned to the jurisdiction, and has again retained the same lawyer. The Bank therefore agrees with Ms. Argue's motion that this motion should be adjourned sine die, that is without setting a specific date when it will be returned to court.

7. Hearing of solicitor-client privilege issues

52 The lawyers who have indicated that they require a hearing on solicitor-client privilege issues relating to the demands which they have received from the applicant Bank were ready to proceed: these are Mr. Rowan, Mr. Attia and Ms. Farr. None of these lawyers requested an adjournment.

However, because of the other issues that had to be resolved, the solicitor-client privilege issue could not be dealt with on January 16. The hearing of this issue will be re-scheduled amongst the parties - having in mind that this issue, on its own, may require special chambers treatment. Some lawyers have not yet responded to the Bank's demands; if any of those lawyers have solicitor-client privilege concerns, it may be possible to schedule their applications at the same time as the applications from the lawyers who have already responded, although it may well be fair to give precedence to the lawyers who have appeared at this hearing.

8. Application by the Bank for additional records from American Express

53 The Bank is entitled to information from American Express about supplementary card holders on the affected accounts. In order to avoid the need for an additional hearing to determine whether the existing form of order is sufficiently broad to cover these additional records, I am prepared to grant an order for additional disclosure in the form proposed by the Bank without determining the breadth of the existing order.

54 American Express has raised a concern about its obligations of confidentiality to its clients. The form of order proposed by the Bank recognizes that American Express may obligations to its clients which it will have to deal with. Because American Express was given notice of this hearing but chose not to attend, I assume that it has taken the position that its obligations to the supplementary card holders does not require it to give such holders notice of this hearing. From the court's perspective, there is no concern about an order forcing disclosure of these records of the type which has been protected by the Supreme Court of Canada in decisions such as Mills, [1999] 3 S.C.R. 668. On its face, an obligation to disclose credit card statements does not attract privacy issues of the type that are engaged by a request to disclose medical records, including psychiatric records, for example. In addition, it is pertinent to note that there are restrictions about the use that can be made of information acquired for the purposes of litigation and these restrictions protect the rights of those who are required to give up information for the purposes of a lawsuit. This is not to say, however, that there are no such issues for these supplementary card holders; obviously, the court would entertain any application that such persons may have relating to disclosure.

55 If any of the parties in this litigation are supplementary card holders, in addition to any obligations which American Express has to those persons, the Bank will provide to parties in these proceedings copies of any records which the Bank obtains from American Express that directly relate to those parties.

VEIT J.

cp/e/nc/qw/qlmmm

EB-2010-0374
December 24, 2010

TAB 6

Current to December 11, 2010

S.O. 1998, c. 15, Schedule B, s. 19

[eff since August 8, 2001](Current Version)

Ontario Energy Board Act, 1998

S.O. 1998, c. 15, Schedule B

PART II
THE BOARD

SECTION 19

Power to determine law and fact

19. (1) The Board has in all matters within its jurisdiction authority to hear and determine all questions of law and of fact.

S.O. 1998, c. 15, Sched. B, s. 19(1), in force November 7, 1998 (O. Gaz. 1998 p. 2217).

Order

(2) The Board shall make any determination in a proceeding by order.

** Editor's Table **

Changes prior to Editor's Tables: S.O. 1998, c. 15, Sched. B, s. 19 (2), in force November 7, 1998 (O. Gaz. 1998 p. 2217).

Provision	Changed by	In force	Authority
19(2)	2001 c9 Sch F s2	2001 Aug 8	O Gaz 2001 p1613

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Reference

(3) If a proceeding before the Board is commenced by a reference to the Board by the Minister of Natural Resources, the Board shall proceed in accordance with the reference.

Additional powers and duties

(4) The Board of its own motion may, and if so directed by the Minister under section 28 or otherwise shall, determine any matter that under this Act or the regulations it may upon an application determine and in so doing the Board has and may exercise the same powers as upon an application.

Exception

(5) Unless specifically provided otherwise, subsection (4) does not apply to any application under the Electricity Act, 1998 or any other Act.

Jurisdiction exclusive

(6) The Board has exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it by this or any other Act.

S.O. 1998, c. 15, Sched. B, s. 19(3-6), in force November 7, 1998 (O. Gaz. 1998 p. 2217).

S.O. 1998, c. 15, Sched. B, s. 19; S.O. 2001, c. 9, Sched. F, s. 2.