TORYS LLP

79 Wellington St. W., 30th Floor
Box 270, TD South Tower
Toronto, Ontario M5K 1N2 Canada
P. 416.865.0040 | F. 416.865.7380
www.torys.com

Crawford Smith
csmith@torys.com
P. 416.865.8209

April 6, 2015

EMAIL AND RESS

Kirsten Walli
Board Secretary
Ontario Energy Board
P.O. Box 2319
2300 Yonge Street
27h Floor
Toronto, ON M4P 1E4

Dear Ms. Walli:

Re: Complaint by TransAlta Corporation, TransAlta Generation Partnership and TransAlta Cogeneration L.P.
EB-2014-0363

We are counsel to Union Gas Limited in the above noted proceeding. Attached is Union's compendium for use during oral argument at the hearing on April 7, 2015.

Yours truly,

[original signed by Crawford Smith]

Crawford Smith

MS

cc: Lisa DeMarco
Intervenors

11229-2133 19143446.1

EB-2014-0363

ONTARIO ENERGY BOARD

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

AND IN THE MATTER OF an application by TransAlta Corporation, TransAlta Generation Partnership and TransAlta Cogeneration L.P.

COMPENDIUM OF UNION GAS LIMITED

April 7, 2015

Torys LLP
79 Wellington St. W., Suite 3000
Box 270, TD Centre
Toronto, ON M5K 1N2
Fax: 416.865.7380

Crawford Smith
Tel: 416.865.8209

Myriam Seers
Tel: 416.865.7535

Lawyers for Union Gas Limited

TABLE OF CONTENTS

Tab 1

EB-2014-0363

ONTARIO ENERGY BOARD

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

AND IN THE MATTER OF an application by TransAlta Corporation, TransAlta Generation Partnership and TransAlta Cogeneration L.P.

WRITTEN SUBMISSIONS OF
UNION GAS LIMITED

A. Overview

1. This proceeding is to answer three threshold questions posed by TransAlta Corporation, TransAlta Generation Partnership and TransAlta Cogeneration L.P. ("**TransAlta**") in connection with a T1/T2 Gas Storage and Distribution Contract between Union and TransAlta Generation Partnership dated November 1, 2012 and in effect until November 1, 2012 (the "**Old Contract**").[1]

2. The questions posed by TransAlta are:

   (1) Does the OEB have, and will it exercise, jurisdiction to determine the correct interpretation of TransAlta's Daily Contract Quantity ("**DCQ**") obligations under [the Old Contract]?

   (2) If the OEB determines that it <u>does</u> have jurisdiction to determine the correct interpretation of TransAlta's DCQ obligations under [the Old Contract], does the OEB have, and will it exercise, jurisdiction over the amounts that may be owed to TransAlta under the [Old Contract]?

   (3) If the OEB determines that it <u>does not</u> have jurisdiction to determine the correct interpretation of TransAlta's DCQ obligations under [the Old Contract], will the

[1] Gas Storage and Distribution Contract dated November 1, 2012, Compendium, Tab 2.

OEB refer TransAlta's application to binding arbitration in accordance with the *Storage and Transportation Access Rule* (STAR)?

3. TransAlta's complaints are in substance about a contractual dispute that arose under the Old Contract in connection with TransAlta's DCQ obligations in the winter of 2014. They do not relate to ongoing rates or to terms of service on an ongoing basis. They amount to a request for an interpretation of the Old Contract and for an award of damages. These matters are squarely within the jurisdiction of the courts, and outside the Board's jurisdiction.

4. The Board likewise has no jurisdiction to compel the parties to submit their dispute to binding arbitration. As Union has already advised TransAlta, the appropriate forum for this dispute to be resolved is the Ontario Superior Court of Justice.

B. Additional Relief Sought by TransAlta

5. On March 23, 2015, TransAlta requested that the relief it seeks in this proceeding be amended to include the following:

> (iv) in the event that the sector-wide DCQ issues cannot be resolved with all stakeholder consensus through the Union Consultations on or before June 30, 2015, TransAlta hereby requests that the Board expressly review and resolve the sector-wide DCQ issues in the context of: (a) the [Natural Gas Review] or as part of a follow-up proceeding to address issues raised through the NGR, or alternatively, (b) in the context of the annual review of Union rates prior to 2016, and/or in the further alternative (c) a dedicated proceeding of the Board on obligated DCQ issues.

6. Any issues with respect to ongoing DCQ obligations are beyond the scope of this proceeding. Therefore, it would be premature for the Board to grant the requested relief as part of this proceeding. In the event that it feels the need to do so, TransAlta is of course free to start a subsequent proceeding or to ask that the Board initiate a proceeding dealing with ongoing DCQ obligations. Union will take a position with respect to the issues raised in that proceeding if and when such a proceeding is commenced.

C. TransAlta's Complaints Relate to a Obligations Under a Contract That Has Now Been Terminated

7. The complaints raised by TransAlta are fundamentally a breach of contract claim in connection with TransAlta's obligation under the Old Contract to deliver a DCQ of gas. In a nutshell, TransAlta claims that the Old Contract should be interpreted such that DCQ it was required to deliver to Union under the Old Contract is 12,912 GJ per day, and not 17,904GJ per day as set out on Schedule 1 to the Old Contract.

8. The Old Contract was terminated effective November 1, 2014. It was replaced by a new T2 Gas Storage and Distribution Contract (the "**New Contract**") that contains revised DCQ parameters acceptable to both parties.[2] Thus, TransAlta's continuing obligations to deliver a DCQ under the New Contract are not the subject of its complaints to the Board.

9. TransAlta's complaints relate to the period between January 4, 2014 and April 25, 2014.[3] Thus, they arise under the Old Contract, not the New Contract. Nothing in TransAlta's complaint deals with its ongoing obligations to deliver DCQ under the New Contract. In the result, there is no dispute between the parties regarding ongoing DCQ obligations and TransAlta's complaints have no bearing on rates or terms of service applicable on a going-forward basis.

10. Indeed, TransAlta seeks an award of damages from Union. In a draft application to the Board TransAlta sent to Union before starting this proceeding, it claimed: "an order compelling Union to reimburse TransAlta all monetary amounts related to any over-calculation of the DCQ for any and all quantities of gas above 12,912 GJ per day that Union has required TransAlta to deliver [for the period of November 1, 2012 to January 31, 2014]" or in the alternative, an order compelling Union and TransAlta to submit to binding arbitration "for a determination of their dispute under the Contract."[4]

---

[2] Gas Storage and Distribution Contract dated November 1, 2014, Compendium, Tab 2.

[3] TransAlta Letter dated December 3, 2014, p. 3, Compendium, Tab 4; TransAlta Letter dated January 12, 2015, Compendium, Tab 6.

[4] TransAlta Draft Application, para. 10, Compendium, Tab 15.

11. In its January 12, 2015 letter, TransAlta alludes to the so-called "far-reaching and unintended consequences" of a potential finding by the Board that is does not have jurisdiction over the "terms and tariffs of a utility contract". Again, for clarity, the contract to which TransAlta refers is the Old Contract. The questions before the Board in this proceeding do not relate to the Board's jurisdiction over DCQ obligations that customers may have on an ongoing basis.

D. No Merit to TransAlta's Complaints

12. Union notes at the outset that there is no merit to TransAlta's complaints that Union has breached the terms of the Old Contract. First, there is no merit to TransAlta's suggestion that the maximum DCQ quantity applicable under the Old Contract was 12,912 GJ per day. As specifically set out in Schedule 1 to the Old Contract,[5] TransAlta's Obligated DCQ was 17,904 GJ per day at Dawn. In accordance with section 2.01 of Schedule 2 of the Old Contract, TransAlta was required to deliver the DCQ to Union on a Firm basis every day. There was no ambiguity in the Old Contract with respect to TransAlta's Obligated DCQ. TransAlta's submissions ignore this express term of the Old Contract and amount to an assertion that the amount listed in Schedule 1 is a mistake. There is no basis for that assertion.

13. Second, there is no basis for TransAlta's assertion that it is entitled to recalculate its Obligated DCQ based on the definition of DCQ in the general terms and conditions. Section 2.01 of the Old Contract expressly states that "[TransAlta] accepts the obligations to deliver the Obligated DCQ parameters in Schedule 1 to Union on a Firm basis." (Emphasis added). Schedule 1 provides that the Obligated DCQ is 17,904 GJ per day at Dawn.

14. Further, TransAlta's own conduct under the Old Contract confirms Union's position. TransAlta's use of storage capacity under the Old Contract was inconsistent with the position it is now taking. Under section 2.04 of Schedule 2 of the Contract, TransAlta was entitled to storage space equal to 15 times the Obligated DCQ for the Contract Year. Since TransAlta's Obligated DCQ was 17,904 GJ per day, as reflected on Schedule 1, its

[5] Gas Storage and Distribution Contract dated November 1, 2012, Sched. 1, Compendium, Tab 2.

Firm Cost-based Storage Space was 268,000 GJ (approximately 15 x 17,904). If TransAlta's Obligated DCQ were 12,912 as it alleges, its Firm Cost-based Storage Space would have been approximately 193,680 GJ (15 x 12,912). Yet, on 26 days in November 2013, 16 days in December 2013 and 5 days in January 2014, TransAlta's storage balance exceeded 193,680 GJ. Thus, there is no merit to TransAlta's assertion that the maximum DCQ that Union may require under the Contract was 12,912 GJ per day.

E. The Board Has No Jurisdiction to Interpret the Old Contract or to Award Damages

15. In Union's submission, the Board has no jurisdiction to interpret the Old Contract or to order Union to pay damages to TransAlta for breach of contract.

16. None of the provisions of the *Ontario Energy Board Act, 1998* to which TransAlta refers in its letter give the Board jurisdiction to alter, interpret or give effect to the terms of the Old Contract, which is a private commercial agreement entered into between Union and TransAlta, both sophisticated commercial parties, where no concerns are raised relating to the rate or terms of service presently applicable to TransAlta.

17. Any dispute as to the meaning of the terms in the Old Contract, and any legal proceeding to determine amounts owed under the Old Contract, is properly the subject of civil litigation before the courts, not of a proceeding before the Board. Indeed, section 12.03 of the Old Contract provides that "the parties to this contract exclusively attorn to the jurisdiction of the Courts of Ontario."[6]

18. Contrary to TransAlta's submissions, section 36 of the Act does not support its arguments. This provision allows the Board to approve or fix just and reasonable rates on a ***prospective*** basis, even if such terms are contrary to the terms of a contract. Nothing in section 36 gives the Board the power to interpret a contract or to award damages under a contract. Further, nothing in section 36 gives the Board the power to interfere with rates

[6] Gas Storage and Distribution Contract dated November 1, 2012, General Terms and Conditions, s. 12.03, Compendium, Tab 2.

that were charged in the past. That would amount to retroactive rate-making, which the Board has no power to do.[7]

19. As the Board indicated in dismissing TransAlta's motion in EB-2014-0154, "[t]he Board has set just and reasonable rates for Union, and the resolution of contractual disputes is generally outside the mandate of the Board."[8]

20. The Court of Appeal has confirmed that the interpretation of contracts and the granting of remedies pursuant to those contracts is within the jurisdiction of the courts and is not within the exclusive jurisdiction of the Board.[9]

21. Further, in *Garland*, the Supreme Court of Canada expressly held that the Board does not have jurisdiction to award damages.[10] Although the dispute in that case involved a rate order, at its heart it was a private law matter within the competence of the civil courts and the Board did not have jurisdiction to order the remedy sought by the plaintiff.

22. This is consistent with the Board's own interpretation of its jurisdiction. In EB-2010-0018, the parties granted the Board the power to resolve their contractual disputes. Even in the face of such an explicit contractual provision, the Board held that it has no legislative authority to adjudicate contractual disputes. It found that the issue between the parties was essentially a contractual dispute between two private entities and that it has "no jurisdiction to consider or remedy contractual disputes."[11]

23. TransAlta has provided no authority to the contrary. Its reliance on the Board's Natural Gas Electricity Interface Review (NGEIR) decision dated November 7, 2006 (EB-2005-0551) is misplaced. Unlike the present situation, the NGEIR decision did not involve a dispute between parties regarding the proper interpretation of their contract. Rather, this was a proceeding initiated by the Board to determine whether forbearance from

---

[7] *ATCO Gas & Pipelines Ltd. v. Alberta (Energy and Utilities Board*, 2006 SCC 4, para. 71, Compendium, Tab 7.

[8] Decision on Motion and Procedural Order No. 3 dated July 29, 2014 (EB-2014-0154), p. 7, Compendium, Tab 16.

[9] *Tribute Resources v. 2195002 Ont. Inc*, 2012 ONSC 25 at para. 24, Compendium, Tab 8, aff'd 2013 ONCA 576 at para. 29, Compendium, Tab 9; *Tribute Resources v. McKinley Farms*, 2010 ONCA 392 at paras. 18-19, Compendium, Tab 10.

[10] *Garland v. Consumers Gas Co.*, 2004 SCC 25 at para. 70, Compendium, Tab 11.

