TAB 1

Case Name:

Enbridge Gas Distribution Inc. (Re)

IN THE MATTER OF the Ontario Energy Board Act, 1998, S.O. 1998, c. 15 AND IN THE MATTER OF an Application by Enbridge Gas Distribution Inc. for an order or orders approving or fixing just and reasonable rates and other charges for the sale, distribution, transmission and storage of gas commencing January 1, 2007.

2007 LNONOEB 52

No. EB-2006-0034

Ontario Energy Board

Panel: Gordon Kaiser, Presiding Member and Vice Chair; Paul Vlahos, Member; Ken Quesnelle, Member

Decision: April 26, 2007.

(103 paras.)

DECISION - RATE AFFORDABILITY PROGRAMS

Majority reasons were delivered by Paul Vlahos, Member and Ken Quesnelle, Member. Separate minority reasons were delivered by Gordon Kaiser, Presiding Member and Vice Chair.

1 PAUL VLAHOS, MEMBER and KEN QUESNELLE, MEMBER:-- This is the decision of Board Member Vlahos and Board Member Quesnelle. The dissenting opinion with reasons of Vice Chair Kaiser follows the majority decision.

2 Enbridge Gas Distribution Inc. ("EGD") filed an application dated August 25, 2006 with the Ontario Energy Board under section 36 of the *Ontario Energy Board Act, 1998* ("the *Act*"), request-

ing a rate increase effective January 1, 2007. On October 4, 2006, the Board issued Procedural Order No. 1 establishing an oral hearing on October 12, 2006 to hear submissions regarding the issues the Board should consider in this proceeding. This decision relates to one specific issue: rate affordability programs.

3 The Low-income Energy Network ("LIEN") proposes that the Board accept as an issue in this proceeding the following matter:

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

4 The inclusion of this issue in this proceeding was opposed by several parties, and no party, other than LIEN, supported its inclusion.

5 A number of parties questioned whether the Board had jurisdiction to hear this matter. The Board in its Decision of October 20, 2006 found that jurisdiction was a threshold issue and that before proceeding further the Board must satisfy itself that it had jurisdiction. The Board accordingly invited parties to file written submissions addressing the jurisdictional arguments made by LIEN.

6 A number of parties filed written arguments indicating that the Board does not have jurisdiction to hear LIEN's issue in this proceeding. On November 7, 2006, LIEN served a Notice of Constitutional Question providing the Attorney General of Ontario with an opportunity to respond to LIEN's arguments about the application of section 15 of the Charter of Rights and Freedoms to the interpretation of the Board's jurisdiction. The Board indicated that it would defer its Decision until the Attorney General had an opportunity to respond.

7 On November 27, 2006, counsel for the Attorney General of Ontario advised the Board that it did not intend to intervene at this jurisdictional stage of the proceeding. The Board then advised the parties that irrespective of the outcome of the jurisdiction hearing it would not consider the issue in this proceeding as it would delay the rate case unreasonably.

Positions of the Parties

8 The Industrial Gas Users Association ("IGUA"), the Consumers Council of Canada ("CCC"), Enbridge Gas Distribution Inc. ("EGD") and Union Gas Limited ("Union") all argued that the Board does not have jurisdiction to establish special rates for low-income consumers. Their arguments contain the common contention that the setting of rates based on a criterion of income level is not captured within the meaning or the intent of the *Ontario Energy Board Act, 1998* (the "Act"). To various degrees, these Parties also provided argument on the implementation difficulties that would arise if such a program were put in place and in general, the appropriateness of the Board establishing rates in such a manner.

9 Board staff submitted that the Board's authority to fix or approve just and reasonable rates under section 36 of the Act can encompass authority to implement at least some forms of rate affordability assistance programs for low income consumers but absent a specific proposal, Board staff did not believe it was prudent to speculate just how far that authority might extend.

10 In its reply argument, LIEN reiterated its arguments that the Board does have the jurisdiction to order special rates for low income consumers.

Board Findings

11 Before the Board addresses the issue of its jurisdiction, the Board will comment on Board Staff's submission regarding the absence of a specific proposal.

12 In its submission, Board staff referred to the record noting that LIEN appeared to confirm that the program that it might propose were this issue added to the issues list was that filed in an earlier proceeding involving the rates of Union Gas Ltd., Ontario's other large gas distributor. Board staff also noted LIEN's position that the issue of the Board's authority is related to low income programs generally, and should not be tied to any specific proposal.

13 The Board notes that certain parties opposing jurisdiction, particularly CCC, referred extensively to the specifics of the program advanced by LIEN before this Board in the separate proceeding referenced above as well as before the Nova Scotia Public Utilities Board and LIEN did not argue in its reply submissions that such references were unjustified or non-relevant. In any event, the Board does not consider the absence of a specific proposal in this proceeding to be determinative of the Board's jurisdiction. In this case, the issue is whether the Board does or does not have jurisdiction to establish rates based on rate affordability for low income consumers.

14 The Board considers this matter to be one of clear importance and is of the view that clarity of its position on jurisdiction is required to instruct those who are advocating on behalf of a low-income constituency. This Decision therefore is predicated on the following understanding: That the proposal is to establish a rate group for low income consumers. The defining characteristic of the rate group would be income-level and the program would be funded by general rates. It is in this context that the Board has considered the question of jurisdiction.

15 The Board agrees with the Parties that argued that the Act does not provide the Board with the authority, either explicitly or implicitly, to approve rates using income level as a criterion. The implementation difficulties referred to by parties are not, in the Board's view, pivotal to the issue at hand. Concerns that may arise related to implementation of new processes or the need to expand Board expertise are not threshold considerations related to the determination of jurisdiction. Where jurisdiction is found to exist, the Board structures itself accordingly.

16 The Board exercises its jurisdiction within the legislative framework established by Government. The *Ontario Energy Board Act, 1998* provides the objectives that govern the Board in its activities. The objectives and the statute as a whole are the sole reference for the determination of jurisdiction. The Board also derives certain powers from other statutes, but none of these powers are relevant to this particular issue.

17 Economic regulation is rooted in the achievement of economic efficiencies, the establishment of fair returns for natural monopolies and the development of appropriate cost allocation methodologies. Also, when appropriately authorized, economic regulation can be utilized in the pursuit of broad social goals such as conserving natural resources or in the provision of incentives for certain behaviours that are seen by the legislature to be in the public interest. An example of this can be seen in the Government's direction to the Board, authorized by the statute to enable certain approaches to conservation and demand management.

18 Through statute, governments authorize bodies such as the Ontario Energy Board to administer the economic regulation of specific sectors of society. At its core, the Board is an economic regulator, and that is where its expertise lies. The Board is engaged in many of the typical economic

regulation activities mentioned above and makes determinations as to the appropriateness of the financial consequences of the regulated activities it authorizes.

19 The manner in which the Board makes its determinations is firmly grounded in the economic regulatory principles associated with rate setting. As submitted by Board Staff, while the term "economic regulator" is not precise, there is a widely accepted and practiced convention related to the setting of rates. Examples of these principles are more fully articulated later in this decision in the analysis of various submissions. The Government has a clear understanding of how the Board operates and the economic regulation principles that it utilizes as an economic regulator and has witnessed the Board's practices in that regard.

20 The Board was created and made operational through legislation. The Board has a responsibility to operate to the full depth and breadth of the authority granted in its governing statute. The limits or boundaries of its authority need not, nor should, be a bright line. This would require near unachievable foresight by the legislators to consider all of the possible eventualities. The objectives provided in the Act are intended to be broad enough to allow the Board to operate with discretion in an ever changing environment and focused enough to ensure that the Board operates within the government's policy framework. Determinations on jurisdiction should be guided solely by the question of what can reasonably be considered to have been intended by the legislators in the scoping and crafting of the Board's mandate. There should be no pre-destining bias based on a desire by the regulator to include or exclude any particular issue.

21 As described by section 36(3) of the Act, the Board has broad authority to utilize whatever methods or techniques it deems appropriate to set just and reasonable rates. LIEN has argued that this be interpreted as the Board having authority to establish a low-income rate class, using income level as a determinant. The Board does not agree. Significant departure from its current practices and principles would be required to institute a rate making process based on income level. The Board considers LIEN's proposal both in the intent and on the basis on which the transfer of benefits would take place to be a significant departure from the traditional rate setting principles applied currently by the Board. The Board's rate setting activities that currently have the effect of transferring benefits do so to accommodate either regulatory efficiency, the removal of financial barriers in support of government policy initiatives or to support a mitigation policy to overcome cost differential such as in rural rate subsidies. None of these activities are based on an income level determinant. The Board also notes that to the extent that any of the current benefit transfers are material, such as in the rural rate subsidy and conservation initiatives, they are supported by the objectives of the Act, specific sections of the Act or by Ministerial Directives under section 27 of the Act.

22 The use of income level as a determinate in establishing utility rates has broad public policy implications. The interplay that this type of income redistribution program would have with other income redistribution programs that would reside outside of the Board's purview could be significant. The consideration of income redistribution should not be done in isolation of the broader government policy environment. The management of the interplay would necessitate a prescriptive statute or directive.

23 Income redistribution policies are at the core of the work done by democratically elected governments. The Board is of the opinion that had the Government wanted the Board to engage in such a fundamentally important function it would have specifically stated as such.

24 The Board is of the view that there is no compelling evidence to suggest that the objectives contained in the Act encompass, explicitly or implicitly, any accommodation for such a fundamental departure from the manner in which the Board currently regulates. For these reasons and for the reasons stated below the Board finds that it does not have jurisdiction to develop a rate class with an income level determinant as depicted earlier in this decision.

Analysis of Submissions

25 The Board is a statutory tribunal. In the *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, [2006] SCC 4 decision, the Supreme Court described the sources from which statutory tribunals obtain their powers:

> In the area of administrative law, tribunals and Boards obtain their jurisdiction under various statutes (express jurisdiction); and (2) the common law, by application of the doctrine of jurisdiction by necessary implication (implied powers).

26 A statutory Board has no powers other than those given to it by statute, either expressly or impliedly. If the Board's jurisdiction to order a low income affordability program cannot be found either expressly or impliedly in a statute, then it does not exist.

27 The question boils down to one of statutory interpretation. The courts have adopted what E.A. Driedger described as the modern approach to statutory interpretation:

> Today there is only one principle or approach; namely, the words of an Act are to be read in their entire context and in their grammatical and ordinate sense harmoniously with the scheme of the Act and the object of the Act, and the intention of Parliament.

The Ontario Energy Board Act

28 In support of its submission that the Board does have the requisite jurisdiction, LIEN pointed to section 36(2) and 36(3) of the *Ontario Energy Board Act, 1998* (the "Act").

> 36 (2) The Board may make orders approving or fixing just and reasonable rates for the sale of gas by gas transmitters, gas distributors and storage companies, and for the transmission, distribution and storage of gas.
>
> 36 (3) In approving or fixing just and reasonable rates, the Board may adopt any method or technique that it considers appropriate.

29 The panel is also guided by the Board's objectives as set out in section 2 of the Act, in particular objective 2:

> 2. To protect the interests of consumers with respect to prices and the reliability and quality of gas service.

30 In the panel's view, neither section 36 nor section 2 explicitly grants to the Board the jurisdiction to order the implementation of a low income affordability program. The panel also finds that the Board does not gain the requisite jurisdiction through the doctrine of necessary implication.

Explicit Powers

31 Section 36(2) contains the Board's just and reasonable rates powers with regard to natural gas utilities. It is not disputed that the Board's powers to determine just and reasonable rates are very broad. Several parties cited the *Union Gas v. Ontario (Energy Board)* (1983), 43 O.R. (2nd) 489 (Ont. Sup. Ct.) case, where the court noted:

> That in balancing these conflicting interests and determining rates that are just and reasonable, the OEB has wide discretion is not in doubt.

32 The Board is aware that its discretion is broad; however, in its consideration of the intent of its governing statutes, the Board must be reasonable in considering the larger public policy arena and the degree to which the legislators considered the Board's conventional ambit.

33 The Board is guided in the contemplation of its jurisdiction by the following. In *Re Multi Malls Inc. et al. v. Minister of Transportation and Communications et al,* 14 O.R. (2d) 49, the Ontario Court of Appeal noted that the powers of regulatory tribunals "must be exercised reasonably and according to the law, and cannot be exercised for a collateral object or an extraneous and irrelevant purpose, however commendable."

34 In determining what is just and reasonable, the Board must be guided by its objectives and the overall purpose of the Act.

35 LIEN has focussed on the Board's objective number 2, which requires the Board to protect consumers with regard to prices and system reliability. In the context of the proposed low-income rate program a sub-set of consumers would be afforded protection at the expense of others. The sub-set would be identified on a level of income basis and based on ability to pay. The Board sees this as a fundamental departure from its current rate setting principles.

36 LIEN also pointed to a number of cases in support of its contention that one of the Board's responsibilities is to keep prices low. For example, LIEN quoted *Union v. Ontario (Energy Board)* as follows:

> Put another way, it is the function of the OEB to balance the interest of the appellants in earning the highest possible return on the operation of its enterprise, a monopoly, with the conflicting interest of its consumers to be served as cheaply as possible.

37 In LIEN's submission, this case stands for the proposition that "just and reasonable" requires that the consumer be served as cheaply as possible. In the Board's view, LEIN's submission misconstrues the thrust of the court's pronouncement, which in fact requires that the Board balance the utility's interest in earning a return with the consumer's interest in being served cheaply. The court did not give preference to one group of consumers' interest over that of another.

38 In summary, the panel can find no explicit grant of jurisdiction to order the creation of a rate class based on income, as depicted earlier in this decision, in the *Ontario Energy Board Act.*

Implicit Powers

39 ATCO described the doctrine of jurisdiction by necessary implication as follows:

> [...] the powers conferred by an enabling statute are considered to include not only those expressly granted but also, by implication, all powers which are prac-

> tically necessary for the accomplishment of the object intended to be secured by the statutory regime created by the legislature.

40 In the panel's view, the power to order the implementation of low income affordability programs is not a practical necessity for the Board to accomplish its statutory objectives.

41 In fixing just and reasonable rates, Section 36(3) of the Act does allow the Board "to adopt any method or technique it considers appropriate." However, in the panel's view, "any method or technique" cannot reasonably be stretched to mean a fundamental replacement of the rate making process based on cost causality with one based on income level as a rate grouping determinant. This particular section replaced section 19 of the old *Ontario Energy Board Act*, R.S.O. 1980, which required a traditional cost of service analysis in quite prescriptive terms:

> 19(2) In approving or fixing rates and other charges under subsection (1), the Board shall determine a rate base for the transmitter, distributor, or storage company, and shall determine whether the return on the rate base produced or to be produced by such rates and other charges is reasonable.
>
> (3) The rate base to be determined by the Board under subsection (2) shall be the total of,
>
> (a) a reasonable allowance for the cost of the property that is used or useful in serving the public, less an amount considered adequate by the Board for depreciation, amortization and depletion;
>
> (b) a reasonable allowance for working capital; and
>
> (c) such other amounts as, in the opinion of the Board, ought to be included.
>
> [...]

42 The change to section 36(3), which allows the Board to "adopt any method or technique it considers appropriate" was deliberately made by the legislature and should accordingly be given meaning. It gives the Board the flexibility to employ other methods of ratemaking in fixing just and reasonable rates, such as incentive ratemaking, rather than the traditional cost of service regulation specified in section 19 of the old Act. The change in the legislation was coincident with the addition of the regulation of the electricity sector to the Board's mandate. The granting of the authority to use methods other than cost of service to set rates for the gas sector was an alignment with the non-prescriptive authority to set rates for the electricity sector. The Board is of the view that if the intent of the legislature by the new language was to include ratemaking considering income level as a rate class determinant, the new Act would have made this provision explicit given the opportunity at the time of the update of the Act and the resultant departure from the Board's past practice.

43 The Board approves subsidies to rural and remote consumers through the Rural and Remote Rate assistance program. The Board is given the explicit authority to do so under section 79 of the Act. Some Parties have pointed to the fact that the legislature chose to specifically enumerate these instances where some ratepayers will subsidize others suggests that it did not intend to grant this power generally. LIEN submits that section 79 demonstrates that the Act contemplates the Board

acting to protect economically disadvantaged groups when approving or fixing just and reasonable rates.

44 The Board considers the fact that section 79 of the Act exists as an indication that the Government has been explicit on issues that it considers warranting special treatment. It should be noted that rural rate assistance predates the Act and the inclusion of section 79 ensured the maintenance of the subsidy. Therefore less can be inferred regarding the significance of section 79 being included in the Act. The Board notes that the underpinning rationale for the rural rate assistance is fundamentally different from the rationale supporting the proposed low-income rate class. Rural rate assistance does not consider income level as an eligibility determinate nor is their any indication that its genesis is rooted in a belief that civil and human rights legislation has historically failed to protect agricultural workers as a group as was submitted by LIEN. The eligibility is based on location and the inherent higher costs of service that are related to density levels. The assistance has the effect of mitigating a cost differential related to geography and is conferred on all customers irrespective of their income level.

45 A common and long standing feature of rate-making is the application of the same charges to all customers in a given customer classification. There is admittedly a degree of subsidization in such rate making as not all customers in a given rate classification impose precisely the same costs to a utility. However, this practice is necessary in order to avoid the complexities and costs of having to determine the individual costs of millions of customers and the existence of millions of rate classifications. Whatever subsidies may exist in such method, it is done for the general benefit and not to favour or target a specific customer group over another on the basis of income level.

46 The Board is vigilant in ensuring that customer groups are afforded the opportunity to receive the benefits of the costs charged. In the case of Demand Side Management (DSM) programs, for example, the Board has ordered that specific funding be channelled for programs aimed at low income consumers. It cannot be argued that this constitutes discriminatory pricing. Rather, the contrary. It is an attempt to avoid discrimination against low income customers who also pay for DSM programs but may not have equal opportunities to take advantage of these programs.

47 Both Board Staff and LIEN submitted that the Board's allowance of contributions to an emergency financial relief program known as Winter Warmth is an indication of the Board's recognition of low-income customers as a group that can be recognized for special treatment. It was also submitted that the fact that these contributions are funded by rates is an indication that authority exists in fixing or approving just and reasonable rates for intra and interclass subsidies. The Board does not agree with this reasoning. The program is designed to trigger assistance upon approval of an application for financial assistance by a customer in a financial crisis situation. The relief is very situation and occurrence specific. Therefore the recipients of this assistance do not constitute a rate class or a sub-class. The program is funded by all customers, therefore the Board does not agree with the assertion that it demonstrates authority for intra and interclass subsidies. The Board is of the view that it would be extremely disproportional to draw on the charity objectives of this modest program to support a determination that the legislators envisioned the possibility of a rate setting determinate of income level.

The Board's treatment of similar requests

48 The Board has in fact considered similar requests in the past for special (lower) rates. In EBRO 493, as one example, the Ontario Native Alliance ("ONA") asked the Board to order a utility

to evaluate the establishment of a rate class for the purpose of providing redress for aboriginal peoples. The Board rejected this request and stated:

> The Board is required by its legislation to "fix just and reasonable rates", and in doing so it attempts to ensure that no undue discrimination occurs between rate classes, and that the principles of cost causality are followed in allocating the underlying rates. While the Board recognizes ONA's concerns, the Board finds that the establishment of a special rate class to provide redress for aboriginal consumers of Centra does not meet the above criteria and it is not prepared to order the studies requested by ONA.

(*Decision with Reasons*, EBRO 493, pp. 314 and 317)

49 Although this decision did not explicitly state that the Board has no jurisdiction to consider special rates for disadvantaged groups, it is a clear expression from the Board on its view of its mandate. It is this Board's view that if the legislature had intended to grant the Board the power to order the implementation of low income assistance programs, it would have stated so expressly.

50 A very similar jurisdictional issue was recently before the Nova Scotia Court of Appeal. In this case, the Nova Scotia Utility and Review Board's ("NSURB") decision that it did not have jurisdiction to order low income affordability programs was appealed to the Court of Appeal. The Court upheld the NSURB's finding that it did not have jurisdiction. Speaking for the majority, Fichaud J.A. stated: "[t]he statute does not endow the Board with discretion to consider the social justice of reduced rates for low income consumers. [...] It is for the Legislature to decide whether to expand the Board's purview..."[1]

The Charter

51 LIEN has submitted that, in making its determination on jurisdiction, the Board should be guided by the Canadian Charter of Rights and Freedoms (the "Charter"). In LIEN's view, where there is ambiguity in the interpretation of a statute, a tribunal should be guided by Charter principles. In support of this position, LIEN cited the Supreme Court decision in *R. v. Rogers* [2006] 1 SCR 554:

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

52 While the Board does not dispute the sentiments expressed in this passage, this decision does not apply to the case at hand. The Court was clear that Charter values are to be applied as an inter-

pretive tool "where there is a genuine ambiguity in the legislation." In this case, we find no such ambiguity. The Board simply has not been given the powers that LIEN seeks to ascribe to it.

