EB-2012-0337

ONTARIO ENERGY BOARD

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998, c.15, Schedule B; and in particular section 36 (2) thereof;

AND IN THE MATTER OF an application by Union Gas Ltd. ("Union Gas") for an Order or Orders approving its 2013-2014 Large Volume Demand Side Management ("DSM") Plan.

ENVIRONMENTAL DEFENCE

MATERIALS FOR ORAL SUBMISSIONS (Union Gas 2013-14 Large Volume DSM)

February 5, 2013

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TAB 1

EB-2012-0337
Union Gas 2013-14 Large Volume DSM
Filed: February 4, 2013

Summary of Environmental Defence Submissions

Environmental Defence requests that the Board:

1. Approve only the 2013 plan and budget, and direct that Union Gas develop a new industrial DSM plan and budget for 2014 that pursues all cost-effective DSM opportunities subject to the constraint that it must not lead to undue rate increases; and
2. Reject the opt-out option requested by APPrO

Factors Supporting an Increased 2014 Industrial DSM Plan and Budget

1. This would protect and further the interests of consumers:
    a. These programs are **extremely cost-effective**: every $100 results in $810 in savings to consumers;[1]
    b. The 8.1:1 ratio is **net of free ridership** (i.e. it accounts for the fact that some DSM activities would have occurred without the program incentives through a 56% free-rider offset);[2]
    c. These programs **significantly lower gas bills**;
    d. These programs **significantly increase efficiency**;
    e. These programs **protect customers from gas price fluctuations**, as consumption levels are reduced; and
    f. Delaying DSM spending results in **lost opportunities** (e.g. if new equipment is purchased without choosing the higher-efficiency option).[3]
2. This would promote energy conservation and efficiency in accordance with government policies:
    a. The Government of Ontario's **GHG emission target** for **2020 requires 30 Mt in additional reductions**;[4]

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[1] Exhibit A, tab 1, pg. 30 (Excerpted in ED Cross-Examination Reference Book, tab 1, pg. 6).
[2] Exhibit A, tab 1, appendix E, pg. 5; DSM Guidelines, pgs. 21, 22 & 28.
[3] Transcript, Vol. 1, January 31, 2013, pg. 89, lns. 2-14.
[4] ED Cross-Examination Reference Book, tab 6, pg. 38; Transcript, Vol. 1, January 31, 2013, pg. 92, lns. 1-9.

2

b. These programs are **comparatively highly cost-effective** – in 2011, 2.7 times more cost-effective than the OPA's industrial energy conservation programs and 6.7 times more than Ontario's electricity conservation programs;[5]

c. These programs are **comparatively under-funded** – in 2011, electric utilities' conservation budgets were almost five times greater than that of Enbridge and Union Gas;[6]

d. The **potential energy savings are comparatively high** – if all economically feasible best practices are implemented in Ontario's industrial sector, the potential energy savings (in PJs) are twice as high with respect to natural gas as compared to electricity;[7]

e. **Natural gas consumption accounts for 34.5%** of Ontario's energy-related GHG emissions and natural gas power plants alone constitute 8%;[8]

f. The Government of Ontario's GHG reduction **policies cannot be met without significant increases in the energy efficiency of natural gas consumption**;[9] and

g. This is a **no net cost** method of achieving GHG reductions.

3. Union **did not examine the potential** for a higher 2014 DSM budget.[10]

4. **Approving the existing 2014 budget would be contrary to the *Ontario Energy Board Act* and unreasonable in law** because, on the evidence before the Board in this proceeding, (i) the relevant factors the Board is required to consider under s. 2 of the *Act* each support an increased 2014 budget, and (ii) there is no evidence supporting the contrary (e.g. such as undue rate increases).[11]

Factors Against an Opt-Out Option

1. The opt-out option would **decrease the incentives** to implement DSM because:

   a. A company that opts-out would **not** be **eligible for DSM financial incentives** that could make an otherwise untenable project profitable;

   b. A company that opts-out would **pay a lower rate for natural gas**, and thus have a lesser incentive to implement DSM; and

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[5] Transcript, Vol. 1, January 31, 2013, pg. 83, lns. 2-28; ED Cross-Examination Reference Book, tab 2, pg. 12.
[6] Transcript, Vol. 1, January 31, 2013, pg. 84, lns. 20-24; ED Cross-Examination Reference Book, tab 2, pg. 10.
[7] Transcript, Vol. 1, January 31, 2013, pg. 86-87; ED Cross-Examination Reference Book, tab 3, pg. 19.
[8] ED Cross-Examination Reference Book, tab 6, pg. 38; Transcript, Vol. 1, January 31, 2013, pg. 92, lns. 9-25.
[9] Transcript, Vol. 1, January 31, 2013, pg. 93, lns. 5-14.
[10] Transcript, Vol. 1, January 31, 2013, pg. 100, lns. 14-17.
[11] *Ontario Energy Board Act, 1998,* s. 2.

c. The opt-out option creates an **incentive against implementing DSM** in order to take the option of lower rates.

2. The opt-out option would potentially **decrease total DSM energy savings** because:

   a. The program already accounts for **free-ridership**;[12]

   b. Mr. Zarumba was **unable to say that natural gas savings would stay the same** if the Board permitted opting-out; and[13]

   c. Mr. Russell was **unable to say that LDE's natural gas savings would stay the same** if it opted-out.[14]

[12] Exhibit A, tab 1, appendix E, pg. 5; DSM Guidelines, pgs. 21, 22 & 28.
[13] APPrO Interrogatory Responses, Exhibit D1, pg. 4.
[14] Transcript, Vol. 2, February 1, 2013, pg. 101, lns. 2-3, 21-23.

TAB 2

Ontario Energy Board Act, 1998

S.O. 1998, CHAPTER 15
Schedule B

PART I
GENERAL

[...]

Board objectives, gas

2. The Board, in carrying out its responsibilities under this or any other Act in relation to gas, shall be guided by the following objectives:

1. To facilitate competition in the sale of gas to users.

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

3. To facilitate rational expansion of transmission and distribution systems.

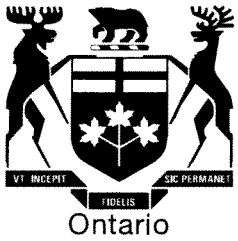
4. To facilitate rational development and safe operation of gas storage.

5. To promote energy conservation and energy efficiency in accordance with the policies of the Government of Ontario, including having regard to the consumer's economic circumstances.

5.1 To facilitate the maintenance of a financially viable gas industry for the transmission, distribution and storage of gas.

6. To promote communication within the gas industry and the education of consumers.

TAB 3



DEMAND SIDE MANAGEMENT GUIDELINES FOR NATURAL GAS UTILITIES

EB-2008-0346

Date: June 30, 2011

As noted above, incentive costs are not included in Program Costs since they do not impact the net benefit or cost from a societal perspective.[10]

iii) Delivery Costs

Program delivery costs include any natural gas utility's devices needed to operate the programs such as specialized software or tools.

iv) EM&V and Monitoring Costs

There are two broad categories of evaluation activity: impact evaluation and process evaluation. Impact evaluation focuses on the specific impacts of the program – for example, savings and costs. Process evaluation focuses on the effectiveness of the program design – for example, the delivery channel. Some of these costs will be assigned directly to a specific program or multiple programs, while a portion of the costs are more appropriately assigned across all programs (i.e., at the DSM portfolio level).

EM&V and monitoring costs are incurred for systems, equipment and studies necessary to track measurable levels of program success (e.g., number of participants/installations, natural gas savings, Net Equipment Costs and Program Costs) as well as to evaluate the features driving program success or failure.

v) Administrative Costs

Administrative costs are generally the costs of staff who work on DSM activities. These costs are often differentiated between support and operations staff. Support staff costs are considered fixed costs or "overhead" that occur regardless of the level of customer participation in the programs. Operations staff costs are variable, depending on the level of customer participation. The natural gas utilities should include all staff salaries that are attributable to DSM programs as part of their Program Costs. For practical purposes, if certain administrative costs cannot be assigned to individual programs these costs should be accounted at the portfolio level.