[11] Decision and Order dated May 17, 2012 (EB-2010-0018) at pp. 14-15, Compendium, Tab 12.

regulation of natural gas storage was justified. The Board considered whether it should (and declined to) order a change to the contract quantities of T1 customers on a prospective basis.[12] However, it did not purport to interpret the terms of those contracts to resolve an existing dispute between the parties relating to past delivery obligations. It also did not purport to retroactively change rates. The Board has no jurisdiction to do so.

E. The Board Has No Jurisdiction to Refer the Dispute to Binding Arbitration

24. Likewise, the Board has no jurisdiction to compel Union and TransAlta to arbitrate a dispute. It is a fundamental principle of arbitration law that a private dispute is only subject to arbitration if both parties consent.[13] Indeed, the *Arbitration Act, 1991* contemplates that only disputes covered by an "arbitration agreement" are subject to arbitration. An "arbitration agreement" is defined as "an agreement by which two or more persons agree to submit to arbitration a dispute that has arisen or may arise between them".[14] There is no such agreement between Union and TransAlta.

25. Union does not consent to arbitrating this dispute with TransAlta. The proper forum to resolve TransAlta's complaints in the Ontario Superior Court of Justice – indeed, the Old Contract provides that the parties are subject to the exclusive jurisdiction of the Ontario courts.[15] As Union has already advised TransAlta, Union is prepared to consent to having the dispute brought before the Superior Court of Justice's Commercial List.

26. TransAlta appears to be taking the position that the Board may refer the dispute to arbitration by applying section 5.1.1 of STAR. First, STAR does not apply to the Old Contract. As the name implies, STAR applies to storage and transmission (or transportation) contracts.[16] STAR creates requirements for non-discriminatory access to transportation capacity – that is, capacity on Union's transmission system other that for

---

[12] Natural Gas Electricity Interface Review decision dated November 7, 2006 (EB-2005-0551), p. 90, TransAlta's Book of Authorities, Tab 4.

[13] *Kaverit Steel & Crane Ltd v Kone Corp* (1992), 120 A.R. 346 at paras. 14-15 (C.A.), leave to appeal to S.C.C. refused, [1992] 2 S.C.R. vii (note), Compendium, Tab 14.

[14] *Arbitration Act, 1991*, S.O. 1991, c. 17, s. 1, Compendium, Tab 15.

[15] Gas Storage and Distribution Contract dated November 1, 2012, Sched. 2, s. 12.03, Compendium, Tab 2.

[16] Storage and Transportation Access Rule, TransAlta's Book of Authorities, Tab 3.

delivery to a customer. Nothing in STAR purports to apply to the terms of distribution contracts.

27. The Obligated DCQ requirement in the Old Contract relates to a distribution service, not a storage or transportation service. Indeed, pursuant to sections 2.01 and 2.02 of the Old Contract, TransAlta is required to deliver, and Union is required to receive, the Obligated DCQ. Section 2.03 of the Old Contract provides for the delivery of gas to TransAlta's point of consumption. Section 2.06 specifies that the distribution service under the Old Contract is a combination of firm and interruptible service. Thus, the Obligated DCQ requirement relates to a distribution service, not a transportation service, and STAR does not apply to it.

28. In addition, contrary to TransAlta's submission, the simple fact that Union is subject to STAR in relation to other activities undertaken by it does not render STAR applicable in this context.

29. Thus, the Board has no jurisdiction to compel the parties to refer the dispute to binding arbitration.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

[Original signed by Crawford Smith]

Crawford Smith and Myriam M. Seers
Lawyers for Union Gas Limited

Tab 2

Contract ID	SA-6233-10
Contract Name	TRANSALTA-SRCP

T1 CONTRACT

This GAS STORAGE AND DISTRIBUTION CONTRACT ("Contract"), made as of the 1st day of November, 2012

BETWEEN:

UNION GAS LIMITED

hereinafter called "Union"

- and -

TRANSALTA GENERATION PARTNERSHIP

hereinafter called "Customer"

WHEREAS, Customer has requested Union and Union has agreed to provide Customer Services;

AND WHEREAS, Union will deliver Customer owned Gas to Customer's Point(s) of Consumption or Storage under this Contract pursuant to the T1 Rate Schedule;

IN CONSIDERATION of the mutual covenants contained herein, the parties agree as follows:

1 INCORPORATIONS

The following are hereby incorporated in and form part of this Contract:

a) Contract Parameters contained in Schedule 1 – DCQ, Storage and Distribution Services Parameters, and Schedule 1a – Supplemental Services Parameters as amended from time to time; and
b) The latest posted version of the T1 Contract Terms and Conditions contained in Schedule 2 subject to Section 12.18 of Union's General Terms and Conditions; and
c) The latest posted version of Union's General Terms and Conditions subject to Section 12.18 of Union's General Terms and Conditions; and
d) The applicable T1Rate Schedule as amended from time to time and as approved by the Ontario Energy Board.

For the purposes of this Contract, "Point(s) of Receipt" shall mean those points identified in Schedule 1 where Union may receive Gas from Customer.

2 PRELIMINARY AND CONTINUING CONDITIONS

This Contract and the rights and obligations of the Parties hereunder shall be conditional upon the fulfillment and maintenance in good standing of the following conditions:

a) Security arrangements acceptable to Union shall be supplied and maintained in accordance with the General Terms and Conditions; and
b) Union shall have received all required OEB approvals.

The above conditions must be initially satisfied by Customer 25 days prior to the Day of First Delivery.

3 CONTRACT TERM

This Contract shall be effective from the date hereof. However, the Service, obligations, terms and conditions hereunder shall commence on the Day of First Delivery. Subject to the provisions hereof, this Contract shall continue in full force and effect for each Contract Year until notice to terminate is provided by either Union or Customer. Such notice must be delivered at least three (3) months prior to the end of a Contract Year.

4 SERVICES PROVIDED

Union agrees to provide Storage Services and Distribution Services as specified in Schedule 1 and Schedule 1a. To be eligible for these services, the Customer must have forecasted annual natural gas consumption of 5,000,000 m3 or greater at one property or contiguous properties. If the Customer does not maintain this level of consumption during the current contract year or is not expected to maintain this level of consumption then, effective the following contract year, the Customer will be placed on an alternate service.

5 RATES FOR SERVICE

Customer agrees to pay for Services herein pursuant to the terms and conditions of the following:

a) The R1 Rate Schedule and the T1 Rate Schedule as they may be amended from time to time by the Ontario Energy Board; and

b) This Contract and the incorporations hereto.

6 NOTICES

Notices shall be delivered pursuant to the Notice provision of the General Terms and Conditions and delivered to the addresses as referenced in Schedule 1.

7 AGENCY

If an agent on behalf of the Customer executes this Contract then, if requested by Union, the agent shall at any time provide a copy of such authorization to Union.

Notwithstanding the provisions of Section 2(a) the agent shall be responsible for providing security arrangements acceptable to Union in accordance with the General Terms and Conditions.

The agent and Customer acknowledge and agree that they are unconditionally and irrevocably jointly and severally liable for all Customer obligations under the Contract.

8 CONTRACT SUCCESSION

This Contract replaces all previous Gas Storage and Distribution Contracts, subject to settlement of any Surviving Obligations.

The undersigned execute this Contract as of the above date. If an Agent on behalf of Customer executes this Contract then, if requested by Union, Agent or Customer shall at any time provide a copy of such authorization to Union.

9 RESTATED CAPSTONE AGREEMENT

Despite Section 12.05 of Union's General Terms and Conditions, it is the intention of the parties hereto that the Firm and Interruptible Contract Demand figures in Section 5 of Schedule 1 of this Contract be as stated in a certain Restated Capstone Agreement between Union, Customer and others dated November 1, 2012 (the "**RCA**"), during the term of the RCA. It is further intended the daily quantities of Gas attributable to Customer shall be as stated in the "Individual Customer Volume Consumption Report" as issued pursuant to the RCA. In the event of a conflict between the provisions of the RCA and this Contract related to the aforementioned parameters, the RCA shall prevail. For greater clarity the aforementioned parameters shall be as per this Agreement in the event the RCA is no longer in effect.

UNION GAS LIMITED

Authorized Signatory

Please Print Name

TRANSALTA GENERATION PARTNERSHIP
by its managing partner
TRANSALTA CORPORATION

I have the Authority to bind the Corporation, or Adhere C/S, if applicable

Please Print Name

Contract ID	SA-6233-10
Contract Name	TRANSALTA-SRCP

Schedule 1
DCQ, Storage and Distribution Services Parameters
Rate T1

1. DATES

This Schedule 1 is effective the 1st day of November 2012
"Day of First Delivery" means the 1st day of November 2012

2. DAILY CONTRACT QUANTITY (DCQ)*

Upstream Point(s) of Receipt

Location	Obligated DCQ GJ per Day
Western	0

Ontario Point(s) of Receipt

Location	Obligated DCQ GJ per Day
Dawn	17,904

*Obligated DCQ does not include Compressor Fuel.

3. SUPPLY OF COMPRESSOR FUEL

Customer shall supply compressor fuel for Union's distribution and storage services.

4. STORAGE PARAMETERS

Parameters	Amount	Unit of Measure
Firm Cost-based Storage Space	[redacted]	GJ
Firm Injection/Withdrawal Right (Union provides deliverability inventory)	[redacted]	GJ per Day
Firm Injection/Withdrawal Right (Customer provides deliverability inventory)	[redacted]	GJ per Day

Note 1: Interruptible Injection/Withdrawal Right [redacted] GJ per day

(Union provides deliverability inventory)

5. DISTRIBUTION PARAMETERS

Point(s) of Consumption

	A	B	C	D
Location				
Union Meter Number				

	Unit of Measure	Point(s) of Consumption A	B	C	D
Daily Contract Demand (CD):					
Firm Contract Demand	m^3/Day	[redacted]			
Interruptible Contract Demand	m^3/Day	[redacted]			
Firm Hourly Quantity*	m^3/hour				
Maximum Hourly Volume	m^3/hour	See Note 1			
Minimum Gauge Pressure	kPa	[redacted]	[redacted]		
Notice Period for Interruption	hours	4	4		
Maximum Number of Days Interruption	days	[redacted]	[redacted]		

*Firm Hourly Quantity (FHQ) means the maximum quantity of natural gas that may flow during any hourly period when an interruption in Interruptible Service becomes effective within a Gas Day.

Note 1: It is the intention of the parties that the Maximum Hourly Volume for each Point of Consumption shall be as in the following table:

(m3/hr)	Firm Maximum Hourly Volume	Interruptible Maximum Hourly Volume	Total Maximum Hourly Volume
Consumption point A	[redacted]	[redacted]	[redacted]
Consumption Point B	[redacted]	[redacted]	[redacted]
Total	[redacted]	[redacted]	[redacted]

If the Firm CD's in the RCA change, the Maximum Hourly Volumes may be re adjusted, subject to a maximum of 117,500 m3/hour for Firm Maximum Hourly Volume.

Rate Parameters

	Unit of Measure	Point(s) of Consumption A	B	C	D
Firm Transportation Demand	As per the Rate T1 Rate Schedule				
Firm Transportation Commodity	As per the Rate T1 Rate Schedule				
Interruptible Transportation Commodity	cents per m^3	[redacted]			

6. MINIMUM ANNUAL VOLUME

		Point(s) of Consumption			
	Unit of Measure	A	B	C	D
Firm Minimum Annual Volume	m^3/year	5,000,000			
Interruptible Minimum Annual Volume	m^3/year	0			

7. CONTACT LIST FOR NOTICES

Customer contact information is found in Unionline. Where multiple contacts have been identified by Customer, Union is obligated to contact the first party only.

Union Gas contact information is found on Union's website.

SCHEDULE "2"
Terms and Conditions
T1 or T2 Contracts

1 UPSTREAM TRANSPORTATION COSTS

Where Union is receiving Gas from Customer at a Point of Receipt upstream of Union's system, Customer shall be responsible to Union for all direct and indirect upstream transportation costs including fuel from the Point of Receipt to Union's system, whether Gas is received by Union or not for any reason including Force Majeure. Where actual quantities and costs are not available by the date when Union performs its billing, Union's reasonable estimate will be used and the appropriate reconciliation will be done in the following month.

2 DELIVERY, RECEIPT, DISTRIBUTION, STORAGE & BALANCING OBLIGATIONS

2.01 Delivery

Customer accepts the obligations to deliver the Obligated DCQ parameters in Schedule 1 to Union on a Firm basis. On days when an Authorization Notice is given, the DCQ parameters are as amended in the Authorization Notice. For all Gas to be received by Union at the Upstream Point of Receipt, Customer shall, in addition to the DCQ, supply on each day sufficient Compressor Fuel as determined by the Transporter.

2.02 Receipt

Union agrees to receive a quantity of Gas at the Points of Receipt identified in Schedule 1, on the terms as contained in Schedule 1, provided Union is not obligated to accept quantities of Gas that exceed any of the following:

a) the sum of the Obligated DCQ as authorized for that Day;
b) the amount properly nominated by Customer to Union for receipt by Union;
c) an amount that would result in Customer exceeding the Firm Storage Space;
d) an amount that would result in Customer exceeding the Firm Injection Right.