Conclusion

53 It is therefore the majority's finding that the Board does not have the jurisdiction to order the implementation of a rate class based on an income level determinant as described above.

DATED at Toronto, April 26, 2007

Original signed by

Paul Vlahos
Member

Original signed by

Ken Quesnelle
Member

DISSENTING DECISION

54 GORDON KAISER, PRESIDING MEMBER AND VICE CHAIR (dissenting):-- The issue in this Motion is whether the Board has the jurisdiction to order special rates for low-income consumers. For the reasons set out below, I respectfully disagree with the majority and find that the Board has jurisdiction.

55 This is not the first time this matter has come before the Board. The Applicant in this case, the Low Income Energy Network (LIEN), raised an identical issue in the Union rate case last year. That Panel did not reject the matter on the basis of jurisdiction but deferred it on the grounds that it would be best to consider the matter in a different forum. LIEN argued before us that there had been little progress and accordingly wished to have the matter heard in the Enbridge rate case. This Panel ruled that before deciding the issue it wished to have detailed submissions on whether the Board had jurisdiction. This section addresses that issue.

56 The Industrial Gas Users Association (IGUA), the Consumers Council of Canada (CCC"), Enbridge Gas Distribution Inc. (EGD) and Union Gas Limited (Union) all argue that the Board does not have the jurisdiction to establish special rates for low-income consumers.

57 Board staff argued that the Board did have jurisdiction to implement some form of rate affordability assistance programs for low-income consumers but stated, "absent a specific proposal Board staff does not believe it is prudent to speculate just how far that authority might extend."

58 For the reasons outlined below, I find that the Board has jurisdiction to approve special rates for low-income consumers in appropriate cases. No decision is being made as to whether the Board should exercise that jurisdiction however. There is no specific proposal before us. A decision whether to exercise jurisdiction should be deferred to a proceeding that faces a definitive proposal.

59 A number of parties also argued that if there were a proceeding to consider low-income rates, it should be a generic proceeding. That, in fact, was the Board's decision the last time this Board considered this issue.[1] I agree with that decision.

60 The case that LIEN makes for rate affordability programs is best summarized in paragraphs 1 and 2 of its written submissions:

"1. Unaffordable gas and electricity rates cause great hardship to poor consumers in Ontario. Sometimes they are forced to choose between heating or eating; sometimes their supply is disconnected. The Ontario Energy Board's ("Board") statutory objective to protect the interests of consumers with respect to prices and the reliability and quality of gas service is not being met by the current rate fixing system. The interests of low-income consumers are not protected and de facto the service to them is unreliable and inadequate.

2. The Board's self-acknowledged and judicially acknowledged mandate is to regulate the province's electricity and natural gas sectors in the public interest. Low-income consumers form a substantial proportion of Ontario's population: approximately 18% of households spread throughout the province. Gas rates and service that disadvantage such a substantial segment of the public, whether directly through rate structure or indirectly through terms and conditions, are not in the public interest."

Jurisdiction

61 Any Tribunal only has the powers stated in its governing statute or those, which arise by "necessary implication" from the wording of the statute, its structure and its purpose.[2] This Board's jurisdiction to fix "just and reasonable" rates is found in section 36(2) of the *Ontario Energy Board Act,* 1998:

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

62 One of the Board's statutory objectives as set out in section 2 of the Act is to "protect the interests of consumers with respect to prices and the reliability and quality of gas service." LIEN argues that without a rate affordability program, the interests of low-income consumers are not protected.

63 It is generally accepted that the Board's jurisdiction is very broad. In *Union Gas Ltd.* v. *Township of Dawn*, the Ontario Divisional Court in 1977 stated:

> "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 courts under the *Planning Act.*
>
> These are all matters that are to be considered in 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 broad public interest that must be served.[3]

64 The same Court in 2005 issued two important decisions. The Court stated in the *NRG* case:

> "The Board's mandate to fix just and reasonable rates under section 36(3) of the *Ontario Energy Board Act, 1998* is unconditioned by directed criteria and is broad; the Board is expressly allowed to adopt any method it considers appropriate."[4]

65 The ruling in the Enbridge case decided that the Board in fixing just and reasonable rates can consider matters of "broad public policy:"

> "the expertise of the tribunal in regulatory matters is unquestioned. This is a highly specialized and technical area of expertise. It is also recognized that the legislation involves economic regulation of energy resources, including setting prices for energy which are fair to the distributors and the suppliers, while at the same time are a reasonable cost for the consumer to pay. This will frequently engage the balancing of competing interests, as well as consideration of broad public policy."[5]

66 This legal principle must be considered in the context of the fact situation before us. The supply of natural gas can be considered a necessity that is available from a single source with prices set by an agent of the Crown. The Divisional Court has said that the Board is entitled in setting rates to consider "broad public policy". This suggests that in appropriate circumstances the Board can consider ability to pay in setting rates if it is necessary to meet broad public policy concerns. Access to an essential service may be such a concern.

67 Those arguing a lack of jurisdiction on the part of the Ontario Board point to section 79 of the Act, which specifically authorizes the Board to provide rate protection for rural or remote customers of an electricity distributor. They argue that if the legislature had intended special rates for low-income consumers, the legislature would specifically have inserted a provision similar to section 79.

68 With respect, the correct reading of the legislative history of that section does not bear this interpretation. The section was introduced when the Board first obtained the jurisdiction to regulate electricity distributors. Prior to that, electricity distributors in the Province were regulated by Ontario Hydro, a Crown corporation. The Government through its Crown corporation had established the policy of setting special rates in remote and rural areas of the province. This section was introduced in 1999 when the authority to set rates was transferred to the Ontario Energy Board to indicate to the Board that this policy should continue.[6] I do not accept that this section represents an attempt by the Government to circumscribe the jurisdiction of the Board. That is contrary to the clear wording of section 36(3) which specifically applies to gas distributors.[7]

The Ability to Pay

69 Those arguing that the Board does not have jurisdiction to enact special rates for low-income customers often do so on the basis that rate-setting would depart from standard regulatory principles and morph into social engineering. They argue that the Board should not consider ability to pay in setting rates, relying to some degree on the decision of the Alberta Board, which rejected lifeline rates on the basis, that "life-line rates are rates based not on economic principles of regulation such as cost of service but on a social principle of the customer's ability to pay."[8]

70 LIEN argues to the contrary, stating that the Board is required to set just and reasonable rates, and in this regard, should have regard to its objects, one of which is "to protect the interest of consumers with respect to price". They argue, "how can the Board protect consumers with respect to price if it cannot consider the ability to pay."

71 Most energy regulators in Canada, including the Ontario Energy Board, agree that the cost of serving customers is a major determinate of rates. But, this is not the only determinate. Another variant of this argument is that the Board is an "economic regulator" and as such, jurisdiction is circumscribed. This principle is relied upon by the majority in this case.

72 With respect, there is no basis for this position in the statute. This very argument in, substantially similar circumstances, was recently rejected by the Federal Court of Appeal in *Allstream Corp.* v. *Bell Canada.*[9] There, Bell Canada had filed tariffs for optical fiber services in different areas. In some areas, Bell priced the service below the floor price previously established by the CRTC. The Commission approved these rates despite the objection of Allstream, a competitor, that the rates would reduce competition and were beyond the Commissions jurisdiction as an "economic regulator".

73 All of the Members of the Commission agreed that the proposed rates did not comply with existing criteria because they fell below the applicable floor price. A majority of the Commission, however, ruled that there were "exceptional" circumstances in five cases as the services were necessary to serve schools in the area. Two dissenting Members of the Commission were highly critical of the majority. One Commissioner stated that "with the advent of competition, the Commission has undertaken twelve years in a continuing painstaking process of wringing out the cross subsidization between the various classes of ratepayers and that, to step back from cost based rates and reintroduce hidden cross subsidization was a retrograde and chilling step."[10]

74 The Federal Court of Appeal in reviewing the Commission's decision considered the sections of the *Telecommunications Act* that governed the Commission's jurisdiction. Section 27(1) of the Act provided that "every rate charged by a Canadian carrier for telecommunications service shall be just and reasonable." Section 27(5) of the Act provided that "in determining whether a rate is just and reasonable, the Commission may adopt any method or technique that it considers appropriate, whether based on a carrier's return on its rate base or otherwise." Those sections are identical to Ontario legislation at play in this proceeding. In upholding the Commission's decision, the Federal Court of Appeal, stated:

> The appellant highlights the fact that the courts have historically deferred to utilities commissions in deciding which factors are relevant in determining a just and reasonable rate. However, such factors have typically been economic considerations of the rates themselves. Examples from the jurisprudence sanction reliance on a utility's costs, investments, reserves, and allowances for necessary working capital; a rate of return on the utility's investment; the recovery of fair and reasonable expenses; costs of debt and equity; and general economic conditions. The factors relied on in this case are not economic considerations relative to the rates themselves and therefore, the appellant argues, the Court should not defer to the Commission...

> The Commission as a whole has experience in rate setting. The variety of opinions and concerns expressed in the decision under appeal is an indication that different members held different views on the industry, the market, the services to be provided, the policy objectives and their application in these circumstances. It is apparent that the Commission was greatly concerned and the dislocation of complex equipment and facility configurations at a significant cost to the detriment of school boards and municipalities in the relevant areas and that such concerns outweighed, in its view, Bell's failure to seek prior approval of these rates. These are considerations that a specialized board can entertain and weigh relative to other considerations. It is true that these considerations are not purely economic in the sense referred to by the appellant such as costs, investment, allowance for necessary working capital, rate of return, etc. These considerations, however, are part of the Commission's wide mandate under section 7, a mandate it alone possesses and are quite distinct from the grant of a rebate under paragraph 27(6)(b) of the Act, a power the Commission did not invoke.
>
> The Commission's choice of "exceptional circumstances" was not patently unreasonable. I therefore cannot find that they were irrelevant considerations which would amount to an error of law or jurisdiction. I would dismiss this appeal with costs.[11]

75 There is no specific proposal before the Ontario Energy Board at this point. This is strictly a question whether the Board has jurisdiction to set special rates for low-income consumers. It may be that there must be "exceptional circumstances" for the Board to exercise that jurisdiction and depart from standard rate making principles, but in my view, the Board has that jurisdiction in the appropriate circumstances.

76 A finding that the Board has jurisdiction to consider ability to pay in setting rates, does not mean, as the majority suggests, that there will be a "fundamental change" in rate-making principles across the board. I accept that cost causality is the basic principle. I also accept the Federal Court's view that there should be exceptional circumstances. But, I also believe that in the appropriate circumstances the Board has the authority to enact those programs.

77 It is important in this context to recognize that section 36(3) of the Act provides that the Board in fixing just and reasonable rates can adopt "any method or technique that it considers appropriate". The majority finds that this language does not allow the Board to consider ability to pay in setting rates. They conclude that if this was the legislative intent, this authority would have been specifically included. With respect, I disagree. This is an extremely broad power. Given the language it is difficult to understand why the legislature would reference one specific rate-making technique or factor. The majority also finds that this provision was intended to allow the Board to move from standard rate-based rate-of-return regulation to incentive regulation. I see nothing in the language of this statute that leads to that restriction.

78 The majority relies on the decision of the Nova Scotia Court of Appeal upholding the decision of the Nova Scotia regulator, where the Board found that it did not have jurisdiction to order low-income affordability programs. With respect, that decision has no application to the situation before us. That decision was clearly founded on section 67(1) of the *Public Utilities Act* of Nova Scotia[12]

which required that rates shall "always be charged equally to all persons under the same rate in substantially similar circumstances and conditions irrespective of service of the same description."

79 This section is not in the Ontario Act. Rather, what is in the Ontario Act (and not in the Nova Scotia Act) is section 36(3) which authorizes the Board in setting just and reasonable rates to adopt "any method or technique it considers appropriate". The statutory scheme and the regulatory authority granted to the Ontario and Nova Scotia Boards is materially different.

80 This Board has jurisdiction to set just and reasonable rates, to act in public interest, and to use any rate-making technique considered appropriate. Moreover, Ontario courts in numerous decisions have confirmed the Board's broad rate-making authority and that the Board can consider matters of public policy. The fact that the Board may be considered an "economic regulator" does not limit that jurisdiction.

81 Put simply, just and reasonable rates do not result from the application of a purely mechanical process of rate review and design. A Board can, and should, take into account a variety of considerations beyond costs in determining rates. It is not unusual for energy regulators, including the Ontario Board, to reduce a rate increase because of "rate shock" and spread the increase over a number of years. Such a determination, as LIEN argues, is driven by considerations of the "ability to pay".

82 I also agree with Board Counsel that the Board has crossed this bridge. This Board in the past has considered ability to pay in different cases. Both Enbridge and Union Gas make annual contributions to the Winter Warmth program, which provides funds to certain low-income consumers to ensure they can heat their homes during winter months.[13]

83 The majority finds that this program constitutes a "charity" or emergency program and does not reflect principles of rate making. With respect, these long-standing programs provide a subsidy to low-income consumers to allow them to purchase gas. If this Board has jurisdiction to order utilities to pay subsidies to low income customers, it has jurisdiction to order utilities to provide special rates.

84 Interestingly, we find another example in this very case. In this proceeding, Enbridge is asking the Board to approve fuel-switching programs to enable consumers to shift from electric-water heaters to gas-water heaters, to increase utility sales and promote conservation given the greater efficiency of the gas-water heater.

85 What's interesting is that the utility is proposing two programs, one for low-income consumers and one for other consumers. The programs are identical and there are roughly the same number of participants in each program. The difference is that the subsidy for the low-income group is $800 per participant while the subsidy for other consumers is only $600. None of the parties of this proceeding objected. No one has argued that the Board does not have jurisdiction to approve different subsidies based on income levels.[14]

Unjust Discrimination

86 Enbridge argues that enacting special rates for low-income consumers would violate the common law principle against unjust discrimination by public utilities as set out in *St. Lawrence Rendering Company Ltd.* v. *the City of Cornwall.*[15]

> "That a public utility was at common law compelled to treat all consumers alike, to charge one no more than the other and to supply the utility as a matter of duty and not as a result of a contract, seems clear."

87 There is no question that this common law principle has been enshrined in public utility statutes for decades. Section 321 of the *Railway Act* for over 100 years prohibited unjust discrimination or undue preference by telecommunication companies as well as railroads.[16] Most public utilities statutes in Canada contain similar provisions prohibiting unjust discrimination.[17] The *Ontario Act* is unique in that respect, because it does not contain this provision. That does not mean the principle does not apply. It is well founded in the Common Law. However, the common law principle does not stand for no discrimination. The prohibition is against unjust discrimination or undue preference.

88 Low-income rates do not necessarily offend the general principle of unjust discrimination or undue preference. That judgment will turn upon the exact nature of the program, something that is not before this panel. In short, the common law principle prohibits unjust discrimination, not any discrimination. It is not a bar to the Board exercising its jurisdiction in the appropriate circumstances.

89 On the contrary, this principle may require special rates. The prohibition against unjust discrimination has often been used to ensure access to a monopoly utility's facilities[18] and arguably relates to the services as well.

Charter of Rights and Freedoms

90 Section 32.2 of the Act, provides that the Board may make orders approving or fixing "just and reasonable rates" for the sale of gas. LIEN argues that in the absence of clear statutory provisions, the requirement for a "just and reasonable rate" must be interpreted to comply with section 15 of the Canadian Charter of Rights and Freedoms. Section 15 states:

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

91 There is no question that the Charter applies to provincial legislation,[19] and the Supreme Court of Canada in *R.* v. *Rogers* held that the Charter, can be used as an interpretative tool:

> "[I]t is equally well settled that, in interpretation of a statute, *Charter* values as an interpretative tool can only play a role where there is a genuine ambiguity in the legislation. In other words, where the legislation permits two different, yet equally plausible, interpretations, each of which is equally consistent with the apparent purpose of the statute, it is appropriate to prefer the interpretation that accords with *Charter* principles."[20]

92 The majority believes that it is clear that jurisdiction does not exist. As a result, they conclude that the required ambiguity is not present and the Charter cannot be used as an interpretive tool. I have concluded that the Act clearly grants the Board the necessary jurisdiction. Given the lack of ambiguity, the Charter would not be available for purposes of interpretation.

93 This, with respect, makes little sense. The Charter is the supreme law of the land. No legislation can be contrary to the Charter and no Board can issue an Order contrary to the Charter. To be fair to LIEN, a split decision suggests ambiguity. All parties agree, as the majority states, that there is no explicit authority in the Statute. The question is whether there is implicit authority. In the circumstances of this case, I find the Charter can be used as an interpretative tool.

94 It is important to remember that the Charter can also be used by disadvantaged groups to set aside Board decisions refusing to set aside special rates, if that refusal amounted to discrimination within the language of section 15.

95 The Charter specifically empowers Courts to provide a remedy to anyone whose rights or freedom has been infringed or denied by Government action. Its reach extends not just to laws but the decisions taken pursuant to those laws. The Supreme Court of Canada held in *Slaight*[21] that no public official could be authorized by statute to breach the Charter and therefore all statutory grants of discretion had to be read down only to authorize decision making which is consistent with Charter rights and guarantees. As Professor Hogg has stated:

> "Action taken under statutory authority is valid only if it is within the scope of that authority. Since neither Parliament nor a Legislature can itself pass a law in breach of the Charter, neither body can authorized action which would be in breach of the Charter. Thus, the limitations on statutory authority which are imposed by the Charter will flow down the chain of statutory authority and apply to regulations, by-laws, orders, decisions and all other action (whether legislative, administrative or judicial) which depends for its validity on statutory authority."[22]

96 In Baker,[23] the Court clearly stated that discretion must be exercised not only in accordance with the boundaries of the statute and the principles of administrative law, but in a manner consistent with the "principles of the Charter" and the "fundamental values of Canadian society".

97 Applicants under s. 15 must however, show they have been subjected to discrimination or denied a legal benefit or protection. They must also show that the denial of the benefit or protection is on an enumerated or analogous ground.[24] In order to determine whether the Charter applies here, it is necessary to answer two questions. First, is poverty or low income an analogous ground? Second, has there been discrimination or a disadvantage as a result of the failure to enact low income rates?

98 In the past, courts have been reluctant to define poverty and low income as an analogous ground.[25] More recent cases however, offer broader interpretations. The Ontario Court of Appeal in Falkiner[26] found that there was discrimination contrary to section 15 of the Charter against individuals who were subjected to differential treatment on the analogous ground of "receipt of social assistance". The Nova Scotia Court of Appeal in *Sparks*[27] found that sections of the *Residential Tenancies Act* were unconstitutional because of discrimination contrary to Section 15 of the Charter against "tenants of public housing". The Nova Scotia Court stated in part:

> Low income, in most cases verging on or below poverty, is undeniably a characteristic shared by all residents of public housing; the principle criteria of eligibility for public housing are to have a low income and a need for better housing...
>
> Section 15(1) of the Charter requires all individuals to have equal benefit of the law without discrimination. Public housing tenants have been excluded from cer-

> tain benefits private sector tenants have as provided to them in the Act. The effect of ss. 25(2) and s. 10(8)(d) of the Act has been to discriminate against public housing tenants who are a disadvantaged group analogous to the historically recognized groups enumerated in s. 15(1).[28]

99 The Ontario Court of Appeal in *Falkiner* came to a similar conclusion:

> I consider that the respondents have been subjected to differential treatment on the analogous ground of receipt of social assistance. Recognizing receipt of social assistance as an analogous ground of discrimination is controversial primarily because of concerns about singling out the economically disadvantaged for Charter protection, about immutability and about lack of homogeneity...
>
> [T]he main question in deciding whether a ground of discrimination should be recognized as analogous is whether its recognition would further the purpose of s. 15, the protection of human dignity ...The nature of the group and Canadian society's treatment of that group must be considered. Relevant factors arguing for recognition include the group's historical disadvantage, lack of political power and vulnerability to having its interests disregarded...
>
> [A]lthough the receipt of social assistance reflects economic disadvantage, which alone does not justify protection under s. 15, economic disadvantage often coexists with other forms of disadvantage. That is the case here.[29]

100 There is no specific plan before the Board at this point. However, we do know that existing utility programs, that subsidize low income groups rely on existing social welfare legislation to define which individuals are "low income". Accordingly, it is possible that those qualified for the low-income rate programs might be those in "receipt of social assistance".