Program Costs should be considered as part of the TRC test for as long as they persist (e.g., monitoring and EM&V costs may be spread over a period of time). Free ridership and spillover effects, if applicable, should also be taken into account when calculating the Program Costs.

All Program Costs associated with free riders should be included in the TRC analysis. Programs that have high free ridership rates will be less cost effective (as measured by the TRC test) since their Program Costs will be included in the analysis while their benefits will not.

[10] For clarity, while incentive costs are not included in the TRC test, incentive costs should be included in and reported as part of the gas utility's DSM program budget.

The spillover effects are associated with customers that adopt energy efficiency measures because they are influenced by a utility's program-related information and marketing efforts, but do not actually participate in the program. Accordingly, there are no Program Costs associated with the spillover effects.[11] If the spillover effects are considered and adequately supported (see section 7.1 for details), then programs that have high spillover rates will be more cost effective (as measured by the TRC test) since they do not have Program Costs while they do generate benefits.

Program Cost estimates should be based on the best available information known to the natural gas utilities at the relevant time.

5.1.3 TRC Test Calculation

For screening purposes, the TRC test should be performed at the program level only.

At the program level, the TRC test takes into account the following:

- Avoided Costs;
- Net Equipment and Program Costs; and
- Adjustments to account for free ridership, spillover effects, and persistence of savings and costs, as applicable.

The results of the TRC test can be expressed as a ratio of the present value ("PV") of the benefits to the PV of the costs. For example, the PV of the benefits consists of the sum of the discounted benefits accruing for as long as the DSM program's savings persist. The PV of the benefits therefore expresses the stream of benefits as a single "current year" value.

If the ratio of the PV of benefits to the PV of the costs (the "TRC ratio") exceeds 1.0, the DSM program is considered cost effective from a societal perspective as it implies that the benefits exceed the costs. If, on the contrary, the TRC ratio for a program falls below 1.0, the program would be screened out and no longer considered for inclusion as part of the DSM portfolio.[12]

The TRC threshold test should be 1.0 for all programs amenable to this screening test, except for low-income programs. To recognize that low-income natural gas DSM programs may result in important benefits not captured by the TRC test, these programs should be screened using a lower threshold value of 0.70 instead.[13]

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[11] An alternative way to explain this is that all Program Costs are allocated to program participants (including free riders) and there are no additional Program Costs generated by the spillover effect.

[12] An alternative way to consider the cost-effectiveness of a program under a TRC ratio threshold of 1.0 is to determine whether the TRC net savings are greater than 0. The TRC net savings are equal to the PV of benefits less the PV of costs.

[13] These various benefits not captured by the traditional net TRC savings measure may include reduction in arrears management costs, increased home comfort, improved safety and health of residents, avoided homelessness and dislocation, and reductions in school dropouts from low-income families.

The four adjustment factors that are the topic of this section are free ridership, spillover effects, attribution and persistence.

As indicated in section 6.1.3, the natural gas utilities should design and screen DSM programs using the best available information known to them at the relevant time, including information on adjustment factors. The natural gas utilities should continuously monitor new information and determine whether the design, delivery and set of DSM programs offered need to be adjusted based on that information.

The evaluation of the achieved results for the purpose of determining the LRAM amounts and the incentive amounts should be based on the best available information which, in this case, refers to the updated adjustment factors resulting from the evaluation and audit process of the same program year. For example, the LRAM and incentive amounts for the 2012 program year should be based on the updated adjustment factors resulting from the evaluation and audit of the results of the 2012 program year.

7.1 Free Ridership and Spillover Effects

A free rider is a "program participant who would have installed a measure on his or her own initiative even without the program."[17] In contrast, spillover effects refer to customers that adopt energy efficiency measures because they are influenced by a utility's program-related information and marketing efforts, but do not actually participate in the program.

All adjustment factors considered, including free ridership and spillover effects, should be assessed for reasonableness prior to the implementation of the multi-year plan and annually thereafter, as part of each natural gas utility's ongoing program evaluation and audit process. The natural gas utilities should always provide information on free ridership for all their applicable programs. In contrast, the natural gas utilities have the option to request the inclusion of spillover effects for any of their programs.

Any request for the Board to consider the spillover effects, needs to be supported by comprehensive and convincing empirical evidence, which clearly quantify the spillover effects that of a specific program has had on program savings and the natural gas utilities' revenue.

For their custom projects, the natural gas utilities should propose common free ridership rates and spillover effects, if applicable, that are differentiated appropriately by market segment and technologies.

[17] Violette, Daniel M. (1995) *Evaluation, Verification, and Performance Measurement of Energy Efficiency Programs*. Report prepared for the International Energy Agency.

TAB 4

Filed: 2012-08-31
EB-2012-0337
Exhibit A
Tab 1
Appendix E

Union Gas Limited, a
Spectra Energy
Company

R100 Enersmart (DSM) Program Customer Focus Group Conference Call Meeting June 25th, 2012

[AS IT WAS HEARD REPORT]

now. The ability for our plant personnel to have access Union's DSM engineering expertise is a positive feature associated with Union's DSM program. So while the program has a cost, it does offer significant value that we do not want to lose.

- Union has made positive changes to make the DSM program more flexible and customers who participate today have more options. Suggest that Union maintain or improve DSM program flexibility where possible. The need for program rules and structure needs to be balanced with making it work for large volume customers.
- Appreciation expressed for Union Gas DSM engineering resources. It was mentioned that these resources make it easier to participate in the program. For example, your engineers identify the opportunity, provide tech engineering support to develop projects and submit reports for us.

Program Participation/Structure:

- Plant managers have been running their plants for many years and would be doing energy efficiency projects without Union Gas involvement.
- Q. How many energy efficiency programs would have been completed without Union's assistance? Would customers have done this work without Union involvement?
    - ANS – As part of our program 56% of all natural gas savings claims are deducted and not included in our lifetime savings metric. This 56% "Free-rider" offset is included to recognize work that customers initiate without Union Gas involvement.

Miscellaneous:

- Q. If Union's DSM program is successful and customers are realizing significant natural gas savings, would Union's volume throughput forecast for R100 customers decline?
    - ANS – Yes, throughput could decrease in any rate class if the DSM program is successful.
- Q. So if Union's revenue requirement remains the same, and volume throughput decreases, will Union be asking for a rate increase?
    - ANS – Typically growth helps to dampen the impact of DSM driven volumetric decreases.
- Q. So, there's an indirect cost associated with the program being successful over time, the R100 rate would increases over time, is this correct?
    - ANS – Using history as a guide, the impact on rates associated with energy efficiency is not as significant as the impact associated with plant closures. To the extent that energy efficiency activity helps to maintain the cost competiveness of a business it is aligned with keeping plants in business and avoiding closure. Growth also serves to balance the impact of energy efficiency.

TAB 5

JUDICIAL REVIEW OF ADMINISTRATIVE ACTION IN CANADA

BY

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AND

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14:1423

standard-of-review analysis.[47] Indeed, paragraph 18.1(4)(c) is essentially no more than a codification (with the minor expansion allowing review for error of law not appearing on the face of the record), of the common law ground of judicial review.[48]

14:1430 ***Common Law Standards of Review***

As a result of *Dunsmuir*, there are now only two common law standards of review: correctness and reasonableness. However, since some statutes prescribe a standard of "patent unreasonableness," that ostensibly now-defunct common law standard nevertheless remains relevant.

14:1431 *Correctness*

The concept of review for correctness has occasioned little difficulty for the courts. When it applies, it requires the reviewing court to decide for itself whether the tribunal decided the question in dispute correctly and, if it did not, to substitute its view for that of the tribunal.[49] Of course, while correctness review is without deference and in that sense *de novo*, and requires a reviewing court to undertake its own analysis of the disputed issue, the reasons for decision given by the tribunal may nevertheless be important as an aid to understanding the statutory scheme, the underlying purposes of the legislation, and the possible consequences for the efficacy of the administrative program of deciding the issue at stake one way rather than another.