2.03 Distribution to Point(s) of Consumption

Union agrees to distribute a quantity of Gas to each Point of Consumption, not to exceed the sum of Firm Contract Demand and Interruptible Contract Demand, or the Firm Contract Demand only when an interruption is in effect, subject to the Maximum Hourly Volume parameters.

On any Day, any Gas in excess of 103% of the Contract Demand shall be overrun. Unless Union specifically provides written authorization to exceed contract parameters, any excess shall be unauthorized overrun and, in addition to any other remedies Union may pursue, Customer shall incur charges as referenced in the Rate Schedule.

The parties agree that any reference to Transportation Service in the Rate Schedule shall include the Distribution Parameters as set out in this Schedule 1.

On any Day during the Contract Year, Gas usage shall be deemed as follows:

First gas used	Firm Gas up to the Firm Contract Demand then in effect.
Next gas used	Interruptible Gas (if applicable) up to the Interruptible Contract Demand then in effect.
Next gas used	Overrun for quantities in excess of the parameters as specified in this Section.

2.04 Storage Space

Storage space available at cost will be re-determined for each Contract Year at contract renewal. Customer shall have the option of electing the storage space allocation method which best serves their needs. The allocation methods available are:

Aggregate Excess Methodology:

Space = total winter (November 1 to March 31) consumption – [total annual consumption x 151 winter days/365 days]

Under this method, the two (2) most recent twelve (12) month periods of historical consumption and twelve (12) months of forecast consumption are used to calculate three storage space values using the above noted formula: weighted 25%, 25% and 50%, respectively. Union will work with Customer to determine a reasonable forecast of consumption. If Customer does not provide a forecast of consumption for the forecast period then the most recent twelve (12) months of historical consumption will be used as the forecast.

If sufficient historical consumption does not exist or if Customer is forecasting a significant change in operations, the agreed upon forecast may get more weight in the calculation.

Fifteen (15) times Obligated DCQ Methodology:

Under this method, storage space available at cost will be calculated as fifteen (15) times the Obligated DCQ calculated for the Contract Year. Obligated DCQ will be calculated as $1/365^{th}$ of the forecast consumption for the Contract Year.

Under either methodology, the calculations will be performed and the greater entitlement will be incorporated into the Contract at each contract renewal date.

Customer may contract for less storage space than the amounts determined above.

2.05 Storage Injection/Withdrawal

Union agrees to inject a quantity of Gas to storage, provided Union is not obligated to inject a quantity of Gas if a customer exceeds their storage space.

Union agrees to withdraw a quantity of Gas from storage, provided Union is not obligated to withdraw a quantity of Gas that exceeds the quantity of gas remaining in the Customer's Firm Storage Space.

On any Day injection/withdrawal activity shall be deemed as follows:

First gas injected or withdrawn	Up to 103% of the injection/withdrawal as specified in Schedule 1, Section 4.
Next gas injected or withdrawn	Market Priced injection/withdrawal as specified in Schedule 1a – Supplemental Services Parameters
Next gas injected or withdrawn	Overrun injection/withdrawal for all other quantities.

Injection/withdrawal overrun will be authorized or unauthorized as indicated on Union's website and Unionline.

The maximum entitlement for storage injection/withdrawal available to Customer at cost is the greater of:

- Obligated DCQ; or
- Firm Contracted Demand less Obligated DCQ

Customer may contract up to the maximum injection/withdrawal entitlement using a combination of Firm injections and withdrawals, interruptible withdrawals or incremental firm injections as specified in Section (C) Storage Service on the applicable Rate Schedule.

Under either methodology, the calculations will be performed and the greater entitlement will be incorporated into the Contract at each contract renewal date.

Customer may contract for less storage injection/withdrawal than the amounts determined above.

2.06 Type of Distribution Service

The type of Distribution Service herein shall be a combination of Firm and Interruptible Service for each Point of Consumption as identified in Schedule 1.

The Interruptible Contract Demand at a Point of Consumption is subject to interruption by Union and, in addition to Force Majeure, is limited to the Maximum Number of Days of Interruption during each Contract Year as identified in Schedule 1. Union shall provide Customer notice of interruption not less than the Notice Period for Interruption for each Point of Consumption, as identified in Schedule 1.

2.07 Transactional Balancing Services

Transactional Balancing Services are defined as those services used by customers to assist in balancing their storage accounts. The following services can be requested through the nomination process, all other services would require an authorization.

Services available and associated locations include:

a) Diversions – Obligated Points of Receipt
b) Suspensions - Obligated Ontario Points of Receipt

c) Incremental Supply – Ontario Points of Receipt
d) Ex-franchise transfers to a third party - Dawn
e) In-franchise transfers - Dawn

Further definition of each Transactional Balancing Service and the associated fees are posted on Union's web site.

These services are nominated by Customer, pursuant to the nomination process in Section 1 of the General Terms and Conditions.

These services may be subject to scheduling reductions or interruptions. Union shall advise the party who nominated on behalf of Customer only of such scheduling reduction or interruption.

Each Transactional Balancing Service is nominated separately and is independent of any other Transactional Balancing Service. Notwithstanding the scheduling of any Transactional Balancing Services, Customer bears the risk that the Transactional Balancing Service may result in overrun. Scheduling a particular Transactional Balancing Service does not constitute the authorization of any overrun of any Contract parameter.

3 MINIMUM ANNUAL VOLUME

3.01 Firm Minimum Annual Volume

In each Contract Year, the Customer shall consume or, in any event, pay for the Firm Minimum Annual Volume ("FMAV") in the formula below. The payment required for the firm quantity not consumed in any Contract Year (the "Firm Deficiency Volume" or "FDV") shall be calculated by multiplying FDV by the Firm Transportation Commodity charge as of the last day of the Contract Year, if applicable. This payment would only apply if the FDV was greater than zero.

Where:

$$FDV = \left[FMAV \times [(U - D_F) / U]\right] - [FV - (F + O)]$$

And:

FMAV	=	Firm Minimum Annual Volume (as identified in Schedule 1)
U	=	number of days in the Contract Year
D_F	=	number of days of Force Majeure in the Contract Year where service is curtailed below the Firm Contract Demand, then in effect
FV	=	total firm volume taken in the Contract Year
F	=	volumes delivered to the Points of Consumption during Force Majeure
O	=	total Authorized and/or Unauthorized Overrun Gas taken in the Contract Year

3.02 Interruptible Minimum Annual Volume

In each Contract Year, the Customer shall consume or, in any event, pay for the Interruptible Minimum Annual Volume ("IMAV") in the formula below. The payment required for the

5 ENERGY CONVERSION

Balancing of Gas receipts by Union with Gas distributed to Customer is calculated in energy. The distribution to Customer is converted from volume to energy at the Customer site-specific heat measurement value.

Site-specific heat measuring equipment will be supplied, installed and maintained by Union Gas at each Point of Consumption, or as determined necessary by Union Gas, at the Customer's expense. The resulting heat value adjustment quantity shall be applied to the Customer's storage account.

6 STORAGE SERVICES

6.01 Storage Injection and Withdrawal

Subject to Section 2, if on any Day the quantity of Gas Union receives from Customer exceeds the quantity distributed to Customer, the amount of such excess shall be deemed to have been injected into Customer's storage account.

Subject to Section 2, if on any Day the quantity of Gas Union distributed to Customer exceeds the quantity received from Customer, the amount of such excess shall be deemed to have been withdrawn from Customer's storage account.

6.02 Deliverability Inventory Provided By Customer

If Customer has agreed to supply their own deliverability inventory, Customer's right to withdraw Gas under the Firm Withdrawal Right shall be adjusted between January 1 and April 30. During this period, if Customer's inventory level in storage at the start of each Day is less than 20% of Storage Space entitlement then Customer's Firm Withdrawal Right will be adjusted in accordance with the following formula:

If: $I >= CDI$,
Then: $AFW = FW$
However if: $I<CDI$
Then: $AFW = FW \times (I / CDI)$

Where:

AFW	=	Adjusted Firm Withdrawal
FW	=	Firm Withdrawal Right (Schedule 1, Storage parameters plus Schedule 1a, Supplemental Deliverability)
I	=	Actual Inventory at the beginning of each Day
CDI	=	Customer Deliverability Inventory (Lesser of: 0.2 x SP or FW/0.075) where: SP = Firm cost-based Storage Space

6.03 Disposition of Gas at Contract Termination

If this Contract terminates or expires and Customer does not have a contract for Storage Service with Union then, except as authorized by Union, any Gas balance remaining in Customer's Storage Space shall incur a charge equivalent to the Unauthorized Storage Space Overrun rate in the

applicable Rate Schedule. Customer shall incur such charge monthly until the Gas balance remaining has been reduced to zero.

7 CUSTOMER'S FAILURE TO DELIVER GAS

7.01 Customer's Failure to Deliver Obligated DCQ to Union

If on any Day, for any reason, including an instance of Force Majeure, Customer fails to deliver the Obligated DCQ to Union then such event shall constitute a Failure to Deliver as defined in the General Terms and Conditions. The Failure to Deliver rate in the R1 Rate Schedule shall apply to the quantity Customer fails to deliver. The upstream transportation costs (if any) (Section L) shall also apply and be payable by Customer.

For Gas that should have been received, Union may make reasonable attempts, but is not obligated to acquire an alternate supply of Gas ("Alternate Supply Gas"). Union's costs and expenses associated with acquiring Alternate Supply Gas will be payable by Customer. For greater certainty, payment of the Failure to Deliver charge is independent of and shall not in any way influence the calculation of Union's costs and expenses associated with acquiring the said Alternate Supply Gas.

Union's obligation to deliver Gas to the Point(s) of Consumption shall be reduced to a quantity of Gas (the "Reduced Distribution Obligation") in aggregate not to exceed the sum of:

a) The confirmed Nomination quantity of Gas to be delivered to Union;
b) Alternate Supply Gas if acquired by Union;
c) Customer's Firm Withdrawal Right subject to Section 6.02.

In addition to any rights of interruption in the Contract, if the Customer consumes Gas in excess of the Reduced Distribution Obligation, Union may immediately suspend deliveries of Gas to the Point(s) of Consumption. In addition, Union may direct Customer to immediately curtail or cease consumption of Gas at the Point(s) of Consumption.

Customer shall immediately comply with such direction. Such suspension or curtailment shall not constitute an interruption under the Contract.

Union shall not be liable for any damages, losses, costs or expenses incurred by Customer as a consequence of Union exercising its rights under this Section.

7.02 Notice of Failure

Each Party shall advise the other by the most expeditious means available as soon as it becomes aware that such failure has occurred or is likely to occur. Such notice may be oral, provided it is followed by written notice.

7.03 Customer Failure to Deliver Compressor Fuel

For Gas to be delivered by Customer to Union at an Upstream Point of Receipt, if Customer fails to deliver sufficient Compressor Fuel then in addition to any other remedy Union shall deem the first Gas delivered to be Compressor Fuel and Section 7.01 will apply.

GENERAL TERMS AND CONDITIONS

GENERAL TERMS AND CONDITIONS

1 NOMINATION REQUIRMENTS FOR IN-FRANCHISE CONTRACTED SERVICES

Customers with contracted Services requiring Nominations to Union must submit Nominations to Union in accordance with Union's nomination provisions. These Nominations must be submitted to Union via fax or Unionline where available for Nominations.

Union follows the North American Energy Standard Board (NAESB) timeline standards providing for 4 available nomination cycles for each Gas Day. Each of the nomination cycles follows the same process sequence: Nomination, acceptance, confirmation and scheduling.

1.01 Nomination Cycle Timelines

The table below identifies the deadlines for each of the 4 standard nomination cycles. All times are identified as Eastern Clock Time ("ECT")

Nomination Cycle	Fax Deadline	Unionline Deadline (where available)	Scheduling Deadline	Effective Flow
Timely (Cycle 1)	1130 hours	1230 hours	1730 hours	1000 hours
Evening (Cycle 2)	1800 hours	1900 hours	2300 hours	1000 hours

Intra-Day Nominations can be used to modify nominated quantities on the current Gas Day.

Nomination Cycle	Fax Deadline	Unionline Deadline (where available)	Scheduling Deadline	Effective Flow
Intra-Day 1 (Cycle 3)	1000 hours	1100 hours	1500 hours	1800 hours
Intra-Day 2 (Cycle 4)	1700 hours	1800 hours	2200 hours	2200 hours

1.02 Nomination Deadline for Services requiring Union to Nominate on Other Pipelines

The Nomination deadline for any contracted services (ie. exchanges) requiring Union to nominate on upstream pipelines is 1030 hours ECT. These services are only offered on the Timely Nomination Cycle. If nominated after 1030 hours ECT and before the close of the Timely Nomination Cycle deadline Union will attempt to accommodate on a reasonable efforts basis. Union does not accept changes to the nominated quantities for these services after the close of the Timely Nomination Cycle deadline.