101 The more difficult question is whether this group is being disadvantaged by a failure to enact low-income rates. Enbridge says that there is no discrimination because everyone gets the same rate. LIEN argues that the requirement of a single rate regardless of income discriminates those who cannot afford the service.

102 It is important to recognize the nature of the service at issue. The supply of gas can be considered an essential commodity. And, there is only once source of this commodity, a regulated utility. And, the price is set by the Ontario Engergy Board, an agent of the Crown.

103 For the reasons expressed above, I believe that the Charter may provide a remedy to disadvantaged groups, in the appropriate circumstances to require Boards to set special rates for supply of an essential commodity from a single regulated source. I also find that the Charter principles of section 15 apply to a determination of jurisdiction and, the Charter supports a conclusion that the Board has jurisdiction. However, even if the Charter does not apply, I believe the Act gives the Ontario Energy Board broad powers and discretion to consider issues of public policy and the necessary jurisdiction to enact low-income rates.

DATED at Toronto, April 26, 2007

Original signed by

Gordon Kaiser
Presiding Member and Vice Chair

qp/e/qlspi

1 *Dalhousie Legal Aid Service v. Nova Scotia Power Inc*" [2006] N.S.J. No. 243 (C.A.)

1 *Union Gas Limited*, EB-2005-0520 (O.E.B.), Transcript, Vol. 01, May 23, 2006 at 86-87 [hereinafter referred to as Union].

2 *ACTO Gas and Pipelines Ltd.* v. *Alberta (Energy and Utilities Board*, [2006] 1 S.C.R. 140, [2006] 2.C.J. 400 at para. 38. See also *Bell Canada* v. *Canada (Canadian Radio-Television and Telecommunications Commission*, [1989] 1 S.C.R. 1722.

3 (1977), 15 O.R. (2d) 722, [1977] O.J. No. 2223 at paras. 28 and 29.

4 *Natural Resource Gas Ltd.* v. *Ontario Energy Board*, [2005] O.J. No. 1520 (Div. Ct.) at para 13.

5 *Enbridge Gas Distribution Inc.* v. *Ontario Energy Board* (2005), 75 O.R. (3d) 72, [2005] O.J. No. 756 at para. 24.

6 Ontario Regulation 442/01 -- *Rural or Remote Electricity Rate Protection* (made under the *Ontario Energy Board Act, 1998*) requires the OEB to determine the annual amount to be collected and distributed for rural or remote electricity rate protection. Prior to the Board being granted authority over electricity rate regulation in 1999, rural rate protection was provided through section 108 of the *Power Corporation Act*, R.S.O. 1990, c. P. 18. That section required that the weighted average bill for the first 1000 kws of consumption by rural residential customer be 115% of the weighted average bill for the first 1000 kws of consumption by a municipal residential customer. Funding of this subsidy was provided by municipal commissions and any other person supplied power by Ontario Hydro.

7 Section 36(3) of the *Ontario Energy Board Act, 1998* states that "In approving or fixing and just and reasonable rates, the Board may adopt any method or technique that it considers appropriate."

8 *EPCOR Distribution Inc.* (August 13, 2004), Decision 2004-067 (A.E.U.B.) at 184 [hereinafter referred to as *EPCOR*].

9 [2005] F.C.J. No. 1237.

10 *Ibid.* at para. 9.

11 *Ibid* at paras. 22 and 34-36.

12 Section 67(1) of the *Public Utilities Act*, R.S.N.S. 1989, c. 380, provides that "All tolls, rates and charges shall always, under substantially similar circumstances and conditions in respect of service of the same description, be charged equally to all persons and at the same rate, and the Board may by regulation declare what shall constitute substantially similar circumstances and conditions."

13 See *Union*, EB-2005-0520 (O.E.B.).

14 *Enbridge Gas Distribution Inc.,* EB-2006-0034 (O.E.B.), Exhibit 1, Tab 1, Schedule 25, at 3.

15 *St. Lawrence Rendering Company Ltd.* v. *the City of Cornwall*, [1951] O.R. 669 at 683. See also *Canada (Attorney General* v. *Toronto (City* (1893, 23 S.C.R. 514.

16 *Railway Act*, R.S.C. 1970, c. R2, s. 321, as amended. See also the *Telecommunications Act*, S.C., 1993, c. 38, s. 27(2). This section is similar to sections 201 and 202 of the *Communications Act 1934*, 47 USCA (1962) which governs US telecommunications companies. See also *EPCOR*, supra note 12 at 184.

17 See the *Public Utilities Act*, R.S.N.L. 1990, c. P-47, ss. 82, 84 and 87; the *Electric Power Act*, R.S.P.E.I. 1988, c. E-4, ss. 28-30; the *Public Utilities Board Act*, R.S.A. 2000, c. P-45, ss. 80 and 100; and the *Utilities Commission Act*, R.S.B.C. 1996, c. 473, ss. 58-60.

18 *Otter Trail Power Co.* v. *United States*, 410 U.S. 366 (1973); *Specialized Common Carrier*, 29 F.C.C. 2d 870 (1971), modified 33 F.C.C. 2d 408 (1972), aff'd sub nom. *Washington Util. & Transp. Comm'n* v. *F.C.C.*, 513 F. 2d 1142 (9th Cir. 19750, cert. denied 423 U.S. 836 (1975); See also *CNCP Telecommunications, Interconnection with Bell Canada, Telecom. Decision* CRTC 79-11, 113 Can. Gazette PT, I, supplement to No. 29, 5 C.R.T. 177 (17 May 1979) aff'd P.C. 1979-2036 at 274.

19 *Retail, Wholesale and Department Store Union, Local 580 [R.W.D.S.U.]* v. *Dolphin Delivery Ltd.,* [1986] 2 S.C.R. 573.

20 *R.* v. *Rogers*, [2006] 1 SCR 554, [2006] S.C.J. No. 15 at para. 18; See also *Bell ExpressVu Limited Partnership* v. *Rex*, [2002] 2 S.C.R. 559, [2002] S.C.J. No. 43 at para. 62.

21 *Slaight Communications Inc.* v. *Davidson*, [1989] 1 S.C.R. 1038.

22 P.W. Hogg, *Constitutional Law of Canada*, looseleaf (Toronto: Carswell, 1997) at para. 34-11.

23 *Baker* v. *Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 25.

24 *Law Society of British Columbia* v. *Andrews*, [1989] 1 S.C.R. 143.

25 *Dunmore v. Ontario (Attorney General)* (1997), 37 O.R. (3d) 287. See also *Alcorn v. Canada (Commissioner of Corrections)* (1999), 163 F.T.R. 1 (T.D.).

26 *Falkiner* v. *Ontario (Ministry of Community and Social Services)* (2002), 59 O.R. (3d) 481, [2002] O.J. No. 1771 C.A. [hereinafter referred to as Falkiner].

27 *Dartmouth/Halifax County Regional Housing Authority* v. *Sparks*, [1993] N.S.J. No. 97 (C.A.)

28 *Ibid.* at pp. 8 and 9 of 11.

29 *Falkiner, supra* note 27 at paras. 84, 85 and 88.

TAB 2

2010 CarswellOnt 1959, 2010 ONCA 248, 317 D.L.R. (4th) 719, 100 O.R. (3d) 161, 261 O.A.C. 1, 187 A.C.W.S. (3d) 110, 100 L.C.R. 137

2010 CarswellOnt 1959, 2010 ONCA 248, 317 D.L.R. (4th) 719, 100 O.R. (3d) 161, 261 O.A.C. 1, 187 A.C.W.S. (3d) 110, 100 L.C.R. 137

Snopko v. Union Gas Ltd.

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

Ontario Court of Appeal

David Watt J.A., J. MacFarland J.A., and Robert J. Sharpe J.A.

Heard: January 22, 2010
Judgment: April 7, 2010
Docket: CA C49977

Proceedings: affirmed *Snopko v. Union Gas Ltd.* ((January 6, 2009)), Doc. 5021/08 ((Ont. S.C.J.))

Counsel: Donald R. Good for Appellants

Crawford Smith for Respondents

Subject: Natural Resources; Civil Practice and Procedure; Contracts; Torts

Natural resources --- Oil and gas — Statutory regulation — Provincial boards

Plaintiffs' lands formed part of one of natural gas storage pools U Ltd. operated — Plaintiffs' gas storage leases with R Ltd. had been assigned to U Ltd. — Ontario Energy Board issued designation order which, inter alia, authorized U Ltd. to inject, store, and remove gas from storage pool — Association, of which plaintiffs were members, brought application before board seeking "fair and equitable compensation" from U Ltd. under s. 38(3) of Ontario Energy Board Act, 1998 — Settlement reached on issue of just and equitable compensation for claims arising during certain years — Plaintiffs brought action against R Ltd. and U Ltd., alleging, inter alia, breach of contract — U Ltd.'s motion for summary judgment dismissing action against it was granted on jurisdictional grounds — Plaintiffs appealed — Appeal dismissed — Board had broad jurisdiction under Act to, inter alia, authorize injection of gas into designated gas storage area, and order person so authorized to pay just and equitable compensation to owners of property overlaying area — Under s. 38(3) of Act, no civil proceeding could be commenced to determine that compensation — In substance, plaintiffs' claims fell within s. 38(2) of Act as claims for just and equitable compensation "in respect of the gas or oil rights or the right to store gas" or "for any damage necessarily resulting from the exercise of the authority given by" designation order — Under s. 19 of Act, board has "in all matters within its jurisdiction au-

2010 CarswellOnt 1959, 2010 ONCA 248, 317 D.L.R. (4th) 719, 100 O.R. (3d) 161, 261 O.A.C. 1, 187 A.C.W.S. (3d) 110, 100 L.C.R. 137

thority to hear and determine all questions of law and of fact" — Board had power to decide all questions of fact and law arising in connection with matters properly before it, including power to rule on validity of relevant contracts and deal with other substantive legal issues.

Civil practice and procedure --- Summary judgment — Miscellaneous.

Cases considered by *Robert J. Sharpe J.A.*:

Wellington v. Imperial Oil Ltd. (1969), [1970] 1 O.R. 177, 8 D.L.R. (3d) 29, 1969 CarswellOnt 247 (Ont. H.C.) — considered

Statutes considered:

Limitations Act, 2002, S.O. 2002, c. 24, Sched. B

Generally — referred to

Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Sched. B

s. 19 — considered

s. 19(1) — referred to

s. 36.1 [en. 2001, c. 9, Sched. F, s. 2(2)] — considered

s. 37 — considered

s. 38 — considered

s. 38(2) — considered

s. 38(3) — considered

APPEAL by plaintiffs from judgment granting defendant's motion for summary judgment dismissing action against it.

***Robert J. Sharpe J.A.*:**

1 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.

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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.

2010 CarswellOnt 1959, 2010 ONCA 248, 317 D.L.R. (4th) 719, 100 O.R. (3d) 161, 261 O.A.C. 1, 187 A.C.W.S. (3d) 110, 100 L.C.R. 137

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 .

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 .

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 *Wellington v. Imperial Oil Ltd.* (1969), [1970] 1 O.R. 177 (Ont. H.C.), 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

2010 CarswellOnt 1959, 2010 ONCA 248, 317 D.L.R. (4th) 719, 100 O.R. (3d) 161, 261 O.A.C. 1, 187 A.C.W.S. (3d) 110, 100 L.C.R. 137

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 *Wellington v. 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.

***J. MacFarland J.A.*:**

I agree.

2010 CarswellOnt 1959, 2010 ONCA 248, 317 D.L.R. (4th) 719, 100 O.R. (3d) 161, 261 O.A.C. 1, 187 A.C.W.S. (3d) 110, 100 L.C.R. 137

***David Watt J.A.*:**

I agree.

Appeal dismissed.

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TAB 3

2004 CarswellOnt 204, 181 O.A.C. 265

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2004 CarswellOnt 204, 181 O.A.C. 265

Graywood Investments Ltd. v. Toronto Hydro-Electric System Ltd.

GRAYWOOD INVESTMENTS LIMITED (Plaintiff / Appellant) and TORONTO HYDRO-ELECTRIC ENERGY SYSTEM LIMITED and ONTARIO ENERGY BOARD (Defendants / Respondent)

Ontario Court of Appeal

Gillese J.A., Labrosse J.A., and Moldaver J.A.

Heard: January 21, 2004
Judgment: January 26, 2004
Docket: CA C40159

Proceedings: affirming *Graywood Investments Ltd. v. Toronton Hydro-Electric System Ltd.* (2003), 2003 CarswellOnt 1852 (Ont. S.C.J.)

Counsel: Robert J. Howe, David S. Cherepacha for Appellant

Frank Newbold, Q.C. for Respondent

Subject: Civil Practice and Procedure; Public

Civil practice and procedure --- Disposition without trial — Stay or dismissal of action — Grounds — Lack of jurisdiction

Energy board published code dealing with conditions that distribution of electricity must meet in carrying out obligations under licence — Board ruled code would not apply to agreements entered before November 1, 2000 — Plaintiff brought action against defendant electricity corporation and defendant Board — Dispute between plaintiff and defendant electricity corporation was whether corporation breached its licence by failure to apply code — Defendants' motion to dismiss plaintiff's action was allowed — Motions judge found Board had exclusive jurisdiction over subject matter of claim pursuant to s. 75 of Ontario Energy Board Act, 1998 and action amounted to abuse of process — Plaintiff appealed — Appeal dismissed — Determination of dispute turned on whether parties entered agreement within meaning of code prior to November 1, 2000 — Dispute was matter for Board in accordance with its authority under s. 19(1) of Act — Motions judge was correct that Board had exclusive jurisdiction over dispute.

Public utilities --- Regulatory boards — General

Energy board published code dealing with conditions that distribution of electricity must meet in carrying out obligations under licence — Board ruled code would not apply to agreements entered before November 1, 2000 — Plaintiff brought action against defendant electricity corporation and defendant Board — Dispute between plaintiff and defendant electricity corporation was whether corporation breached its licence by failure to apply code — Defendants' motion to dismiss plaintiff's action was allowed — Motions judge found Board had exclusive jurisdiction over subject matter of claim pursuant to s. 75 of Ontario Energy Board Act, 1998 and action amounted to abuse of process — Plaintiff appealed — Appeal dismissed — Determination of dispute turned on whether parties entered agreement within meaning of code prior to November 1, 2000 — Dispute was matter for Board in accordance with its authority under s. 19(1) of Act — Motions judge was correct that Board had exclusive jurisdiction over dispute.

Statutes considered:

Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Sched. B

Generally — referred to

s. 19(1) — referred to

s. 75 — referred to

APPEAL by plaintiff from judgment reported at 2003 CarswellOnt 1852 (Ont. S.C.J.) dismissing plaintiff's claim on basis of lack of jurisdiction and abuse of process.

Per Curiam:

1 The appellant appeals the decision of the motions judge who dismissed Graywood Investments Limited's ("Graywood") claim on the basis that the Ontario Energy Board ("OEB" or "the Board") had exclusive jurisdiction over the subject-matter of the claim and that the action amounted to an abuse of process.

2 Pursuant to its powers under the *Ontario Energy Board Act*, S.O. 1998, c. 15 ("the Act"), the OEB approved and published a Distribution System Code dealing with conditions that a distributor of electricity must meet in carrying out its obligations under its license. The OEB ruled that the Code does not apply to projects "that are the subject matter of an agreement entered into before November 1, 2000."

3 The essence of the dispute between Graywood and Toronto Hydro-Electric Energy System Limited ("Hydro") is whether Hydro was in breach of its license in failing to apply the Code. In that regard, the motions judge found, correctly in our view, that the dispute was one that fell squarely within the exclusive jurisdiction of the Board under s. 75 of the Act.

4 In the circumstances of this case, the determination of that dispute turned on whether the parties had entered into an agreement, within the meaning of the Code, prior to November 1, 2000. That was a matter for the Board to decide, in accordance with its authority under s. 19(1) of the Act.

5 This action by Graywood is based on the same fundamental issue as to whether there was an agreement between the parties prior to November 1, 2000, within the meaning of the Code.

6 The application for judicial review brought by Graywood against Hydro and the OEB is also based on the same issue.

7 In our view, the fundamental issue was within the exclusive jurisdiction of the OEB. The complaint of Graywood may be a matter of judicial review, but this action is nothing more than an attempt to circumvent the OEB's decision.

8 We agree with the conclusion of the motions judge.

9 We would dismiss this appeal with costs fixed at $9,000.

Appeal dismissed.

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TAB 4

2005 CarswellOnt 39, 193 O.A.C. 180, 74 O.R. (3d) 147

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2005 CarswellOnt 39, 193 O.A.C. 180, 74 O.R. (3d) 147

Enbridge Gas Distribution Inc. v. Ontario (Energy Board)

In the Matter of the Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Sch. B. as amended

And In the Matter of the Gas Distribution Access Rule made by the Ontario Energy Board under section 44 of the Ontario Energy Board Act, 1998

And In the Matter of an Appeal from provisions of the Gas Distribution Access Rule pursuant to subsection 33(1) of the Ontario Energy Board Act, 1998

Enbridge Gas Distribution Inc. and Union Gas Limited (Appellants) and Ontario Energy Board (Respondent)

Ontario Court of Appeal

Catzman J.A., Doherty J.A., and Goudge J.A.

Heard: September 28, 2004
Judgment: January 11, 2005
Docket: CA C41293, C41294

Proceedings: affirming *Enbridge Gas Distribution Inc. v. Ontario (Energy Board)* (2003), 2003 CarswellOnt 5573 (Ont. Div. Ct.)

Counsel: J.L. McDougall, Q.C., Helen T. Newland, Michael D. Schafler for Appellant, Gas Distribution Inc.

Patricia D.S. Jackson, Crawford G. Smith for Appellant, Union Gas Limited

David M. Brown for Intervenor, Direct Energy

Robert Frank, Elisabeth DeMarco for Intervenor, Ontario Energy Savings Corp. et al.

Kenneth T. Rosenberg, Richard P. Stephenson for Respondent, Ontario Energy Board

Subject: Public

Public utilities --- Regulatory boards — General

Ontario Energy Board promulgated Gas Distribution Access Rule (GDAR) under authority of Ontario Energy Board Act, 1998 — Gas distributors' application for judicial review of decision of Board was dismissed — Divisional Court found that s. 44(1)(b) of Act authorized Board to make rules "governing the conduct of gas distributor as such conduct related to" gas vendor — Divisional Court determined that "conduct" included regulation of business practices, including terms and conditions upon which parties entered into contracts — Divisional Court stated that billing services dealt with in Ch. 6 of GDAR were one aspect of host of business practices covered in GDAR — Divisional Court held that these commercial relationships were necessary in regulated resource and were themselves subject to regulation — Divisional Court found that Board had jurisdiction to give gas vendors right to choose method of billing to consumers who contract with them for purchase of gas — Gas distributors appealed — Appeal dismissed — Divisional Court's reading of s. 44(1)(b) of Act in its grammatical and ordinary sense was harmonious with scheme and object of Act and with intention of legislature — Divisional Court was correct in finding that Act conferred ample jurisdiction on Board to make billing provisions of GDAR.

Public utilities — Regulatory boards — Practice and procedure — Judicial review — Natural justice — Procedural fairness

Ontario Energy Board promulgated Gas Distribution Access Rule (GDAR) under authority of Ontario Energy Board Act, 1998 — Gas distributors' application for judicial review of decision of Board was dismissed — Divisional Court found that required notice of GDAR made by Board did not fail to meet standard of "description of anticipated costs and benefits of proposed rule" — Divisional Court stated that final notice described anticipated benefits to be "the certainty of edifying and clarifying conditions of access to gas distribution services" and the establishment of "rules governing the relationship between gas distributors and gas vendors" — Divisional Court pointed out that interested parties had ample opportunity to make representation in respect of "described costs and benefits" — Divisional Court held that there was no merit in submission that Board did not consider representations made by appellants and others — Divisional Court found that Board was meticulous in treating and commenting upon those representations — Divisional Court determined that as changes to draft GDAR were made in response to submissions of interested parties, parties had every opportunity to respond to proposed changes — Divisional Court stated that Board had to balance competing interests of gas vendors, gas distributors and consumers — Divisional Court determined that exercise in which Board was engaged was by definition, prospective — Divisional Court held that Board was not required to produce detailed cost-benefit analysis — Gas distributors appealed — Appeal dismissed — Divisional Court was correct in finding that Board followed correct procedure as outlined in s. 45 of Act and that gas distributors were given reasonable opportunities to make written submissions with respect to proposed rule and proposed changes to rule.

