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12 July 2013

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
2300 Yonge Street
Suite 2700, P.O. Box 2319
Toronto, Ontario
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Dear OEB Members:

Re: Written Submissions on behalf of Nishnawbi Aski Nation
NAN re: HORCI 2013 RATE APPLICATION / EB-2012-0137
DMC File No.: 10068

Further to the Board's Procedural Order No. 3 (dated 28 June 2013), please find herein the written submissions of the Nishnawbe Aski Nation ("NAN") in respect of the Notice of Application from Hydro One Remotes Communities Inc. ("Remotes") which is EB-2012-0137.

Among other reasons, NAN requested intervenor party status in this proceeding because the NAN communities served by Remotes have a direct interest in Remotes' rate increase application. NAN residents will be directly and adversely affected by the proposed 3.45% rate increase for the year 2013.

Further, given the financial pressures facing NAN communities, which has received considerable media coverage during the past year, any increase in the cost of living in such communities will be significant.

The viability of many NAN communities, and the ability of their residents to obtain a reliable and affordable source of electricity to meet their community and individual needs, is therefore raised by Remotes' rate increase application.

The position of Remotes in this proceeding appears to be that (a) once a rate increase percentage has been established for grid-connected communities in Ontario, that percentage should be used for communities in diesel-dependent communities and (b) the Board should be approving the proposed increase in a *pro forma* manner.

NAN submits that such an approach, especially for residential consumers in the most economically disadvantaged communities in the province, would be unjust and unreasonable, and inconsistent with the Divisional Court decision in *Advocacy Centre for Tenants-Ontario v. Ontario Energy Board* (25 February 2008) ("*Advocacy Centre* decision"), a copy of which has been provided with this letter.

Remotes' proposed rate increase for remote community customers

In its application, Remotes is "proposing to increase rates to the average customer in its service territory by 3.45%, the average increase for grid-connected customers approved by the Board in 2011."

NAN's Proposal that the rate increase be limited to two per cent (2%) for residential customers

NAN submits that the proposed rate increase for *residential* customers should be limited to two per cent (2%) rather than the 3.5% proposed by Remotes in its Application, for the reasons outlined below.

Recent Decision in EB-2011-0211

On December 23, 2010, Remotes filed an application with the Board seeking exemptions from specific provisions in the Distribution System Code ("DSC"), some of which granted special protection to low-income energy consumers.

In its submission to the Board, which had delegated authority to Counsel, Special Projects (per Ms. Jennifer Lea) to make the decision on the application, NAN pointed out that granting the requested exemptions to Remotes would result in unfairness to residential customers in NAN communities.

Specifically, residents in NAN communities would face stricter rules relating to the payment of arrears and the disconnection and reconnection of electrical service, and the alternative procedures proposed by Remotes would potentially interfere with the ability of low-income customers to obtain financial assistance under the Board's approved Low-Income Energy Assistance Plan ("LEAP"). By way of example, NAN showed how the alternative and stricter arrears payment rules proposed by Remotes could create barriers to eligibility under LEAP.

In its decision, Counsel to the Board exempted Remotes from having to comply with the provisions in the DSC which were the subject matter of Remotes' application.

The net result for low-income and other customers in NAN communities is that they now face more stringent rules relating to the repayment of arrears compared to every other residential customer in Ontario.

It is against this background that Remotes is now requesting that customers in remote communities, many of whom are low-income, should be subject to a rate increase which is based on the increase which other, more fortunate customers in the province have been ordered by the Board to pay.

As noted below, Remotes is making its request for a 3.45% rate increase in circumstances where the principles of "cost causality" in setting rates cannot be said to apply to remote communities because the cost of generating and distributing electricity in such communities is supported by rural and remote rate assistance under section 79 of the *Ontario Energy Board Ac, 1998*..

In NAN's respectful submission, it appears that the *benefits* of arrears protection enjoyed by more financially capable energy consumers in Ontario have been denied to NAN residents, while Remotes is asserting that the *burdens* for NAN residents should be the same as wealthier residential customers in the province who enjoy connection to the grid.

Reasons in support of the proposed two per cent (2%) limit in the increase for residential customers in Remote communities

The reasons in favour of restricting the proposed rate increase for residential customers of Remotes to two per cent (2%) instead of the 3.45% proposed by Remotes are as follows:

1. The Ontario Divisional Court has confirmed that the Board has jurisdiction to take into account the "ability to pay" in setting utility rates: (*Advocacy Centre* decision, p. 12). This important decision confirmed the Board's jurisdiction to take into consideration broader social and economic factors in setting acceptable rate increases for a given class of utility customers.

2. Further, the mandate of the Board in considering rate increases is a broad one under the *Ontario Energy Board Act, 1998* because the Board is charged under s. 2 with protecting "the interests of consumers with respect to prices…" (*Advocacy Centre* decision, p. 8).

3. Under s. 79(1) of the *Act*, the Legislature has directed the Board, in approving just and reasonable rates for a distributor who delivers electricity to rural or remote consumers, to *provide rate protection for those consumers or prescribed classes of those consumers by reducing the rates that would otherwise apply in accordance with the prescribed rules.* Given the broad mandate enjoyed by the Board in setting rates, it is submitted that the Board is *not* bound to follow previous rate increase decisions which it has made for grid-connected consumers.

   The RRRP regime was set up to recognize that certain electricity consumers in Ontario are in different circumstances than most grid-connected consumers and rate-related assistance for the former is necessary to ensure that everyone in the province has access to reliable and affordable electricity.

4. In previous decisions, the Divisional Court has emphasized that the Board's mandate to fix just and reasonable rates "is unconditioned by directed criteria and is broad; the board is expressly allowed to adopt any method it considers appropriate" (*Natural Resource Gas Ltd. v. Ontario Energy Board,* [2005] O.J. No. 1520 at para. 13 (Div. Ct.), as quoted on p. 8 in *Advocacy Centre* decision).

5. With respect to Remotes' provision of electrical service in the twenty-one (21) remote communities that it serves, Remotes is a monopoly distributor of that service. The role of Remotes as a utility is even more crucial because many remote communities, particularly NAN communities, lack alternative sources of energy such as natural gas, wind turbines,

hydro-electric sources, and solar energy. Further, gasoline and other fossil fuels are always in short supply and prohibitively expensive in NAN communities.

In such circumstances, the Board should exercise its mandate to protect consumers from rate increases because of the need to avoid excessive prices resulting from monopoly distribution of an essential service, by recognizing that remote communities are more heavily dependent on electricity to meet their energy needs than most other communities in the province;

6. Although the common, if not universal, historical feature of rate-making for a natural monopoly is the application of the same charges to all consumers within a given consumer classification based upon cost of service (i.e. cost causality), those factors cannot be said to play a significant role in Remotes' operations. The Divisional Court has noted that the traditional approach of the Board has been to set rates on a "cost of service" basis, by employing a complex cost allocation exercise:

> In brief, this approach first looks to the utility's capital investments and maintenance costs including a fair rate of return to determine revenues required. The revenue requirement is then divided amongst the utility' rate paying customers on a rate class basis (i.e. residential, commercial, industrial, etc.) (*Advocacy Centre* decision, p. 9)

However, it should be obvious to the Board that recovery of the "cost of service" is not the basis on which Remotes generates and distributes electricity to diesel-generated communities. Nor does it appear to be part of Remotes new role as a transmitter of electricity (e.g. to Cat Lake First Nation).

Indeed, Remotes' repeated assertion in its application materials that it is a "break even business" is a misnomer. The fact is that approximately two-thirds of Remotes capital funds and operating revenue comes from the RRRP. Given that funding for Remotes' operations is largely external and independent of its own operations, Remotes cannot accurately state that it operates on a "break even" basis. Its actual customer revenues account for a small portion of the annual capital and operational funds required to generate, transmit, and distribute electricity to remote communities (See *Advocacy Centre* decision, p. 2 on the issue of "cost causality" generally).