1.03 Nomination Quantities (Units)

All Services are required to be nominated in whole Gigajoules (GJ's)

1.04 Compressor Fuel

For Services requiring Customer to provide Compressor Fuel in kind, the nominated fuel requirements will be calculated by rounding to the nearest whole GJ.

1.05 Union's Acceptance of Nominations

Union will accept Nominations for contracted Services on each of the 4 standard nomination cycles. The Nomination will be rejected if the activity on the Nomination does not properly balance or if the nominated quantities violate Customer's contractual entitlements.

If a Nomination is not received prior to the nomination deadline it will be held for scheduling in the subsequent nomination cycle for the Gas Day.

1.06 Confirmation Process

The confirmation process validates nominated quantities to flow between interconnecting pipelines to ensure Customers have nominated identical quantities to both pipeline operators. In the case where there is a discrepancy between the nominated quantities and the discrepancy cannot be resolved with Customer, then the lower quantity will be the confirmed scheduled quantity.

1.07 Scheduling Process

During the scheduling process Union compares all of the Nominations to the physical capacity available for the Gas Day in question.

If there is insufficient capacity available to meet all of the nominated quantities Union will complete scheduling reductions of nominated Interruptible Services.

If Union is unable to completely schedule an Interruptible Service, Customer will be advised of its scheduled quantities no later than the close of the scheduling deadline for the applicable Nomination cycle. Once notified, Customer is, within 30 minutes, required to submit a revised Nomination to meet the scheduled quantity for the Interruptible Service. In order to be accepted, this Nomination must be properly balanced and the nominated quantities must not violate Customer's contractual entitlements. If a revised Nomination is not submitted, Union will, using the contracted Services Customer has available, re-balance the Nomination to match the scheduled quantities.

Scheduling of Firm Services must be nominated on the Timely Nomination Cycle. Nominations for increasing quantities for Firm Services after the Timely Nomination Cycle will be treated as Interruptible Services and will only be scheduled if there is sufficient capacity available.

1.08 Subsequent Nominations

All scheduled Nominations for Services will remain in effect until a new Nomination is provided by Customer.

The Unbundled Service requires a valid daily Nomination.

1.09 Parkway Call

This Section 1.09 is only applicable to Services taken under Rates U2, U5, U7 and U9. Union shall advise Customer of the Parkway Call requirement on or before 1730 hours ECT on the day immediately preceding the Gas Day for which the Parkway Call is required.

After being notified by Union, but no later than 1900 hours ECT on the same day, Customer shall provide a revised Nomination to Union, which shall include the entire Parkway Call. If a revised Nomination acceptable to Union is not provided by 1900 hours ECT or does not include the entire Parkway Call, a Failure to Deliver will be deemed to have occurred, and the Failure to Deliver section in Schedule 2 of this Contract shall apply.

2 FORCE MAJEURE

In the event that either Customer or Union is rendered unable, in whole or in part, by Force Majeure, to perform or comply with any obligation or condition of this Contract then, subject to the provision of this Section 2, the obligations (other than the obligations to make payment of money then due) of both parties so far as they are directly related to and affected by such Force Majeure, shall be suspended during the continuance of the Force Majeure.

The party claiming Force Majeure shall give Notice, with full particulars of such Force Majeure, to the other party as soon as possible after the occurrence of Force Majeure.

The party claiming Force Majeure shall also give Notice to the other party as soon as possible after the Force Majeure is remedied in whole or part.

Force Majeure means:

a) Acts of God, landslides, lightning, earthquakes, fires, storms, floods, washouts, explosions, breakage or accident to its machinery or equipment or lines of pipe;

b) freezing or failure of wells or lines of pipe; curtailment of firm transportation and/or firm storage by Transporters;

c) strikes, lockouts or other industrial disturbances, riots, sabotage, insurrections, civil disturbance, acts of terrorism, wars, arrests or restraint of governments and people;

d) any laws, orders, rules, regulations, acts of any government body or authority, civil or military;

e) any act or omission by parties not controlled by the party claiming Force Majeure; and

f) any other similar causes not within the control of the party claiming Force Majeure and which by the exercise of due diligence such party is unable to prevent or overcome.

The party claiming Force Majeure shall make reasonable efforts to avoid, or correct the Force Majeure and to remedy the Force Majeure once it has occurred in order to resume performance.

2.01 Force Majeure Not Available

A party claiming Force Majeure shall not be entitled to the benefit of the provisions of Force Majeure if any one or more of the following circumstances prevail:

a) the Force Majeure was caused by the negligence of the party claiming Force Majeure;

b) the party claiming Force Majeure failed to make all reasonable efforts (not including litigation, if such remedy would require litigation) to remedy the Force Majeure;

c) the Force Majeure was caused by lack of funds;

d) the party claiming Force Majeure did not give Notice required, as soon as reasonably possible after the Force Majeure occurred.

2.02 Force Majeure Declared by Union

During a Force Majeure declared by Union, Customer will be responsible for commodity charges and will only be relieved of the demand charges applicable to that part of the Services not available to Customer as a result of the Force Majeure. Union will not be responsible for any Transporter charges.

2.03 Force Majeure Declared by Customer

During a Force Majeure declared by Customer, all demand charges and all commodity charges otherwise payable under this Contract will continue to be payable. Where this Contract includes an Obligation to Deliver Gas, such Obligation to Deliver Gas shall not be relieved under Force Majeure. Union will not be responsible for any Transporter charges.

2.04 Applicability to Contractual Annual Quantity Requirements

a) The number of days of Force Majeure will proportionally reduce any minimum annual quantity upon which any minimum bills are determined, and such reduced minimum annual quantity will not be limited to the minimum quantity required to qualify for the applicable Rate Schedule.

b) Services taken during the period of Force Majeure will be deemed not to have been taken for purposes of determining the applicable minimum annual quantity.

3 TERMINATION and SUSPENSION

3.01 Termination of Contract and Suspension of Service

In the event of a breach, misrepresentation, non-observance or non-performance by any party to this Contract of any covenant, provision, representation, condition, continuing condition, restriction or stipulation contained in this Contract (including, without limiting the generality of the foregoing, any failure to pay, any failure to provide financial assurances when required pursuant to the terms of this Contract, or any Failure to Deliver), the party not in default may give written Notice to the defaulting party requiring it to remedy such default. If the defaulting party fails to fully remedy the party not in default for all consequences of such default within a period of ten (10) Business Days from receipt of such Notice, then:

(a) this Contract may be terminated by Notice from the party not in default; and/or

(b) if the Customer is the defaulting party, Union may suspend Services under this Contract. Such suspension shall not relieve Customer from paying any charges payable under this Contract.

If either party makes an assignment in bankruptcy, is a party against whom a receiving order is made, or for whom a receiver or monitor has been appointed under a security agreement or by a court or any similar action under any law, the other party may terminate this Contract immediately, except where not permitted by such law.

(c) The rights set forth in this Section 3.01 shall be in addition to, and not in derogation of or in substitution for, any other right or remedy which the parties respectively at law or in equity shall or may possess.

3.02 Effect of Termination

Notwithstanding the termination of this Contract, each party shall continue to be liable to pay on the terms herein specified any amount accrued and payable up to the time of termination. Termination will be without waiver of any other remedy to which the party not in default may be entitled including breaches of contract, for past and future damages, and losses.

4 NOTICE

All Notices required hereunder (each a "Notice"), except for those in Section 1 (Nominations) of these General Terms and Conditions shall be in writing and shall be sufficiently given and received if personally delivered or sent by mail, Unionline, fax or e-mail to the address of the party specified in Schedule 1 to this Contract.

Personally served Notice is deemed to be received when actually delivered.

Notice sent by mail, Unionline, or e-mail is deemed to have been received when actually received.

Notice sent by fax is deemed to have been received on the date of receipt of the transmission.

Notwithstanding the above, with the exception of Notice of interruption of Interruptible Services or Force Majeure, any Notice received after 5:00 pm or on a weekend or a statutory holiday is deemed to be received on the next Business Day.

The addresses of Customer and Union for receipt of Notices are as set out in Schedule 1 and such addresses may be changed by Notice given in accordance with this Section 4.

5 BILLING

5.01 Monthly Billing

Each Month, Union shall render a bill for Services and any other charges for the preceding Month. Charges may be based on estimated quantities. If based on an estimate, Union shall provide, in a future Month's billing, an adjustment based on any difference between actual quantities and estimated quantities.

5.02 Right of Examination

Both Union and Customer shall have the right to examine at any reasonable time, copies of the books, records and charts of the other to the extent necessary to verify the accuracy of any statement, chart or computation made under or pursuant to the provisions of this Contract.

5.03 Payments

5.03-1 Payment Date

Payment date is identified in the applicable Rate Schedule. If payment date is not identified in a Rate Schedule, it will be as identified on the invoice.

5.03-2 Remedies For Non-Payment

In the event that Customer fails to pay Union when payment is due, late payment charges as identified in the applicable Rate Schedule and the termination and suspension provisions in Section 3 will apply.

5.03-3 Adjustment of Underpayment or Overpayment

If a Customer in good faith disputes a bill or any portion thereof, Customer shall pay the undisputed portions of the bill. Together with such payment, Customer shall provide written Notice to Union setting out the portions of the bill that are in dispute, an explanation of the dispute and the amount that Customer believes is the correct amount.

If it is subsequently determined that a bill or any portion thereof disputed by Customer is correct, then Customer shall pay the disputed portions of the bill with Interest within thirty (30) days after the final determination.

If it is subsequently determined that Customer has been overcharged and Customer has actually paid the bill(s) containing the overcharge then, within thirty (30) days after the final determination, Union shall refund the amount of any such overcharge with Interest.

If it is subsequently determined that Customer has been undercharged, Customer shall pay the amount of any such undercharge within thirty (30) days after the final determination.

Customer and Union each expressly disclaims and waives any claim or dispute (including those related to amounts charged for Services or quantities of Gas distributed, stored, or transported) that relate to a period that is earlier than 12 Months prior to the date written Notice to the other party of such claim or dispute is asserted. This applies to the extent allowed under law and whether such claim or dispute is related to a billing error or measurement error or any other error or circumstance whatsoever.

5.04 Financial Assurance

If at any time during the term of this Contract, Union has reasonable grounds to believe that Customer's creditworthiness under this Contract has become unsatisfactory, then Union may by written Notice request financial assurances from Customer in an amount determined by Union in a commercially reasonable manner. Upon receipt of such written Notice, Customer shall have 14 days to provide such financial assurances.

The financial assurances requested by Union will not exceed the sum of the following:

a) an amount equal to 60 days of all Services; and,

b) if Customer holds a temporary capacity assignment from Union of a third party asset (for example, upstream pipeline capacity), an amount equal to the higher of 60 days of all charges for the third party asset, or security equivalent to that which may be required by the third party asset provider as if Customer held the asset directly; and,

c) if Customer supplies their own Gas, an amount equivalent to the value, as determined by Union, of any current or projected negative Banked Gas Account balance.

Customer may provide Union such financial assurances in the form of cash, letters of credit, guarantees or such other form as may be agreed upon between Customer and Union.

In the event that Customer fails to provide financial assurances as set out above, the termination and suspension provisions in Section 3 shall apply.

Where Customer has provided financial assurances to Union, and the grounds for requesting such financial assurances have been removed so that Customer's creditworthiness under this Contract has become satisfactory, then Customer may request the return of such financial assurances from Union by written Notice. Upon receipt of such written Notice Union shall have 14 days to return such financial assurances to Customer.

5.05 Non-Payment Remedy

If Customer shall be indebted (whether past, present, or future, liquidated or unliquidated) to Union, under this Contract, Union has the right to reduce any amount payable by Union to Customer under this Contract by an amount equal to the amount of such indebtedness to Union.

As part of this remedy, Union may take title to any or all of Customer's Gas in Union's possession. Such Gas shall be valued at the day price for Gas at Dawn as listed in Canadian Gas Price Reporter for the day of non-payment.

6 QUALITY

6.01 Natural Gas Quality

In any Month, the minimum average gross heating value of the Gas received by Union from Customer and delivered to Customer by Union shall be thirty-six (36) Megajoules per Cubic Metre. Gas shall not contain more than twenty-three (23) milligrams of hydrogen sulphide per Cubic Metre nor four hundred and sixty (460) milligrams of total sulphur per Cubic Metre of Gas, as determined by standard methods of testing.

6.02 Freedom from Objectionable Matter

The Gas received by Union and delivered to Customer hereunder shall be free (at prevailing pressure and temperature in Union's pipeline at the Point of Receipt or Point of Consumption, as the case may be) from dust, or other solids or liquids which cause injury to, or interfere with proper operation of the lines, regulators, or meters through which it flows.

6.03 Parties' Responsibilities

If the Gas being received by Union from Customer or delivered by Union to Customer fails at any time to conform to any of the specifications set forth in this Section 6, the party receiving such Gas shall notify the delivering party of such deficiency and thereupon the party receiving the Gas may, at its option, refuse to accept receipt of Gas pending correction by the party delivering the Gas. Neither party is responsible for any loss, damage, or injury resulting from such party's delivery of Gas that does not conform to any specifications set forth in Section 6 except to the extent any such loss, damage or injury arises as a result of such party's gross negligence or wilful misconduct.