Public utilities — Regulatory boards — Practice and procedure — General

Ontario Energy Board promulgated Gas Distribution Access Rule (GDAR) under authority of Ontario Energy Board Act, 1998 — Gas distributors' application for judicial review of decision of Board was dismissed — Divisional Court, stating that standard of review was correctness, held that s. 44(1)(b) of Act gave Board jurisdiction to make billing provisions of GDAR and that Board complied with process set out in s. 45 in arriving at GDAR — Gas distributors appealed — Appeal dismissed — Divisional Court was right in finding that it should use standard of review of correctness in deciding appeal of making of GDAR — Legislature intended court to ask if Board was correct in finding that s. 44(1) of Act gave it jurisdiction to issue GDAR — Question remained same whether pragmatic and functional analysis or ultra vires analysis was used.

Cases considered by *Goudge J.A.*:

Baker v. Canada (Minister of Citizenship & Immigration) (1999), 174 D.L.R. (4th) 193, 1999 CarswellNat 1124, 1999 CarswellNat 1125, 243 N.R. 22, 1 Imm. L.R. (3d) 1, 14 Admin. L.R. (3d) 173, [1999] 2 S.C.R. 817

(S.C.C.) — followed

Pushpanathan v. Canada (Minister of Employment & Immigration) (1998), 226 N.R. 201, (sub nom. *Pushpanathan v. Canada (Minister of Citizenship & Immigration))* 160 D.L.R. (4th) 193, (sub nom. *Pushpanathan v. Canada (Minister of Citizenship & Immigration))* [1998] 1 S.C.R. 982, 1998 CarswellNat 830, 1998 CarswellNat 831, 43 Imm. L.R. (2d) 117, 11 Admin. L.R. (3d) 1, 6 B.H.R.C. 387, [1999] I.N.L.R. 36 (S.C.C.) — followed

T.W.U. v. Canadian Radio-Television & Telecommunications Commission (2003), 2003 FCA 381, 2003 CarswellNat 3259, 2003 CAF 381, 2003 CarswellNat 4215, (sub nom. *Telecommunications Workers Union v. Canadian Radio-Television & Telecommunications Commission)* [2004] 2 F.C.R. 3, 233 D.L.R. (4th) 298, (sub nom. *Telecommunications Workers Union v. Canadian Radio-Television & Telecommunications Commission)* 312 N.R. 128 (F.C.A.) — referred to

Statutes considered:

Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Sched. B

Generally — referred to

s. 33 — considered

s. 33(1)(b) — considered

s. 33(2) — considered

s. 44(1) — considered

s. 44(1)(b) — considered

s. 44(1)(b)(i) — considered

s. 44(1)(d) — considered

s. 45(1)-45(8) — referred to

s. 45 — considered

s. 45(1) — considered

s. 45(2) — considered

s. 45(3) — considered

s. 45(4) — considered

s. 45(5) — considered

s. 45(6) — considered

s. 45(7) — considered

s. 45(8) — considered

APPEAL from judgment reported at *Enbridge Gas Distribution Inc. v. Ontario (Energy Board)* (2003), 2003 CarswellOnt 5573 (Ont. Div. Ct.), affirming dismissal of application by gas distributors for judicial review of decision of Ontario Energy Board.

***Goudge J.A.*:**

1 Natural gas is a major fuel source for energy users in Ontario. The gas consumer buys its gas from a gas vendor and then has a gas distributor transport the gas to it by pipeline. The consumer must pay both the gas vendor and the gas distributor for their services. Historically, gas distributors have always been able to bill their customers directly for the transportation service they provide. They consider this to be a very important and valuable means of regular communication with their customers.

2 This came to an end on December 11, 2002, when the respondent Ontario Energy Board issued the Gas Distribution Access Rule (the "GDAR") pursuant to the rule-making power given to it by the *Ontario Energy Board Act, 1998*, S.O. 1998 c. 15, Schedule B (the "Act"). It did so after a consultation process that took a number of months.

3 Among other things, the GDAR permits the gas vendor to determine who will bill its customers for the gas they buy and for its transportation to them by the gas distributor. The gas vendor may choose to provide both charges to the customer, or require the gas distributor to do so, or choose to have each provide its own bill to the customer.

4 The appellants, who are both large gas distributors in Ontario, exercised their right under the Act to appeal the making of the GDAR to the Divisional Court. Their position is that the Act does not give the Board the jurisdiction to make a rule with these billing provisions. They argue that these aspects of the GDAR do not come within the Board's jurisdiction to make rules "governing the conduct of a gas distributor as such conduct relates to" a gas vendor. They also argue that, in any event, the Board did not follow the process that the Act requires it to follow before issuing a rule.

5 The Divisional Court dismissed both arguments and upheld the GDAR. With leave, the appellants bring the matter to this court. For the reasons that follow, I would dismiss the appeal.

The Background

6 The appellants are the two major gas distributors in Ontario. Each provides distribution service by delivering gas through its network of buried pipelines to consumers in its particular area of the province. Although the appellants' gas distribution activities are regulated by the Board, both engage in other business activities which are not regulated. However, they require the Board's approval to do so because of the risks posed where the same corporation combines unregulated activities with the regulated gas distribution service it alone provides to its particular franchise area.

7 Gas vendors provide their customers with gas supply, but do not transport it to them. That supply reaches the customers through the distribution systems of the gas distributors. A customer buying from a gas vendor must pay

the gas vendor for the gas supply it provides and the gas distributor for the gas distribution it provides. A gas distributor and a gas vendor are in engaged in different but related business activities. Each has a separate and direct business relationship with the customer. Although the Board regulates the price customers pay for gas distribution services, it does not regulate the price customers pay to gas vendors for the gas itself. That price is set by the marketplace.

8 It is in this context that the Board set out to develop and promulgate a rule governing certain aspects of the relationship between gas distributors and gas vendors.

9 For this case, the critical rule-making provision in the Act is s. 44(1)(b)(i). Of secondary importance is s. 44(1)(d). They read:

> 44(1) The Board may make rules,
>
> . . . . .
>
> (b) governing the conduct of a gas distributor as such conduct relates to any person,
>
> (i) selling or offering to sell gas to a consumer,
>
> . . . . .
>
> (d) establishing conditions of access to transmission, distribution and storage services provided by a gas transmitter, gas distributor or storage company.

10 The Act also creates the rule-making process. Subsections 45(1) to (8) say this:

> **Notice and comment**
>
> 45(1) The Board shall ensure that notice of every rule that it proposes to make under section 44 is given in such manner and to such persons as the Board may determine.
>
> **Content of notice**
>
> (2) The notice must include,
>
> (a) the proposed rule or a summary of the proposed rule;
>
> (b) a concise statement of the purpose of the proposed rule;
>
> (c) an invitation to make written representations with respect to the proposed rule;
>
> (d) the time limit for making written representations;
>
> (e) if a summary is provided, information about how the entire text of the proposed rule may be obtained; and
>
> (f) a description of the anticipated costs and benefits of the proposed rule.

Opportunity for comment

(3) Upon giving notice under subsection (1), the Board shall give a reasonable opportunity to interested persons to make written representations with respect to the proposed rule within such reasonable period as the Board considers appropriate.

Exceptions to notice requirement

(4) Notice under subsection (1) is not required if what is proposed is an amendment that does not materially change an existing rule.

Notice of changes

(5) If, after considering the submissions, the Board proposes material changes to the proposed rule, the Board shall ensure notice of the proposed changes is given in such manner and to such persons as the Board may determine.

Content of notice

(6) The notice must include,

(a) the proposed rule with the changes incorporated or a summary of the proposed changes;

(b) a concise statement of the purpose of the changes;

(c) an invitation to make written representations with respect to the proposed rule;

(d) the time limit for making written representations;

(e) if a summary is provided, information about how the entire text of the proposed rule may be obtained; and

(f) a description of the anticipated costs and benefits of the proposed rule.

Representations re: changes

(7) Upon giving notice of changes, the Board shall give a reasonable opportunity to interested persons to make written representations with respect to the changes within such reasonable period as the Board considers appropriate.

Making the rule

(8) If notice under this section is required, the Board may make the rule only at the end of this process and after considering all representations made as a result of that process.

11 Finally, the Act sets out the right of appeal used by the appellants. Section 33(1)(b) and s. 33(2) read as follows:

33(1) An appeal lies to the Divisional Court from,

. . . . .

(b) the making of a rule under section 44;

. . . . .

(2) An appeal may be made only upon a question of law or jurisdiction and must be commenced not later than 30 days after the making of the order or rule or the issuance of the code.

12 In December 1999, the Board notified all interested parties that it had instructed its staff to undertake a consultation process to develop a draft rule for the Board's consideration. On February 6, 2001, the Board issued a notice of proposal to make a rule, together with the draft GDAR. After receiving written and oral input from interested parties including the appellants, a panel of the Board issued a report on June 19, 2002, giving its advice to the Board. Shortly thereafter, on June 28, 2002, the Board issued a notice of proposed changes to the proposed GDAR and attached a copy of the revised draft rule. A further consultation process followed, and again the appellants participated fully. On October 9, 2002, the same panel of the Board issued a supplementary report containing its advice to the Board. The Board responded by issuing a notice of additional proposed changes to the draft rule on October 11, 2002. It called for any further written representations by October 31, 2002. Finally, on December 11, 2002, the Board released the GDAR.

13 Although the GDAR speaks to a number of issues, only its provisions concerning billing the customer are under attack by the appellants. The rule sets out three billing options:

(a) Gas distributor-consolidated billing: where the gas distributor issues a single bill to the consumer setting out the charges for gas distribution services and the charges for the gas commodity sold (which are remitted to the gas vendor when received);

(b) Split billing: where the gas distributor issues a bill to the consumer for gas distribution services and the gas vendor issues a bill to the consumer for the gas commodity sold; and

(c) Gas vendor-consolidated billing: where the gas vendor issues a single bill to the consumer setting out the charges for the gas commodity sold and the charges for gas distribution services (which are remitted to the gas distributor when received).

14 The GDAR requires a gas distributor to accommodate whichever option is chosen by a gas vendor for the gas supply services it provides or intends to provide to consumers in the gas distributor's part of the province.

15 The appellants appealed the making of the GDAR to the Divisional Court pursuant to s. 33 of the Act. That court issued short reasons, finding that the standard of review is correctness, that s. 44(1)(b) of the Act gives the Board had jurisdiction to make the billing provisions of the rule, and that the Board complied with the process set out in s. 45 in arriving at the rule. With leave, the appellants come to this court.

Analysis

16 This appeal raises three issues:

(1) Was the Divisional Court right in finding that it should use the standard of review of correctness in deciding an appeal of the making of the GDAR?

(2) Does the Board have the jurisdiction to make a rule with the billing provisions contained in the GDAR?

(3) Did the Board follow the process required by the Act in making the GDAR?

The First Issue — The Standard of Review

17 The appellants argue that the Divisional Court was right and that the standard of review determined by the well-known pragmatic and functional approach is correctness. In this court, the Board's primary position is that the pragmatic and functional analysis is misplaced and that the issue on the appeal of the making of a rule is simply whether the rule is *ultra vires* the statutory provisions that give the Board jurisdiction to make it.

18 In the end, both the appellants' approach and that of the Board end up at the same place, and, I think in this case, the correct place. On an appeal of the making of the GDAR, the court must determine whether s. 44(1) of the Act properly interpreted gives the Board the jurisdiction to make the rule. In this task, no deference is to be accorded to the Board's view of the extent of its rule-making jurisdiction.

19 However, because the Board takes an alternative position that, on a pragmatic and functional analysis, the appropriate standard of review is reasonableness, something more should be said.

20 Section 44(1) of the Act gives the Board jurisdiction to make rules that have the force of law. Historically, when subordinate legislation like this is attacked as not being authorized by the authorizing legislation, the court asks whether the subordinate legislation is *ultra vires* the rule-making jurisdiction granted by the statute. In this case, that is to ask whether s. 44(1) of the Act, properly interpreted, gives the Board the jurisdiction to make this rule. The court accords no deference to the Board's view of the scope of jurisdiction granted by s. 44(1) and in essence applies a correctness standard but without having first applied a pragmatic and functional analysis to determine that this is the appropriate standard of review.

21 The Supreme Court of Canada described the pragmatic and functional analysis in detail in the seminal case of *Pushpanathan v. Canada (Minister of Employment & Immigration)*, [1998] 1 S.C.R. 982 (S.C.C.). Courts have commonly applied this analysis to determine the standard of review to be applied to the adjudicative decisions of administrative agencies. In *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.), the Supreme Court of Canada extended this to the task of determining the standard of review to be applied to the exercise of a statutory discretion by an administrative agency. Brown and Evans in their text [*Judicial Review of Administrative Action in Canada*], loose-leaf (Toronto: Canvasback, July 2004) at 14-3320 suggest that it is only a matter of time before the Supreme Court of Canada applies the pragmatic and functional analysis to determine the appropriate standard of review of an administrative agency's act of subordinate law-making. Indeed, the Federal Court of Appeal has done just that in *T.W.U. v. Canadian Radio-Television & Telecommunications Commission* (2003), 233 D.L.R. (4th) 298 (F.C.A.).

22 In my view, whether one uses the *ultra vires* analysis or the pragmatic and functional analysis the result is the same. An application of the latter to the making of the GDAR by the Board yields the conclusion that the proper standard of review is correctness. As a consequence, the court must ask whether s. 44(1), correctly interpreted, gives the Board the jurisdiction to make the rule. This is the same question the court would pose in assessing whether the rule made by the Board is *ultra vires* its empowering legislation.

23 All the contextual factors to be considered in the pragmatic and functional approach suggest the strict scrutiny of the correctness standard of review. The Board's rule making is not protected by a privative clause but is sub-

ject to a statutory right of appeal to the Divisional Court. The question here — the proper interpretation of s. 44(1) — is clearly one of law. It involves pure statutory interpretation, something to which the Board can claim no greater expertise than the courts, particularly where the interpretation is of statutory provisions that do not engage the core of the Board's expertise. The desirability of the rule, and the various considerations that the Board must balance in making it, are not factors in the court's task. The Act does not require the Board to give reasons to explain why s. 44(1) provides the jurisdiction to make the rule, making it difficult to subject the Board's reasoning to the somewhat probing analysis that would be part of a more deferential standard of review. Finally, there is nothing in the language of s. 44(1) to suggest that the court should give deference to the Board's view of the extent of the jurisdiction granted to it. For example, s. 44(1) does not entitle the Board to make rules governing the conduct of a gas distributor that "in the Board's opinion" relates to a gas vendor.

24 In short, all these considerations indicate that the legislature intends the court to ask if the Board was correct in finding that s. 44(1) of the Act gives it jurisdiction to issue the GDAR. Whether a pragmatic and functional analysis or an *ultra vires* analysis is used, the question is the same.

The Second Issue — The Rule-Making Jurisdiction of the Board

25 The central issue in this appeal is whether s. 44(1) gives the Board jurisdiction to make the GDAR and, in particular, its provisions concerning billing the consumer for gas distribution services and gas commodity sales.

26 The Divisional Court found that s. 44(1)(b) gives the Board sufficient jurisdiction, and in this court this subsection was the main battleground. It provides that the Board may make rules "governing the conduct of a gas distributor as such conduct relates to [a gas vendor]".

27 The appellants' primary argument is that s. 44(1)(b), properly interpreted, does not give the Board jurisdiction to do what it did. They say that the intention of this subsection is to limit the Board's jurisdiction to a rule governing only the part of a gas distributor's conduct that relates to its business relationship with a gas vendor, such as when the gas vendor acts as agent on behalf of its gas supply customer to arrange with the gas distributor for delivery of that gas supply to that customer. This would exclude the billing provisions of the GDAR, which govern a gas distributor's conduct that is part of its business relationship, not with a gas vendor, but with its gas distribution customer.

28 In my view, there is nothing in either the language of s. 44(1)(b) or its statutory context to suggest such a narrow interpretation. The subsection does not say that the conduct of the gas distributor governed by a rule must relate to the gas vendor by being a part of a direct business relationship between the two and that in no other sense can the conduct be related to the business of the gas vendor. Moreover, such a narrow reading would be inconsistent with the broad purpose of the Act, which is to regulate all aspects of the gas distribution business, not simply those aspects that involve a direct business relationship with gas vendors.

29 The contested provisions of the GDAR apply to the billing arrangements used by gas distributors to charge their customers for transporting their gas supply to them. How gas distributors get paid by their customers for the gas distribution service provided is obviously an important part of the gas distribution business. Similarly, how gas vendors get paid by their customers for the gas commodity supplied is an important part of the gas vendors' business.

30 The GDAR requires the gas distributor to use the billing arrangement chosen by the gas vendor for the gas distribution service it provides to the customer they share. In doing so, the rule governs conduct of the gas distributor that is a part of its gas distribution business. That conduct relates to the billing arrangement used by the gas vendor for the gas commodity sold to the customer it shares with the gas distributor. The connection is that the two charges, whether contained in a single bill sent by the gas distributor, or in one sent by the gas vendor, or in separate

bills, reflect two complementary services both of which are necessary if either is to be of any value to the customer. The commodity is of no use without the distribution, and vice versa. The billing method for gas distribution is related to the billing method for gas sale because together they comprise the way the customer receives the total charge for his use of gas.

31 Thus, in my view the words of s. 44(1)(b) read in their grammatical and ordinary sense, confer ample jurisdiction on the Board to make the billing provisions of the GDAR. Moreover, such a reading is harmonious with the scheme and object of the Act and the intention of the legislature. The exercise of jurisdiction by the Board in making these provisions regulates an important part of the gas distribution business. This constitutes a manifestation of one of the fundamental purposes of the Act, namely the regulation by the Board of gas distribution in Ontario.

32 However, the appellants raise a number of additional arguments beyond simple statutory interpretation to buttress their position that s. 44(1)(b) does not provide the Board with the necessary jurisdiction.

33 First, they say that the billing provisions of the GDAR have the effect of requiring a gas distributor to act not as a gas distributor but as either a billing service provider for gas vendors or a billing service purchaser from gas vendors, and that s. 44(1)(b) cannot have contemplated a rule that does so. However, this argument overlooks the reality that under the GDAR, gas distributors remain distributors of gas. They continue to deliver gas to consumers. The rule does not change the nature of their business. They remain gas distributors. The rule simply governs the billing arrangement they have with their customers for the gas distribution service they provide, which is an important part of that business.

34 Second, the appellants argue that the billing provisions of the GDAR go beyond s. 44(1)(b) because they do not regulate an existing field of conduct but rather create a new field by requiring gas distributors and gas vendors to cooperate in billing their common customers. The error in this argument is that the rule governs the conduct of gas distributors in the way they transmit to their customers the charges for the gas distribution service they provide. That is not a field of conduct created by the rule but something that has always been an integral part of the gas distribution business.

35 Third, the appellants say that the GDAR turns gas distributors into wholesale distributors by requiring them to send their bills to gas vendors when the latter select the gas vendor-consolidated billing option. They argue that because the Act limits the definition of "gas distributor" to one who delivers gas to a consumer, s. 44(1)(b) cannot sustain a rule that creates wholesale gas distributors. However, the billing provisions of the GDAR do not take gas distributors outside of their statutory definition. Distributors continue to deliver gas to the end consumer. Under the gas vendor-consolidated billing option, all that the gas distributor sends to the gas vendor is the charge to the consumer for the gas distribution service. This does not make the gas distributor into a wholesale distributor of gas.

36 Fourth, the appellants rely on a 1999 Board decision finding that a gas distributor is not engaged in a business activity that is subject to regulation under the Act when it offers a billing service that permits a gas vendor to provide its charge for gas sales to the gas distributor to forward to the customer they share. The appellants argue that having found this, the Board cannot now find that it can make a rule regulating the conduct it has previously determined to be beyond regulation. However, this miscasts what the billing provisions of the GDAR do. They govern the billing method to be used by gas distributors in providing their customers with the charges for gas distribution services. This constitutes the regulation of an important part of the gas distribution business, consistent with the central purpose of the Act. By requiring the gas distributor to enclose the charge for gas sales with its own charge for gas distribution services to the customer, where the gas distributor-consolidated billing option is chosen by the gas vendor, the rule is doing no more than governing the billing practice of the gas distributor as it relates to the billing practice of the gas vendor.

37 Fifth, the appellants argue that the vendor billing provisions of the GDAR effectively expropriate their

goodwill by depriving them of direct contact with their customers. They say that the legislature could not have intended s. 44(1)(b) to permit expropriation without compensation. I do not accept this submission. While the gas vendor-consolidated billing option precludes one way for the gas distributor to communicate with its customers, there are many others. Moreover, many instances of statutory regulation of business may have an adverse impact on that business. The issue is not this, but whether the regulation is properly authorized by the governing legislation.