7. The Divisional Court has suggested that the rate protection which is afforded by the RRRP renders the "cost of service" or "cost causality" approach inappropriate to the analysis of rate increases in remote communities. In the *Advocacy Centre* case, the Court stated that " 'rate protection' through s. 79 [of the *Ontario Energy Board Act, 1998*] operates as a subsidy paid by some of Ontario's residential electricity customers for the benefit of others and represents a departure from the principle of cost causality being applied on the same basis to all consumers within a given class (i.e. residential, commercial, and industrial)." (*Advocacy Centre* decision, p. 7).

8. Although the Divisional Court agreed that the traditional approach of "cost of service" had been the root principle underlying the determination of rates by the Board, the Court stated as follows:

> However, the Board is authorized to employ "any method or technique that it considers appropriate" to fix "just and reasonable rates". Although "cost of service" is necessarily an underlying fundamental factor and starting point to determining 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 "interests of consumers with respect to prices" (*Advocacy Centre* decision, p. 11)

9. Perhaps more importantly, the Divisional Court confirmed as follows:

> 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." (*Advocacy Centre* decision, p. 11)

10. In its interrogatories, NAN requested Remotes to confirm whether it had performed a deductive analysis based on its estimated budgetary needs, looking at the available sources of funding other than rate increases for the customers which it serves and then calculating the percentage increase from its customers that would be required for Remotes to meet the budget it had put together.

    Stated in a different manner, Remotes was asked to advise to what extent it had simply adopted the 3.45% average increase for grid-connected customers approved by the Board in 2011 and then built its financial and budgetary analysis around the increased rate contribution it intended to obtain from its customers (NAN Interrogatory #1, List 1).

    Remotes' response to these interrogatories was instructive as far as any "cost of service" or deductive analysis based on shortfalls in its budgetary needs were concerned. Remotes advised that since "Remotes customers do not pay rates based on the cost of service, Remotes did not base the proposed rate increases on its revenue requirements."

    Further, Remotes confirmed that it had "not built its budget around the proposed 3.45% increase to its customer rates." Instead, Remotes had "built it financial plan based on the required levels of investment to meet its strategic goals and to mitigate risk associated with financial, operational, environmental, safety, regulatory and legal considerations."

    Remotes' decision to request a 3.45% increase for residential customers has nothing to do with financial or cost of service imperatives. It is, in fact, a percentage which has simply been adopted arbitrarily on the basis that residential customers in remote communities, which are some of the poorest communities in the province, should be subject to the same rate increase as customers elsewhere in Ontario which the Board approved in 2011.

    NAN submits that the answers provided by Remotes make it clear that, in this case, the Board should exercise broad discretion in determining the appropriate rate increase for residential customers in remote communities and the Board should consider the challenging financial circumstances facing most residential customers in remote communities. NAN communities are comprised principally of residents who qualify as

low-income consumers, unemployment rates are extremely high, and most residences are dependent on electricity for lighting, cooling *and* heating in a climate that can be very inhospitable.

In NAN's respectful submission, Remotes' application ignores the broad mandate of the Board to protect the interests of energy consumers in Ontario, as well as the Divisional Court's confirmation that the Board may employ *any method or technique in determining the rate increase which may be appropriate*. That mandate includes considering the challenging economic circumstances faced by low income customers when electricity rates are being set.

The Board is also aware that the decision in *Advocacy Centre* laid the foundation for the establishment of LEAP in Ontario and for significant amendments to the DSC to protect customers, especially low-income customers, in Ontario.

11. As a result of the Settlement Agreement (dated 17 June 2013) which was reached between the parties to this Application, the total revenue requirement of Remotes to run its operations during 2013 was reduced from $53,143,000 to $50,820,000, a savings of $2,323,000. Prior to the intervenor parties and Remotes agreeing on the terms in the Settlement Agreement, the bulk of the additional $2,323,000 would have been obtained from the RRRP because it is the most significant source of funds for Remotes' operations in any given year.

    NAN submits that the savings realized from the settlement process are more than sufficient to justify restricting the rate increase for residential customers to the two per cent (2%) being requested by NAN instead of the 3.45% identified in Remotes' application.

    Given these cost savings, Remotes is not in a position to complain that a rate increase of two percent (2%) instead of 3.45% for residential customers would cause any financial hardship to Remotes in meeting its obligations in serving remote communities. Further, in obtaining exemptions from the DSC in EB-2011-0211, which will have the impact of imposing stricter arrears payment requirements on NAN residents, Remotes has confirmed that it will spend considerably less in providing service to remote communities than it would have otherwise spent if compliance with the DSC provisions had been required.

    Despite the realization of substantial cost savings from the settlement process in the within application, and in EB-2011-0211, Remotes has steadfastly maintained that a 3.45% rate increase for residential customers is warranted-- simply because that rate increase has been approved by the Board previously for grid-connected customers.

    NAN submits that such an approach would not result in just or reasonable rates or rate increases being imposed on residential customers in remote communities.

12. Remotes has advised in answer to an interrogatory from NAN that the "proposed increase to customer rates will increase Remotes' revenues from its existing customers by $343,000. Over a full year, the proposed rate increase would increase revenues from existing customers by approximately $517,000".

Presumably, this figure represents the total additional revenue which would be obtained from *all* customer classes in remote communities. The percentage and amount accounted for by residential customers, therefore, would be considerably less than the annualized amount of $517,000.

As noted above, the additional revenue required to support and justify a two per cent (2%) rate increase can easily be found in the cost savings of $2.3 million realized from the settlement process involving the parties.

Remotes is in the best position to determine the amount of additional revenue required to supplement the proposed revised budget of $50,820,000 in order to restrict the proposed rate increase for residential customers to two per cent (2%). The increased revenue from the RRRP based on a revised $50,820,000 budget would not be significant. It would likely be somewhere in the range of $200,000. However, Remotes is in the best position to determine the dollar amount represented by the differential between a 3.45% increase and a 2% increase for residential customers only.

In its interrogatories, NAN noted that, after the Board had approved the 2009 rate increase application from Remotes (EB-2008-0232), the actual OM&A costs of Remotes were almost $6,000,000 lower than Remotes had estimated in that OEB proceeding. Because the proposed rate increase in that proceeding had been justified in part by the estimated $36,020,000 budget for Remotes, NAN asked whether any *rebate* had been paid to Remotes' customers when the subsequent expenditures of Remotes only proved to be $30,125,000. NAN also stated that if no rebate had been provided, it wanted Remotes to explain why that had been the case (NAN Interrogatory #13, List 1).

Remotes confirmed that no rebate had been given to its customers when its budgetary expenditures had proven to be substantially lower than the budget which the Board had approved. Instead, Remotes simply repeated its basic position that it believed that "basing its customers increases on the Ontario LDC average" was "equitable". Remotes also stated that fuel and transportation costs in remote communities were "inherently volatile" and that Remotes did "not want to set a precedent whereby 100% of the volatility of its costs is borne by its customers".

Of course, the answer provided by Remotes about the volatility of fuel and transportation costs was not responsive to NAN's request for an explanation as to why no rebate had been given to Remotes' customers. The fact is that, in 2009, the rate increase imposed on all customer classes served by Remotes ended up playing a more significant revenue role for that generator/distributor when the actual expenditures of Remotes proved to be $30,000,000 instead of $36,000,000.

13. If Remotes can simply rely on the average increase for grid-connected customers (previously approved in other proceedings before the OEB) to determine the increase for residential customers in diesel-dependent communities, then obtaining the evidence and submissions of intervenors will have proven to be illusory and unnecessary. The transparency and the true purpose of the application process will also be undermined.