7 MEASUREMENT

7.01 Determination of Volume and Energy

a) The volume and energy amounts shall be determined in accordance with the Electricity and Gas Inspection Act, R.S.C. 1985 c. E-4 (the "Act") and the Electricity and Gas Inspection Regulations, S.O.R 86/131 (the "Regulations"), and any documents issued under the authority of the Act and Regulations and any amendments thereto. Where there is no site specific energy measurement, Union's Average Heat Value will be used to convert volumes to energy.

b) The supercompressibility factor shall be determined in accordance with either the "Manual for Determination of Supercompressibility Factors for Natural Gas" (PAR Project NX-19) published in 1962 or with American Gas Association Transmission Measurement Committee Report No. 8, Nov. 1992, at Union's discretion.

7.02 Metering by Union, Check Measuring Equipment

Union will install and operate meters and related equipment in accordance with the Act and the Regulations referenced in these General Terms and Conditions.

Customer may install, maintain, and operate, such check measuring equipment as desired, and shall be so installed as not to interfere with the operation of Union's measuring equipment at

or near the Consumption Point. This check measuring equipment will be downstream of the Consumption Point and at Customer's own expense.

Where Union has installed heat value measuring equipment at Customer's end use location, the heating value properly measured at this site will be used to convert volume to energy for Gas delivered by Union to Customer.

7.03 Observation of Measurement Work

Union and Customer shall have the option to have representatives present at the time of any installing, reading, cleaning, changing, repairing, inspecting, testing, calibrating, or adjusting done in connection with the other's measuring equipment. Each party shall provide reasonable notification to the other party in connection with testing, calibrating or adjusting measuring equipment, to enable the other party to be present if desired.

7.04 Calibration and Test of Meters

The accuracy of Union's measuring equipment shall be verified by Union at reasonable intervals.

If Customer notifies Union that it desires a special test, the expense of any such test shall be borne by Customer if the measuring equipment tested is found to be in error by two per cent (2%) or less. In this event, previous recordings shall be considered accurate, but such equipment shall be adjusted to record as near to absolute accuracy as possible. If the special test shows a percentage of inaccuracy greater than two percent (2%), the expense of the test will by borne by Union and the financial adjustment shall be calculated in accordance with the Act and Regulations thereunder, and any successor statutes and regulations. Union shall not be required to verify the accuracy of such equipment more frequently than once in any thirty (30) day period.

7.05 Correction of Metering Errors - Failure Of Meters

In the event a meter is out of service, or registered inaccurately, the volume or quantity of Gas shall be determined by Union as follows:

a) by using the registration of any check meter or meter, if installed and accurately registering; or, in the absence of (a) then;

b) by correcting the error if the percentage of error is ascertainable by calibration, tests or mathematical calculation; or in the absence of both (a) and (b), then;

c) by estimating the quantity of Gas delivered during periods under similar conditions when the meter was registering accurately.

8 POSSESSION OF AND RESPONSIBILITY FOR GAS

8.01 Point of Receipt and Point of Consumption Controls

As between Union and Customer, control, responsibility, and possession of all Gas received and/or delivered and transported hereunder shall pass from the delivering party to the receiving party at the Points of Receipt and the Points of Consumption as applicable.

8.02 Title to the Gas

Each party warrants that it owns or controls, or has the right to deliver or have delivered to the other party, Gas that is free and clear of any lien, mortgage, security interest or other encumbrance whatsoever. The delivering party shall indemnify and hold harmless the receiving party from all claims, actions, or damages arising from any adverse claims by third parties claiming an ownership or an interest in such Gas.

8.03 Common Carrier and Insurance

To further clarify the relationship between Union and Customer, Union is not a common carrier and Union is not an insurer of Customer's Gas.

8.04 Right to Commingle the Gas

Union shall have the right to commingle and use the Gas received under this Contract with Gas owned by Union or others and deliver such commingled Gas to Customers.

9 FACILITIES AT CONSUMPTION POINT

9.01 Construction, Maintenance and Entry

Union may construct on Customer's property (whether owned by Customer or any other party), at each Point of Consumption the metering stations and facilities required by Union. Union employees or agents may at any reasonable time, with notification to Customer (except in cases of emergency where no notification is required), enter Customer's property provided that in all cases Union's employees or agents agree to abide by Customer's facility security policies and procedures and health and safety policies provided that they are reasonable and provided by Customer to Union's employees or agent prior to entry to the property.

9.02 Property, Easements, Utilities

Customer agrees that all stations and facilities installed by Union, including the meter station, are the property of Union whether the facilities are on property belonging to Customer or some other party.

Customer grants to Union on such non-financial commercial terms and conditions as may be agreed upon any required easements or agreements and undertakes to obtain or execute and deliver to Union such required easements or agreements to allow Union to have the related use of Customer's land interests which may be reasonably required by Union to facilitate Construction.

In the event that the station at the Point of Consumption requires electrical power circuitry, exclusive telecommunications and/or telecommunications lines, or other utility supply apparatus ("Equipment"), at each or any meter in the station, for telemetry; in addition to telemetry; or for purposes unrelated to telemetry, Customer agrees to provide and pay for all such Equipment and all utilities required (including power and telephone service as specified by Union) for the purpose of serving the Equipment. The exclusive telephone line for each meter must not employ a manual switchboard.

10 INDEMNITY

Each party (the "Indemnifying Party") hereby agrees to indemnify and save the other party (the "Indemnified Party") harmless from and against all claims, demands, actions, causes of action, damage, loss, deficiency, cost, liability and expense which may be brought against the Indemnified Party or which Indemnified Party may suffer or incur as a result of, in respect of, or arising out of any of the following:

a) any non-performance or non-fulfilment of any covenant or agreement on the part of the Indemnifying Party contained in this Contract;

b) any misrepresentation, inaccuracy, incorrectness or breach of any representation or warranty made by the Indemnifying Party contained in this Contract or contained in any document given pursuant to this Contract;

c) *(Subsection 10(c) is only applicable to Agent or Customer as the Indemnifying Party)* the failure of the Indemnifying Party to satisfy its obligations to End Use locations listed in Schedule 3 (where a Schedule 3 is included in this Contract);

d) *(Subsection 10(d) is only applicable to Agent as the Indemnifying Party)* any dispute arising out of any aspect of the relationship between the Agent and Customer;

e) any negligence or wilful misconduct of the Indemnifying Party;

f) all costs and expenses including, without limitation, legal fees, incidental to or in respect of the foregoing.

This indemnity shall survive the termination or expiration of this Contract.

11 REPRESENTATIONS AND WARRANTIES BY AGENT

Agent hereby represents and warrants to Union as follows and confirms that Union is relying upon the accuracy of each of such representations and warranties in connection with the execution of this Contract by Union and the acceptance of its rights and obligations hereunder:

a) Agent is the duly appointed agent of Customer and, in such capacity, is entitled to enter into this Contract on behalf of Customer and to act on its behalf hereunder;

b) Union is entitled to rely on anything done or any document signed by Agent on behalf of Customer, in respect of this Contract as if the action had been taken or the document had been signed by Customer; and

c) payments made by Customer to Union pursuant to invoices shall be made without any right of deduction or set-off regardless of any rights Customer may have against Agent or any rights Agent may have against Customer.

d) Agent shall be the only person to deliver or receive all Notices, invoices, and payments. Any Notice, invoice, or payment made to Union by Agent will be deemed to be received

from Customer. Any Notice, invoice, or payment made by Union to Agent will be deemed to be received by Customer. Union shall not be responsible to communicate to End Users any such Notice, invoice, or payment from or to Agent.

12 MISCELLANEOUS PROVISIONS

12.01 Interpretation

12.01-1 Definitions and Industry Usage

Capitalized terms and certain other terms used in this Contract and not specifically defined shall have the meaning set forth in these General Terms and Conditions, Schedules and/or Rate Schedule. Words, phrases or expressions which are not defined herein and which, in the usage or custom of the business of the exploration, production, transmission, storage, and distribution or sale of natural gas in Canada have an accepted meaning shall have that meaning.

12.01-2 Expanded Meaning

In this Agreement, unless there is something in the subject matter or context inconsistent therewith:

a) words importing the singular shall include the plural and vice versa;

b) words importing the gender shall include the masculine, feminine and neuter genders; and

c) references to any statute shall extend to any orders in-council or regulations passed under and pursuant thereto, of any amendment or re-enactment or such statute, orders-in-council or regulations, or any statute, orders-in-council or regulations substantially in replacement thereof.

12.01-3 Inconsistency

In the event of a conflict among the terms of the (i) Rate Schedules; (ii) the body of the Contract; (iii) Schedules to the Contract; and, (iv) these General Terms and Conditions, the terms of the documents shall govern in the priority as listed.

12.01-4 Currency

Unless otherwise indicated, all reference to dollars in this Contract shall mean Canadian dollars.

12.01-5 Time

All references to time in this Contract shall be stated in Eastern Clock Time.

12.02 Assignability

Neither the rights nor the obligations of Customer under this Contract shall be assignable without the prior written consent of Union. Union's consent may not be unreasonably withheld or delayed.

12.03 Proper Law of Contract

This Contract shall be governed by and construed in accordance with the laws of the Province of Ontario, and the parties to this Contract exclusively attorn to the jurisdiction of the Courts of Ontario.

12.04 Successors and Assigns

The Contract shall be binding upon and shall enure to the benefit of the Parties hereto and their respective successors and permitted and lawful assigns.

12.05 Entire Contract

This Contract constitutes the entire agreement between the parties pertaining to the subject matter hereof. This Contract supersedes any prior agreements, understandings, negotiations or discussions, whether oral or written, between the Parties in respect of the subject matter hereof.

12.06 Confidentiality

Except for credit purposes, unless the Parties to this Contract otherwise expressly agree in writing, the terms of this Contract will remain strictly confidential except as otherwise required by applicable law or by any competent regulatory body or court of competent jurisdiction.

12.07 Priority of Service

Despite any other provision of this Contract, when the use of Gas or Service is curtailed or restricted, by order of any authorized government agency, or by Force Majeure, Customer shall, in accordance with the direction of Union, curtail or discontinue use of Gas or Service during the period in which such Gas or Service is so jeopardized. Union shall not be liable for any loss of production or for any damages whatsoever by reason of such curtailment or discontinuance or because of the length of advance Notice given directing such curtailment or discontinuance. However, Union shall use its reasonable efforts to provide Notice as soon as possible to Customer, of such curtailment or discontinuance of Gas or Service as aforesaid.

12.08 Waiver and Future Default

No waiver by either Union or Customer of any one or more defaults by the other in the performance of any provisions of this Contract shall operate or be construed as a waiver of any future default or defaults, whether of a like or a different character.

12.09 Laws, Regulations and Orders

This Contract and the respective rights and obligations of the Parties hereto are subject to all present and future valid laws, statutes, orders, rules and regulations of any competent legislative body, or duly constituted authority now or hereafter having jurisdiction. This Contract shall be varied and amended to comply with or conform to any valid order or direction of any board, tribunal or administrative agency, which affects any of the provisions of this Contract.

12.10 Right to Contract

Customer hereby represents and warrants to Union that it or its Agent has the sole right to enter into this Contract for each of the Points of Consumption, for the term of this Contract.

12.11 Surviving Obligations

Despite the termination or expiry of this Contract, the following defined provisions shall remain in full force and effect in accordance with their terms and shall survive termination or expiry. The term of the survival shall be for the period referenced in this section.

a) confidentiality as outlined in Section 12.06

b) liability and Gas balancing obligations to the extent any liabilities and Gas balancing obligations have accrued prior to the date of termination or expiry of this Contract, and may continue as a result of an event occurring prior to the termination or expiry of this Contract (for the period until all liabilities and Gas balancing and reconciliations have been completed)

c) Settlement of accounts; rights to set off; calling any Letter of Credit; collecting on any security (for the period until all accounts have been settled).

12.12 Joint and Several Liability

In the event that Customer is more than one person the obligations of all of such persons shall be joint and several and Union shall not be required to exhaust its rights and remedies against any one person prior to exercising its rights and remedies in respect of any other person.

12.13 Invalidity of Provisions

If any of the provisions of this Contract are invalid, illegal or unenforceable in any respect, the validity or legality of enforceability of the remaining provisions shall not in any way be affected.

12.14 Service Curtailment

Union may be required from time to time to perform Construction to its facilities, which may impact Union's ability to meet Customer's requirements. In such event, Union shall have the right to suspend any Service in whole or in part but will use reasonable efforts to determine a mutually acceptable period during which such Construction will occur and also to reasonably limit the extent and duration of any impairments. Union shall provide at least fifteen (15) days Notice (except in cases of emergency, in which event it may be done immediately with Notice provided as soon as reasonably possible afterwards) to Customer of the extent that Union's ability to provide Service may be impaired. During any such curtailment, Customer will be relieved of the demand charges for Services directly related to the said curtailment, but commodity and proportionate demand charges for Services available to Customer will be payable.