38 Finally, the appellants argue that s. 44(1)(b) could not have been intended to permit a rule which interferes with their common law right to have a direct billing relationship with their customers. The simple answer to this is that the appellants have no common law right to engage in the gas distribution business at all. This is an activity that is entirely governed by the Act under the supervision of the Board. This regulation, including the making of rules, cannot be said to deprive the appellants of any common law rights.

39 I therefore conclude that, interpreted properly, s. 44(1)(b) of the Act gives the Board jurisdiction to make the billing provisions of the GDAR and that none of the appellants' arguments to the contrary can succeed. Having reached this conclusion, it is unnecessary to determine whether s. 44(1)(d) of the Act also provides the necessary jurisdiction to do so.

The Third Issue — The Process the Board Must Follow to Make a Rule

40 Section 45(2) requires that the Board must give notice of the anticipated costs and benefits of the rule it proposes to make. If, after receiving written representations from interested parties, the Board then proposes material changes to the proposed rule, s. 45(6) requires that it give a second notice describing the anticipated costs and benefits of the proposed rule as amended. The appellants complain that in this case the Board did not do so, either for the proposed GDAR as a whole, or for the provisions setting out the different billing arrangements. They say that this allowed the Board to escape the discipline required of it by the Act and prevented the appellant from fully making representations to the Board, something to which the Act entitles them. They say that for this reason the GDAR, or at least the billing provisions of it, cannot stand.

41 I do not agree with this submission.

42 Section 45 requires the Board to provide only a description of the anticipated costs and benefits of the proposed rule as whole. It does not require a prospective cost-benefit analysis of each provision in the proposed rule. That would take the notice requirement to an unworkable level of detail.

43 Nor do I think that the Act requires a description of anticipated costs and benefits as a means of imposing an intellectual discipline on the Board. If the legislature was concerned that the Board would engage in thoughtless rule making, it would surely have imposed a requirement to give reasons for rule making, if indeed it left the Board with any rule-making power at all.

44 Rather, s. 45 read in its entirety, makes clear that the notice requirement, both for the proposed rule and for proposed material changes in it, is in order to give interested parties a reasonable opportunity to make written submissions with respect to the proposed rule or the changes. That is the standard to be used in evaluating what the Board did here.

45 In this case the Board issued the notice that it proposed to make the GDAR on February 6, 2001. Following representations by interested parties including the appellants, the panel of the Board issued an advisory report to the Board. This was followed on June 28, 2002, by a notice of proposed material changes, which again elicited representations from the appellants and others and another advisory report from the panel. A further notice of additional proposed changes followed on October 11, 2002, again offering the opportunity for written representations before the GDAR was issued on December 11, 2002.

46 In each case, the notice set out the anticipated costs and benefits in a general way, although the Board made it clear that precision was impossible given that this involved prediction of things yet to come.

47 The Divisional Court aptly summed up its conclusion that these notices fulfilled the legislative objective of permitting reasonable opportunity for written submissions prior to the making of the GDAR. At para. 9 it said:

> What is clear from the chronology attached to this endorsement is that interested parties had ample opportunity to make representation in respect of the "described costs and benefits". The Appeal Book is in eight volumes comprising 5,058 pages. Even a cursory examination of the record reveals the considerable extent to which the appellants and others participated in the process of developing the GDAR.

48 I agree entirely with this assessment. This ground of appeal must fail.

49 In summary, the appeal must be dismissed. As no party seeks costs, none are ordered.

Catzman J.A.:

I agree.

Doherty J.A.:

I agree.

Appeal dismissed.

END OF DOCUMENT

TAB 5

Case Name:

Ontario (Energy Board) (Re)

IN THE MATTER OF the Ontario Energy Board Act, 1998, S.O. 1998, c. 15, (Schedule B); AND IN THE MATTER OF a proceeding initiated by the Ontario Energy Board to determine whether it should order new rates for the provision of natural gas, transmission, distribution and storage services to gas-fired generators (and other qualified customers) and whether the Board should refrain from regulating the rates for storage of gas; AND IN THE MATTER OF Rules 42, 44.01 and 45.01 of the Board's Rules of Practice and Procedure.

2007 LNONOEB 51

Nos. EB-2006-0322, EB-2006-0338, EB-2006-0340

Ontario Energy Board

Panel: Pamela Nowina, Vice Chair, Presiding Member; Paul Vlahos, Member; Cathy Spoel, Member

Decision: May 22, 2007.

(194 paras.)

Tribunal Summary:

In November of 2006 the Board issued a Decision with Reasons in the Natural Gas Electricity Interface Review proceeding (the "NGEIR Decision"). This proceeding was initiated by the Ontario Energy Board in response to issues first raised in the Board's Natural Gas Forum Report issued in 2004. The NGEIR Decision addressed the key issues of natural gas storage rates and services for gas-fired generators, and storage regulation.

In the NGEIR Decision, the Board determined that it would cease regulating the prices charged for certain storage services but that the rates for storage services provided to Union and Enbridge distribution customers will continue to be regulated by the Board.

The Board received three Notices of Motion for review of certain parts of the NGEIR Decision. The Board held an oral hearing to consider the threshold questions that the Board should apply in determining whether the Board should review those parts of the NGEIR Decision and whether the moving parties met the test or tests.

The Board finds that the motions do not pass the threshold tests applied by the Board, except in two areas.

First, the Board finds that the decision to cap the storage available to Union Gas Limited's in-franchise customers at regulated rates to 100 PJ is reviewable.

Second, the Board finds that the decisions regarding additional storage requirements for Union Gas Limited's in-franchise gas-fired generator customers and Enbridge's Rate 316 are reviewable.

DECISION WITH REASONS

TABLE OF CONTENTS

Section A: Introduction

1 The Board received three Notices of Motion for review of its Decision in the Natural Gas Electricity Interface Review proceeding[1] ("NGEIR"). Motions were filed by the City of Kitchener ("Kitchener") and the Association of Power Producers of Ontario ("APPrO"). There was also a joint notice by the Industrial Gas Users' Association ("IGUA"), the Vulnerable Energy Consumers Coalition ("VECC") and the Consumers Council of Canada ("CCC")

2 On January 25, 2007, the Board issued a Notice of Hearing and Procedural Order which established a schedule for the filing of factums by the moving parties, any responding parties' factums, and an oral hearing date for hearing the threshold question. On February 8, 2007, factums were filed by Kitchener, APPrO, IGUA, and jointly by CCC and VECC.

3 Responding factums were filed on February 15, 2007 by Board Staff, Union Gas Limited, Enbridge Gas Distribution Inc., Market Hub Partners Canada Ltd., School Energy Coalition, The Independent Electricity System Operator and BP Canada Energy Company.

4 In its Procedural Order No.2, the Board indicated that, at the upcoming oral hearing, parties should confine their submissions to the material in their factums and to responding to the factums of other parties. The Board also stated that parties should address only the issues set out in the Board's Procedural Order No. 1, namely:

1) What are the threshold questions that the Board should apply in determining whether the Board should review the NGEIR Decision? and

2) Have the Moving Parties met the test or tests?

5 On March 5 and 6, 2007, the Board heard the oral submissions of all the parties with the exception of the Independent System Operator and BP Canada who had advised the Board that they would not be appearing at the oral hearing.

The NGEIR Decision

6 On November 7, 2006 the Board issued its Decision with Reasons in the Natural Gas Electricity Interface Review proceeding (the "NGEIR Decision"). This proceeding was initiated by the Ontario Energy Board in response to issues first raised in the Board's Natural Gas Forum Report issued in 2004. The 123-page NGEIR Decision addressed the key issues of:

1) Rates and services for gas-fired generators, and

2) Storage regulation.

7 The parties reached settlements with Enbridge and Union on most of the issues related to rates and services for gas-fired generators. These settlements were approved by the Board. The oral hearing and the NGEIR Decision addressed the broad issue of storage regulation and any issues that were not settled in the settlement negotiations.

8 The issue concerning storage regulation was whether the Board should refrain from regulating the prices charged for storage services under section 29 (1) of the Ontario Energy Board Act, 1998. The Board found that the storage market is workably competitive and that neither Union nor Enbridge have market power in the storage market. The Board determined that it would cease regulating the prices charged for certain storage services; however, the Board found that rates for storage services provided to Union and Enbridge distribution customers will continue to be regulated by the Board.

9 The motions requested the following decisions made in the NGEIR Decision be either reviewed and changed; cancelled, or clarified, in a new Board proceeding:

Kitchener

- The aggregate excess methodology for allocating storage space

- The 100 PJ cap on Union's regulated storage

APPrO

- Whether short notice balancing service should be included on the tariffs of Union and Enbridge

IGUA/CCC/VECC

- Parts of the NGEIR Decision pertaining to storage, storage regulation and storage allocation be cancelled

- Review to be heard by a different Board panel

10 The parties outlined the grounds for the motions which included allegations of errors of fact and in some cases, errors of law.

Organization of the Decision

11 In this Decision, the Board organized the issues raised by the parties into sections that cover the same or similar topics. In each section following the section on the threshold test, the Board identifies the issue or issues raised, and makes a finding whether the issues are reviewable by applying the threshold test.

12 The sections of this Decision are:

A. Introduction (this section)

B. Board Jurisdiction to Hear Motions

C. Threshold Test

D. Board Process

E. Board Jurisdiction under Section 29

F. Status Quo

G. Onus

H. Competition in the Secondary Market

I. Harm to Ratepayers

J. Union's 100 PJ Cap

K. Earnings Sharing

L. Additional Deliverability for Generators and Enbridge's Rate 316

M. Aggregate Excess Method of Allocating Storage

N. Orders

O. Cost Awards

13 The Board has reviewed the factums and arguments of all parties but has chosen to set out or summarize the factums or arguments by parties only to the extent necessary to provide context to its findings.

Section B: Board Jurisdiction to Hear the Motions

14 Under Rule 45.01, the Board may determine as a threshold question whether the matter should be reviewed before conducting any review on the merits.

15 In the case of IGUA's motion, which raises questions of law and jurisdiction, counsel for Board Staff argued that the Board should not, and indeed could not, review the NGEIR Decision as these grounds are not specifically enumerated in Rule 44.01 as possible grounds for review. Counsel for Board Staff argued that the Board has no inherent power to review its decisions and the manner in which it exercises such power must fall narrowly within the scope of the *Statutory Powers Procedure Act* (SPPA), which grants the Board this power.

16 The Board's power to review its decisions arises from Section 21.1(1) of the SPPA which provides that:

> A tribunal may, if it considers it advisable and if its rules made under section 25.1 deal with the matter, review all or any part of its own decision or order, and may confirm, vary, suspend or cancel the decision or order.

17 Part VII (sections 42 to 45) of the Board's Rules of Practice and Procedure deal with the review of decisions of the Board. Rule 42.01 provides that "any person may bring a motion requesting the Board to review all or part of a final order or decision, and to vary, suspend or cancel the order or decision". Rule 42.03 requires that the notice of motion for a motion under 42.01 shall include the information required under Rule 44. Rule 44.01 provides as follows:

> Every notice of motion made under Rule 42.01, in addition to the requirements of Rule 8.02, shall:
>
> (a) set out the grounds for the motion that raise a question as to the correctness of the order or decision, which grounds may include:
>
> (i) error in fact;
>
> (ii) change in circumstances;
>
> (iii) new facts that have arisen;
>
> (iv) facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time; and

(b) if required, and subject to Rule 42, request a stay of the implementation of the order or decision, or any part pending the determination of the motion.

18 Counsel for Board Staff argued that while the grounds for review do not have to be exactly as those described, they must be of the same nature, and that to the extent the grounds for review include other factors such as error of law, mixed error of fact and law, breach of natural justice, or lack of procedural fairness, they are not within the Board's jurisdiction. He argued that Rule 44 should be interpreted as an exhaustive list, and that as section 21.1(1) of the SPPA requires that the tribunal's rules deal with the matter of motions for review, the Board's jurisdiction is limited to the matters specifically set out in its Rules.

19 In support of this interpretation of the Rule 44.01, Counsel relied on the fact that an earlier version of the Board's rules specifically allowed grounds which no longer appear in Rule 44.01. Therefore, it must be assumed that the current Rules are not intended to allow motions for review based on those grounds. The relevant section of the earlier version of the Rules read as follows:

> 63.01 Every notice of motion made under Rule 62.01, in addition to the requirements of Rule 8.02, shall:
>
> (a) set out the grounds for the motion that raise a question as to the correctness of the order or decision, which grounds may include:
>
> (i) error of law or jurisdiction, including a breach of natural justice;
>
> (ii) error in fact;
>
> (iii) a change in circumstances;
>
> (iv) new facts that have arisen;
>
> (v) facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time;
>
> (vi) an important matter of principle that has been raised by the order or decision;
>
> (b) request a delay in the implementation of the order or decision, or any part pending the determination of the motion, if required, ...

20 Counsel for Board Staff argued that the "presumption of purposeful change" rule of statutory interpretation should be applied to the Board's Rules. This rule applies generally to legislative instruments and is based on the presumption that legislative bodies do not go to the bother and expense of making changes to legislative instruments unless there is a specific reason to do so. Applied to Rule 44, this means that the Board should be presumed to have intended to eliminate the possibility of motions for review based on grounds which are no longer enumerated. He further argued that because the SPPA requires the Board's Rules "to deal with the matter", the Board can only

deal with them in the manner allowed for by its Rules, and any deviation from the Rules will cause the Board to go beyond its power to review granted by Section 21.1(1) of the SPPA.

21 In general Union and Enbridge supported the argument made by counsel for Board Staff.

22 Other parties made several arguments to counter those put forward by counsel for Board Staff. These included:

* as the Board's rules are not statutes or regulations but deal with procedural matters the rules of statutory interpretation such as the presumption of purposeful change have little if any application

* to the extent rules of statutory interpretation apply, section 2 of the SPPA specifically requires that the Act and any rules made under it be liberally construed:

  This Act, and any rule made by a tribunal under subsection 17.1(4) or section 25.1, shall be liberally construed to secure the just, most expeditious and cost-effective determination of every proceeding on its merits

* that the *Interpretation Act* requires that the word "may" be construed as permissive, whereas "shall" is imperative, so the list of grounds in Rule 44 should be considered as examples. In support of this argument, counsel for CCC referred to Sullivan and Dreiger on the Construction of Statutes, Fourth Edition, Butterworths, pp 175*ff* which cites the Supreme Court of Canada decision in *National Bank of Greece (Canada) v. Katsikonouris* (1990), 74 D.L.R. (4th) 197

* that the Ontario Court of Appeal decision in *Russell v. Toronto(City)* (2000), 52 O.R. (3d) 9 provides that a tribunal (in that case the Ontario Municipal Board) cannot use its own policy or practice to restrict the range of matters which it will consider on a motion to review

* that the *Russell* decision gives tribunals a broad jurisdiction to review in contradistinction to the narrow right of appeal to the Divisional Court.

Findings

23 In the Board's view, in addition to the specific sections of the SPPA and the Board's Rules dealing with motions to review, it is helpful to look at the overall scheme of the SPPA and the Rules to determine the scope of the Board's jurisdiction to review a decision.

24 Originally, the SPPA was enacted to ensure that decision making bodies such as the Board provided certain procedural rights to parties that were affected by those decisions. These basic requirements apply regardless of whether a tribunal has enacted rules of practice and procedure. They include such requirements as:

* Parties must be given reasonable notice of the hearing (s 6)

* Hearings must be open to the public, except where intimate personal or financial matters may be disclosed (s 9)

* The right to counsel (s 10)

* The right to call and examine witnesses and present evidence and submissions and to conduct cross-examinations of witnesses at the hearing reasonably required for a full and fair disclosure of all matters relevant to the issues in the proceeding (s 10.1)

* That decisions be given in writing with reasons if requested by a party (s 17 (1))

* That parties receive notice of the decision (s 18)

* That the tribunal compile a record of the proceeding (s 20).

25 In addition to these requirements there are several practices and procedures that tribunals are allowed to adopt, if provision is made for them in an individual tribunal's rules. These include:

* Alternative dispute resolution. Section 4.8 provides that a tribunal may direct parties to participate in ADR if "it has made rules under section 25.1 respecting the use of ADR mechanisms..."

* Prehearing conferences. Section 5.3 provides that "if the tribunal's rules under section 25.1 deal with prehearing conferences, the tribunal may direct parties to participate in a pre-hearing conference..."

* Disclosure of documents. Section 5.4 provides that "if the tribunal's rules made under section 25.1 deal with disclosure, the tribunal may,..., make orders for (a) the exchange of documents, ..."

* Written hearings. Section 5.1 (1) provides that "a tribunal whose rules made under section 25.1 deal with written hearings may hold a written hearing in a proceeding."

* Electronic hearings. Section 5.2 provides that "a tribunal whose rules made under section 25.1 deal with electronic hearings may hold an electronic hearing in a proceeding."

* Motions to review. Section 21.1(1) provides that "a tribunal may, if it considers it advisable and if its rules made under section 25.1 deal with the matter, review all or any part of its own decision or order, and may confirm, vary, suspend or cancel the decision or order."

26 Beyond stating that a tribunal's rules have to "deal with" each of these procedures in order for the tribunal to avail itself of them, there are no restrictions on the way in which they do so. In this

regard nothing distinguishes motions to review from the other "optional" procedural matters listed above. A tribunal is free to create whatever procedures it thinks appropriate to handle them, provided they are consistent with the SPPA.

27 The Board notes that there are situations where the SPPA does not give tribunals full discretion in developing their rules to deal with "optional" procedural powers. For example, section 4.5(3) allows tribunals or their staff to make a decision not to process a document relating to the commencement of a proceeding. This section not only requires a tribunal to have "made rules under section 25.1 respecting the making of such decisions" but also requires that "those rules shall set out ... any of the grounds referred to in subsection 1 upon which the tribunal or its administrative staff may decide not to process the documents relating to the commencement of the proceeding;..." While a tribunal can prescribe the grounds for such a decision in its rules, the grounds must come from a predetermined list found in the SPPA. In that case, it is clear that only certain grounds are permitted, and a tribunal must restrict itself to those grounds enumerated in its rules.

28 The SPPA could put similar restrictions on the development of a tribunal's rules dealing with motions to review, but it does not.

29 While the Court of Appeal's decision in *Russell v. Toronto* dealt with motions to review under the *Ontario Municipal Board Act* rather than under the SPPA, the power granted to review decisions is effectively the same, so the principles enunciated in the *Russell* decision are applicable to the Board. The Court of Appeal found that the OMB could not use its own policies and guidelines to restrict the scope of the power to review which was granted to it by statute. The Board therefore finds that it cannot use its Rules to limit the scope of the authority given to it by the SPPA.

30 The SPPA allows each tribunal to make its own Rules, so as to allow it to deal more effectively with the specific needs of its proceedings. The SPPA does not give the Board the authority to limit the substantive matters within the Board's purview.

31 The provisions of the SPPA dealing with the making of rules, give tribunals a very wide latitude to meet their own needs, both in the context of creating rules and in each individual proceeding:

> 25.0.1 A tribunal has the power to determine its own procedure and practices and may for that purpose,
>
> (a) make orders with respect to the procedures and practices that apply in any particular proceeding; and
>
> (b) establish rules under section 25.1
>
> 25.1 (1) A tribunal may make rules governing the practice and procedure before it.
>
> (2) The rules may be of general or particular application.
>
> (3) The rules shall be consistent with this Act and with the other Acts to which they relate.

(4) The tribunal shall make the rules available to the public in English and in French.

(5) Rules adopted under this section are not regulations as defined in the *Regulations Act.*

(6) The power conferred by this section is in addition to any other power to adopt rules that the tribunal may have under another Act.

32 In the Board's view these sections of the SPPA give the Board very broad latitude to determine the procedure best suited to it from time to time. While consistency with the Act is required, the Rules are not regulations, and can be amended from time to time by the Board to suit its evolving needs.

33 The Board finds that there is nothing in the SPPA to suggest that rules dealing with motions to review should be interpreted or applied any differently from other provisions of the Board's Rules.

The Board's Rules

34 In addition to Section 2 of the SPPA which provides for a liberal interpretation of the Act and the Rules, the Board's Rules include the following provisions as a guide to their interpretation.

1.03 The Board may dispense with, amend, vary or supplement, with or without a hearing, all or any part of any rule at any time, if it is satisfied that the circumstances of the proceeding so require, or it is in the public interest to do so.

2.01 These Rules shall be liberally construed in the public interest to secure the most just, expeditious and cost-effective determination of every proceeding before the Board.