14:1432 *Unreasonableness*

Generally speaking, "unreasonableness" has developed into a standard that permeates much of the law governing non-procedural

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[47] ***Canada (Citizenship and Immigration) v. Khosa***, 2009 SCC 12 at para. 44.

[48] ***Canada (Citizenship and Immigration) v. Khosa***, 2009 SCC 12 at paras. 52*ff*. The original enactment of this provision in 1970 preceded the emergence of the pragmatic and functional analysis and the concept of judicial deference on questions of law decided by administrative tribunals; furthermore, the Federal Court of Appeal has held that the existence of paragraph 18.1(4)(c) is only one factor to be considered in the pragmatic and functional analysis as indicative of correctness as the standard of review of questions of law: ***Sketchley v. Canada (Attorney General)*** (2005), 263 D.L.R. (4th) 113 (FCA) at paras. 64-69.

[49] ***New Brunswick (Board of Management) v. Dunsmuir***, 2008 SCC 9 at para. 50.

grounds of judicial review. However, it takes its colour from context,[50] and will vary somewhat, depending upon whether the issue is one of error of law,[51] error of fact,[52] error of mixed fact and law,[53] or one that involves section 1 of the *Charter*.[54]

Prior to *Dunsmuir*, the Supreme Court of Canada described an unreasonable decision as one that was not supported by any reasons that could withstand a probing examination.[55] However, in introducing the "new" or "reformed" standard of unreasonableness in *Dunsmuir*, the Court gave relatively little guidance as to its relationship to the previous two standards. Rather, the Court set forth its own definition as follows:

> What does this revised reasonableness standard mean? Reasonableness is one of the most widely used and yet most complex legal concepts. In any area of the law we turn our attention to, we find ourselves dealing with the reasonable, reasonableness or rationality. But what is a reasonable decision? How are reviewing courts to identify an unreasonable decision in the context of administrative law and, especially, of judicial review?
>
> Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with

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[50] ***Canada (Citizenship and Immigration) v. Khosa,*** 2009 SCC 12 at para. 59. **And see particularly *Catalyst Paper Corp.***, 2012 SCC 2 at para. 18 as well as ***Doré v. Barreau du Québec,*** 2012 SCC 12 at para. 7.

[51] See topic 14:4000, *post*.

[52] See topic 14:3000, *post*.

[53] See topic 14:5000, *post*.

[54] See topic 14:4320, *post*. **See** particularly *dicta* in ***Doré v. Barreau du Québec,*** 2012 SCC 12.

[55] ***Canada (Director of Investigations and Research) v. Southam Inc.***, [1997] 1 S.C.R. 748 at para. 56; **and see** *C.U.P.E., Local 933 v. Cape Breton (Regional Municipality)* (2006), 270 D.L.R. (4th) 572 (NSCA) at para. 72 (test is whether there is any "tenable support" for the decision); *Hamilton v. Law Society of British Columbia* (2006), 55 B.C.L.R. (4th) 304 (BCCA) at para. 53.

> whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.[56]

Although the Court in *Dunsmuir* did not provide an abstract, multi-factored definition of "unreasonableness," the following general guidance can be gleaned from its comments.[57] First, review for unreasonableness assumes that there is no uniquely correct answer to a question in dispute, at least not one that a court is qualified to give. Second, the function of a reviewing court is to determine whether a tribunal's decision is "within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law." It is not to determine the "correct" or "preferable" answer, and then ask whether the tribunal's decision is "close enough."[58] Third, review on a standard of unreasonableness is concerned largely with the "existence of justification, transparency, and intelligibility within the decision-making process."[59] Accordingly, a court must start its review by focusing on the reasons for decision given by the tribunal to see if they provide a rational explanation for it.[60] Fourth, curial deference, embodied in review for unreasonableness, "requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experience, and the different roles of the courts and administrative bodies within the Canadian constitutional system."[61] Further, this deference is to be accorded to the decision-maker's weighing of *Charter*

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[56] ***New Brunswick (Board of Management) v. Dunsmuir***, 2008 SCC 9 at paras. 46-7.

[57] See also ***Canada (Citizenship and Immigration) v. Khosa***, 2009 SCC 12 at para. 59.

[58] But see *Cohen v. Canada (Attorney General)*, 2008 FC 676 at paras. 30-1.

[59] ***New Brunswick (Board of Management) v. Dunsmuir***, 2008 SCC 9 at para. 47.

[60] See also ***Law Society of New Brunswick v. Ryan***, [2003] 1 S.C.R. 247 at paras. 48-52 where reasonableness is said to require a line of analysis that rationally could lead from the evidence to the result: *Alberta Liquor Store Assn. v. Alberta (Gaming and Liquor Commission)*, 2008 ABQB 595 at para. 65. **And see e.g.** *Alberta Union of Provincial Employees v. Health Sciences Assn. of Alberta*, 2008 ABQB 279 at paras. 133*ff* (unexplained change of policy by labour relations board unreasonable). **And see** particularly discussion in ***A.T.A. v. Alberta (Information and Privacy Commissioner)***, 2011 SCC 61 of how the reasonableness standard is to be applied when no reasons were given by the tribunal on a particular issue, at paras. 51*ff*.

[61] ***New Brunswick (Board of Management) v. Dunsmuir***, 2008 SCC 9 at para. 49. This same thought is expressed more bluntly in ***Macdonald v. Mineral Springs Hospital***, 2008 ABCA 273 at para. 82.

values within the administrative scheme.[62]

14:1433 *Patent Unreasonableness*

Although "patent unreasonableness" is no longer a recognized standard of review at common law, it continues to have relevance where it is a legislated standard of review.[63] Obviously, it suggests a greater degree of deference. Nevertheless, there is still some uncertainty in defining precisely what "patently unreasonable" signifies. As Cory J. has observed, "the test [of patent unreasonableness] has been articulated somewhat differently for findings of fact and law."[64] Furthermore, while some judges have viewed the standard as establishing a very high threshold of review,[65] others have regarded the difference between a conclusion of law that is unreasonable, as opposed to being merely wrong, as one of degree only.[66] However, more recently the Supreme Court of Canada simply stated that "the difference between 'unreasonable' and 'patently unreasonable' lies in the immediacy or

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[62] ***Doré v. Barreau du Québec***, 2012 SCC 12, at para. 56.

[63] E.g. ***British Columbia (Workers' Compensation Board) v. British Columbia (Human Rts. Tribunal),*** 2011 SCC 52, *Audmax Inc. v. Ontario (Human Rights Tribunal)* (2011), 328 D.L.R. (4th) 506 (Ont. Div. Ct.) at paras. 25*ff*; *Viking Logistics Ltd. v. British Columbia (Workers' Compensation Board)* (2010), 18 Admin. L.R. (5th) 274 (BCSC); *1251497 Alberta Inc. v. Edmonton (City)* (2010), 503 A.R. 30 (Alta. Q.B.) (statutory appeal); *British Columbia (Workers' Compensation Appeal Tribunal) v. Hill* (2011), 16 B.C.L.R. (5th) 142 (BCCA); *Dodd v. Alberta (Registrar of Motor Vehicle Services)* (2010), 7 Admin. L.R. (5th) 1 (Alta. Q.B.) at para. 26; *Kerton v. British Columbia (Workers' Compensation Appeal Tribunal)* (2011), 13 B.C.L.R. (5th) 27 (BCCA); *Victoria Times Colonist v. C.E.P., Local 25-G,* [2009] 9 W.W.R. 269 (BCCA) at paras. 6-10; *Manz v. British Columbia (Workers' Compensation Appeal Tribunal)* (2009), 82 Admin. L.R. (4th) 185 (BCCA) (patent unreasonableness standard endured); *Allied Hydro Council v. Construction, Maintenance and Allied Workers Bargaining Council, Local 2300*, 2008 BCSC 1660 at para. 79, ref'g to British Columbia's *Administrative Tribunals Act*, S.B.C. 2004, c. 45, ss. 58(1) and (2). **See** particularly *Pacific Newspaper Group Inc. v. C.E.P., Local 2000,* 2009 BCSC 1795 for a good discussion of the meaning of this term, post-*Dunsmuir*. **See also** *Ontario Human Rights Code*, s. 45.8, discussed in *Knoll North America Corp. v. Adams* (2010), 104 O.R. (3d) 297 (Ont. Div. Ct.); *Toronto (City) Police Service v. Phipps* (2010), 325 D.L.R. (4th) 701 (Ont. Div. Ct.) at paras. 27*ff*; *Traffic Safety Act*, R.S.A. 2000, c. T-6, s. 47.1(3). **See further** topics 14:3531, 14:5452 and 15:2430, *post.*

[64] See ***Toronto (City) Board of Education v. O.S.S.T.F., District 15***, [1997] 1 S.C.R. 487 at p. 507.