12.15 Unauthorized Use of Services

If Customer exceeds the Contract parameters (including Service parameters, after notification of interruption of Interruptible Service or curtailment resulting from a Force Majeure), in

addition to charges identified in the Rate Schedules, Customer shall also be responsible for any direct damages resulting from exceeding the Contract parameters and/or not complying fully with any Notice.

If Customer uses Interruptible Services, in breach of notification of interruption, Union will have the right to change Customer from Interruptible Service to Firm Service or increase its Firm Service, by an amount equivalent to the quantity of such excess Interruptible Service used on any day effective on the first Day of any Month following such breach.

12.16 Consequential Claims or Damages

Neither party shall be responsible for any consequential, incidental, special or indirect damages whatsoever, including, without limitation, loss of profits, loss of earnings, business interruption losses, cost of capital or loss of business opportunities. This provision shall survive the termination or expiration of this Contract.

12.17 Further Assurances

Each party will do, execute and deliver, or will cause to be done, executed and delivered, all such further acts, documents, and assurances as may reasonably be requested for the carrying out and performance of this Contract.

12.18 Amendment

Union may from time to time incorporate updates to Schedule 2 to this Contract and/or these General Terms and Conditions which are intended to be applicable to all of Union's customers on non-discriminatory basis. Union will notify Customer not less than 60 days prior to the effective date of the update and post the update on Unionline. Union will notify Customer again not less than 30 days prior to the effective date of the update. If 10 Business Days prior to the effective date, Customer has not provided Notice to Union objecting to the update, then Customer will be deemed to have accepted the revised Schedule 2 to this Contract and/or these General Terms and Conditions, as the case may be, which shall, as of the effective date, apply to this Contract. If Customer has provided Notice objecting to the update, the revision shall not apply to this Contract.

12.19 Counterparts

This Agreement may be executed in several counterparts, each of which so executed being deemed to be an original. Such counterparts together shall constitute one and the same instrument and notwithstanding their date of execution shall be deemed to be made and dated as of the date hereof.

13 DEFINITIONS

Except where this Contract expressly states another meaning, the following definitions, when used in these General Terms and Conditions or in this Contract, shall have the following meanings:

"Agent" means such person as appointed by Customer as its agent to enter into the Contract on behalf of the Customer and to act on Customer's behalf hereunder.

"Average Heat Value" means the average forecasted heating value of all Gas to be received by Union for the applicable Delivery Area for the applicable period.

"Authorization Notice" means the written approval provided by Union in response to Customer's request for a short-term amendment to certain contract parameters or additional Services. Such Authorization Notice shall specify the approved amended parameters and the term for the amendment.

"Business Day" means any day upon which Union's head office in Chatham, Ontario, is normally open for business.

"Bundled Service" means a Service provided by Union under the Gas Distribution Contract and/or the Bundled T Gas Contract without daily Nominations at the Consumption Point.

"Bundled T" means the Bundled T Gas Contract with Union under which Customer receives Receipt Services.

"Compressor Fuel" means an amount of Gas specified by Transporter to be supplied by a shipper as a fuel source for Transporter's pipeline compressors.

"Construction" means constructing, maintaining, removing, operating and/or repairing Union's facilities for the purpose of commencing, maintaining, or discontinuing deliveries of Gas to Customer.

"Contract" means the contract entered into between Union and Customer to which these General Terms and Conditions, Rate Schedules and Schedules apply, and into which they are incorporated by reference.

"Contract Demand" ("CD") means the maximum volume or quantity of Gas that Union is obliged to deliver in any one day to a Customer under all Services or, if the context so requires, a particular Service at the Consumption Point.

"Contract Year" means a period of twelve (12) consecutive Months beginning on the day of First Delivery and each anniversary date thereafter unless mutually agreed otherwise.

"Cubic Metre" ("m^3") means the volume of Gas which occupies one cubic metre when such Gas is at a temperature of 15 degrees Celsius, and at an absolute pressure of 101.325 kilopascals.

"Customer" shall have the meaning as defined in this Contract.

"Daily Contract Quantity" ("DCQ") means that portion of the daily parameters as set out in Schedule 1, being a quantity of Gas which Customer must deliver to Union on a Firm basis. The DCQ (GJ/day) is equal to 12 months of consumption of end-use locations underlying the direct purchase contract / 365 days * heat value (GJ/m^3). If this Contract has a term greater than 12 months, the DCQ is calculated by dividing the historical consumption for the term of this Contract by the number of Days in this Contract term. The consumption of general service end-use locations is weather normalized.

"Day of First Delivery" means the date the Service, obligations, terms and conditions of the Gas Distribution Contract commence, as set out in its Schedule 1.

"Day of First Receipt" means the date the Service, obligations, terms and conditions of the Bundled T commence, as set out in its Schedule 1.

"Delivery Area" means the receipt zone(s) of Union (Manitoba, Western, Northern, Sault Ste. Marie, Central, North Central or Eastern Delivery Areas) which are defined as the delivery zone(s) of TCPL for service under its applicable toll schedules.

"Delivery Service" means the transportation of Gas by Union to storage or the Consumption Points.

"Distribution Service" means any combination of Delivery Service and Storage Service.

"End User" means the ultimate user of the Gas in Union's franchise area.

"Failure to Deliver" means the circumstance where Customer is obligated to deliver a quantity of Gas to Union, and all or a portion of the said quantity is not received by Union at the Points of Receipt.

"Firm" means any Services not subject to interruption or curtailment except under sections titled Force Majeure; Service Curtailment; and Priority of Service of these General Terms and Conditions.

"Firm Entitlements" means the quantity of Gas as set out in Schedule 1 of the Unbundled Service contract which Customer will nominate and deliver to Union and Union shall receive at each contracted Receipt Point.

"Gas" means Gas as defined in the Ontario Energy Board Act, 1998, as amended, supplemented or re-enacted from time to time, which may be commingled supplies.

"Gas Day" means a period of twenty-four (24) consecutive hours beginning at 10:00 a.m. in the Eastern Time Zone. The reference date for any day shall be the calendar date upon which the twenty-four (24) hour period shall commence.

"Interruptible" means any Services subject to interruption, after being notified by Union.

"Interest" means the minimum commercial lending rate of Union's principal banker for the relevant period.

"Joule" (J) means the work done when the point of application of a force of one (1) newton is displaced a distance of one (1) metre in the direction of the force. The term "Megajoule" (MJ) shall mean 1,000,000 Joules. The term "gigajoule" (GJ) shall mean 1,000,000,000 Joules.

"Month" means a period beginning at 10:00 a.m. (Eastern Clock Time) on the first day of the calendar month and ending at the same hour on the first day of the next succeeding

calendar month.

"Nomination" means a request to Union for a Service in accordance with Union's nomination provisions.

"Non-Obligated" means any quantities of Gas that are not committed to be delivered by Customer on a Firm basis and which Union will receive on a Firm basis when delivered by Customer.

"Obligated" means that quantity of Gas which Customer is committed to deliver to Union on a Firm basis at the Points of Receipt.

"Points of Consumption" or "Consumption Points" means, unless otherwise specified in this Contract, the outlet side of the Union measuring equipment located at Customer's or End User locations as specified in Schedule 1 or Schedule 3, as applicable.

"Rate Schedule" means the Ontario Energy Board approved rate schedule applicable to the Service being provided, (including schedules attached thereto), or such other replacement rate schedule as approved by the Ontario Energy Board from time to time.

"Receipt Service" means the approved receipt of Gas from Customer to Union at the Points of Receipt.

"Receipt Point" or "Points of Receipt" shall mean the points listed on Schedule 1 of this Contract where Union may receive Gas from Customer.

"Schedules" means the schedules attached to and forming part of this Contract.

"Seasonal" means any Service that is available during a specified period of the Year.

"Service(s)" means Receipt, Delivery or Storage Service as defined herein.

"Storage Service" means the space and deliverability service for storage under either Bundled Service or Unbundled Service.

"TCPL" means TransCanada PipeLines Limited.

"Transporter" means the transmission company that transports the Gas to the Receipt Point.

"Unbundled Service" means a Service provided by Union under which Customer will nominate and balance daily for Receipt, Storage and Delivery Services.

"Unionline" means Union's electronic web based system for Customer and Union to interact electronically, including but not limited to nominating and information exchange.

"When Available" means any interruptible Service that is available based on Union's sole discretion after Firm and Interruptible Services have been exhausted and is priced at the interruptible rate in the applicable Rate Schedule.

"Western" means the points of receipt on the TCPL system where Union is able to receive Gas.

"Year" means a period of 365 days; provided, however, that any such Year, which contains a date of February 29, shall consist of 366 days.

Tab 3

Contract	SA6233
Contract Name	TRANSALTA-SRCP

T2 CONTRACT

This GAS STORAGE AND DISTRIBUTION CONTRACT ("Contract"), made as of the 1st day of November, 2014

BETWEEN:

UNION GAS LIMITED

hereinafter called "Union"

- and -

TRANSALTA GENERATION PARTNERSHIP

hereinafter called "Customer"

WHEREAS, Customer has requested Union and Union has agreed to provide Customer Services;

AND WHEREAS, Union will deliver Customer owned Gas to Customer's Point(s) of Consumption or Storage under this Contract pursuant to the T2 Rate Schedule;

IN CONSIDERATION of the mutual covenants contained herein, the parties agree as follows:

1 INCORPORATIONS

The following are hereby incorporated in and form part of this Contract:

a) Contract Parameters contained in Schedule 1 – DCQ, Storage and Distribution Services Parameters, and Schedule 1a – Supplemental Services Parameters as amended from time to time; and
b) The latest posted version of the T2 Contract Terms and Conditions contained in Schedule 2 subject to Section 12.18 of Union's General Terms and Conditions; and
c) The latest posted version of Union's General Terms and Conditions subject to Section 12.18 of Union's General Terms and Conditions; and
d) The applicable T2 Rate Schedule as amended from time to time and as approved by the Ontario Energy Board.

For the purposes of this Contract, "Point(s) of Receipt" shall mean those points identified in Schedule 1 where Union may receive Gas from Customer.

2 PRELIMINARY AND CONTINUING CONDITIONS

This Contract and the rights and obligations of the Parties hereunder shall be conditional upon the fulfillment and maintenance in good standing of the following conditions:

a) Security arrangements acceptable to Union shall be supplied and maintained in accordance with the General Terms and Conditions; and
b) Union shall have received all required OEB approvals.

The above conditions must be initially satisfied by Customer 25 days prior to the Day of First Delivery.

3 CONTRACT TERM

This Contract shall be effective from the date hereof. However, the Service, obligations, terms and conditions hereunder shall commence on the Day of First Delivery. Subject to the provisions hereof, this Contract shall continue in full force and effect for each Contract Year until notice to terminate is provided by either Union or Customer. Such notice must be delivered at least three (3) months prior to the end of a Contract Year.

4 SERVICES PROVIDED

Union agrees to provide Storage Services and Distribution Services as specified in Schedule 1 and Schedule 1a.
To be eligible for services under the T2 Rate Schedule, Customer must have an aggregated Firm Daily Contract Demand of at least 140,870 $m^3$for all Point(s) of Consumption. If the Customer does not maintain this level of aggregated Firm Daily Contract Demand during the current contract year or is not expected to maintain this level of Firm Daily Contract Demand then, notwithstanding any other remedy available to Union under this Contract or any other term of this Contract, effective the following contract year, the Customer, may no longer qualify for service under the T2 Rate Schedule and may be placed on an alternate service by Union.

5 RATES FOR SERVICE

Customer agrees to pay for Services herein pursuant to the terms and conditions of the following:

a) The R1 Rate Schedule and the T2 Rate Schedule as they may be amended from time to time by the Ontario Energy Board; and
b) This Contract and the incorporations hereto.

6 NOTICES

Notices shall be delivered pursuant to the Notice provision of the General Terms and Conditions and delivered to the addresses as referenced in Schedule 1.

7 AGENCY

If an agent on behalf of the Customer executes this Contract then, if requested by Union, the agent shall at any time provide a copy of such authorization to Union.

Notwithstanding the provisions of Section 2(a) the agent shall be responsible for providing security arrangements acceptable to Union in accordance with the General Terms and Conditions.

The agent and Customer acknowledge and agree that they are unconditionally and irrevocably jointly and severally liable for all Customer obligations under the Contract.

8 CONTRACT SUCCESSION

This Contract replaces all previous Gas Storage and Distribution Contracts, subject to settlement of any Surviving Obligations.

9 RESTATED CAPSTONE AGREEMENT

Despite Section 12.05 of Union's General Terms and Conditions, it is the intention of the parties hereto that the Firm and Interruptible Contract Demand figures in Section 5 of Schedule 1 of this Contract be as stated in a certain Restated Capstone Agreement between Union, Customer and others dated November 1, 2012 (the "**RCA**"), during the term of the RCA. It is further intended the daily quantities of Gas attributable to Customer shall be as stated in the "Individual Customer Volume Consumption Report" as issued pursuant to the RCA. In the event of a conflict between the provisions of the RCA and this Contract related to the aforementioned parameters, the RCA shall prevail. For greater clarity the aforementioned parameters shall be as per this Agreement in the event the RCA is no longer in effect.