2.02 Where procedures are not provided for in these Rules, the Board may do whatever is necessary and permitted by law to enable it to effectively and completely adjudicate on the matter before it.

35 As these provisions are of general application to all of the Board's Rules of Practice and Procedure, the Board finds that each of its individual rules should be read as if the above rules 1.03, 2.01 were part of them, except of course where restricted by the SPPA or another Act. Therefore, the Rules which "deal with the matter" of motions to review, i.e. Rules 42 to 45, should be read in conjunction with Rules 1.03 and 2.01. Similarly, the rules dealing with alternative dispute resolution, written hearings and so on include Rules 1.03 and 2.01.

36 The Board finds that it should interpret the words "may include" in Rule 44.01 as giving a list of examples of grounds for review for the following reasons:

* It is the usual interpretation of the phrase;

* It is consistent with section 2 of the SPPA which requires a liberal interpretation of the Rules;

* It is consistent with Rule 1.03 of the Board's rules which allows the Boar to amend, vary or supplement the rules in an appropriate case; and

* If the SPPA had intended to require that the power to review be restricte to specific grounds it would have required the rules to include those grounds and would have required the use of the word "shall".

37 With respect to the application of the principle of presumption of purposeful change urged by counsel for Board Staff, the Board notes that at the same time that its rules were amended to remove certain grounds of appeal from Rule 44.01, Rule 1.03 was also amended. The previous version of Rule 1.03 (then 4.04) read as follows:

> The Board may dispense with, amend, vary, or supplement, with or without a hearing, all or any part of any Rule, at any time by making a procedural order, if it is satisfied that the special circumstances of the proceeding so require, or it is in the public interest to do so.

38 When compared with the current Rule 1.03, it is apparent that the old rule was more restrictive -- amendments had to be made by procedural order, and the circumstances of the proceeding had to be "special". Given the need for a procedural order, it is reasonable to interpret the old rule as applying only to the sorts of matters dealt with in procedural orders, the conduct of the proceeding and not to other provisions of the rules. No such restriction applies in the current Rule 1.03.

39 The Board finds that to the extent the Rules were amended to remove specific grounds from the list for motions to review, the contemporaneous amendments to Rule 1.03 give the Board the necessary discretion to supplement this list in an appropriate case. The Board presumably was aware of that at the time of the amendments.

40 The Board therefore finds that it has the jurisdiction to consider the IGUA motion to review even though the grounds are errors of mixed fact and law which do not fall squarely within the list of enumerated grounds in Rule 44.01.

41 Even if this interpretation of Rule 44.01 is incorrect, the Board can apply Rule 1.03 to supplement Rule 44.01 to allow the grounds specified by IGUA. Given the number of motions for review, the timing involved, the nature of the hearing and the nature of the alleged errors, the Board concludes that it is in the public interest to avoid splitting this case into Motions reviewed by some parties and appealed by others.

42 This panel is also aware that Appeals to the Divisional Court can only be based on matters of law including jurisdiction. If the position advanced by counsel for the Board staff was accepted, er-

rors of mixed fact and law could not be effectively reviewed or appealed by any body. This, the Board believes is not consistent with Section 2 of the SPPA.

Section C: Threshold Test

43 Section 45.01 of the Board's Rules provides that:

> In respect of a motion brought under Rule 42.01, the Board may determine, with or without a hearing, a threshold question of whether the matter should be reviewed before conducting any review on the merits.

44 Parties were asked by the panel to provide submissions on the appropriate test for the Board to apply in making a determination under Rule 45.01.

45 Board Staff argued that the issue raised by a moving party had to raise a question as to the correctness of the decision and had to be sufficiently serious in nature that it is capable of affecting the outcome. Board Staff argued that to qualify, the error must be clearly extricable from the record, and cannot turn on an interpretation of conflicting evidence. They also argued that it's not sufficient for the applicants to say they disagree with the Board's decision and that, in their view, the Board got it wrong and that the applicants have an argument that should be reheard.

46 Enbridge submitted that the threshold test is not met when a party simply seeks to reargue the case that the already been determined by the Board. Enbridge argued that something new is required before the Board will exercise its discretion and allow a review motion to proceed.

47 Union agreed with Board Staff counsel's analysis of the scope and grounds for review.

48 IGUA argued that to succeed on the threshold issue, the moving parties must identify arguable errors in the decision which, if ultimately found to be errors at the hearing on the merits will affect the result of the decision. IGUA argued that the phrase "arguable errors" meant that the onus is on the moving parties to demonstrate that there is some reasonable prospect of success on the errors that are alleged.

49 CCC and VECC argued that the moving parties are required to demonstrate, first, that the issues are serious and go to the correctness of the NGEIR decision, and, second, that they have an arguable case on one or more of these issues. They argued that the moving parties are not required to demonstrate, at the threshold stage, that they will be successful in persuading the Board of the correctness of their position on all the issues.

50 MHP argued that the threshold question relates to whether there are identifiable errors of fact or law on the face of the decision, which give rise to a substantial doubt as to the correctness of the decision, and that the issue is not whether a different panel might arrive at a different decision, but whether the hearing panel itself committed serious errors that cast doubt on the correctness of the decision. MHP submitted that a review panel should be loathe to interfere with the hearing panel's findings of fact and the conclusions drawn there from except in the clearest possible circumstances.

51 Kitchener argued that jurisdictional or other threshold questions should be addressed on the assumption that the record in NGEIR establishes the facts asserted.

52 School Energy Coalition argued that an application for reconsideration should only be denied a hearing on the merits in circumstances where the appeal is an abuse of the Board's process, is vexatious or otherwise lacking objectively reasonable grounds.

Findings

53 It appears to the Board that all the grounds for review raised by the various applicants allege errors of fact or law in the decision, and that there are no issues relating to new evidence or changes in circumstances. The parties' submissions addressed the matter of alleged error.

54 In determining the appropriate threshold test pursuant to Rule 45.01, it is useful to look at the wording of Rule 44. Rule 44.01(a) provides that:

> Every notice of motion... shall set out the grounds for the motion that raise a question as to the correctness of the order or decision...

55 Therefore, the grounds must "raise a question as to the correctness of the order or decision". In the panel's view, the purpose of the threshold test is to determine whether the grounds raise such a question. This panel must also decide whether there is enough substance to the issues raised such that a review based on those issues could result in the Board deciding that the decision should be varied, cancelled or suspended.

56 With respect to the question of the correctness of the decision, the Board agrees with the parties who argued that there must be an identifiable error in the decision and that a review is not an opportunity for a party to reargue the case.

57 In demonstrating that there is an error, the applicant must be able to show that the findings are contrary to the evidence that was before the panel, that the panel failed to address a material issue, that the panel made inconsistent findings, or something of a similar nature. It is not enough to argue that conflicting evidence should have been interpreted differently.

58 The applicant must also be able to demonstrate that the alleged error is material and relevant to the outcome of the decision, and that if the error is corrected, the reviewing panel would change the outcome of the decision.

59 In the Board's view, a motion to review cannot succeed in varying the outcome of the decision if the moving party cannot satisfy these tests, and in that case, there would be no useful purpose in proceeding with the motion to review.

Section D: Board Process

60 IGUA's grounds for review included the following alleged errors in the process used by the panel:

1. The Board has no jurisdiction to conduct what amounts to its own public inquiry in the midst of a contested rates and pricing proceeding between utilities and their ratepayers,

2. In embarking on its own public inquiry with respect to matters in issue between the parties with respect to storage regulation, the Board erred in law in exceeding its adjudicative mandate and engaged in a process which disqualifies it as an adjudicator and invalidates its decision with respect to forbearance.

61 In particular, IGUA argued that the process adopted by the Board was flawed as it did not adhere to traditional notions of the adversarial process. IGUA's position was that a "contested rates

and pricing proceeding between utilities and their ratepayers" is required to be conducted by the Board as if it were litigation between the parties as it is fundamentally an issue between them as to what the rates should be.

62 In IGUA's view, the Board departed from appropriate practice at the prehearing stage by

* Setting the agenda based on its priorities
* Defining the issues without input from the parties
* Directing the utilities to file evidence pertaining to some of the issues identified by the Board
* Directing that settlement discussions take place on all issues except storage regulation
* Directing all parties to file their evidence at the same time rather than dividing them by interest and having them file evidence in support of and then opposed to the issues identified by the Board

63 IGUA's largest area of concern however was that once evidence had been filed, "the Board did not confine its future participation in the process to the performance of the adjudicative functions of hearing and determining the matters of fact and law in dispute". IGUA's overriding complaint is that the Board was engaging in its own fact finding mission and was not confining itself to hearing and determining the disputed matters of fact and law which had been raised by parties opposite in interest to one another.

64 IGUA argued that once a dispute became clear as between the utilities and the ratepayers the Board had to "stay out of the arena" and allow these parties to determine how to present and argue the case, in effect constraining the Board to choose between the cases put forward by the various parties.

65 Examples of the alleged behaviour objected to by IGUA include:

* The Board advising the parties that it had retained its own expert, but then not filing a report from this expert nor having him made available for cross examination.
* Board members posing questions which indicated that they were searching for a forbearance solution to the Storage Regulation issues, but not asking questions about the ability of the existing regulatory regime to address the concerns which the Board raised.
* The Board advising BP Canada, a party to the hearing, that it wished to hear evidence from it on certain issues and providing a list of questions in advance -- at the time counsel for ratepayer interests objected to the question as "rather leading".

* Counsel for the Board hearing team taking a position in argument adverse in interest to the evidence it had led.

66 Counsel for Board Staff argued that IGUA's complaints ignore critical differences between the Board and the courts and they confuse the role of the hearing panel with the roles of staff counsel in Board proceedings.

67 Counsel for Board Staff argued that the Board is not a court of record. It is a highly specialized tribunal that has a strong and important policy-making function. The Board is entitled to commence or initiate proceedings in its own right. It is not required to sit passively as an independent adjudicator and wait for parties to initiate proceedings before it, nor is the Board required to play a purely passive adjudicative role during the course of proceedings once they have been commenced, and particularly once they have been commenced at the instigation of the Board itself.

68 Counsel for Board Staff also argued that hearing panels of the Board are fully entitled to ask probing questions of witnesses who appear before them, and there is nothing whatsoever untoward about doing so.

69 The other parties largely supported the position of Board Staff.

Findings

70 At a minimum, the Board is required to comply with the provisions of the SPPA and the *Ontario Energy Board Act, 1998* ("OEB Act"). The SPPA provides parties with certain procedural rights, none of which IGUA has alleged has been disregarded by the Board in this case:

* Parties must be given reasonable notice of the hearing (s 6)

* Hearings must be open to the public, except where intimate personal or financial; may be disclosed (s 9)

* Parties have the right to counsel (s 10)

* Parties have the right to call and examine witnesses and present evidence and submissions and to conduct cross-examinations of witnesses at the hearing reasonably required for a full and fair disclosure of all matters relevant to the issues in the proceeding (s 10.1)

* Tribunals must give decisions in writing and must provide reasons if requested by a party (s 17 (1))

* Parties are entitled to notice of the decision (s 18)

* The tribunal must compile a record of the proceeding (s 20)

71 Beyond these basic requirements, the SPPA specifically allows tribunals to require parties to participate in various other procedures. With respect to prehearing conferences, section 5.3 of the SPPA provides that a tribunal may direct parties to participate in a prehearing conference to consider the settlement of any or all of the issues.

72 Section 19(4) of the OEB Act specifically allows the Board to determine matters on its own motion:

> 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.

73 Section 21 of the OEB Act provides that:

> The Board may at any time, on its own motion and without a hearing, give directions or require the preparation of evidence incidental to the exercise of the powers conferred upon the Board by this or any other Act.

74 Therefore as well as the power to initiate proceedings, the Board is also given the statutory right to require the preparation of evidence incidental to the exercise of its powers.

75 While the Board accepts IGUA's argument that in a hearing under Section 36 of the OEB Act it has the jurisdiction to hear and determine all questions of law and fact, it does not agree with IGUA's characterization of the limits on its exercise of this adjudicative function.

76 As the Board has an over-riding responsibility to make its decisions in the public interest the parties cannot have the final word in determining the nature of the dispute and the options open to the Board. The Board is not required to accept the position of any of the parties, provided that its process is transparent and open and the parties have a fair opportunity to exercise their rights under the SPPA.

77 IGUA cited several authorities in support of its argument. The Board found them of little assistance as they arose in quite different contexts, generally that of civil disputes between the parties. That is not the context within which the Board operates. We are not judges in civil disputes and the Board's mandate is much broader than determining rights between the parties.

78 With respect to the specific allegations made by IGUA, the Board's findings follow.

79 The Board was fully entitled to issue a notice of proceeding on its own motion in December of 2005 and to delineate the issues it expected the parties and the intervenors to address in the proceeding.

80 Pursuant to the Board's settlement guidelines and the SPPA, the Board is entitled to exclude from the ambit of a settlement conference particular issues that it believes should be heard in full in the hearing which is what the hearing panel did in this case. This is another example of an area where the Board's practice is fundamentally different from that of the courts.

81 The Board is fully entitled under its Rules to develop procedural orders to meet the needs of any particular proceeding and there is nothing in the Rules or the SPPA which would restrict it from directing all parties to file their evidence simultaneously. This does not in any way impede the parties from exercising their statutory rights to have access to the evidence and to cross-examine witnesses.

82 In a proceeding initiated by the Board, as this one was, where there is no applicant, this procedure is an appropriate one.

83 With respect to the expert witness retained by Board Staff, Section 14 of the OEB Act expressly permits the Board "to appoint persons having technical or special knowledge to assist the Board." As there is no suggestion that the Board's expert played a role in the deliberations of the hearing panel or that the hearing panel relied in any way on the advice of the expert, there is nothing improper arising out of his retainer. Experts consulted by Board Staff are in the same position as staff and are not required to file evidence, or to submit to questioning by any of the parties.

84 The Board also finds that IGUA's complaints that the NGEIR panel members asked questions of witnesses, which IGUA complains indicated that they were searching for a forbearance solution to the storage regulation issue, are without merit. Adjudicators are entitled to ask probing questions of witnesses who testify before them, including leading questions. The fact that questions are asked or not asked does not mean that the panel has made up its mind one way or the other on an issue.

85 The Board also finds that the NGEIR panel was fully entitled as a result of the powers granted in section 21 of the OEB Act to act as it did in putting questions to a witness from BP Canada. It is also not an unusual occurrence for the Board to agree to hear evidence in camera, where there is confidential or sensitive commercial information involved.

86 The Board also finds no error in the fact that counsel for the Board hearing team made final argument in which she took a position adverse to the expert evidence that the Board hearing team led. The Board hearing team is entitled to take whatever position it chooses based on the evidence that was adduced during the hearing and nothing that Board hearing counsel did could possibly ground a complaint of breaches of the rules of natural justice against the NGEIR hearing panel itself.

Section E: Board Jurisdiction under Section 29

87 The joint factum of CCC and VECC and the factum of the IGUA both allege that the original NGEIR panel erred in misinterpreting or overreaching in respect of its jurisdiction under section 29 of the OEB Act.

88 In particular, the CCC/VECC factum states as follows at paragraph 8:

> 8. The moving parties submit that the NGEIR Decision raises the following issues:
>
> (i) Whether the Board correctly interpreted Section 29 of the Ontario Energy Board Act (the "Act"). It is the position of the moving parties that the Board erred in its interpretation of Section 29 of the Act, thereby depriving itself of jurisdiction;
>
> (ii) Whether the Board gave effect to the legislative intent underlying Section 29 of the Act. It is the position of the moving parties that the Board failed to give effect to the intention of the Legislature in enacting Section 29 of the Act;

89 In its factum, IGUA alleged that the Board had no jurisdiction to conduct what IGUA characterized as the Board's "own public inquiry in the midst of a contested rates and pricing proceeding between utilities and their ratepayers". (IGUA factum par. 84(a))

90 IGUA also alleged that:

> ...the Board erred in law in exceeding its adjudicative mandate and engaged in a process which disqualifies it as an adjudicator and invalidates its Decision with respect to forbearance. (IGUA factum par. 84(b))

91 In addition to these general submissions by CCC/VECC and IGUA about the NGEIR panel's interpretation of its jurisdiction under Section 29, these parties also argued specifically that the NGEIR panel exceeded its jurisdiction under Section 29 by restructuring the storage businesses of Union and Enbridge. They asserted that the power to restructure the storage business comes under section 36 of the legislation. (Tr. Vol. 1, pp. 28 and 56-57)

Findings

92 The NGEIR panel's interpretation and application of section 29 is central to the NGEIR Decision. The NGEIR Decision therefore deals extensively with the question of the legal test to be applied under section 29, the analytical framework for assessing whether the natural gas market is competitive and finally, the assessment of market power in the natural gas sector in Ontario.

93 The starting point for the NGEIR Decision is the Board's interpretation of section 29 which is set out in Chapter 3 of the Decision and reads as follows:

> On an application or in a proceeding, the Board shall make a determination to refrain, in whole or part, from exercising any power or performing any duty under this Act if it finds as a question of fact that a licensee, person, product, class of products, service or class of services is or will be subject to competition sufficient to protect the public interest

94 In Chapter 3 of the NGEIR Decision, the NGEIR panel discussed the statutory test to be used in the assessment of competition in the storage market and applies the analytical framework mandated by that statutory test. In particular, the panel reviews the history of section 29 and of the concept of forbearance and light-handed regulation.

95 The NGEIR panel's review of Section 29 is described at two levels. The first is the assessment of competition, which is done by applying the market power tests, and the second is the relationship between competition and the public interest.

96 The NGEIR panel interprets "competition" within section 29 at page 24 of the NGEIR Decision as follows:

> There are degrees of competition in any market. They range from a monopoly, where there is a sole seller, to perfect competition, where there are many sellers and no one seller can influence price and quantity in the market. It is not necessary to find that there is perfect competition in a market to meet the statutory test of "competition sufficient to protect the public interest"; what economists refer to as a "workably competitive" market may well be sufficient.
>
> It is also important to remember that competition is a dynamic concept. Accordingly, in section 29 the test is whether a class of products "is or will be" subject to sufficient competition. In this respect parties often rely on qualitative evidence to estimate the direction in which the market is moving.

97 The NGEIR panel further interprets its mandate at page 44 as follows:

> ...Section 29 says that the Board shall make a determination to refrain "in whole or part" which the Board believes allows considerable flexibility in this regard. In addition, the Board concludes that it is required by the statute to address the public interest trade-offs, for example, between price impacts and the development of storage and the Ontario market generally.

98 The NGEIR panel then proceeds to assess the "level of competition" using the market power tests and finds the storage market in Ontario is subject to "workable competition".

99 Following this, it then addresses the question of whether the level of competition is sufficient to protect the public interest. In so doing, the panel addresses what should be encompassed in its consideration of the public interest in the context of the assessing competition as follows:

> The public interest can incorporate many aspects including customers, investors, utilities, the market, and the environment. Union and Enbridge argued for a narrow definition of the public interest. In their view, competition itself protects the public interest, and once the Board has satisfied itself that the market is competitive, the public interest is protected by definition. The Board finds this to be an inappropriate narrowing of the concept. Competition is better characterized as a continuum, not a simple "yes" or "no". The Board would not be fulfilling its responsibilities if it limited the review in the way suggested without considering the full range of impacts and the potential need for transition mechanisms and other means by which to ensure forbearance proceeds smoothly.
>
> Some of the intervenors took the position that the public interest review should be focussed on the financial impacts. For example, Schools argued that the Board should look at the benefits and costs of forbearance, and in its view, the costs include a possible transfer of between $50 million and $174 million from ratepayers to shareholders (arising from the proposed end to the margin-sharing mechanisms and the potential re-pricing of cost-based storage to market prices). The Board agrees that the financial impacts are a relevant consideration, but does not agree that an assessment of the public interest should be limited to an assessment of the immediate rate impacts. [Emphasis added] (pages 42 and 43)

100 The NGEIR panel then proceeds to balance the Board's public interest mandate against its legislative objectives and describes the trade-offs. It does this by reviewing each of the relevant objectives (i.e., to facilitate competition in the sale of gas to users, to protect the interests of consumers with respect to prices an the reliability and quality of gas service, to facilitate rational development and safe operation of gas storage) and conducting an assessment of whether the level of storage competition is sufficient to protect the public interest in light of each of those objectives.

101 At page 56 of Chapter 5, having determined that part of the storage market is workably competitive and having considered some of the key elements of the public interest, the panel addresses whether and it what circumstances the Board should refrain from setting storage prices and approving storage contracts.