14. NAN respectfully reminds the Board that the First Nations remote communities served by HORCI are unique in Ontario. The effect of rate increases on families and communities is much more profound than would be experienced in other Ontario communities. These

communities and their people exist on fixed budgets. In these communities, public budgets as they relate to services and infrastructure have been capped at a 2% growth rate since the mid 1990's even though the actual annual growth rate in many communities has been significantly higher. To make matters worse, in the most recent federal budgets, there have been *net reductions* in funding for service and infrastructure programs. The fiscal realities of these communities and their people are simply not the same as those in other Ontario communities.

15. NAN also submits that affordable electrical energy is fundamental to the provision of services such as sewage treatment, clean water, policing, medical treatment and education, and to the operation of local government to administer those services. The 3.45% rate increase proposed by Remotes for residential customers, unsupported by an increase in income to the families and householders, can only make financial hardship more significant while diminishing their quality of life.

All of which is respectfully submitted on behalf of NAN.

Yours very truly,
Barrister & Solicitor

Douglas M. Cunningham **[Electronic signature]**

Douglas M. Cunningham
DMC/am

c: Grand Chief Harvey Yesno (NAN)
c: Deputy Grand Chief Les Louttit
c: Anna Maciel (DMC's Legal Assistant)

COURT FILE NO.: 273/07
DATE: 20080516

ONTARIO
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

KITELEY, CUMMING, AND SWINTON JJ.

B E T W E E N:	
ADVOCACY CENTRE FOR TENANTS-ONTARIO and INCOME SECURITY ADVOCACY CENTRE on behalf of LOW-INCOME ENERGY NETWORK	***Paul Manning*** and ***Mary Truemner***, for the Appellant
Appellant	
- and -	
ONTARIO ENERGY BOARD	***Michael Miller***, for Ontario Energy Board
Respondent	***Fred Cass*** and ***David Stevens,*** for Enbridge Gas Distribution Inc.
	Robert Warren, for Consumers Council of Canada
	HEARD at Toronto: February 25, 2008

KITELEY and CUMMING JJ.

The Appeal

[1] The Respondent Ontario Energy Board (the "Board") is the provincial economic regulator for the natural gas and electricity sectors. The Board exercises its jurisdiction within the statutory authority established by the Legislature, being the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Schedule B (the "*Act*").

[2] By a majority (2:1) decision dated April 26, 2007, the Board determined that the *Act* does not explicitly grant to the Board jurisdiction to order the implementation of a low income affordability program: *Enbridge Gas Distribution Inc.* (April 26, 2007), EB-2006-0034 (Ont. Energy Bd.) (the "Board Decision"). The Board also found that the Board does not gain the requisite jurisdiction through the doctrine of necessary implication.

[3] Enbridge Gas Distribution Inc. ("EGD") sought approval by the Board of EGD's 2007 gas distribution rates based simply upon the Board's traditional, standard "cost of service" rate-making principles. The Appellant Low Income Energy Network ("LIEN") had intervened in the application before the Board. LIEN argues that without a rate affordability program, the interests of low-income consumers are not protected. LIEN proposed that the Board accept as an issue in the EGD 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 such a program be funded? How should eligibility criteria be determined? How should levels of assistance be determined?

[4] LIEN seeks from the Board the introduction of a rate affordability assistance program to make natural gas distribution rates affordable to poor people. The underlying premise of the proposal of LIEN is that low income consumers (estimated to be about 18% of households in Ontario) should pay less for gas distribution services than other consumers. LIEN emphasizes that the supply of natural gas (or other source of energy) serves to meet basic human needs such as warmth from heating and the generation of power. Those who cannot afford to use natural gas as a source of energy may be placed at a significant disadvantage. LIEN submits that 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 is arguably such a concern. The supply of natural gas can be considered a necessity that is available from a single source with prices set by the Board in the public interest.

[5] The majority of the Board held that the LIEN proposal amounted to an income redistribution scheme. The Board noted that such a scheme would require a consumer rate class based upon income characteristics and would implicitly require subsidization of this new class by other rate classes. It is undisputed that a common, if not universal, historical feature of rate-making for a natural monopoly is the application of the same charges to all consumers within a given consumer classification based upon cost of service, that is, cost causality.

[6] Section 33 of the *Act* provides for an appeal to this Court on a question of law or jurisdiction. LIEN seeks a declaration that the Board has the jurisdiction to order a "rate affordability assistance program" for low income consumers of the utility, EGD, within its franchise areas as the distributor of natural gas.

[7] The position of EGD, the Board and the intervenor, the Consumers Council of Canada, is that LIEN's quite understandable and commendable concern is an issue of public policy to be dealt with by the Legislature and falls outside the jurisdiction of the Board.

The Standard of Review

[8] The issue is whether the Board is correct in its determination that it does not have jurisdiction to implement a low income affordability program.

[9] There is common ground that the standard of review is correctness. That is, this Court will interpret the statutory grant of authority on the basis of its own opinion as to a statute's construction, rather than deferring to the Board's determination of the issue. A tribunal's determination that it has no jurisdiction will be set aside as a "wrongful declining of jurisdiction" if the Court is of the view that the tribunal's decision is wrong. Donald J.M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada*, looseleaf (Toronto: Canvasback Publishing, 1998) at 14-3 to 14-4.

Analysis of the Board's Jurisdiction

A. Applicable Principles

[10] The Court is to be guided by the principles of statutory interpretation as set forth in Ruth Sullivan, *Driedger on the Construction of Statutes*, 3rd ed., (Toronto: Butterworths, 1994) at 131:

> There is only one rule in modern interpretation, namely, courts are obliged to determine the meaning of legislation in its total context, having regard to the purpose of the legislation, the consequences of proposed interpretations, as well as admissible external aids. In other words, the courts must consider and take into account all relevant and admissible indicators of legislative meaning. After taking these into account, the court must then adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is its compliance with the legislative text; (b) its efficacy, that is, its promotion of the legislative purpose; and (c) its acceptability, that is, the outcome is reasonable and just.

[11] The words of the *Act* are to be read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme and object of the legislation and the Legislature's intent. *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, [2006] 1 S.C.R. 140 at para. 37 [*Atco*].

[12] The statute shall be interpreted as being remedial and given such "fair, large and liberal interpretation as best ensures the attainment of its objects." *Legislation Act*, S.O. 2006, c. 21, Schedule F, s. 64 (1).

[13] A statutory administrative tribunal obtains its jurisdiction from two sources: explicit powers expressly granted by statute, and implicit powers by application of the common law doctrine of jurisdiction by necessary implication. *Atco*, *supra*, at para. 38.

[14] The Court must apply a "pragmatic or functional" analysis in determining the issue of jurisdiction, by considering the wording of the *Act* conferring jurisdiction upon the Board, the purpose of the *Act* creating the Board, the reason for the Board's existence, the area of expertise of its members and the nature of the problem before the Board. *Union des employés de Service, local 298 v. Bibeault,* [1988] 2 S.C.R. 1048 at 1088.

B. The Wording of the Act

[15] Section 36 of the *Act* confers the Board's jurisdiction:

> **36.** (1) No gas transmitter, gas distributor or storage company shall sell gas or charge for the transmission, distribution or storage of gas except in accordance with an order of the Board, which is not bound by the terms of any contract.
>
> ....
>
> (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.
>
> (3) In approving or fixing just and reasonable rates, the Board may adopt any method or technique that it considers appropriate.

[16] LIEN submits that the Board's authority to fix "just and reasonable rates" by adopting "any method or technique it considers appropriate", conferred by s. 36 (2) and (3) of the *Act* is very broad and the statutory language must be given its ordinary meaning.