The undersigned execute this Contract as of the above date. If an Agent on behalf of Customer executes this Contract then, if requested by Union, Agent or Customer shall at any time provide a copy of such authorization to Union.

UNION GAS LIMITED

_____
Authorized Signatory

_____
Please Print Name

TRANSALTA GENERATION PARTNERSHIP
by its managing partner
TRANSALTA CORPORATION

_____
I have the Authority to bind the Corporation, or Adhere C/S, if applicable

_____
Please Print Name

Contract ID	SA 6233
Contract Name	TRANSALTA - SRCP

Schedule 1
DCQ, Storage and Distribution Services Parameters
Rate T2

1. DATES
This Schedule 1 is effective the 1st day of November 2014.
"Day of First Delivery" means the 1st day of November 2014.

2. DAILY CONTRACT QUANTITY (DCQ)*

Upstream Point(s) of Receipt

Location	Obligated DCQ GJ per Day
Western	[redacted]

Ontario Point(s) of Receipt

Location	Obligated DCQ GJ per Day
Dawn	[redacted]

*Obligated DCQ does not include Compressor Fuel.

3. SUPPLY OF COMPRESSOR FUEL
Customer shall supply compressor fuel for Union's distribution and storage services.

4. STORAGE PARAMETERS

Parameters	Amount	Unit of Measure
Firm Cost-based Storage Space	[redacted]	GJ
Firm Injection/Withdrawal Right (Union provides deliverability inventory)	[redacted]	GJ per Day
Firm Injection/Withdrawal Right (Customer provides deliverability inventory)	[redacted]	GJ per Day
Interruptible Injections/Withdrawal Right (Union provides deliverability inventory)	[redacted]	GJ per day

Contract ID	SA 6233
Contract Name	TRANSALTA - SRCP

5. DISTRIBUTION PARAMETERS

Point(s) of Consumption

	A	B	C	D
Location				
Union Meter Number				

		Point(s) of Consumption			
	Unit of Measure	**A**	**B**	**C**	**D**
Daily Contract Demand (CD):					
Firm Contract Demand	m^3/Day	[redacted]			
Interruptible Contract Demand	m^3/Day	[redacted]			
Firm Hourly Quantity*	m^3/hour				
Maximum Hourly Volume	m^3/hour	See Note 1			
Minimum Gauge Pressure	kPa	[redacted]	[redacted]		
Notice Period for Interruption	hours	[redacted]	[redacted]		
Maximum Number of Days Interruption	days	[redacted]	[redacted]		

*Firm Hourly Quantity (FHQ) means the maximum quantity of natural gas that may flow during any hourly period when an interruption in Interruptible Service becomes effective within a Gas Day.

Note 1: It is the intention of the parties that the Maximum Hourly Volume for each Point of Consumption shall be as in the following table:

	Firm Maximum Hourly Volume (m3/hr)	Interruptible Maximum Hourly Volume (m3/hr)	Total Maximum Hourly Volume (m3/hr)
Consumption point A	[redacted]	[redacted]	[redacted]
Consumption Point B	[redacted]	[redacted]	[redacted]
Total	[redacted]	[redacted]	[redacted]

If the Firm CD's in the RCA change, the Maximum Hourly Volumes may be re adjusted, subject to a maximum of [redacted] m3/hour for Firm Maximum Hourly Volume.

Rate Parameters

		Point(s) of Consumption			
	Unit of Measure	**A**	**B**	**C**	**D**
Firm Transportation Demand	**As per the Rate T2 Rate Schedule**				
Firm Transportation Commodity	**As per the Rate T2 Rate Schedule**				
Interruptible Transportation Commodity	cents per m^3	1.0			

6. MINIMUM ANNUAL VOLUME

		Point(s) of Consumption			
	Unit of Measure	**A**	**B**	**C**	**D**
Firm Minimum Annual Volume	m^3/year	[redacted]			
Interruptible Minimum Annual Volume	m^3/year	[redacted]			

7. CONTACT LIST FOR NOTICES

Customer contact information is found in Unionline. Where multiple contacts have been identified by Customer, Union is obligated to contact the first party only.

Union Gas contact information is found on Union's website.

Tab 4

NORTON ROSE FULBRIGHT
Barristers & Solicitors / Patent & Trade-mark Agents

Norton Rose Fulbright Canada LLP
Royal Bank Plaza, South Tower, Suite 3800
200 Bay Street, P.O. Box 84
Toronto, Ontario M5J 2Z4 Canada

F: +1 416.216.3930
nortonrosefulbright.com
Elisabeth L. DeMarco
+1 416.203.4431
elisabeth.demarco@nortonrosefulbright.com

December 3, 2014

Kirsten Walli
Board Secretary
Ontario Energy Board
P.O. Box 2319, 27th Floor
2300 Yonge Street
Toronto ON M4P 1E4

Dear Ms. Walli:

Re: **Complaint by TransAlta Corporation, TransAlta Generation Partnership and TransAlta Cogeneration L.P. ("TransAlta")**

We are counsel to TransAlta. TransAlta is a licensed natural gas fired electricity generator with plant operations in Sarnia, Ontario.

I. Introduction

TransAlta and Union Gas Limited (**Union**) are parties to a standard form T1/T2 Gas Storage and Distribution Contract dated November 1, 2012, which comprises a contract cover sheet, an attached Schedule A and incorporates by reference Union's General Terms and Conditions[1] (all of which is collectively referred to as the **T1/T2 Contract**).[2] A copy of the T1/T2[3] Contract is attached as **Appendix A**.

The T1/T2 Contract is a mixed storage and distribution contract and therefore falls within the *Storage and Transportation Access Rule* (**STAR**)[4] and its related requirements. TransAlta and Union are in disagreement over the interpretation of TransAlta's Daily Contract Quantity (**DCQ**) obligations under the T1/T2 Contract.

TransAlta is writing to the Board to seek a preliminary determination on three issues (the **Preliminary Issues**) relating to the interpretation of the T1/T2 Contract and alternative dispute resolution requirements applicable to all contracts for transportation services (including combined distribution and storage contracts such as the T1/T2 Contract). The Preliminary Issues are:

(a) First, does the Board have, and will it exercise, jurisdiction to consider and decide the correct interpretation of the DCQ obligations and definitions in the standard form T1/T2 Contract held by TransAlta?

(b) Should the Board decide the first preliminary issue in the affirmative, does the Board have, and will it exercise jurisdiction over the determination of amounts that may be owing to TransAlta under the T1/T2 Contract?

---

[1] General Terms and Conditions, Union Gas Limited (Jan 2009) [**General Terms and Conditions**].
[2] T1/T2 Gas Storage and Distribution Contract dated November 1, 2012 [**Contract**].
[3] with confidential provisions that are irrelevant to this proceeding redacted
[4] *Storage and Transportation Access Rule*, December 2, 2009 [**STAR**].

(c) Should the Board determine that it does not have jurisdiction to determine the first and/or second Preliminary Issues, will the Board refer the complaint to binding arbitration in accordance with the STAR, which requires alternative dispute resolution provisions for all transportation services contracts?

To be clear, TransAlta is not asking the Board to decide the merits of the DCQ interpretation issue at this stage. TransAlta is only seeking direction on the Preliminary Issues referred to above. The following information is provided for background purposes only to assist the Board in making its determination on the Preliminary Issues.

II. Background

(a) The T1/T2 Contract

Schedule 1 to the T1/T2 Contract provides for an obligated DCQ of 17,904 GJ/day. The DCQ calculation for periods subsequent to the first 12 months is calculated in accordance with the definition of "Daily Contract Quantity" contained in Union's General Terms and Conditions. The definition reads as follows:

> **Daily Contract Quantity** ("DCQ") means that portion of the daily parameters as set out in Schedule 1, being a quantity of Gas which Customer must deliver to Union on Firm basis. The DCQ (GJ/day) is equal to 12 months of consumption of end-use locations underlying the direct purchase / 365 days * heat value (GJ/m^3). If this Contract has a term greater than 12 months, the DCQ is calculated by dividing the historical consumption of the term of this Contract by the number of Days in this Contract term. The consumption of general service end-use locations is weather normalized.[5] [emphasis added]

The T1/T2 Contract had a term greater than 12 months:

(d) s. 3 of the T1/T2 Contract dealing with "Contract Term" states that "[t]his Contract shall be effective from the date hereof" and does not provide a limit on the term of the T1/T2 Contract; and

(e) the date and "Day of First Delivery" under the T1/T2 Contract was November 1, 2012 and the T1/T2 Contract continued to be in force until October 31, 2014, after which date a new contract came into effect.

Accordingly, the definition requires that DCQ be calculated by dividing the historical consumption for the term of the T1/T2 Contract by the number of the days in the term. This results in TransAlta's DCQ being 12,912 GJ/day, as determined using the stipulated calculation period between November 1, 2012 and January 31, 2014.[6] Union takes the position that the DCQ is 17,904 GJ/day, despite indication to the contrary in the definition.

(b) The Matters at Issue

Union rarely sought delivery of the DCQ amount listed in the T1/T2 Contract and proceeded by way of implied waiver, until the winter of 2014. From January 4-9, 2014, and commencing again on January 18, 2014, Union demanded that TransAlta deliver the listed 17,904 GJ/day, refused to allow TransAlta to satisfy that demand with gas that it had in storage, and restricted TransAlta from selling gas to anyone other than in-franchise customers. This demand coincided with the onset of exceptionally high gas prices.

---

[5] General Terms and Conditions, p 18.

[6] TransAlta chose an end-of-month date for an initial calculation of the DCQ. If the measure is made between November 1, 2012 and January 3, 2014, which is the day before Union began to unilaterally require delivery of a DCQ of 17,904 GJ/Day, the DCQ under the T1/T2 Contract will be 11,790 GJ/day.

However, TransAlta communicated that the T1/T2 Contract definition and stipulated calculation of DCQ resulted in a lower maximum obligated amount of 12,912 GJ/day (historical consumption divided by the number of days in the term as per the DCQ definition in the T1/T2 Contract). By letter dated March 7, 2014, TransAlta advised Union of its position and that it was taking steps to reduce its DCQ to 12,912 GJ/day. A copy of TransAlta's March 7 letter is attached as **Appendix B**.

In response, Union demanded that TransAlta increase its delivery to 17,904 GJ/day, and advised TransAlta that if it failed to deliver that DCQ amount, it would bill TransAlta for replacement gas and also impose penalties.

On March 11, 2014, TransAlta wrote to Union and advised that it would deliver the 17,904 GJ/day amount, as demanded, but would do so under protest and without prejudice to its rights under the T1/T2 Contract, before the Board and at common law or equity. TransAlta also proposed binding arbitration to resolve the DCQ issue in accordance with the mandatory terms of service and standard form of contracts for transportation services as required by STAR. A copy of TransAlta's March 11 letter is attached as **Appendix C**. TransAlta is of the understanding that all similarly situated customers were not treated in a uniform manner.

On March 12, 2014, TransAlta wrote to Union to commence a complaint under STAR, on the grounds that requiring TransAlta to deliver the listed maximum DCQ amounted to discriminatory treatment contrary to STAR. A copy of TransAlta's March 12 letter is attached as **Appendix D**.

On March 20, 2014, Union's external counsel responded to TransAlta's letters indicating that Union (i) disagreed with TransAlta's DCQ calculation, (ii) disagreed that the T1/T2 Contract was subject to STAR, and (iii) refused to participate in any arbitration. A copy of the March 20 letter is attached as **Appendix E**.

Union also refused to permit TransAlta to use presently stored gas to meet the 17,904 GJ/day requirement and instead required TransAlta to meet the requirement with new gas delivery. Union continued to require TransAlta deliver 17,904 GJ/day until April 25, 2014.

III. TransAlta's Submissions on the Preliminary Issues

(a) Does the Board have jurisdiction to consider and decide the correct interpretation of the DCQ obligations and definitions in the standard form T1/T2 contract held by TransAlta?

The Board has jurisdiction to consider TransAlta's complaint for four reasons: (i) the Board's jurisprudence establishes jurisdiction over T1/T2 contracts and the standard terms of service and forms of contract for transportation services; (ii) the T1/T2 Contract is intended to implement the Board's approved rates and tariffs; (iii) Union and the T1/T2 Contract are subject to STAR and its conduct with respect to DCQ is contrary to STAR; and (iv) the Board's broad jurisdiction as established by sections 2 and 36 of the *Ontario Energy Board Act, 1998* (the **OEB Act**) includes the power to review gas distribution contracts.

(i) The Board's historical supervisory jurisdiction over T1/T2 contracts supports the Board's continued jurisdiction

The Board has historically taken on supervisory jurisdiction over T1/T2 contracts. This jurisdiction was confirmed by the Board's Natural Gas Electricity Interface Review decision dated November 7, 2006 (EB-2005-0551) (the **NGEIR Decision**) (excerpts cited below attached as **Appendix F**) and Natural Gas Storage Allocation Policies decision dated April 29, 2008 (EB-2007-0724, EB-2007-0725) (the **2008 Decision**) (excerpts cited below attached as **Appendix G**).