[65] See e.g. ***Syndicat des employés de production du Québec et de l'Acadie v. Canada (Labour Relations Board)***, [1984] 2 S.C.R. 412 at p. 420, *per* Beetz J.

[66] See e.g. *S.U.N., Local 105 v. Regina Pasqua Hospital,* [1983] 1 S.C.R. 303 at p. 307, *per* Laskin C.J.C.

TAB 6

CITATION: Toronto Hydro-Electric System Limited v. Ontario Energy Board, 2010 ONCA 284
DATE: 20100420
DOCKET: C49980

COURT OF APPEAL FOR ONTARIO

Feldman, Lang and MacFarland JJ.A.

BETWEEN:

Toronto Hydro-Electric System Limited

Appellant (Respondent in Appeal)

and

Ontario Energy Board

Respondent (Appellant in Appeal)

Glenn Zacher and Patrick G. Duffy, for the appellant Ontario Energy Board

James D.G. Douglas and Morgana Kellythorne, for the respondent Toronto Hydro-Electric System Limited

Heard: October 9, 2009

On appeal from the order of the Divisional Court (Lederman, Kiteley and Swinton JJ.) dated September 9, 2008, with reasons by Kiteley J. and reported at (2008), 93 O.R. (3d) 380.

MacFarland J.A.:

[1] This is an appeal with leave of this court from the order of the Divisional Court (Kiteley, Swinton JJ., Lederman J. dissenting) dated September 9, 2008. The court

declared that the Ontario Energy Board exceeded its jurisdiction and erred in law when it imposed, as a condition in its rate decision for 2006, a duty on Toronto Hydro-Electric System Limited to obtain the approval of a majority of its independent directors before declaring any future dividends payable to its affiliates (the "condition").

OVERVIEW

[2] Toronto Hydro-Electric System Limited ("THESL") is an electricity distributor licensed and regulated by the Ontario Energy Board ("OEB"). THESL is a wholly-owned subsidiary of Toronto Hydro Corporation ("THC"). All of the shares of THC are owned by the City of Toronto (the "City").

[3] In 2004-2005, THC paid over $116 million to the City in the form of dividends and interest payments. THC funded a significant part of these payments through substantial annual increases in dividends from THESL and by charging THESL an above-market rate of interest on an inter-company loan. At the time THESL made the payments it had not completed a capital plan for reinvestment in its aging infrastructure.

[4] When THESL applied to the OEB for approval of its distribution rates to be effective May 2006, the OEB expressed concern about the level of dividend payments and the above-market rate of interest being paid by THESL. Evidence before the OEB disclosed that the City anticipated a significant shortfall in its 2006 operating budget; that the City regarded THC as "a revenue source in the 2006 operating budget"; and that the

City demanded substantial increases in dividends from THC which, in turn, demanded increased dividends from THESL.

[5] The OEB is the regulator of Ontario's electricity industry, and is statutorily mandated to "protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service." The OEB manages this mandate primarily by setting just and reasonable rates.

[6] In its decision, the OEB disallowed as a regulatory expense any interest charges above market rates, and required a majority of THESL's independent directors to approve any future dividend payments. In reaching this decision, the OEB noted that if a utility like THESL was to pay all of its retained earnings to its shareholders, this could adversely affect its credit rating, which in turn could harm ratepayer interests by causing higher costs and degradation in services. THESL appealed this decision.

[7] In the Divisional Court, THESL argued that the OEB had no jurisdiction to impose the condition it did, either by statute or at common law, and further that the imposition of such a condition represented an unwarranted and indeed unlawful restriction on the authority of the board of directors to declare a dividend.

[8] The majority in the Divisional Court accepted THESL's position on both bases advanced, allowed the appeal and set aside the part of the OEB decision that imposed the condition.

[9] The OEB argues that the majority of the Divisional Court panel failed to appreciate and distinguish the principles that govern regulated utilities like THESL, which operate as monopolies, from those that apply to private sector companies, which operate in a competitive market. The OEB submits that this distinction is critical because whereas the directors and officers of an unregulated company have a fiduciary obligation to act in the best interests of the company (which usually equates to the interests of the shareholders), a regulated utility must operate in a manner that balances the interests of the utility's shareholders against the interests of its ratepayers. If a utility fails to operate in this way, it is incumbent on the OEB to intervene in order to strike this balance and protect the interests of ratepayers.

[10] For the reasons that follow I would allow the appeal, set aside the order of the Divisional Court and restore the part of the rate decision that imposed the condition.

[11] The issue for this court is whether the OEB had the ability, as part of its 2006 rate decision, to require THESL to obtain the approval of a majority of its independent directors before declaring any dividends.

ANALYSIS

[12] This court has held that the OEB is a highly specialized expert tribunal with broad authority to regulate the energy sector in Ontario and to balance competing interests: see

Natural Resource Gas Ltd. v. Ontario Energy Board (2006), 214 O.A.C. 236 (C.A.), at para. 18.

[13] The analysis must begin with the legislation that establishes the OEB and gives the OEB its powers. The OEB's objectives in respect of electricity are stated in s. 1 of the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sch. B (the "Act"):

> Boards objectives, electricity
>
> 1.(1) The Board, in carrying out its responsibilities under this or any other Act in relation to electricity, shall be guided by the following objectives:
>
> > 1. To protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service.
> >
> > 2. To promote economic efficiency and cost effectiveness in the generation, transmission, distribution, sale and demand management of electricity and to facilitate the maintenance of a financially viable electricity industry.[1]

[14] In short, the OEB is to balance the interests of ratepayers in terms of prices and service while at the same time ensuring a financially viable electricity industry that is both economically efficient and cost effective.

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[1] On September 9, 2009, three additional objectives were added to s. 1(1).

[15] The *Electricity Act, 1998,* S.O. 1998, c. 15, Sch. A, requires a distributor of electricity to sell electricity to every person connected to the distributor's distribution system (s. 29). However, the distributor can only charge for the distribution of electricity in accordance with an order of the OEB. Section 78 of the Act provides in part:

> 78(2) No distributor shall charge for the distribution of electricity or for meeting its obligations under section 29 of the *Electricity Act, 1998* except in accordance with an order of the Board, which is not bound by the terms of any contract.
>
> ...
>
> (3) The Board may make orders approving or fixing just and reasonable rates for the transmitting or distributing of electricity and for the retailing of electricity in order to meet a distributor's obligations under section 29 of the *Electricity Act, 1998*.

[16] In relation to its ability to make orders the Act provides:

> 23(1) The Board in making an order may impose such conditions as it considers proper, and an order may be general or particular in its application.

[17] In order to determine the appropriate standard of review, the inquiry must begin with a consideration of the nature of the OEB's decision.