[17] The Board argues that the word "rates" is in the plural form in s. 36 (2) to allow the Board to set different rates for different classes of consumers based upon the costs of serving those consumers. For example, large industrial users are typically considerably more expensive to serve than residential consumers. Separate rate classes are a necessity to ensure that consumers reimburse for the actual costs of the service they receive.

[18] The majority opinion in the Board Decision is of the view that the words "any method or technique" cannot reasonably be interpreted 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." (p.9)

[19] The phrase "approving or fixing just and reasonable rates" in the present s. 36 (2) was first introduced by s. 17 (1) of Bill 38, *An Act to Establish the Ontario Energy Board*, 1st Sess., 26th Leg., Ontario, 1960 by the then Minister of Energy Resources, the Hon. Robert Macaulay. He outlined for the Legislature the philosophy underlying rate setting (*Legislature of Ontario Debates*, 9 (8 February 1960) at 199 (Hon. Macaulay)):

> First, why are there rate controls? There are rate controls because, in effect, the distribution of natural gas is a monopoly, a public utility. Secondly...it is fair that whatever rate is charged should be one designated, not only in the interests of the consumer, but also in the interests of the distributor...[O]ne really should have in mind 3 basic objectives: First, the rate should be low enough to secure to the user a fair and just rate. Second, the rate should be adequate to pay for good service and replacement and retirement of the used portion of the assets. Third, it should be high enough to attract a sufficient return on capital....

[20] He went on to explain the purpose of the Government's policy (at 205):

> "[F]irst, to protect the consumer, and to see that he pays a fair and just rate, not more or less, and that is competitive with other fuels. Second, to make sure the rate is sufficient to provide adequate service, replacements and safety for the company providing the service. Third, it is that the company should be able to charge a rate which is sufficient to attract the necessary capital to expand.

[21] The present s.36 (3) replaced s.19 of the old *Ontario Energy Board Act*, R.S.O. 1980, c. 332, which required a traditional cost of service analysis in very 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 ...is reasonable.
>
> The rate base ...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.

[22] The authority was granted in s. 36 (3) to use "any method or technique it considers appropriate" in approving "just and reasonable rates" i.e., employing methods other than simply on a traditional cost of service basis as proscribed in the repealed s. 19 to set rates for the gas sector. This aligned the approach for natural gas with the non-prescriptive authority seen governing Ontario Hydro as a Crown corporation in rate setting for electricity distributors.

[23] Thus, under the former *Act* the phrase "just and reasonable rates" was limited to the cost of service basis articulated in prescriptive detail in s. 19. The change in repealing s. 19 and allowing the Board to "adopt any method or technique it considers appropriate" provides greater flexibility to the Board to employ other methods of rate making in approving and fixing "just and

reasonable rates" rather than simply the traditional cost of service regulation seen in the former s. 19.

[24] Subsection 36 (3) allows the Board to adopt "any method or technique that it considers appropriate" in fixing "just and reasonable rates." The majority Board Decision view is that this provision, considered within the context of the *Act* as a whole, allows the Board to employ flexible techniques and methods for cost of service analyses in determining rates, for example, the incentive rate mechanisms currently used for the major gas utilities.

[25] In the same rate setting proceeding that is under review, EGD reportedly asked the Board to approve two fuel-switching programs to enable residential consumers to shift from electric-water heaters to gas-water heaters, given that the latter promote conservation inasmuch as there is greater energy efficiency. The programs are identical except that there is a subsidy offered for the low income group of $800 per participant but a subsidy of only $600 for other consumers. Vice Chair Kaiser in dissenting points out that none of the parties have objected to this proposal and no one has argued that the Board does not have jurisdiction to approve different subsidies based upon income levels.

[26] Indeed, the majority opinion in the Board Decision allows that the Board has ordered that specific funding be channeled aimed at low income consumers for "Demand Side Management Programs."

[27] As well, the Board on occasion has reduced a significant rate increase because of so-called "rate shock" by spreading the increase over a number of years. Although this does not in itself suggest an unequal approach as between residential consumers it does indicate that the Board considers it has jurisdiction to take "ability to pay" into account in rate setting.

[28] EGD, like other utilities, makes annual contributions to enable emergency financial relief through the so-called "Winter Warmth Program" which provides funds as a subsidy to some low income consumers, enabling them to be able to heat their homes in winter months. These subsidies are taken into account as costs of the utility in the approval and fixing of rates by the Board. Although the program is funded by all consumers, to some extent there is indirect cross-subsidization within the residential consumer class.

[29] The Board points out that this is a relatively small program in the nature of a charitable objective, involving the United Way, which is specific to individual consumers in a financial crisis situation. But the fact remains that its implementation means that some residential consumers are paying less for the distribution and purchase of natural gas than other residential consumers are paying. If the Board has jurisdiction to approve utilities paying subsidies to the benefit of low income consumers then it arguably has jurisdiction to order utilities to provide special rates on a low income basis.

[30] Section 79 of the *Act* explicitly authorizes the Board to provide rate protection for rural or remote consumers of an electricity distributor. The majority decision argues that it is a reasonable inference that the Legislature, by virtue of the explicit singling out of a single

category of consumers in s. 79, did not intend this benefit to apply to other categories of consumers. The Board argues that if s. 36 (2) and (3) are intended to allow for differential rate setting for subsets of residential consumers, then s. 79 is unnecessary. The majority decision considers the existence of s. 79 as indicating that the Legislature has been explicit on issues that it considers warrant special treatment through a subsidy. The majority decision argues that the existence of s. 79 implicitly excludes any intent to confer jurisdiction to depart from simply the cost of service approach employed to implement the mandate given to the Board by s. 36.

[31] Moreover, the majority decision points out that rural rate assistance through s. 79 does not consider income level as an eligibility determinant. Rather, eligibility is based upon location and the inherent higher costs of service related to density levels. The assistance from the program is conferred upon all consumers within a given geographical area irrespective of their income level. Hence, this program arguably serves simply to mitigate the effect of the cost differential related to geography and remains consistent with a rate making process based upon cost causality. Nevertheless, "rate protection" through s. 79 operates as a subsidy paid by some of Ontario's residential electricity consumers for the benefit of others and represents a departure from the principle of cost causality being applied on the same basis to all consumers within a given class (i.e., residential, commercial and industrial).

[32] As pointed out in the dissent by Board Vice Chair Gordon Kaiser, s. 79 was introduced in 1999 when the authority to regulate rates for *electricity* distributors was transferred to the Ontario Energy Board. Prior thereto, electricity distributors were regulated by Ontario Hydro, a Crown corporation which had established the policy of setting special rates in remote and rural areas through the now repealed s. 108 of the *Power Corporation Act,* R.S.O. 1990, c. P. 18. The inference can be made, as Vice Chair Kaiser asserts, that s. 79 was introduced into the *Act* to expressly indicate to the Board that this significant historical policy must continue.

C. The Purpose of the Act and the Reason for the Board's existence

[33] The objectives for the Board with respect to natural gas regulation are set forth in s. 2 of the *Act*:

> (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 a manner consistent with the policies of the Government of Ontario.

5.1To 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.

[34] The Board is charged under s. 2 of the *Act* with protecting "the interests of consumers with respect to prices ...." The Board argues that this provision speaks to consumers as a single class, not to a particular subset of consumers. The majority decision of the Board says the Board's mandate is to balance the interests of consumers as a single group with the interests of the regulated utility in the setting of "just and reasonable rates."

[35] The Divisional Court has emphasized in the past that the Board's mandate to fix just and reasonable rates "is unconditioned by directed criteria and is broad; the board is expressly allowed to adopt any method it considers appropriate." *Natural Resource Gas Ltd. v Ontario Energy Board*, [2005] O.J. No. 1520 at para. 13 (Div. Ct.). The Divisional Court also stated in *Enbridge Gas Distribution Inc. v. Ontario Energy Board* (2005), 75 O.R. (3d) 72, [2005] O.J. No. 756 at para.24:

> ...[T]he legislation involves economic regulation of energy resources, including setting prices for energy which are fair and reasonable 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.