> In terms of a section 29 analysis, the goal would be to continue to regulate (and set cost-based rates) for those customers who do not have competitive storage alternatives and to refrain from regulating (allow market-based prices) for those who do have competitive alternatives.

102 The NGEIR panel then applies its interpretation of the legislative intent of section 29 to the facts before it. That panel's understanding of its mandate under section 29 and its careful application of that mandate are evidenced in its findings at pages 56 and 57 of the decision. The NGEIR panel's application of the requisite elements of section 29 is evident in the balancing between considerations of competition with aspects of public interest.

> The parties recognized that bundled customers, in particular, do not acquire storage services separately from distribution services, do not control their use of storage, and do not have effective access to alternatives in either the primary or secondary markets. Competition has not extended to the retail end of the market, and therefore is not sufficient to protect the public interest. However, the Board finds that customers taking unbundled or semi-unbundled service should have equivalent access to regulated cost-based storage for their reasonable needs. The Board finds that it would not further the development of the competitive market, or facilitate the development of unbundled and semi-unbundled services, if these unbundled and semi-unbundled services were to include current storage services at unregulated rates. The Board also agrees with the parties that noted that repricing existing storage will not provide an incentive for investment in new storage and therefore cannot be said to provide that public interest benefit.
>
> However, customers taking unbundled and semi-unbundled services do have greater control over their acquisition and use of storage than do bundled customers. It is also the Board's expectation that these customers will have access to and use services from the secondary market. Therefore, the Board concludes it is particularly important to ensure that the allocation of cost-based regulated storage to these customers is appropriate. This issue is addressed in Chapter 6.
>
> MHP Canada has suggested that the Board adopt full forbearance in storage pricing as a policy direction. Similarly, Union has characterized its allocation proposal and Enbridge has characterized its "exemption" approach for in-franchise customers as being "transitions" to full competition. The Board has found that the current level of competition is not sufficient to refrain from regulating all storage prices; nor do we see evidence that it would be appropriate to refrain from regulating all storage prices in the future. The current structure (for example, the full integration of Union's storage and transportation businesses and the full integration of Union as a provider of storage services and as a user of storage services) is not conducive to full forbearance from storage rate setting. In addition, there would be significant direct and indirect rate impacts associated with full forbearance from rate setting, and there is little evidence of significant attendant public interest benefits. The current situation is that these customers are not subject to competition sufficient to protect the public interest; nor is there a reasonable prospect that they will be at some future time.

103 The submissions of both CCC/VECC and of IGUA are that the Board misinterpreted and misapplied section 29 of the OEB Act. This panel finds that there is no reviewable error associated with the NGEIR panel's interpretation of section 29. The NGEIR Decision clearly evidences that the NGEIR panel knew and understood that section 29 was not a section that the Board had invoked in any previous decisions or analyses. For that reason, the Decision provides extensive background regarding the section and goes into significant detail regarding the appropriate framework and analysis required to be undertaken. The Decision shows that the NGEIR panel reviewed the elements of section 29 and considered each of those elements in considerable detail. Where moving parties raised specific questions regarding the application of Section 29, for example, with respect to whether the NGEIR panel had sufficient evidence upon which to make a finding that there was competition sufficient to protect the public interest and whether the NGEIR panel erred in setting a cap on the amount of natural gas storage available to in-franchise customers, the Board makes specific findings elsewhere in this Decision.

104 With respect to the allegation by CCC/VECC and IGUA that the NGEIR panel exceeded its jurisdiction by restructuring the storage businesses of Union and Enbridge, something which they assert should come under section 36 of the legislation, the Board also finds there is no reviewable error.

105 The NGEIR panel confined its considerations related to the application of the test under Section 29 in determining whether and to what extent there was competition in the natural gas storage market sufficient to protect the public interest. The portions of the decision that go on to discuss the impacts of the Section 29 decision on the structure of the natural gas storage market flow from the determination under Section 29, but the NGEIR panel does not, in its Decision, describe these as arising out of their Section 29 jurisdiction. The NGEIR proceeding was commenced pursuant to sections 19, 29 and 36 of the *Ontario Energy Board Act, 1998.* As such, the NGEIR panel acted under the authority of Section 29 and 36 in making the determinations in the NGEIR Decision. The decisions made by the NGEIR panel with respect to the allocation of storage available at cost-based rates and the treatment of the premium on market-based storage transactions were made based on evidence filed by the parties to the proceeding and the NGEIR panel considers this evidence as part of the NGEIR Decision.

106 The Board finds that the allegations of CCC/VECC and IGUA on this point do not raise a question as to the correctness of the decision. The NGEIR panel clearly confined itself to its legislative mandate as provided in Section 29 in determining whether the natural gas market was subject to competition sufficient to protect the public interest. The NGEIR's findings that flow from the Section 29 determination align with the evidence that was before it, did not fail to address any material issue and did not make any inconsistent findings with respect to the evidence before it, except as otherwise noted in this decision.

Section F: Status Quo

107 The factums and submission of both CCC/VECC and of IGUA allege that the NGEIR panel erred by failing to consider the option of retaining the current regulatory regime in respect of natural gas storage regulation. CCC/VECC and IGUA articulate this alleged error in a number of different ways in different parts of their factums and submissions.

108 For example, at paragraph 3 of their joint factum, CCC and VECC take the position that:

> "... the Board was obligated to consider whether a change in the status quo with respect to the regulation of storage was required and that it erred in failing to do so." IGUA's factum states that "...reasonable people, objectively examining the process which led to the Decision, will likely conclude that retaining the status quo was not a decision-making option which the Board considered, either fairly or at all, and that the Board itself was a proponent for forbearance relief."

Findings

109 The NGEIR Decision provides evidence in various places, of the NGEIR panel's recognition of both the current regulatory status with respect on natural gas storage in Ontario and the dynamic nature of competition generally.

110 In particular, Chapter 2 is described at page 5 of the decision as "...an overview of gas storage in Ontario today -- the existing storage facilities, the use of storage by Union's and Enbridge's "in-franchise" customers, the "ex-franchise" market for storage, and the prices charged for storage services."

111 Later in the NGEIR Decision, as part of its findings on the assessment of assessment of storage competition, the Board expressly disagrees with Mr. Stauft's testimony that the regulated cost-base price for storage is a reasonable proxy for the competitive price of storage. Implicit in this finding is the NGEIR panel's consideration of the current regulatory regime.

112 At page 46 of the Decision, the NGEIR Panel also considered the current regulatory regime in the context of question of the sharing of the premium which exists between the price of market-based storage and the underlying costs. The Board acknowledged the current state as follows:

> Currently, that premium is shared between utility ratepayers and utility shareholders. Under the utilities' proposals for forbearance, the premium would be retained by the shareholders. This would result in significant transfer of funds in the case of Union (2007 estimate is $44.5 million); less so in the case of Enbridge (2007 estimate is $5 million to $6 million). The intervenors in general rejects these proposals and, as a result, opposed forbearance.

113 At page 47, the NGEIR panel specifically considered and expressly acknowledged the importance of the change from the status quo, but ultimately rejected these submissions as follows:

> The Board agrees that the distribution of the premium is a significant consideration. In many ways, it has been the underlying focus of the NGEIR Proceeding. However, the impact of removing the premium from rates is the result of removing a sharing of economic rents; it is not the result of competition bringing about a price increase. So while it is an important consideration which the Board must address (see Chapter 7), it is not a sufficient reason, in and of itself, to continue regulating storage prices.

114 There are a number of other examples throughout the NGEIR Decision that satisfy the Board that the NGEIR panel was conscious of the status quo regulatory regime and bore this in mind throughout its analysis on the narrow issue of competition and the s. 29 analysis as well as in considering the impacts upon both shareholders and ratepayers, of a completely or partial forbearance decision.

115 The Board also feels that the decision by the NGEIR panel to continue to regulate and set cost-based rates for existing storage services provided to in-franchise customers up to their allocated amounts evidences a clear understanding of the current regulatory framework and under what circumstances, based upon the evidentiary record before the NGEIR panel, it was appropriate to deviate from that current framework.

116 The Board is not convinced, however, that the analysis mandated by the legislative language of s. 29 requires the Board to consider the status quo in the way that has been suggested by some parties. Although it was important for the NGEIR panel to review the current regulatory framework to set the stage for the analysis, the Board is not convinced by the arguments of CCC/VECC, nor those of IGUA that consideration of the status quo is an integral, or even a necessary part of the s. 29 analysis. The purpose of s. 29 was clearly stated by the NGEIR panel and that is to determine whether there is or will be competition sufficient to protect the public interest. If there is a finding that competition does exist, nothing in the section requires the panel to then consider whether the current regulatory framework is sufficient to accommodate the competitive market. In fact, the section mandates that upon finding competition sufficient to protect the public interest, that "...the Board shall make a determination to refrain, in whole or part, from exercising any power or performing any duty under this Act..." In this case, the Board determined that it would refrain, in part, from regulating the setting of rates and the review of contracts for natural gas storage.

117 The Board therefore concludes that CCC/VECC and IGUA have not demonstrated that their grounds for review based on the alleged failure of the NGEIR panel to consider retaining the status quo as a viable decision-making option raise an issue that is material and directly relevant to the findings made in the decision. This panel concludes that there is no reviewable error with respect to the NGEIR panel's alleged failure to fairly consider the status quo.

Section G: Onus

118 At paragraph 84(d) of its factum, IGUA alleges that the Board erred in concluding that there is no onus of proof to be assigned in the rates and pricing proceedings it initiated. IGUA alleges that the NGEIR panel erred in law in not assigning the onus of proof to the utilities.

Findings

119 Pages 26 to 27 of the NGEIR Decision deal explicitly with this issue. In that part of the Decision, the panel acknowledges that generally, the onus is on the applicant. The panel also, however, pointed out the unique nature of the NGEIR proceeding and the fact that the proceeding was brought on the Board's own motion.

120 The Board is satisfied that all parties to the NGEIR Proceeding were given a full and fair opportunity to provide submissions on the question of onus and that, based on the Decision, the NGEIR panel heard and understood those submissions. This panel is not satisfied that the question of onus is an issue that is material and directly relevant to the findings made in the Decision, nor that if a reviewing panel did decide the issue differently, that it would change the outcome of the Decision. For these reasons, the Board finds that there is no reviewable error relating to assignment of or the failure to assign onus in the NGEIR proceeding.

Section H: Competition in the Secondary Market

121 In the NGEIR Decision, the Board concluded that Ontario storage operators compete in a geographic market that includes Michigan and parts of Illinois, Indiana, New York and Pennsyl-

vania, that the market is competitive and neither Union nor Enbridge have market power. This determination was made by employing the following four step process, based on the Competition Bureau's Merger Enforcement Guidelines (MEGs):

* Identification of the product market.

* Identification of the geographic market.

* Calculation of market share and market concentration measures.

* An assessment of the conditions for entry for new suppliers, together with any dynamic efficiency considerations (such as the climate for innovation and the likelihood of attracting new investment).

122 IGUA alleged that the NGEIR panel made numerous errors in assessing sufficiency of competition in the secondary market. IGUA's allegations of errors can be summarized as follows:

* The NGEIR panel erred in misapprehending and misapplying the analytical tests used for determining market power.

* The NGEIR panel did not recognize that the evidence pertaining to the operation of the secondary market did not quantitatively establish the extent to which storage services, excluding commodity, were available at Dawn, nor their prices, nor whether consumers regarded such services as substitutes for delivery services offered by Union.

* The NGEIR panel failed to recognize that the evidence of Gaz Métropolitain Inc. (GMi) did not establish that Union lacked market power in storage services transacted at Dawn, and indeed this evidence established the opposite.

Findings

123 IGUA alleges that the Board misapprehended and misapplied the market power analytical frameworks presented in documents from the Competition Bureau, the Federal Energy Regulatory Commission (FERC), and the Canadian Radio-Television and Telecommunications Commission (CRTC). According to IGUA, a 10 step procedure must be followed in order to correctly carry out a market power analysis instead of the four step process used by the NGEIR panel.

124 The Board notes that, in settling on the four step procedure that should apply to determine whether Union and Enbridge have market power and whether the storage market is competitive, the NGEIR Decision provided substantial review and analysis pertaining to Competition Bureau's Enforcement Guidelines (MEGs) and the FERC's 1996 Policy Statement on Market Power Analysis. It is evidenced in the Decision that this was the result of the review of substantial pre-filed evidence, cross examination and argument on this topic.

125 In the Board's view, the test to be applied is not whether a review panel of the Board would have adopted a different analytical framework. Rather, it is matter of whether in settling upon a certain analytical process, there was an error of fact or law. In view of the extensive record and the

analysis and reasons provided in the NGEIR Decision, the Board finds that IGUA not raised an identifiable error in the NGEIR Decision. Rather the submissions of the moving parties are more in the nature of re-arguing the same points that were made in the original hearing. This evidence was presented and evaluated by the NGEIR panel. As the Board stated in enunciating the threshold test at Section C of this Decision, a motion for review cannot succeed if a party simply argues that the Board should have interpreted conflicting evidence differently. The Board has therefore determined that there is not enough substance to the issues raised by IGUA such that a review of those issues could result in the Board determining that the NGEIR Decision or Order should be varied, cancelled or suspended. As such, the NGEIR panel's determination on the nature and application of market power analysis to the natural gas storage market in and around Ontario is not reviewable.

126 IGUA alleges that the NGEIR panel did not recognize that the evidence pertaining to the operation of the secondary market did not quantitatively establish the extent to which storage services were available at Dawn, nor their prices or whether consumers regarded such services as substitutes for delivery services offered by Union.

127 In the Board's view, this alleged error is essentially an application of the alleged market power analysis framework error discussed above. The NGEIR panel listed several forms of evidence in support of its conclusion that the secondary market in transportation services is unconstrained and therefore serves to enlarge the geographic market from what it would otherwise have been found to be.

128 The NGEIR panel treated evidence on the operation of primary and secondary markets in transportation as relevant to the determination of the geographic market in a manner consistent with the market power analysis methodology that the NGEIR panel had settled upon. For the reasons stated above, the Board finds that the original NGEIR panel's use of evidence relating to the secondary market in transportation services is not reviewable.

129 IGUA cites the NGEIR hearing transcript (volume 10, pages 56-120) in support of its allegation that the Board failed to recognize that GMi's evidence actually supported IGUA's view that Union has market power.

130 The Decision (at page 35, paragraphs 4-5) clearly reflects the statements of GMi witnesses that they regularly contact alternative suppliers for comparisons to Union's services. IGUA has not shown that the NGEIR panel's findings are contrary to the evidence that was before the panel, or that the panel failed to address GMi's evidence or made inconsistent findings with respect to that evidence. The Board therefore finds that there is no reviewable error with respect to the NGEIR panel's use of the evidence provided by GMi.

Section I: Harm to Ratepayers

131 IGUA and CCC/VECC alleged that the Board erred when it bifurcated the natural gas storage market between those customers that continue to benefit from storage regulation and those customers who do not. They allege that as a result of this bifurcated market, the Board conferred a windfall benefit on the shareholders of the utilities with no corresponding benefit to ratepayers and that this is unfair.

132 The parties also alleged that the transitional measures the Board employed to implement the new regime merely serve to underscore the error in the finding that the market should be split. The parties alleged that the market, taken as a whole, was determined not to be workably competitive,

and the transitional measures are evidence that a decision to forbear from the regulation of prices was not appropriate.

133 Finally, CCC and VECC alleged that the Board erred in its interpretation of section 29, and acted in excess of its jurisdiction, by moving assets out of rate base, with no credit to the ratepayer. They argued that the effect of the NGEIR Decision is to allocate the rate base storage assets of the utilities between in-franchise and ex-franchise customers, and to allow for a new shareholder business within each utility. They submitted that doing those things does not naturally follow from a finding that the rates charged by the utilities to ex-franchise customers do not need to be regulated.

Findings

134 The Board finds that the issues raised in this area have not met the threshold test for the matter to be forwarded to a reviewing panel of this Board. The NGEIR panel did not err in failing to consider the facts, the evidence, or in exercising its mandate. There were no facts omitted or misapprehended in the NGEIR panel's analysis nor are the moving parties raising any new facts.

135 It was entirely within the NGEIR panel's mandate and discretion how to assess the competitive position of segments of the market and how to address the regulatory treatment of customers within those segments. The NGEIR panel clearly decided that ex-franchise customers of both Union and Enbridge had access to a competitive natural gas storage market. Further, the decision goes on to make clear on page 61, that Enbridge as a utility is ex-franchise to Union and therefore should be subject to market prices. The NGEIR Decision differentiates between the competitive position of a utility (e.g. Enbridge) and the competitive position of that utility's in-franchise customers. For example, the Decision is clear that the in-franchise customers of Enbridge will pay cost-based rates which will continue to be regulated by the Board and are based on EGD's costs of storage service owned by the utility and the costs that EGD pays for procuring these services in the competitive market.

136 A key issue the parties raise is that the bifurcated market brings about unfair and inconsistent treatment, and therefore constitutes a misapplication of the Board's mandate to protect the public interest. However, on this point, the grounds that the moving parties raised to support a review are in fact the very points used by the NGEIR panel to protect consumers as a natural consequence of the decision to refrain from storage regulation of the ex-franchise market. It is clear that the NGEIR panel took into account the protection of the public interest in its decision to provide transition mechanisms to protect consumers.

137 With respect to the allegation of a windfall benefit for shareholders of the utilities with no corresponding benefit to ratepayers, the Board is of the view that this is related to the question of earnings sharing. This issue is more fully addressed in Section K of this Decision. It is important to note here, however, that the NGEIR panel's decisions with respect to the profit or earnings sharing mechanism were based on the evidence presented by all parties and flowed from the broader decisions with respect to the competitiveness of the gas storage market. Chapter 7 of the NGEIR Decision clearly described the NGEIR panel's considerations with respect to and its reasoning for changing the earnings sharing mechanism. In the Board's view, the changes related to the earnings sharing mechanism necessarily arise from a recognition by the Board of the implications of its findings under Section 29 that there is a workably competitive market for storage in the ex-franchise market.

Section J: Union's 100 PJ Cap

138 In their factum, CCC and VECC allege that, on the one hand the Board in its NGEIR Decision said that a substantial portion of the storage market requires regulatory protection because there is insufficient competition to protect the public interest while on the other hand the Board exposed this same group to the effects of competition from the unregulated market.

139 Kitchener has also specifically sought the Board's review of an aspect of the NGEIR Decision related to the Board's placement of a "cap" on the amount of Union's storage space that is reserved for in-franchise customers at cost-based rates.

140 The Board determined at page 83 of the NGEIR Decision that Union should reserve 100 PJ of storage space at cost-based rates for its in-franchise customers. The Decision reads as follows (page 83):

> The Board acknowledges that there is no single, completely objective way to decide how much should be reserved for future in-franchise needs. The Board has determined that Union should be required to reserve 100 PJ (approximately 95 Bcf) of space at cost-based rates for in-franchise customers. This compares with Union's estimate of 2007 in-franchise needs of 92 PJ (87 Bcf). At an annual growth rate of 0.5% each year, which Union claims is the growth rate since 2000, in-franchise needs would not reach 100 PJ until 2024. The limit would be reached in 2016 if the annual growth is 1%; at a very annual high growth rate of 2% per annum, the 100 PJ limit would be reached in 2012.
>
> The 100 PJ (95 Bcf) amount is the capacity that Union must ensure is available to in-franchise customers if they need it. Union should continue to charge in-franchise customers based on the amount of space required in any year. If Union's in-franchise customers require less than 95 Bcf in any year, as measured by Union's standard allocation methodology, the cost-based rates should be based on that amount, not on the full 95 Bcf reserved for their future use. Union will have the flexibility to market the difference between the total amount needed and the 95 Bcf reserve amount.

141 The Board acknowledged that the cap might be reached at any time between 2012 and 2024, depending on what growth rate assumptions are used. At the current rate of growth (0.5% each year), the cap would not be met until 2024.

142 In Kitchener's oral submissions (page 187, Volume 1), Mr. Ryder on behalf of Kitchener makes the following comments:

> And while the cap of 100 pJs allows for some growth so it won't immediately affect the Ontario consumer, the cap will be reached between 2012 and 2024. That's between 5 and 17 years from now.
>
> Now, that's not far off, and if the public interest requires a margin for growth today in 2007, then the public interest will surely require it in five to 17 years from now when the cap is reached.

> And when it is reached, it is my submission that the Board will have wished it had reviewed the decision in 2007, because, when the cap is reached, this decision will be responsible for adding significantly to the costs of energy in Ontario, to the detriment of the Ontario consumer.