I. Avoiding the "Jurisdiction" Trap

[18] In recent years administrative law has undergone a significant transformation. Ever since Dickson J. championed the notion of increased deference to specialized

administrative tribunals in *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227 ("*CUPE*"), courts have sought to avoid labelling matters as jurisdictional where such a label might lead to a more searching review of the administrative decision than is appropriate in the circumstances. In *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, Bastarache and LeBel JJ. underlined the importance of *CUPE* in this regard at para. 35:

> Prior to *CUPE*, judicial review followed the "preliminary question doctrine", which inquired into whether a tribunal had erred in determining the scope of its jurisdiction. By simply branding an issue as "jurisdictional", courts could replace a decision of the tribunal with one they preferred, often at the expense of a legislative intention that the matter lie in the hands of the administrative tribunal. *CUPE* marked a significant turning point in the approach of courts to judicial review, most notably in Dickson J.'s warning that courts "should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so" (p. 233). Dickson J.'s policy of judicial respect for administrative decision making marked the beginning of the modern era of Canadian administrative law.

[19] Support for the *CUPE* conceptualization of jurisdiction is also found in the majority reasons of Abella J. in *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, [2007] 1 S.C.R. 650, at paras. 88-89:

> The Federal Court of Appeal also concluded that the standard for reviewing the Agency's decision on the issue of whether an obstacle is undue, is patent unreasonableness. I agree. I do not, however, share the majority's view that VIA raised a preliminary, jurisdictional question falling outside the

> Agency's expertise that was, therefore, subject to a different standard of review. Applying such an approach has the capacity to unravel the essence of the decision and undermine the very characteristic of the Agency which entitles it to the highest level of deference from a court — its specialized expertise. It ignores Dickson J.'s caution in [*CUPE*] that courts "should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so".
>
> *If every provision of a tribunal's enabling legislation were treated as if it had jurisdictional consequences that permitted a court to substitute its own view of the correct interpretation, a tribunal's role would be effectively reduced to fact-finding.* Judicial or appellate review will "be better informed by an appreciation of the views of the tribunal operating daily in the relevant field". Just as courts "should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so", so should they also refrain from overlooking the expertise a tribunal may bring to the exercise of interpreting its enabling legislation and defining the scope of its statutory authority. [Emphasis added; citations omitted.]

[20] Genuine questions regarding the boundaries of administrative authority under statute do arise. Administrative bodies must be correct in answering these questions. It is crucial to distinguish, however, between these "true" matters of jurisdiction and the wider understanding of jurisdiction that Dickson J. rebuked in *CUPE*. This point was highlighted by Bastarache and LeBel JJ. in *Dunsmuir* at para. 59:

> Administrative bodies must also be correct in their determinations of true questions of jurisdiction or *vires*. We mention true questions of *vires* to distance ourselves from the extended definitions adopted before *CUPE*. It is important here to take a robust view of jurisdiction. We neither wish nor

> intend to return to the jurisdiction/preliminary question doctrine that plagued the jurisprudence in this area for many years. *"Jurisdiction" is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter.* The tribunal must interpret the grant of authority correctly or its action will be found to be *ultra vires* or to constitute a wrongful decline of jurisdiction. An example may be found in *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485. In that case, the issue was whether the City of Calgary was authorized under the relevant municipal acts to enact bylaws limiting the number of taxi plate licences. That case involved the decision-making powers of a municipality and exemplifies a true question of jurisdiction or *vires*. These questions will be narrow. We reiterate the caution of Dickson J. in *CUPE* that reviewing judges must not brand as jurisdictional issues that are doubtfully so. [Emphasis added; citations omitted.]

[21] David Phillip Jones and Anne S. de Villars offer a helpful analysis of the difference between the "narrow" and "wide" meaning of jurisdiction in their text, *Principles of Administrative Law*, 5th ed. (Toronto: Carswell, 2009) at pp. 140-41:

> In its broadest sense, "jurisdiction" means the authority to do every aspect of an *intra vires* action. In a narrower sense, however, "jurisdiction" means the power to commence or embark on a particular type of activity. A defect in jurisdiction "in the narrow sense" is thus distinguished from other errors – such as a breach of a duty to be fair, considering irrelevant evidence, acting for an improper purpose, or reaching an unreasonable result – which take place *after* the delegate has lawfully started its activity, but which cause it to leave or exceed its jurisdiction.
>
> ...

> It is important to remember that virtually all grounds for judicial review of administrative action depend upon an attack on some aspect of the delegate's jurisdiction (in the wider sense) to do the particular activity in question. Consequently, it is equally important to remember that any behaviour which causes the delegate to *exceed* its jurisdiction is just as fatal as any error which means that it never had jurisdiction "in the narrow sense" even to commence the exercise of its jurisdiction. [Italics in original; footnotes omitted.]

[22] Further guidance in terms of defining exactly what constitutes "true" questions of jurisdiction can be gleaned from the reasons of Abella J. in *VIA Rail*. At para. 91, she cited *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890, at para. 18, for the proposition that "[t]he test as to whether the provision in question is one that limits jurisdiction is: was the question which the provision raises one that was intended by legislators to be left to the exclusive decision of the Board?" In the same paragraph, Abella J. also referred to *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, at p. 1087, where Beetz J. held that "the only question which should be asked [is], 'Did the legislator intend the question to be within the jurisdiction conferred on the tribunal?'"

[23] Thus, the focus is on discerning legislative intent with respect to the scope of a tribunal's authority to undertake an inquiry. This reading is consistent with Bastarache and LeBel JJ.'s observation that "[d]eference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity" (*Dunsmuir* at para. 54), and Abella J.'s conclusion that "[a]

tribunal with the power to decide questions of law is a tribunal with the power to decide questions involving the statutory interpretation of its enabling legislation" (*VIA Rail* at para. 92). It also accords with Jones and de Villars observation at p. 146:

> [A] conscious and clearly-worded decision by the legislature to use a subjective or open-ended grant of power has the effect of widening the delegate's jurisdiction and, therefore, narrowing the ambit of judicial review of the legality of its actions.

[24] Courts should hesitate to analyze the decisions of specialized tribunals through the lens of jurisdiction unless it is clear that the tribunal exceeded its statutory powers by entering into an area of inquiry outside of what the legislature intended. If the decision of a specialized tribunal aims to achieve a valid statutory purpose, and the enabling statute includes a broad grant of open-ended power to achieve that purpose, the matter should be considered within the jurisdiction of the tribunal. Its substance may still be reviewed for other reasons – on either a reasonableness or correctness standard – but it does not engage a true question of jurisdiction and cannot be quashed on the basis that the tribunal could not "make the inquiry" or "embark on a particular type of activity". In contrast, where a tribunal is pursuing an illegitimate objective, or is engaging in actions that clearly defy the limits of its statutory authority, then a reviewing court may properly declare its decisions to be *ultra vires*. These principles are consistent with Abella J.'s reasoning in *VIA Rail* at para. 96:

> It seems to me counterproductive for courts to parse and recharacterize aspects of a tribunal's core jurisdiction... in a way that undermines the deference that jurisdiction was conferred to protect. By attributing a jurisdiction-limiting label, such as "statutory interpretation" or "human rights", to what is in reality a function assigned and properly exercised under the enabling legislation, a tribunal's expertise is made to defer to a court's generalism rather than the other way around.

II. Broad Powers of the OEB

[25] The case law suggests that the OEB's power in respect of setting rates is to be interpreted broadly and extends well beyond a strict construction of the task.