[36] Writing for the majority of the Supreme Court of Canada in *Atco, supra,* at para. 62 Bastarache J. stated that "[r]ate regulation serves several aims – sustainability, equity and efficiency – which underlie the reasoning as to how rates are fixed."

D. The Area of Expertise of its Members and the Nature of the Problem before the Board

[37] The Board was asked to consider the application of the utility to establish rates. In that context, an intervenor asked the Board to consider whether, as a factor in rate-setting, the Board could consider the interests of low-income consumers and establish a rate affordability program. That issue of rate-setting is squarely within the jurisdiction of the Board.

[38] The majority opinion in the Board Decision correctly states that the Board's mandate for economic regulation is "rooted in the achievement of economic efficiencies, the establishment of fair returns for natural monopolies and the development of appropriate costs allocation methodologies".. However, that does not answer the question as to the full scope of the Board's jurisdiction in approving or fixing "just and reasonable rates" and adopting "any method or technique that it considers appropriate" in so doing.

[39] The Board's regulatory power is designed to act as a proxy in the public interest for competition in view of a natural gas utility's geographical natural monopoly. Absent the intervention of the Board as a regulator in rate-setting, gas utilities (for the benefit of their

shareholders) would be in a position to extract monopolistic rents from consumers, in particular, given a relatively inelastic demand curve for their commodity. Clearly, a prime purpose of the *Act* and the Board is to balance the interests of consumers of natural gas with those of the natural gas suppliers. The 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.

[40] In performing this regulatory function, it is consistent for the Board to seek to protect the interests of *all* consumers vis-a-vis the reality of a monopoly. The Board must balance the respective interests of the utility and the collective interest of all consumers in rate setting. *Re Union Gas Ltd. and Ontario Energy Board et al.* (1983), 1 D.L.R. (4th) 698 (Div. Ct.), (1983) 43 O.R. (2d) 489 at 501. The Board's regulatory power is primarily a proxy for competition rather than an instrument of social policy. *Dalhousie Legal Aid Service v. Nova Scotia Power Inc.*, (2006), 268 D.L.R. (4th) 408 at para. 33 [*Dalhousie*].

[41] *Dalhousie* dealt with a request for a low income affordability program like that advanced by LIEN. However, it involved a consideration of rate setting under s. 67 (1) of the Nova Scotia *Public Utilities Act* ,R.S.N.S. 1989, c. 380, which is very different in wording with respect to jurisdiction to that seen in s. 36 of the *Act* at hand. The Nova Scotia provision expressly provides that "rates 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 ...." Hence, the Nova Scotia Utility and Review Board found that it did not have jurisdiction to order low income affordability programs.

[42] Section 36 of the *Act* has broad language, empowering the Board to set "just and reasonable" rates for the distribution of natural gas. The supply of natural gas can be considered a necessity that is available from a single source with prices set by the Board in the public interest. The Board has traditionally set rates on a "cost of service" basis, that is, on the basis of cost causality and employing a complex cost allocation exercise. In brief, this approach first looks to the utility's capital investments and maintenance costs including a fair rate of return to determine revenues required. The revenue requirement is then divided amongst the utility's rate paying consumers on a rate class basis (i.e., residential, commercial, industrial, etc.).

[43] The rates have been traditionally designed with the principled objective of having each rate class pay for the actual costs that class imposes upon the utility. That is, the Board has sought to avoid inter-class and intra class subsidies. See RP-2003-0063 (2005) at 5. Consistent with this approach, the Board has refused the establishment of a special rate class to provide redress for aboriginal consumers. *Decision with Reasons* EBRO493 (1997) (O.E.B.). In that case, the Ontario Native Alliance ("ONA") requested the Board to order a utility to evaluate the establishment of a rate class for the purpose of providing a special rate class for aboriginal peoples. At 316-17, the Board stated:

> The Board is required by the 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.

[44] This decision would be within the Board's jurisdiction and a like response to LIEN in the case at hand would arguably be consistent and reasonable. However, the Board in dealing with the ONA request did not decline on the basis of jurisdiction. Rather, it said that it should not exercise its jurisdiction as requested by ONA for the reasons given.

[45] A low income rate affordability program would necessarily lead to treating consumer groups on a differentiated basis with higher prices for a majority of residential consumers and subsidization of the low-income subset by the majority group and/or other classes of consumers.

[46] If the Board were to reduce the rates for one class of consumers based upon an income determinant, the Board would have to increase the rates for another class or classes of consumers. In effect, such a rate reduction would impose a regressive indirect tax upon those required to pick up the shortfall. Such an approach would arguably be a dramatic departure from the Board's regulatory function as implemented to date, which has been to protect the collective interest of consumers dealing with a monopoly supplier through a "cost of service" calculation and then to treat consumers equally through determining rates to pay for the "cost of service" on a cost causality basis for classes of consumers.

[47] The Board's mandate has not been directed to the public interest in social or distributive justice through a differentiation of rates on the basis of income. That need is seen to be met through other mechanisms and programs legislated by the provincial Legislature and/or Parliament, for example, by refundable tax credits and social assistance.

[48] Indeed, the provincial income tax legislation previously provided for public tax expenditures to assist low income consumers with rising electricity costs. This was done through an "Ontario home electricity payment" by reference to income levels. *Income Tax Act*, R.S.O. 1990, c.1.2, s. 8.6.1, as rep. by *Income Tax Amendment Act (Ontario Home Electricity Relief), 2006*, S.O. 2006, c. 18, s. 1. As well, Parliament has provided a one-time relief for energy costs to low income families and seniors in Canada through the *Energy Costs Assistance Measures Act*, S.C. 2005, c. 49.

[49] The Board is an economic regulator, rather than a formulator of social policy. While no doubt the Board must take into account broad policy considerations, rate-setting is at the core of the Board's jurisdiction. *Garland v. Consumers' Gas Company* (2000), 185 D.L.R. (4th) 536 at paras. 17, 45-46 (Ont. S.C.J.). Special rates for low income consumers would not be based upon economic principles of regulation but rather on the social principle of ability to pay. Any program to subsidize low income consumers would require a source of funding which is a matter of public policy. See generally *Re Rate Concessions to Poor Persons and Senior Citizens*, 14 Pub. Util. Rep. 4th 87 at 94 (Or. 1976).

[50] This view of the nature and limit of the regulatory function is generally accepted as the norm in other jurisdictions. See for example *Washington Gas light Co. v. Public Service Commission of the District of Columbia* (1982), 450 A.2d 1187 at para. 38 (D.C. Ct. App.); *State of Louisiana v. the Council of the City of New Orleans and New Orleans Public Service, Inc.* (1975), 309 So. 2nd 290 at 294 (La. Sup. Ct.).

[51] The historical common law approach for public utility regulation has been that consumers with similar cost profiles are to be treated equally so far as reasonably possible with respect to the rates paid for services. See, for example, *St. Lawrence Rendering Co. Ltd. v. The City of Cornwall,* [1951] O.R. 669-685 at 683; *Chastain et al. v. British Columbia Hydro and Power Authority* (1972), 32 D.L.R. (3d) 443 at 454 (B.C.S.C); *Canada (Attorney General)* v. *Toronto (City)* (1893), 23 S.C.R. 514 at 519-520.

Conclusions on the Board's Jurisdiction

[52] We agree that the traditional approach of "cost of service" is the root principle underlying the determination of rates by the Board because that is necessary to meet the fundamental, core objective of balancing the interests of all consumers and the natural monopoly utility in rate/price setting.