143 Page 7 of the CCC/VECC factum states:

> The Board made no finding, however, that at the end of the operation of those transitional measures, the public interest, as represented by in-franchise customers of Union and EGD, would be protected. The moving parties submit that Section 29 required the Board, before making an order to forbear from regulation under Section 29, to find on the evidence that, at the end of the transitional measures, there would be sufficient competition to protect the public interest. The moving parties submit that, in failing to make that finding, the Board erred.

Findings

144 On page 57 of the NGEIR decision, in reference to the in-franchise customers of Union the NGEIR panel makes the following statement:

> The current situation is that these customers are not subject to competition sufficient to protect the public interest; nor is there reasonable prospect that they will be at some future time.

145 Later in the decision at page 82, the decision states:

> The Board panel concludes that its determination that the storage market is competitive requires it to clearly delineate the portion of Union's storage business that will be exempt from rate regulation. Retaining a perpetual call on all of Union's current capacity for future in-franchise needs is not consistent with forbearance. As evidenced by the arguments from GMi and Nexen, two major participants in the ex-franchise market, retaining such a call is likely to create uncertainty in the ex-franchise market that is not conducive to the continued growth and development of Dawn as a major market centre.
>
> The Board concludes that it would be inappropriate, however, to freeze the in-franchise allocation at the level proposed by Union. Union's proposal implies that a distributor with an obligation to serve would be prepared to own, or to have under contract, only the amount of storage needed to serve in-franchise customers for just the next year. In the Board's view, it is appropriate to allow for some additional growth in in-franchise needs when determining the "utility asset" portion of Union's current capacity.
>
> The Board acknowledges that there is no single, completely objective way to decide how much should be reserved for future in-franchise needs."

146 The NGEIR panel then goes on to provide its decision on the methodology which was used to determine the cap and says at page 83 of the decision:

The 100 PJ (95 BCF) amount is the capacity that Union must ensure is available to in-franchise customers if they need it.

147 The NGEIR panel then makes a finding with respect to how the excess capacity should be treated if the in-franchise customers require less than 100 PJ in a given year. The NGEIR panel is silent on the outcome if in-franchise customers require more than 100 PJ of storage per year. Although the NGEIR panel is clear that it does not expect this circumstance to occur for many years, the decision nevertheless appears to raise the possibility that in-franchise customers may, at some point, be subject to unregulated prices.

148 The Board finds that on this issue the moving parties have raised a question as to the correctness of the order or decision and that a review based on the issue could result in the Board deciding that the decision or order should be varied, cancelled or suspended.

149 In particular, in this instance, there are unanswered questions that are raised by the NGEIR Decision on the 100 PJ cap issue. Since the NGEIR Decision clearly stated that the in-franchise customers did not have and were not likely to have access to competition in the foreseeable future, a decision that forbears from the regulation of pricing for these customers at some time in the future does not appear to this panel to be consistent. The Board finds that the following questions should have been addressed by the NGEIR panel:

(a) If the cap of 100 PJ of storage for in-franchise Union customers remain in place in perpetuity, what is the basis for forbearance (under Section 29) of required storage above 100 PJ for in-franchise customers?

(b) If the cap of 100 PJ of storage for in-franchise Union customers does not remain in place in perpetuity, what mechanism should the Board use to monitor the likelihood of the cap being exceeded?

(c) If the cap of 100 PJ of storage for in-franchise Union customers is likely to be exceeded, what, if any, remedy is available to in-franchise customers?

150 The Board therefore finds that the NGEIR panel either failed to address a material issue or made inconsistent findings, that the alleged error is material and relevant to the outcome of the decision, and that if the error is substantiated by a reviewing panel and corrected, the reviewing panel could change the outcome of the decision.

151 The Board therefore finds that this is a reviewable matter.

Section K: Earnings Sharing

152 Certain parties, led by VECC, allege that the NGEIR panel erred because one of the effects of the NGEIR Decision on the in-franchise customers of Union is that these customers will lose the benefit of their share of the premium obtained by Union through the sale of storage to ex-franchise customers. The parties stated that the NGEIR Decision will result in a material increase in revenue to the shareholder of Union and, to a lesser extent, an increase in the revenue to EGD's shareholder. They also indicated that at the same time, there will be no corresponding benefit to the ratepayers of either Union or EGD. In fact the moving parties argued that the ratepayers of Union and EGD will suffer adverse impacts, in both the short and the long term. The moving parties maintained that the NGEIR Decision upsets the balance between the interests of ratepayers and shareholders which the

regulatory system is supposed to maintain and that the NGEIR Decision is, therefore, contrary to public and regulatory policy.

153 It was also stated by the moving parties that section 29 of the OEB Act does not permit the Board to re-allocate rate-based storage assets. The effect of the NGEIR Decision was to allocate rate-based storage assets between in-franchise and ex-franchise customers and to allow for a new shareholder business within each utility. The moving parties stated that the Board exceeded its jurisdiction by moving assets out of rate base with no credit to the ratepayer.

154 It was further asserted that rather than requiring utility shareholders to share the premiums derived from the sale of storage to ex-franchise customers, there will now be a separation of utility and non-utility assets and revenues and costs associated therewith. The moving parties stated that this will raise cross-subsidization and other issues pertaining to the performance of utility and non-utility services; a result which they say contravenes the spirit and intent of the pure utility policy adopted by the Ontario government years ago.

155 Further, the parties allege that the Board erred in concluding that it has the power to forbear under Section 29 of the *OEB Act* when an exercise of the power results in a windfall benefit to utility shareholders and consequential harm to ratepayers. The parties asserted that changes to the allocation between ratepayers and utility shareholders of financial benefits and burdens produced by a particular regulatory regime must take place under the auspices of regulation.

Findings

156 The Board notes that the NGEIR Decision deals extensively with the issue of the allocation/sharing of margins (also called premiums, revenues or earnings) associated with the sale of natural gas storage on both a short-term (transactional services) and long-term contractual basis. The Decision canvasses both the status quo (prior to the implementation of the changes required by the NGEIR Decision) and provides an explanation of the rationale for changing the earnings sharing structure, the new mechanisms for earnings sharing and the transitional implementation (where applicable) of those mechanisms.

157 In particular, chapter 2 of the NGEIR Decision provides, among other things, a description of the current types and volumes of sales of natural gas storage by Union to ex-franchise customers and canvasses the current regulatory treatment of ex-franchise sales, including the rate treatment of margins on storage sales. In Chapter 7, the NGEIR panel goes into greater detail regarding the extent of margin sharing and the regulatory history that underlines premium sharing for both short-term (for both Union and Enbridge) and long-term (for Union only) sales of storage.

158 Chapter 7 goes on to provide the Board's findings on for the sharing of margins for both short-term and long-term transactions and to describe a transition mechanism related to long-term margins.

159 The record that the NGEIR panel relied upon included extensive evidence and argument of many parties, including the moving parties to this proceeding and the utilities. The NGEIR Decision refers to various parties' submissions on the issue of premium sharing and the Board reiterated some of the historical evidence with respect to the margin sharing in its Decision. The NGEIR Decision indicates that the NGEIR panel heard and considered the evidence and submissions before it in making its determinations with respect to this issue.

160 Importantly, the NGEIR panel's findings relate back to and to a certain extent flow from its broader decision to refrain, in part, from regulating rates for storage services. The Board does not accept the suggestion that the Board exceeded its jurisdiction by moving assets (in the case of Union) out of rate-base and by altering the status quo margin sharing mechanism. On the contrary, the NGEIR Decision clearly articulates that the changes to margin sharing flow necessarily and logically from the decision to refrain, in part, from regulated rates for storage services.

161 The determinations of the NGEIR panel are also consistent with its determination to distinguish between "utility assets" and "non-utility assets". The Decision clearly indicates that the NGEIR panel canvassed past decisions of the Board on this issue and considered the implications of its findings on both the utilities and ratepayers. Part of this consideration is evidenced in the development by the panel of a transition mechanism related to the implementation of the Board's finding that profits from new long-term transactions should accrue entirely to the utility (Union) as opposed to ratepayers. The threshold panel does not accept the argument that this transitional implementation is a form of implicit acknowledgement that the finding is inappropriate. The NGEIR panel exemplified Board precedent for the use of a phase-out mechanism and, in its finding, indicated that it had considered other options for a transitional mechanism.

162 The Board finds that the NGEIR panel's determinations on the treatment of the premium on market-based storage transactions are not reviewable. The record of the NGEIR proceeding clearly demonstrates that the NGEIR panel considered the evidence, the regulatory history with respect to the issue of premium sharing and parties' submissions and made its determination on the basis of that evidence and those submissions. There is nothing in the moving parties' evidence or arguments that demonstrate to the Board that the NGEIR panel made a reviewable error. For this reason, the Board has determined that the threshold test has not been met and it will not order a review of the NGEIR Decision as it pertains to the issue of the division of the utilities assets or the sharing of the margin realized from the sale of natural gas storage to ex-franchise customers.

Section L: Additional Storage for Generators and Enbridge's Rate 316

163 Many of the issues which existed between Union and Enbridge and their generator customers were resolved in the Settlement Proposals which were filed and accepted by the Board in the NGEIR proceeding. These settlements deal with storage space parameters, increased deliverability for that space, and access to that enhanced space to balance on an intra-day basis. What remained unresolved was the pricing for the new high deliverability storage services for in-franchise generators.

164 The utilities had proposed in the NGEIR proceeding to offer these services at market-based rates and proposed that the Board refrain from regulating the rates for these services. The power generators took the position that storage services provided to them should be regulated at cost-based rates.

165 In the NGEIR Decision, APPrO's position was described as follows:

> The Association of Power Producers of Ontario (APPrO) argued that the product it is more interested in -- high deliverability storage -- is not currently available in Ontario. APPrO argued that competition cannot exist for a product that is not yet introduced and pointed out that when it is introduced it will be available only from Ontario utilities as ex-Ontario suppliers will be constrained by the nomina-

> tion windows specified by the North American Energy Standards Board (NAESB).

166 The NGEIR Decision stated:

> With respect to APPrO's position, the Board is not convinced that high deliverability storage service is a different product. High deliverability storage may be a new service, but it is a particular way of using physical storage, which still depends upon the physical parameters of working capacity and deliverability.

167 In the Motions proceeding, APPrO stated that its position was and continues to be narrower than what was described by the NGEIR panel. APPrO was not seeking high deliverability storage. Rather, it was seeking services that would allow generators to manage their gas supply on an intra-day basis. It is not operationally possible for the generator to increase the rate at which gas can be delivered in and out of the storage space with deliverability from a supplier other than Union. Moreover, APPrO asserted that the frequent nominations windows required for such service are only available in Ontario from the utilities. Since this is a monopoly service, then it should be offered at cost.

168 Union argued that APPrO has not brought forward any new facts or changes in circumstance, nor has it demonstrated any error in the Board's original decision. It also stated that APPrO's assertion that high-deliverability storage is only available from the utility is demonstrably wrong and that there was sufficient evidence that high deliverability storage is available from others. Union disagreed with APPrO's position that deliverability could not be separated from storage space. Although this is correct in the physical context, Union submitted that there were substitutes for deliverability and storage space and gas-fired power generators could acquire their intra-day balancing needs from sources other than the utilities. This according to Union was clearly addressed in the original proceeding and considered by the Board in its decision and APPrO was simply seeking to re-argue its position that had already been fully canvassed.

169 Enbridge pointed out that any de-linking of storage and deliverability that occurred was as a result of the settlement agreed to by APPrO and the power generators with Enbridge. The settlement states that the allocation methodology for gas-fired generators' intra-day balancing needs is based on the assumption that high deliverability storage is available to those customers in the market.

170 APPrO has also raised an issue with some aspects of Rate 316 offered by Enbridge. Rate 316 was part of a proposal submitted by Enbridge during the NGEIR proceeding in response to generators' need for high deliverability storage service. As a result of the Settlement Proposal, Enbridge's Rate 316 provides an allocation of base level deliverability storage at rolled in cost along with high deliverability storage at incremental cost to in-franchise gas fired generators. Section 1.5 of the Settlement Proposal indicates that generators are entitled to an allocation of 1.2% deliverability storage at rolled-in cost based rates.

Findings

171 In the Board's view, it is unclear from the NGEIR Decision whether the NGEIR panel took the implications of the Union settlement agreement into consideration. The NGEIR Decision does not provide sufficient clarity regarding the issues raised by APPrO. It appears that there are some practical limitations faced by gas-fired generators in that presently they can only access certain services from the utility. Although Union asserted that it is demonstrably wrong to suggest, as APPrO

has, that "high-deliverability storage is only available from the utility" and that "there was sufficient evidence that high deliverability storage is available from others" this was not the finding expressed in the NGEIR Decision. In fact, at page 69 of the NGEIR Decision, the NGEIR Panel acknowledged this by stating that: "These services are not currently offered, indeed they need to be developed, and investments must be made in order to offer them." On the other hand, APPrO asserted that only TCPL offers some intra-day services but only in some parts of Ontario through a utility connection or a direct connection with TCPL. To the extent that APPrO's facts may be correct, there is sufficient question whether the NGEIR Decision erred by requiring that monopoly services be priced at market.

172 For these reasons, and given the potential material impact on power generators, the Board finds that the alleged errors raised by APPrO with respect to Union are material and relevant to the outcome of the decision, and that if the error is substantiated by a reviewing panel and corrected this could change the outcome of the decision. The Board will therefore pass this matter to a reviewing panel of the Board to investigate and make findings as it sees fit.

173 With respect to the Rate 316 issue, on page 70 of the NGEIR Decision, the Board stated:

> The Board notes that Enbridge committed to offer Rate 316, whether or not the Tecumseh enhancement project goes ahead, and to price it on cost pass-through basis. The Board expects Enbridge to fulfill this commitment.

174 The Board further noted:

> The Board will refrain from regulating the rates for new storage services, including Enbridge's high deliverability service from the Tecumseh storage enhancement and Rate 316, and Union's high deliverability storage, F24-S, UPBS and DPBS services.

175 At the motion hearing, APPrO indicated that it wanted the Board to issue an order requiring Enbridge to do what the Board has asked them to do, that is, to offer Rate 316 on a cost pass-through basis. Enbridge has already committed to offering this service in the Settlement Proposal and the Board has already noted this commitment in this decision. This panel does not see any further value to issuing an order stating the same.

176 However, there is some ambiguity with respect to Rate 316. The NGEIR decision seems to indicate that the Board will refrain from regulating Rate 316. Even so, the Enbridge NGEIR Rate Order has a tariff sheet for Rate 316 with storage rates for maximum deliverability of 1.2% of contracted storage space. This seems to indicate that Rate 316 is regulated for 1.2% deliverability storage and the Board has refrained from regulating rates for deliverability higher than 1.2%. It is difficult to recognize this distinction from the NGEIR Decision.

177 For these reasons, the Board finds that APPrO has raised a question as to the correctness of the order or decision in respect of the Rate 316 issue and that a review panel of the Board could decide that the decision or order should be varied (by way of clarification or otherwise), cancelled or suspended.

Section M: Aggregate Excess Method of Allocating Storage

178 In the NGEIR proceeding, Union had proposed the "aggregate excess" method in allocating storage to its customers. The aggregate excess method is the difference between the amount of gas a customer is expected to use in the 151-day winter period and the amount that would be consumed in that period based on the customer's average daily consumption over the entire year. Kitchener had proposed two alternative methodologies. The NGEIR Decision approved Union's proposal.

179 Kitchener argued that the NGEIR Decision failed to take into account that the aggregate excess methodology, because it uses normal weather to estimate a customer's storage allocation, unnecessarily increases utility rates and therefore offends the requirement of just and reasonable rates under sections 2 and 36 of the Act. Kitchener also argued that there is no evidence to support the Board's conclusion that aggregate excess meets the reasonable load balancing requirements of the Kitchener utility.

180 Union argued that these issues were fully considered by the Board in its NGEIR Decision and that Kitchener has not brought forward any new evidence or any new circumstances; it is simply attempting to reargue its case.

Findings

181 With respect to Kitchener's allegation that the NGEIR panel did not consider the impact on rates, the Board notes that the record in the NGEIR proceeding indicates that the impact on utility rates was examined extensively. The issue was raised in Kitchener's pre-filed evidence at page 5 and again at page 14. The transcript from the proceeding also indicates that there was extensive discussion on costs (Volume 12, pages 39-133) during cross examination and additional undertakings were filed on the topic. The record also indicates that the previous Panel questioned the witnesses specifically with respect to the costs and a utility's exposure to winter spot purchases (Volume 12, pages 183-184). The issue was again raised by Kitchener in argument (Volume 17, page 153) and once again questions were posed to Kitchener's counsel by the NGEIR panel (Volume 17, pages 159-164).

182 The NGEIR Decision (pages 93 to 95) refers to Kitchener's alternatives and arguments and deals with that issue squarely when it finds that:

> The Board does not agree that the allocation of cost based storage should be determined assuming colder than normal weather or that it should be designed to provide protection against a cold snap in April. To do so would result in in-franchise customers as a group being allocated more cost-based storage than they are expected to use in most winters. As noted in 6.2.2, the Board concludes that the objective of the allocation of cost-based storage space is to assign an amount that is reasonably in line with what a customer is likely to require. In the Board's view, that supports continuing the assumption of normal weather.

183 In the Board's view, the record clearly indicates that this issue was thoroughly examined in the NGEIR proceeding. The Board believes that Kitchener's claim that the NGEIR panel failed to account for the fact the aggregate excess methodology increases utility rates is without merit. Kitchener presented no new evidence or new circumstances which would convince the Board that this issue is reviewable.

184 To support its second claim (i.e. the Board erred because there is no evidence to support the Board's conclusion that the aggregate excess method meets the reasonable load balancing require-

ments of the Kitchener utility), Kitchener argues that the Board ignored the evidence which suggests that the actual allocation to Kitchener over the past 6 years has been at a contractual level which is 10.6% higher than aggregate excess.

185 The Board disagrees. Contrary to Kitchener's assertions, the NGEIR Decision clearly considers the fact that Kitchener's aggregate excess amount is 10.6% lower than its current contracted amount. Specifically, the NGEIR Decision states:

> The current contract expires March 31, 2007 and Kitchener is seeking a long-term storage contract with Union effective April 1, 2007. It is concerned that its allocation of cost-based storage in a new contract will be restricted to the amount calculated under the aggregate excess method. Kitchener's current aggregate excess amount is 3.01 million GJ, 10.6% lower than the amount of cost-based storage in its current contract.

186 The NGEIR Decision also states:

> The issue is whether Kitchener has made a compelling case that its use of storage is so different from the assumed use underlying the aggregate excess method that Union should be required to develop an allocation method just for Kitchener. The Board finds Kitchener has not successfully made that argument.

187 In view of the above, the Board is convinced that the NGEIR panel considered the evidence before it. The claim by Kitchener that the Board ignored the evidence in question and based its decision only on the evidence provided by Union is demonstrably incorrect.

188 Kitchener also claims that the Board committed an error in fact by stating (at page 85 of the NGEIR Decision), that Enbridge uses a methodology similar to that of Union's. In the Boards' view, this reference is simply to provide context and is clearly referring to the mathematical formula used to calculate the storage allocation. It is certainly not a matter capable of altering the decision on this point.

189 In conclusion, the Board finds that the matters raised by Kitchener are not reviewable.

Section N: Orders

190 Having made its determinations on the Motions, the Board considers it appropriate to make the following Orders.

191 The Board Orders That:

> The Motions for Review are hereby dismissed without further hearing, with the following exceptions. The Board's findings on Union's 100 PJ cap on cost-based storage for in-franchise customers and the additional storage requirements for in-franchise gas-fired generators are reviewable for the purposes set out in this Decision.

Section O: Cost Awards

192 The eligible parties shall submit their cost claims by June 5, 2007. A copy of the cost claim must be filed with the Board and one copy is to be served on both Union and Enbridge. The cost

claims must be done in accordance with section 10 of the Board's Practice Direction on Cost Awards.

193 Union and Enbridge will have until June 19, 2007 to object to any aspect of the costs claimed. A copy of the objection must be filed with the Board and one copy must be served on the party against whose claim the objection is being made.

194 The party whose cost claim was objected to will have until June 26, 2007 to make a reply submission as to why their cost claim should be allowed. Again, a copy of the submission must be filed with the Board and one copy is to be served on both Union and Enbridge.

DATED at Toronto, May 22, 2007

Original signed by

Pamela Nowina
Presiding Member and Vice Chair

Original signed by

Paul Vlahos
Member

Original signed by

Cathy Spoel
Member

qp/e/qlspi

1 EB-2008-0551 (November 7, 2006)