[26] For example, in *Advocacy Centre for Tenants-Ontario v. Ontario Energy Board* (2008), 293 D.L.R. (4th) 684 (Ont. Div. Ct.), the majority of the court held that the OEB had the jurisdiction to establish a rate affordability assistance program for low-income consumers purchasing the distribution of natural gas from the utility. Section 36(3) of the Act states that "[i]n approving or fixing just and reasonable rates, the Board may adopt any method or technique it considers appropriate." In paras. 53-56, the majority noted the breadth of the OEB's rate-setting power when its actions were in furtherance of the statutory objectives:

> [T]he Board is authorized to employ "any method or technique that it considers appropriate" to fix "just and reasonable rates."... the Board must determine what are "just and reasonable rates" within the context of the objectives set

> forth in s. 2 of the *Act*. Objective #2 therein speaks to protecting "the interests of consumers with respect to prices."
>
> ...
>
> [T]he Board in the consideration of its statutory objectives might consider it appropriate to use a specific "method or technique" in the implementation of its basic "cost of service" calculation to arrive at a final fixing of rates that are considered "just and reasonable rates." This could mean, for example, to further the objective of "energy conservation", the use of incentive rates or differential pricing dependent upon the quantity of energy consumed. As well, to further the objective of protecting "the interests of consumers" this could mean taking into account income levels in pricing to achieve the delivery of affordable energy to low income consumers on the basis that this meets the objective of protecting "the interests of consumers with respect to prices."
>
> The Board is engaged in rate-setting within the context of the interpretation of its statute in a fair, large and liberal manner.

[27] The jurisdiction of the OEB was also reviewed in *Enbridge Gas Distribution Inc. v. Ontario Energy Board.* (2005), 74 O.R. (3d) 147 (C.A.). In *Enbridge*, the OEB issued a rule permitting the gas vendor to determine who will bill its customers for the gas they buy from a vendor and for its transportation to them by the distributor. The appellants argued that this rule went beyond the jurisdiction conferred on the OEB by s. 44(1) of the Act, which provides that the OEB may make rules "governing the conduct of a gas distributor as such conduct relates to [a gas vendor]". Goudge J.A. ultimately found that the OEB had the jurisdiction to issue the rule. He endorsed a broad understanding of the Act in paras. 27-28:

> [The appellants] 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. ...
>
> 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. ... 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.

[28] A recent decision from the Divisional Court offers further support for the proposition that the OEB enjoys a wide ambit of power in its rate-setting function. In *Toronto Hydro-Electric System Ltd. v. Ontario Energy Board et al.* (2009), 252 O.A.C. 188 (Div. Ct.), leave to appeal to Ont. C.A. refused, the OEB allocated THESL's net after-tax gains on the sale of three properties to reduce THESL's revenue requirement, and thereby also reduce electricity distribution rates to ratepayers. The court unanimously held that the proper approach to a review of the OEB decision did not involve a "true" jurisdictional analysis as contemplated in *Dunsmuir*. Rather, a reasonableness standard applied because the decision in the case – whether and how the OEB may allocate the net after-tax gains on the sale of properties to reduce THESL's revenue requirement - was squarely within the rate-setting authority of the OEB and went to very core of the OEB's mandate. The court noted the expansive content of the rate-setting power at para. 17:

> An OEB decision may well engage or impact principles of corporate law, given that it regulates incorporated distributors, but the nature of the issue must be viewed in light of the regulatory scheme. While the decision in this case may have the effect of curtailing the appellant's ability to otherwise distribute or invest the net after tax gains from the sale of the properties, the substance of the OEB's decision relates to whether and how to apply those gains in its rate setting formula. Unlike the cases relied upon, this issue directly relates to the OEB's determination of rates and goes to the heart of its regulatory authority and expertise. There is no dispute that the OEB has rate-setting powers under the *OEBA* which are broad enough to encompass the power to determine reduced revenue requirements as a result of the sale of non-surplus assets. Although there is no privative clause, the OEB is a highly specialized expert tribunal with broad authority to regulate the energy sector in Ontario and to balance competing interests. [Citations omitted.]

[29] The present appeal does not engage a "true" question of jurisdiction. As confirmed above, the Act is to be interpreted broadly. It is clear that the legislative intent of s. 78 of the Act is that the OEB have the principal responsibility for setting electricity rates. The Act specifies that in carrying out its responsibilities the OEB *shall* be guided by the objectives in s. 1(1), which include protecting the interests of customers with respect to prices and the adequacy, reliability and quality of electricity service. The Act also permits the OEB in making an order, to impose such conditions as *it* considers proper, and states that these conditions may be general or particular in application (s. 23(1)). Thus, the legislation reflects a clear intent by legislators to use both a subjective and open-ended grant of power to enable the OEB to engage in the impugned inquiry in the course of rate setting.

[30] Further, it is apparent that as part of its rate-setting function, the OEB was entitled to consider the history of THESL's dividend payments. This was part of the inquiry into whether and how to control outgoing cash flows from THESL in order to ensure adequate capital. This line of inquiry goes to the heart of the OEB achieving its statutory objectives. In its reasons, the OEB noted that at the hearing there was considerable discussion of the dividend issue and that information concerning the dividend payouts had been filed. An inquiry into dividend payments was an inquiry that all parties believed was within the OEB's jurisdiction. The "true" nature of the respondent's challenge cannot be characterized as a matter of jurisdiction. Of course, it does not follow that the methods chosen are insulated from review (see Part IV).

III. The *ATCO* Decision

[31] THESL argues that the Supreme Court of Canada's recent decision in *ATCO Gas & Pipeline Ltd. v. Alberta (Energy & Utilities Board)*, [2006] 1 S.C.R. 140, militates in favour of reviewing OEB decisions using a correctness standard. *ATCO* involved an application by ATCO to have the sale of a property approved by the Alberta Energy and Utilities Board as required by the statute. The Board approved the sale and imposed a condition requiring that a certain portion of the sale proceeds be allocated to rate-paying customers. The *Alberta Energy Board Utilities Act* set out that with respect to an order, the Board may "impose any additional conditions that the Board considers necessary in the public interest".

[32] Writing on behalf of three other justices, Bastarache J. divided the inquiry into two questions. The first question was whether the Board had the power pursuant to its enabling statutes to allocate the proceeds from the sale of the utility's asset to its customers when approving the sale. The second question was whether the Board was permitted to allocate the proceeds of the sale in the way that it did. Bastarache J. concluded that the first question was to be reviewed on a correctness standard and the second question was to be reviewed on a more deferential standard.

[33] This case is distinguishable from *ATCO*. The statutory grant of power in *ATCO* to "impose any additional conditions that the Board considers necessary in the public interest" is different than the statutory grant of power in this case. Bastarache J. referred to this provision as vague, elastic, and open-ended. In the present case, the OEB's imposition of a condition it considers proper (s. 23(1)) has to be guided by the legislated objectives set out in s. 1(1). These objectives are not vague, elastic, and open-ended. To the extent that there is uncertainty with respect to the achievement of the s. 1(1) objectives, that is a matter undeniably within the expertise of the OEB. Further, unlike the *ATCO* provision, the objectives in the Act require that the OEB protect the interests of *both* the customer and the utility.

[34] There are four other factors that support distinguishing *ATCO* from this case. First, the decision in *ATCO* reveals that Bastarache J. reasoned that *ATCO* was not a rate-setting case. He noted that the provision granting the power to impose conditions could

not be read in isolation. Rather, he explained that the provision had to be considered within the context of the purpose and scheme of the legislation. Bastarache J. stated that the main purpose of the Board is rate setting. The allocation of the sale proceeds did not fit within the limits of the powers of the Board, which "are grounded in its main function of fixing just and reasonable rates ('rate setting') and in protecting the integrity and dependability of the supply system" (para. 7).

[35] Second, at para. 30, Bastarache J. determined that the Board's protective role - safeguarding the public interest in the nature and quality of the service provided to the community by public utilities by ensuring that utility rates are always just and reasonable - did not come into play. This factor pointed to a less deferential standard of review. In the present case, the OEB's "protective role" was central to the dividend condition.

[36] Third, Bastarache J., viewed the issue in *ATCO* as the Board's power to transfer proprietary rights in the assets of the utility to the customers. In this case, the dividend condition did not result in the transfer of proprietary rights.