[53] However, the Board is authorized to employ "any method or technique that it considers appropriate" to fix "just and reasonable rates." Although "cost of service" is necessarily an underlying fundamental factor and starting point to determining 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."

[54] The "cost of service" determination will establish a benchmark global amount of revenues resulting from an estimated quantity of units of natural gas or electricity distributed. The Board could use this determination to fix rates on a cost causality basis. This has been the traditional approach.

[55] However, in our view, the Board need not stop there. Rather, the 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."

[56] The Board is engaged in rate-setting within the context of the interpretation of its statute in a fair, large and liberal manner. It is not engaged in setting social policy.

[57] This is not, of course, to imply any preferred course of action in rate setting by the Board. The Board in its discretion may determine that "just and reasonable rates" are those that follow from the approach of "cost causality" once the "cost of service" amount is determined. That is, the principle of equality of rates for consumers within a given class (e.g., residential consumers) may be viewed as the most just and reasonable approach. A determination by the Board that all residential gas consumers (with relatively minor deviations through such programs as the "Winter Warmth Program") pay the same distribution rates is not in itself discriminatory on a prohibited ground. Indeed, it can be seen as a non-discriminatory policy in terms of prices paid.

[58] Nor is it to suggest that as a matter of public policy, objectives of distributive justice or conservation in respect of energy consumption are best achieved by rate setting as compared to, for instance, tax expenditures or social assistance devised and implemented by the Legislature through mechanisms independent of the operation of the *Act*. It is noted that the Minister is given the authority in s. 27 of the *Act* to issue policy statements as to matters that the Board must pursue; however, the Minister has not issued any policy statement directing the board to base rates on considerations of the ability to pay. Moreover, the power granted to a regulatory authority "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." *Re Multi Malls Inc. et al. and Minister of Transportation and Communications et al* (1977), 14 O.R. (2d) 49 at 55 (C.A.). As we have said, cost of service is the starting point building block in rate setting, to meet the fundamental concern of balancing the interests of all consumers with the interests of the natural monopoly utility.

[59] Nor does our conclusion presume as to what methods or techniques may be available in determining "just and reasonable rates." Efficiency and equity considerations must be made. Rather, this is to say only that so long as the global amount of return to the utility based upon a "cost of service" analysis is achievable, then the rates/prices (and the methods and techniques to determine those rates/prices) to generate that global amount is a matter for the Board's discretion in its ultimate goal and responsibility of approving and fixing "just and reasonable rates."

[60] The issue before the Court is that of jurisdiction, not how and the manner by which the Board should exercise the jurisdiction conferred upon it.

[61] In our view, and we so find, the Board has the jurisdiction to take into account the ability to pay in setting rates. We so find having taken into account the expansive wording of s. 36 (2) and (3) of the statute and giving that wording its ordinary meaning, having considered the purpose of the legislation within the context of the statutory objectives for the Board seen in s. 2, and being mindful of the history of rate setting to date in giving efficacy to the promotion of the legislative purpose.

[62] We also find that that interpretation is appropriate taking into account the criteria articulated in *Driedger,* above, namely it complies with the legislative text, it promotes the legislative purpose and the outcome is reasonable and just.

[63] As indicated above, a statutory administrative tribunal obtains its jurisdiction from explicit powers or implicit powers. Having found that the jurisdiction to consider ability to pay in rate setting is explicitly within the *Act,* we need not consider the doctrine of necessary implication or the related principle of implied exclusion.

The issue of the *Canadian Charter of Rights and Freedoms*

[64] Before concluding, it is appropriate to mention the submission made on behalf of LIEN in respect of s. 15 (1) of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), c. 11 (the "*Charter*").

[65] LIEN says it raises the *Charter* simply within the context of it being an interpretive tool in discerning the meaning of an asserted ambiguous s. 36 of the *Act*. LIEN says it does not raise any issue that the *Act* or the Board's actions or inactions are contrary to the *Charter*.

[66] LIEN argues that in the absence of clear statutory provisions, the requirement for "just and reasonable rates" must be interpreted to comply with s. 15. The *Charter* applies to provincial legislation and can be used as an interpretive tool. *R. v. Rogers*, [2006] 1 S.C.R. 554, [2006] S.C.J. No. 15 at para. 18. In our view, as stated above, the *Act* provides the Board with the requisite jurisdiction without having to look to the *Charter*.

[67] While we heard submissions from LIEN, we declined to hear from counsel for the respondents on this issue. We agree with our colleague Swinton J. that such an argument requires a full evidentiary record.

Disposition

[68] For the reasons given, the appeal is allowed and it is declared that the Board has the jurisdiction to establish a rate affordability assistance program for low income consumers purchasing the distribution of natural gas from the utility, EGD.

[69] All parties agree that there is not to be any award of costs in respect of this appeal.

KITELEY J.

CUMMING J.

Released: May , 2008

Swinton J. (dissenting):

[70] The sole issue in this appeal is whether the Ontario Energy Board (the "Board") erred in holding that it had no jurisdiction, when setting residential rates for gas distribution, to order a rate affordability program for low income consumers. In my view, the majority of the Board was correct in concluding that the Board lacked jurisdiction to make such an order.

[71] The majority of the Board predicated its decision on the understanding that the appellants' proposal contemplated the establishment of a rate group for low income residential consumers that would be funded by general rates. I, too, proceed on that assumption. While there were no details of a specific program put forth by the appellants during the hearing, it is inevitable that the Board, in setting lower rates for the economically disadvantaged, would have to impose higher rates on other consumers.

The Board's Practice in Setting Rates

[72] Pursuant to the *Ontario Energy Board Act, 1998,* S.O. 1998, c. 15, Schedule B (the "Act"), the Board has authority to set rates for both gas and electricity. It has traditionally set rates for gas through a "cost of service" assessment, in which it seeks to determine a utility's total cost of providing service to its customers over a one year period (the "test year"). According to the Board's factum, these costs include the rate base (which is essentially the net book value of the utility's total capital investments) and the utility's operational and maintenance costs for the test year, among other things. The utility's total costs for the test year (usually including a rate of return on the rate base portion) forms the revenue requirement. The revenue requirement is then divided amongst the utility's ratepayers on a rate class basis (that is, residential, small commercial, industrial, etc.).

[73] With respect to gas, it has always been the Board's practice to allocate the revenue requirement to the different rate classes on the basis of how much of that cost the rate class actually causes ("cost causality"). To the greatest extent possible, the Board has striven to avoid inter-class subsidies (see, for example, Decision with Reasons, RP-2003-0063 (2005), p. 5).

The Proper Approach to Statutory Interpretation

[74] To determine the issue in this appeal, it is necessary to consider the powers conferred on the Board by its constituent legislation, the *Ontario Energy Board Act*. That Act must be interpreted using the modern principles of statutory interpretation described by Professor Ruth Sullivan in *Driedger on the Construction of Statutes* (3rd ed.) (Toronto: Butterworths, 1994) as follows:

> There is only one rule in modern interpretation, namely, courts are obliged to determine the meaning of legislation in its total context, having regard to the purpose of the

> legislation, the consequences of proposed interpretations, the presumptions of special rules of interpretation, as well as admissible external aids. In other words, the courts must consider and take into account all relevant and admissible indicators of legislative meaning. After taking these into account, the court must then adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is, its promotion of the legislative purpose; and (c) its acceptability, that is, the outcome is reasonable and just. (at p. 131)

[75] The words of a statute are to be read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, its objects, and the intent of the Legislature (*ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, [2006] 1 S.C.R. 140 at para. 37).