[37] Fourth, in giving examples of conditions that could attach to the approval of a sale, Bastarache J. stated at para. 77 that the Board "could also require as a condition that the utility reinvest part of the sale proceeds back into the company in order to maintain a modern operating system that achieves the optimal growth of the system." As will be

explained, the OEB placed the condition on the payment of dividends to ensure that dividends would not be paid when there was insufficient capital for plant maintenance.

IV. Reviewing the Exercise of OEB Jurisdiction: The Reasonableness Standard

[38] Having determined that the OEB did not exceed its statutory grant of power, the question remains whether it could order that the declaration of a dividend requires the approval of the majority of THESL's independent directors. This question is reviewable on a reasonableness standard.

[39] Recently, a reasonableness standard was used by this court in *Natural Resource Gas v. Ontario Energy Board* (2006), 214 O.A.C. 236 (C.A.). The case arose from the application by a gas distributor seeking an order increasing its rate over a 12-month period, in order to allow for the recovery of unrecorded costs which were the result of an accounting error. Writing for the panel, Juriansz J.A. reviewed some of the recent appellate jurisprudence and concluded that reasonableness was the appropriate standard of review as the question was one of mixed fact and law, and also involved policy considerations:

> In two recent decisions, *Graywood Investments Ltd. v. Toronto Hydro-Electric System*, [2006] O.J. No. 2030 (C.A.) and *Enbridge Gas Distribution Inc. v. Ontario (Energy Board)*, [2006] O.J. No. 1355 (C.A.), this court has considered the standard of review of decisions of the OEB.

In *Enbridge*, while the result did not turn on the standard of review, Doherty J.A. did note (at para. 17) that the OEB had advanced a "forceful argument that the standard of review should, at the highest, be one of reasonableness".

In *Graywood*, MacPherson J.A. recognized the expertise of the OEB in general (at para. 24):

> First, the OEB is a specialized and expert tribunal dealing with a complicated and multi-faceted industry. Its decisions are, therefore, entitled to substantial deference.

In order to take this case outside the application of this general conclusion, [the distributor] must establish that the nature of the question in dispute and the relative expertise of the OEB regarding that question are different in this case than in *Graywood.* [At paras. 7-10.]

...

It is clear that the Act constitutes the OEB as a specialized expert tribunal with the broad authority to regulate the energy sector in Ontario. In carrying out its mandate, the OEB is required to balance a number of sometimes competing goals. On the one hand, it is required to protect consumers with respect to prices and the reliability and quality of gas service, but on the other hand, it is to facilitate a financially viable gas industry. The legislative intent is evident: the OEB is to have the primary responsibility for setting gas rates in the province.

The Act does not contain a privative clause. Section 33 provides a right of appeal to the Divisional Court from an order of the OEB "only upon a question of law or jurisdiction". [At paras. 18-19.]

...

While the question does involve the meaning of the phrase "just and reasonable", it requires the application of that phrase to the particular and unusual facts of this case. The question is one of mixed fact and law and involves policy considerations

> as well. The OEB possesses greater expertise relative to the court in determining the question.
>
> Consequently, I conclude that the OEB's decision is reviewable on a standard of reasonableness. [At paras. 23-24.]

[40] The facts of this case do not warrant departure from the reasonableness analysis. In my view, the nature of the OEB decision – structuring a condition that will protect the long-term integrity of THESL's energy infrastructure – falls squarely within the category of "mixed fact and law" with "policy considerations".

[41] One of the reasons given by the majority below for applying a correctness standard was because the case dealt with principles of corporate law. When dealing with a regulated corporation the fact that corporate law principles are at play does not alone suggest a correctness standard of review. Corporate law principles will often be engaged when making decisions in respect of regulated corporations. It is the regulator's duty to use its expertise to apply corporate law principles within the context of its objectives; this implies a reasonableness standard.

V. Is the Decision a Reasonable One?

[42] At para. 47 of *Dunsmuir*, Bastarache and LeBel JJ. described the two inquiries involved in assessing the reasonableness of a decision:

> Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one

> specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. *In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.* [Emphasis added.]

[43] The first inquiry of the reasonableness analysis is into the "existence of justification, transparency and intelligibility within the decision-making process." The second inquiry is "concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of facts and law." Thus, the first inquiry deals with the justification process as articulated in the reasons for the decision and the second inquiry looks at the outcome. As noted in *Dunsmuir*, the reasonableness analysis will concern mostly the first inquiry.

(a) Justification, transparency and intelligibility

[44] The inquiry into the justification, transparency and intelligibility of the decision-making process is focused on the reasons for the decision. In an oft-cited passage from *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, Iacobucci J. at para. 55 articulated the relationship between the reasons of a tribunal and the ultimate reasonableness of its decision:

> A decision will be unreasonable only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived. If any of the reasons that are sufficient to support the conclusion are tenable in the sense that they can stand up to a somewhat probing examination, then the decision will not be unreasonable and a reviewing court must not interfere. *This means that a decision may satisfy the reasonableness standard if it is supported by a tenable explanation even if this explanation is not one that the reviewing court finds compelling.* [Emphasis added; citations omitted.]

[45] Further, as Abella J. explained in *Via Rail* at para. 104:

> Where an expert and specialized tribunal has charted an appropriate analytical course for itself, with reasons that serve as a rational guide, reviewing courts should not lightly interfere with its interpretation and application of its enabling legislation.

[46] And as more recently noted by Binnie J. in *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339, at para. 59:

> Reasonableness is a single standard that take its colour from the context. ... [A]s long as the process and the outcome fit comfortably within the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome.

and at para. 63:

> *Dunsmuir* thus reinforces in the context of adjudicative tribunals the importance of reasons, which constitute the primary form of accountability of the decision-maker to the applicant, to the public and to a reviewing court.

[47] The OEB's reasons provide an intelligible explanation for the condition. The reasons both disclose a concern relating to "prices and the adequacy, reliability and quality" of service and explain how the chosen remedy will help to alleviate this concern.

[48] Before addressing these two elements, it is important to note one factor about the context of the decision. THESL is what has been described as a "regulated monopoly". As Bastarache J. explained in *ATCO* at para. 3, "utility regulations exist to protect the public from monopolistic behaviour and the consequent inelasticity of demand while ensuring the continued quality of an essential service". In other words, the OEB's regulatory power is designed to act as a proxy in the public interest for competition: see *Advocacy Centre for Tenants-Ontario*. Because there is no competition, THESL could easily pass on the expense of business decisions to ratepayers through increased utility prices, or through the degradation of the quality of service, without the usual risk of losing customers. As was explained in para. 39 of *Advocacy Centre for Tenants-Ontario*, "[t]he Board's mandate through economic regulation is directed primarily at avoiding the potential problem of excessive prices resulting because of a monopoly distributor of an essential service."

[49] While THESL is incorporated, as is required by s. 142 of the *Electricity Act*, under the provisions of the *Business Corporation Act*, R.S.O. 1990, c. B.16, ("*OBCA*") it is publicly regulated rather than a private corporation. This distinction is an important one. As Lederman J. noted in his dissenting reasons in the court below at para. 78:

> At the heart of a regulator's rate-making authority lies the "regulatory compact" which involves balancing the interests of investors and consumers. In this regard, there is an important distinction between private corporations and publicly regulated corporations. With respect to the latter, in order to achieve the "regulatory compact", it is not unusual to have constraints imposed on utilities that may place some restrictions on the board of directors. That is so because the directors of utility companies have an obligation not only to the company, but to the public at large.

[50] The principles that govern a regulated utility that operates as a monopoly differ from those that apply to private sector companies, which operate in a competitive market. The directors and officers of unregulated companies have a fiduciary obligation to act in the best interests of the company (which is often interpreted to mean in the best interests of the shareholders) while a regulated utility must operate in a manner that balances the interests of the utility's shareholders against those of its ratepayers. If a utility fails to operate in this way, it is incumbent on the OEB to intervene in order to strike this balance and protect the interests of the ratepayers.

[51] The decision reveals that the OEB was concerned about the aging plant and the lack of necessary capital. At the hearing it was argued that there appeared to be underinvestment in the physical plant over the past several years (para. 4.4.1). Evidence was presented that 30 to 40 per cent of the plant in service had exceeded its expected life (para. 4.5.3). The Board concluded that increased capital spending was required to address the issues of the aging plant (para. 4.7.1) and to maintain system reliability (para. 4.10.8).

[52] However, despite the need for capital, the evidence was that there was a very dramatic increase in the dividend payouts in 2004 and 2005. As the OEB noted at para. 6.4.1, "[t]he level of dividends appears to be greater than the net income of the utility over at least a two year period." At para. 6.4.4 the OEB explained why these events were of concern:

> The question arises as to whether the Board should restrict the dividend payout by the utility. To the extent a utility pays all of its retained earnings to the shareholder, it will become more dependent on borrowing and this may have an adverse effect on its credit rating.

[53] In sum, the OEB was concerned because THESL was paying THC very large dividends even though increased capital spending was going to be needed to maintain system reliability. THESL was either going to ignore its aging infrastructure or have to borrow funds to address it. Both courses of conduct would ultimately, as the OEB explained, have adverse effects on ratepayers. Lederman J. effectively summarized these circumstances at paras. 80 and 85:

> The setting of rates will accomplish little in terms of public protection if the revenue can be stripped out of the company without any controls.
>
> ...
>
> The OEB had evidence before it that THESL was paying increased dividends and an above market rate of interest while it was under investing by about $60 million in its capital expenditures. The OEB noted that if a utility like THESL was to pay all its retained earnings to its shareholder,

> this could adversely impact its credit rating, which in turn, could cause higher costs and degradation in service to electricity consumers.

[54] The OEB also explained how it reached the conclusion that an appropriate response to the concerns raised by the substantial dividend payouts, was to require that any dividend paid by THESL be approved by a majority of its independent directors.

[55] At the time of the hearing, the composition of the board of directors of THESL was identical to the THC. The reasons reveal that the OEB was very concerned about the about the relationships between THESL, THC, and the City. For example, at para. 3.2.3 the OEB questioned the percentage of THC's costs recovered from THESL:

> It is readily apparent to the Board that allocating these costs based on gross revenues produces an unwarranted bias against the ratepayers. The revenues of the utility are inflated by the high cost of wholesale power. That is an ever increasing amount. Because these costs are increasing, it does not follow the utility's share of the overhead costs should be increasing. In short, there is no necessary relationship between the revenue share and the share of overhead cost.

[56] The reasons also discuss the above-market interest rate THESL was paying the THC on a loan (s. 5.3), as well as the purchase of the City's street lighting business (para. 6.4.3). According to the OEB, the above-market interest rate resulted in THESL paying approximately an additional $16 million per year which was being borne by the ratepayers. Amplifying the concern was the City's decision after the hearing, but before the decision was released, to extend the loan to 2013. This led the OEB to note at para.

5.3.8, it is "apparent that the financing decisions are being made unilaterally by the City, which is the sole shareholder of the utility."

[57] With respect to dividends, as already noted, the OEB was concerned about the very dramatic increase in the dividend payouts in 2004 and 2005. At para. 5.3.18 the OEB stated:

> *Nor is it any defence to say this is not a decision of the utility but is being made unilaterally by the City of Toronto. That is exactly the problem. In fact it could be argued that this is part of a pattern.* The City has extracted extensive dividends from this utility in recent years. It is likely one of the rare occurrences in Canadian financial markets where the level of dividends exceeds the net income. [Emphasis added.]

[58] Moreover, the OEB was aware of a change in a shareholder direction and the payment of special dividends. These facts are referred to in para. 6.4.2:

> At one time, there was a shareholder direction that limited the dividend payout to 40% of the utility's income, but that was changed to 50% of consolidated income. Moreover, it appears that were special dividends over and above that amount.

[59] Thus, the OEB was of the opinion that one of the reasons for the THESL's unusual dividend payouts was the THC's, and ultimately the City's, control over THESL's decision making. The OEB explained at paras. 6.4.5 and 6.4.6 of the decision:

> A related question is the independence of the directors. The evidence in the hearing is that the directors of the utility and the parent, Toronto Hydro Corporation are currently identical.

> And none of the members of management are to be on the Board. This is an unusual situation.
>
> There is a requirement that at least one third of the directors of the distributor must be independent but that rule will not apply to this utility until July 1, 2006. In the course of these hearings the utility has confirmed that it will comply with the requirement and at that time, the independent directors will be appointed.

[60] Concern about affiliate transactions is not unique to THESL. The decision notes that there is extensive jurisprudence in gas cases with respect to transactions between a regulated utility and an affiliate (para. 5.3.17). The OEB has also established the *Affiliate Relationship Code for Electricity Distributors and Transmitters* ("*ARC*") with a separate compliance procedure to guard against harm to ratepayers that may arise as a result of dealings between a utility and its affiliates. One of the provisions of the *ARC* required that one third of the board of directors of a distributor be independent from any affiliate by July 1, 2006. It is evident that independence is viewed as a guard against harmful decisions that arise as a result of dealings between a utility and its affiliates.

[61] Following this line of reasoning, the Board concluded at paras. 6.4.7 to 6.4.9 that the condition was needed to balance the interests of *both* the customer and the shareholder:

> Given the unusual high level of dividend payout and the concern expressed by a number of parties, the Board believes that it is appropriate that any dividend paid by the utility to the City of Toronto should be approved by a majority of the independent directors.

> Much of the controversy in this case has been dominated by discussion about non arms length transaction between the utility and the City of Toronto, whether it relates to dividend payouts, payment of interest on loans or the purchase of goods and services. *The introduction of independent directors will be a step in the right direction. The requirement that independent directors approve dividend payouts to affiliates will give the public greater assurance that the interests of ratepayers are not subservient to those of the shareholders.* The Board believes this is in keeping with the policy intent of Section 2 of the ARC.
>
> This provision will be reviewed by the Board in the next rate case. At a minimum it will signal the Board's serious concern with the state of inter-affiliate relations. [Emphasis added.]

[62] For the reasons set out above, this was a reasonable decision.

(b) Acceptable Outcomes

[63] To reiterate, the second inquiry in a reasonableness analysis is that the decision fall "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." It is in this part of the analysis where, in my opinion, this court should address THESL's argument that the imposed condition violated corporate law.

[64] THESL argued at the Divisional Court, and argues before this court, that the OEB order was contrary to settled principles of corporate law that the directors of a public company cannot delegate their power to declare dividends. Section 127(3)(d) of the *OBCA* confirms this prohibition by expressly excluding any delegation of the board of directors' power to declare a dividend from the general rule permitting delegation to a managing director or committee of directors.

[65] The OEB submits that the authority to approve dividends was not taken away from the directors. Approval by the entire board is still required before a dividend can be issued. The independent directors are simply an additional check on the authority of the full board. The OEB also relies on s. 128(1) of the Act which provides that, "[i]n the event of a conflict between this Act and any other general or special act, this Act prevails."

[66] The majority judgment below accepted THESL's argument, and found that the OEB had effectively delegated the power to declare dividends to the majority of the independent directors contrary to the *OBCA* and long-standing corporate law principles.

[67] In dissenting reasons, Lederman J. accepted the submission of the OEB – that the order leaves the discretion to declare a dividend in the hands of THESL's directors, albeit with an additional check by THESL's independent directors.

[68] In the context of a regulated corporation, I agree with Lederman J. As he explained at para. 81, "the OEB has crafted a reasonable and less intrusive remedy that balances the interests of THESL's shareholder and its ratepayers and is consistent with the 'regulatory compact'."

CONCLUSION

[69] For these reasons, I would allow the appeal, set aside the order of the Divisional Court and in its place make an order in accordance with these reasons. In the circumstances, I would not order costs.

RELEASED: April 20, 2010 "KF"

"J. MacFarland J.A."
"I agree K. Feldman J.A."
"I agree S.E. Lang J.A."