The Words of the Provision in Issue

[76] Subsection 36(2) of the Act gives the Board the broad authority to approve or fix "just and reasonable" rates for the distribution of gas. On its face, those words might encompass the power to set rates according to income. However, the words do not explicitly confer the power to do so, and the Supreme Court of Canada commented in *ATCO, supra* that a discretionary grant of authority to a tribunal cannot be viewed as conferring unlimited discretion. A regulatory tribunal must interpret its powers "within the confines of the statutory regime and principles generally applicable to regulatory matters, for which the legislature is assumed to have had regard in passing that legislation" (at para. 50).

[77] The appellants also rely on s. 36(3), which states that in approving or fixing just and reasonable rates, the Board may adopt "any method or technique that it considers appropriate". These words were added to the Act in 1998. Examples of methods or techniques used by the Board for setting gas distribution rates are cost of service regulation and incentive regulation.

[78] On its face, the words of s. 36(3) do not confer the jurisdiction to provide special rates for low income customers. The subsection replaced an earlier provision of the Act which required a traditional cost of service analysis in setting rates. I agree with the conclusion of the Board majority as to the meaning of s. 36(3) (Reasons, p. 10):

> 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 costs 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.

The Regulatory Context

[79] According to longstanding principles governing public utilities developed under the common law, a public utility like the respondent Enbridge Gas Distribution Inc. ("Enbridge") must treat all its customers equally with respect to the rates they pay for a particular service (*Attorney General of Canada v. The Corporation of the City of Toronto* (1892), 23 S.C.R. 514 at 519-20; St. *Lawrence Rendering Co. Ltd. v. Cornwall*, [1951] O.R. 669 (H.C.J.) at 683; *Chastain v. British Columbia Hydro and Power Authority* (1972), 32 D.L.R. (3d) 443 (B.C.S.C.) at 454).

[80] As noted in the Board's majority reasons, the Board is, at its core, an economic regulator (Reasons, p. 4). Rate setting is at the core of its jurisdiction (*Garland v. Consumer's Gas Company* (2000), 185 D.L.R. (4th) 536 (Ont. S.C.J.) at para. 45). I agree with the majority's description of economic regulation as being "rooted in the achievement of economic efficiencies, the establishment of fair returns for natural monopolies and the development of appropriate cost allocation methodologies" (Reasons, p. 4).

[81] Historically, in setting rates, the Board has engaged in a balancing of the interests of the regulated utility and consumers. The Board has not historically balanced the interests of different groups of consumers. As the Divisional Court stated in *Union Gas Ltd. v. Ontario (Energy Board)* (1983), 43 O.R. (2d) 489 at p. 11 (Quicklaw):

> ... it is the function of the O.E.B. to balance the interest of the appellant in earning the highest possible return on the operation of its enterprise (a monopoly) with the conflicting interest of its customers to be served as cheaply as possible.

See, as well, *Northwestern Utilities v. The City of Edmonton*, [1929] 1 S.C.R. 186 at 192.

[82] In a similar vein, the Supreme Court in *ATCO, supra* spoke of a "regulatory compact" which ensures that all customers have access to a utility at a fair price. The Court went on to state (at para. 63):

> Under the regulatory compact, the regulated utilities are given exclusive rights to sell their services within a specified area at rates that will provide companies the opportunity to earn a fair rate of return for all their investors. In return for this right of exclusivity, utilities assume a duty to adequately and reliably serve all customers of their defined territories, and are required to have their rates and certain operations regulated...

The Court described the object of the Act "to protect both the customer *and* the investor" (at para. 64).

[83] The Legislature, in conferring power on the Board, must be taken to have had regard to the principles generally applicable to rate regulation (*ATCO, supra* at paras. 50 and 64). I agree with the submission of Enbridge that those principles are the following:

> (a) customers of a public utility must be treated equally insofar as the rate for a particular service or class of services is concerned; and
>
> (b) the Legislature will be presumed not to have intended to authorize discrimination among customers of a public utility unless it has used specific words to express this intention.

[84] Thus, the considerations of justice and reasonableness in the setting of rates have been and are those between the utility and consumers as a group, not among different groups of consumers based on their ability to pay.

Other Provisions of the Act

[85] In applying s. 36(2), the Board must be bound by the objectives set out in s. 2 of the Act, which includes

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

[86] The appellants submit that these words are broad enough to permit the Board to order a rate affordability assistance program. However, that is not obvious from the words used, which refer to "consumers" as a whole, and not to any particular subset of consumers. Indeed, it can be argued that any low income rate affordability program would run counter to the stated objective, given that such a program must almost certainly be funded through higher rates paid by other consumers. The result would be to provide benefits to one group of consumers at the expense of others.

[87] The reason for this conclusion lies in the Board's historical approach to rate setting, as described earlier in these reasons. The Board sets a revenue requirement for utilities before allocating those costs to the different rate classes. The only way the utility could recover its revenue requirement, given a rate class with lower rates for low income consumers, would be to increase the rates charged to other classes. Therefore, such higher prices can not be seen as protecting the interests of consumers with respect to prices, as set out in objective 2.

[88] Moreover, the Act contains an explicit provision in s. 79 that allows the Board to provide rate protection for rural and remote customers of electricity distributors. Subsection 79(1) provides:

> The Board, in approving just and reasonable rates for a distributor who delivers electricity to rural or remote consumers, shall provide rate protection for those consumers

> or prescribed classes of those consumers by reducing the rates that would otherwise apply in accordance with the prescribed rules.

Section 79 also provides grandfathering for those who had a subsidy prior to the change in the Act. As well, it explicitly allows the distributor to be compensated for the subsidized rates through contributions from other consumers, as provided by the regulations.

[89] This section was added to the Act in 1998, when the Board was given the authority over electricity rate regulation. Section 79 ensured the ongoing protection of rural rates put in place when electricity distribution was regulated by Ontario Hydro.

[90] One of the principles of statutory interpretation is "implied exclusion". As Professor Sullivan has stated, this principle operates "whenever there is reason to believe that if the legislature had meant to include a particular thing within its legislation, it would have referred to that thing expressly" (*supra,* p. 186). While the purpose of s. 79 of the Act was to protect a pre-existing policy to assist rural and remote residential consumers, nevertheless, it is telling that there is no similar explicit power to order special rates or rate subsidies for other groups elsewhere in the Act.

The Significance of Ordering Rate Affordability Programs

[91] An appropriate interpretation can be justified in terms of its promotion of the legislative purpose and the reasonableness of the outcome (see Sullivan, quoted above at para. 5).

[92] The ability to order a rate affordability program would significantly change the role that the Board has played – indeed, the majority of the Board stated a number of times that the proposal to base rates on income level would be a "fundamental" departure from its current practice. In the past, the Board has acted as an economic regulator, balancing the interests of the utility and its shareholders against the interests of consumers as a group. Were it to assume jurisdiction over rate affordability programs, it would carry out an entirely different function. It would enter into the realm of social policy, weighing the interests of low income consumers against those of other consumers. This is not a role that the Board has traditionally played. This is not where its expertise lies, nor is it well-suited to taking on such a role.

[93] An examination of the particular case before the Board illustrates this. The appellants seek a rate affordability assistance program for gas in response to Enbridge's application for a rate increase for gas distribution – that is, for the *delivery* of natural gas. Customers can make arrangements for the purchase of the commodity of natural gas with a variety of suppliers in the competitive market. Therefore, were the Board to assume jurisdiction to order a rate affordability assistance program here, it could address only one part of the problem that low income consumers face in meeting their heating costs – the cost of distribution of gas.

[94] In addition, the Board would have to consider eligibility criteria for a rate affordability assistance program that reasonably would take into account existing programs for assistance to

low income consumers. Obviously, this would include social assistance programs. As well, Enbridge, in its factum, has identified other programs which provide assistance for low income consumers. For example, the Ontario government has implemented a program to assist low income customers with rising electricity costs through amendments to income tax legislation (*Income Tax Act*, R.S.O. 1990, c. I.2, s. 8.6.1, as amended S.O. 2006, c.18, c.1). At the federal level, there was one-time relief for low income families and senior citizens provided by the *Energy Costs Assistance Measures Act*, S.C. 2005, c. 49.

[95] Moreover, in order to cover the lower costs, the Board would have to increase the rates of other customers in a manner that would inevitably be regressive in nature, as it is difficult to conceive how the Board would be able to determine, in a systematic way, the ability of these other customers to pay.

[96] Clearly, the determination of the need for a subsidy for low income consumers is better made by the Legislature. That body has the ability to consider the full range of existing programs, as well as a wide range of funding options, while the Board is necessarily limited to allocating the cost to other consumers. The relative advantages of a legislative body in establishing social programs of the kind proposed are well described in the following excerpt from a decision of the Oregon Public Utility Commissioner (*Re Rate Concessions to Poor Persons and Senior Citizens* (1976), 14 PUR 4th 87 at p. 94):

> Utility bills are not poor persons' only problems. They also cannot afford adequate shelter, transportation, clothing or food. The legislative assembly is the only agency which can provide comprehensive assistance, and can fund such assistance from the general tax funds. It has the information and responsibility to deal with such matters, and can do so from an overall perspective. It can determine the needs of various groups and compare those needs to existing social programs. If it determines a special program is needed to deal with energy costs, it can affect all energy sources rather than only those the commissioner regulates.
>
> With clear authority to establish social welfare policy, the legislative assembly also can monitor all state and federal welfare programs and the sources and extent of aid given to different groups. Without such overview, as independent agencies aid various segments of society, the total aid given each group is unknown, and unequal treatment of different groups becomes likely.

[97] Where the issue of rate affordability programs has arisen in other jurisdictions, courts and boards have ruled that a public utilities board does not have jurisdiction to set rates based on ability to pay (see, for example, *Washington Gas Light Co. v. Public Service Commission of the District of Columbia* (1982), 450 A. 2d 1187 (D.C. Ct. App.) at para. 38; *Dalhousie Legal Aid Service v. Nova Scotia Power Inc.* (2006), 268 D.L.R. (4th) 408 (N.S.C.A.) at 419; Alberta Energy and Utilities Board Decision 2004-066, Section 9.2.6 at 161, as well as the Oregon case, *supra*).

[98] The appellants distinguish the *Dalhousie Legal Aid* case because the Nova Scotia legislation is different from Ontario's. Specifically, s. 67(1) of the *Public Utilities Act*, R.S.N.S. 1989, c. 380 provides that "[a]ll 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".

[99] While the language of the two statutes does differ, nevertheless, the reasons of the Nova Scotia Court of Appeal make it clear that the Board's role is not to set social policy. At para. 33, Fichaud J.A, observed, "The Board's regulatory power is a proxy for competition, not an instrument of social policy."

[100] Moreover, the principle in s. 67(1) of the Nova Scotia Act requiring that rates be charged equally is a codification of the common law, set out earlier in these reasons. The Ontario Board has long operated according to the same principles.

[101] The appellants submit that the recent decision in *Allstream Corp. v. Bell Canada*, [2005] F.C.J. No. 1237 (C.A.) assists their case. There, the Federal Court of Appeal upheld a decision of the Canadian Radio-Television and Telecommunications Commission (the "CRTC") approving special facilities tariffs submitted by Bell for the provision of optical fibre services pursuant to certain customer-specific arrangements. All but one related to a Quebec government initiative aimed at supporting the construction of broadband networks for rural municipalities, school boards and other institutions. The Court determined that the Commission's decision approving the tariffs was not patently unreasonable, given the exceptional circumstances of the case that justified a deviation from the normal practice of rate determination. The Court noted that the Commission considered matters that were not purely economic, but noted that such considerations were part of the Commission's wide mandate under s. 7 of the *Telecommunications Act,* S.C. 1993, c. 38 (at paras. 34-35).

[102] Section 7 of that Act, unlike s. 2 of the *Ontario Energy Board Act,* expressly includes the power "to respond to the economic and social requirements of users of telecommunications services" (s. 7(h)), as well as to enrich and strengthen the social and economic fabric of Canada and its regions (s. 7(a)). Moreover, while s. 27(2)(b) of that Act forbids unjust discrimination in rates charged, s. 27(6) explicitly permits reduced rates, with the approval of the Commission, for any charitable organization or disadvantaged person.

[103] In contrast to the broad mandate given to the CRTC, the objectives of the Board are much more confined. When the Board's objectives go beyond the economic realm, specific reference has been made to other objectives, such as conservation and consumer education (s. 2 (5) and (6)). There is no reference to the consideration of economic and social requirements of consumers.

[104] The appellants have also pointed out that the Board has in the past authorized programs that transfer benefits to lower income customers. The Winter Warmth program is one in which individuals can apply for emergency financial relief with heating bills. It is triggered by an

application from a particular customer, and the program is funded by all customers. The fact that the Board has approved this charitable program does not lead to the conclusion that it has jurisdiction to set rates on the basis of income level.

[105] With respect to the Demand Side Management (DSM) programs, the majority of the Board explained that this is not equivalent to a rate class based on income level. At p. 11 of its Reasons, the majority stated,

> 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 channeled for programs aimed at low income customers. 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.

[106] Were the Board to assume jurisdiction to order a rate affordability assistance program, it would be taking on a significant new role as a regulator of social policy. Given the dramatic change in the role that it has historically played, as well as the departure from common law principles, it would require express language from the Legislature to confer such jurisdiction

Jurisdiction by Necessary Implication

[107] In order to impute jurisdiction to a regulatory body, there must be evidence that the exercise of the power in question is a practical necessity for the regulatory body to accomplish the goals prescribed by the Legislature (*ATCO, supra* at paras. 51, 77). In this case, there is no evidence that the power to implement a rate affordability assistance program is a practical necessity for the Board to meet its objectives as set out in s. 2.

The Role of the Charter

[108] The appellants submit that the values found in s. 15 of the *Canadian Charter of Rights and Freedoms* should be considered in the interpretation of the ratemaking provisions of the Act. However, the Charter has no relevance in interpretation unless there is genuine ambiguity in the statutory provision (*R. v. Rodgers*, [2006] 1 S.C.R. 554 at paras. 18-19). A genuine ambiguity is one in which there are "two or more plausible readings, each equally in accordance with the intentions of the statute" (at para. 18).

[109] In my view, there is no ambiguity in the interpretation of s. 36 of the Act, and therefore, there is no need to resort to the Charter.

[110] In any event, the appellants' argument is, in fact, that the failure of the Board to order a rate affordability program is discriminatory on the basis of sex, race, age, disability and social assistance, because of the adverse impact on these groups (Factum, para. 43, as well as para. 47).

Such an argument can not be made without a full evidentiary record, and the inclusion of statistical material in the Appeal Book is not a sufficient basis on which to address this equality argument.

Conclusion

[111] For these reasons, I am of the view that the majority decision of the Board was correct, and that the Board has no jurisdiction to order rate affordability assistance programs for low income consumers. Therefore, I would dismiss the appeal.

Swinton J.

Released: May 16, 2008

COURT FILE NO.: 273/07
DATE: 20080516

ONTARIO
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

KITELEY, CUMMING AND SWINTON JJ.

B E T W E E N:

ADVOCACY CENTRE FOR TENANTS-ONTARIO and INCOME SECURITY ADVOCACY CENTRE on behalf of LOW-INCOME ENERGY NETWORK

Appellant

- and -

ONTARIO ENERGY BOARD

Respondent

REASONS FOR JUDGMENT

Released: May 16, 2008