In the NGEIR decision, although the Board declined to order a change in contract quantities for T1 customers, it was clear that the Board had the power do so with adequate evidence, and provided such changes were done in a "controlled and deliberate manner".[7]

In the 2008 Decision, the Board further affirmed its jurisdiction to over T1/T2 contracts and its "overriding obligation" to ensure that "contract terms are just and reasonable":

> If the Board concludes that terms and conditions of Union's contracts for cost-base storage must evolve to respond to changing circumstances, it will order such changes regardless of the rollover provision in current T1 contracts or the provisions of the June 2000 settlement agreement. The rollover provision might be an important consideration when assessing how customers could be affected by any new allocation rules, and when determining appropriate transition mechanisms. Such considerations, however, do not change the Board's overriding obligation to ensure rates and contract terms are just and reasonable.[8]

The Board's jurisdiction over the terms of T1/T2 Contract is consistent with administrative law principles. The Board has specialized, subject-matter expertise in natural gas and is best placed to interpret and administer such contracts. T1/T2 contracts are unique to the natural gas market, and the parties to such contracts are often regulated by the Board. The Board is best positioned to consider the T1/T2 Contract in the context the specific dynamics of the natural gas market and the regulatory environment.

(ii) The T1/T2 Contract falls within the Board's rate-making and oversight jurisdiction

Second, the Board's rate-making authority would include the consideration of the T1/T2 Contract. The T1/T2 Contract is incorporated by reference into the current T2 Rate Schedule (attached as **Appendix H**):

(a) Section 5 of the T2 Rate Schedule provides that "Additional information on Union's T2 service offering can be found at: ... [Union's website]". The Union website page for T2 contracts posts (i) the standard form Contract Cover, and (ii) Union's General Terms and Conditions.

(b) The T2 Rate Schedule contemplates the related contract in several sections: B (Applicability); Storage Service – sections 1, 3.2 and 4.1; Transportation Charges – section 1; and Overrun Service – Injection, Withdrawals and Transportation.

(iii) Union's conduct and the terms of the T1/T2 Contract are contrary to STAR, over which the Board has jurisdiction

Union's conduct with respect to the DCQ has resulted in TransAlta being treated differently than other shippers, customers and consumers, and is thereby discriminatory and in contravention of STAR. Further, Union's conduct has had the effect of requiring TransAlta to subsidize other users on the Union system.

In the context of its obligations and duties under the T1/T2 Contract, Union is subject to STAR. Union is a "natural gas transmitter" and "integrated utility" as defined by STAR. Under the T1/T2 Contract, Union provides TransAlta with "transportation services" (which includes both storage and distribution services) and TransAlta is a Customer.[9]

Section 1.1.1(i) of STAR states that the rule's purpose is to ensure non-discriminatory access:

---

[7] Natural Gas Electricity Interface Review decision dated November 7, 2006 (EB-2005-0551) **[NGEIR Decision]**, p 90.
[8] Natural Gas Storage Allocation Policies decision dated April 29, 2008 (EB-2007-0724, EB-2007-0725) **[2008 Decision]**, p 34.
[9] STAR, s. 1.2, Definitions, "natural gas transmitter" and "integrated utility".
[9] STAR, section 1.1.1 (i).

> 1.1.1. This Rule outlines conduct and reporting requirements for natural gas transmitters, integrated utilities and storage companies. The purpose of this Rule is to:
>
> i) Establish operating requirements to ensure open and non-discriminatory access to transportation services for shippers and storage companies;[10]

In an application filed with the OEB (excerpt attached at **Appendix I**), Union advised that its Rate T2 Service is offered to its largest contract rate customers, with approximately 22 large industrial customers contracting for this service. In its description of Rate T2, it advised that the rate provided significant flexibility, because if a plant is not operating for any reason, there is no obligation to deliver gas to Union. While this publicly filed application sets out how Union interprets its T2 obligations with its customers, this does not conform with how Union treated TransAlta. Union's refusal to waive or modify TransAlta's DCQ requirement amounts to discriminatory treatment against TransAlta and warrants the exercise of the Board's related jurisdiction.

In Union's March 20, 2014 letter referred to above (and attached as **Appendix E**), Union asserted that, pursuant to the OEB's Decision on Tariffs dated August 30, 2010 (EB-2010-0155) (the **Decision on Tariffs**) (attached as **Appendix J**), STAR does not apply to the T1/T2 Contract or any distribution contracts but rather only applies to natural gas transmission contracts. This is not supported by the Decision on Tariffs, which does not preclude the STAR's application to T1/T2 distribution and storage contracts, but rather simply addresses the STAR's application to the current M12, C1 and M16 transmission contracts.

Union's position also directly contradicts the clear and unambiguous language of STAR. STAR applies to: (i) natural gas transmitters and integrated utilities, and Union falls within both definitions with respect to its obligations under the T1/T2 Contract; and (ii) contracts for storage and transportation services (which would include combined distribution storage contracts such as the T1/T2 Contract). Accepting Union's position would effectively "read out" the provisions of the STAR that address natural gas transmitters and integrated utilities.

(iv) Broad jurisdiction under the OEB Act

The OEB Act gives broad jurisdiction to the Board, and includes the review of contracts relating to the transportation and distribution of gas. This jurisdiction is established by the Board's objectives and rate-making authority in accordance with:

(a) Section 2 of the OEB Act, which states that the Board, in carrying out its responsibilities in relation to gas, shall be guided by several objectives, including the following:

(i) "to facilitate competition in the sale of gas"

(ii) "to protect the interests of consumers with respect to prices and the reliability and quality of gas service"

(iii) "to facilitate the maintenance of a financially viable gas industry for the transmission, distribution and storage of gas"[11]

Considering the proper and fair interpretation of a T2 contract falls within the ambit of these broad objectives.

(b) Section 36 of the OEB Act, which gives the Board broad jurisdiction to govern the transmission, distribution and storage of gas, and specifically provides that the Board "is not bound by the terms of any contract":

[10] STAR, section 1.1.1 (i).
[11] *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15 **[OEB Act]** s. 2.

> 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.[12]

In other words, charges for the distribution and storage of gas are subject to oversight by the Board, which shall include the review of gas distribution contracts.

(b) Should the Board determine that it does not have jurisdiction to determine the first and/or second Preliminary Issue, will the Board refer the complaint to binding arbitration in accordance with the provisions of STAR, which require alternative dispute resolution provisions for all transportation services contracts, including the T1/T2 Contract?

In the event the Board declines jurisdiction over TransAlta's complaint, the Board should nevertheless order that the complaint be referred to Alternative Dispute Resolution (**ADR**), specifically binding arbitration.

As argued above, Union is a "natural gas transmitter" and an "integrated utility" as defined by STAR. STAR requires transmitters to include ADR provisions in their contracts. The relevant provisions of STAR state:

> **2.3 Shipper – Standard Terms of Service and Standard Forms of Contracts for Transportation Services**
>
> ...
>
> 2.3.2 A transmitter shall ensure that each transportation service has its own standard form of contract and its own terms of service, and that the terms of service, at a minimum, include the standards outlined in section 2.3.4.
>
> ...
>
> 2.3.4. A transmitter's tariff shall include the following terms of service:
>
> ...
>
> viii) Alternative Dispute Resolution provisions;[13]
>
> [emphasis added]

The T1/T2 Contract does not contain any ADR provisions and is clearly in violation of STAR.

Notwithstanding the absence of ADR provisions, TransAlta proposed that the dispute over the interpretation of the T1/T2 Contract and the DCQ be submitted to binding arbitration. Union refused to submit to arbitration.

The policy promoted by STAR is to encourage regulated entities to engage in alternative dispute resolution and resolve their disputes privately and efficiently. Union's failure to include ADR provisions in the T1/T2 Contract and engage in arbitration despite being presented with the opportunity warrants intervention by the Board. The Board is well within its jurisdiction to order that the complaint be referred to arbitration.

Section 5 of STAR outlines the process for initiating a complaint under STAR.[14] TransAlta's March 12, 2014 letter (attached as **Appendix D**) satisfies this requirement. As noted, Union disagreed that it or the T1/T2 Contract were subject to STAR.

[12] OEB Act, s. 36.
[13] STAR, s. 2.3.

We look forward to receiving the Board's direction in this matter. Should the Board require further information, or wish to receive further submissions (written or oral), TransAlta would be happy to oblige.

Sincerely,

NORTON ROSE FULBRIGHT CANADA LLP

Lisa (Elisabeth) DeMarco

[14] STAR, s. 5.

Tab 5

TORYS LLP

79 Wellington St. W., 30th Floor
Box 270, TD South Tower
Toronto, Ontario M5K 1N2 Canada
P. 416.865.0040 | F. 416.865.7380
www.torys.com

Crawford Smith
csmith@torys.com
P. 416.865.8209

January 5, 2015

EMAIL

Kirsten Walli
Board Secretary
Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, 27th Floor
Toronto, Ontario
M4P 1E4

Dear Ms. Walli:

Re: Complaint by TransAlta Corporation, TransAlta Generation Partnership and TransAlta Cogeneration L.P. ("TransAlta")

We are counsel to Union Gas Limited ("Union"). We write in response to Elisabeth DeMarco's letter addressed to you dated December 3, 2014, submitted on behalf of TransAlta (the "TransAlta Letter").

The TransAlta Letter requests a "preliminary determination" from the Ontario Energy Board as to whether the Board has, and will exercise, jurisdiction to interpret the terms of and settle any amounts owing under a gas storage and distribution contract said to be in place between TransAlta and Union. Should the Board determine that it does not have jurisdiction, TransAlta requests that the Board refer the dispute to binding arbitration.

For the reasons that follow, Union submits that the Board should reject TransAlta's request.

1. No Contractual Dispute Between the Parties

The TransAlta Letter refers to a "T1/T2 Gas Storage and Distribution Contract dated November 1, 2012" between the parties ("the Old Contract"). In a nutshell, TransAlta seeks an order from the Board that the Daily Contract Quantity of Gas it is required to deliver to Union under the Old Contract is 12,912GJ/day.

The fundamental problem with TransAlta's position is that the Old Contract no longer governs the parties' relationship. Remarkably, this fact goes entirely unstated in the TransAlta Letter.

By notice dated July 30, 2014, and effective November 1, 2014, TransAlta terminated the Old Contract. As it advised Union, "Please accept this e-mail as notice that TransAlta wishes to terminate our gas delivery and storage T-2 contract at Sarnia, effective November 1, 2014. We look forward to discussing alternate contract parameters for a replacement contract."

Following termination, Union and TransAlta negotiated the terms of a replacement contract. On October 31, 2014, TransAlta executed a new T2 Gas Storage and Distribution Contract effective November 1, 2014 (the "New Contract"). The New Contract contains revised DCQ parameters acceptable to both parties. No concerns are expressed in the TransAlta Letter relating to the New Contract and none have been expressed to Union otherwise. The New Contract is attached to this letter. The Old Contract is attached to the TransAlta letter.

In the result, there is no existing contractual dispute between the parties that requires adjudication by the Board. TransAlta's request that the Board adjudicate a past dispute that has no bearing on the rate or terms of service applicable going forward should be rejected.

2. Complaints Relating to Old Contract without Merit and Outside Board Jurisdiction

In any event, TransAlta's complaints relating to the Old Contract are without merit on their face and its request that the Board determine "amounts that may be owing to TransAlta" is beyond the Board's jurisdiction.

No Merit to Complaints

First, in Union's view, there is no merit to TransAlta's suggestion that the maximum DCQ quantity applicable under the Old Contract was 12,912 GJs per day. As specifically set out in Schedule 1 to the Old Contract,[1] TransAlta's Obligated DCQ was 17,904 GJs per day at Dawn. In accordance with section 2.01 of Schedule 2 of the Old Contract, TransAlta was required to deliver the DCQ to Union on a Firm basis every day. There was no ambiguity in the Old Contract with respect to TransAlta's Obligated DCQ.

Further, TransAlta's own conduct under the Old Contract confirms Union's position. Last winter, TransAlta regularly delivered 17,904 GJs of gas to Union at Dawn. In addition, TransAlta's use of storage capacity under the Old Contract was also inconsistent with the position it is now taking. Under section 2.04 of Schedule 2 of the Contract, TransAlta was entitled to storage space equal to 15 times the Obligated DCQ for the Contract Year. Since TransAlta's Obligated DCQ was 17,904 GJs per day, as reflected on Schedule 1, its Firm Cost-based Storage Space was 268,000 GJs (approximately 15 x 17,904). If TransAlta's Obligated DCQ were 12,912 as it alleges, its Firm Cost-based Storage Space would have been approximately 193,680 GJs (15 x 12,912). Yet, on 26 days in November 2013, 16 days in December 2013 and 5 days in January 2014, TransAlta's storage balance exceeded 193,680 GJs. Thus, there is no merit to TransAlta's assertion that the maximum DCQ that Union may require under the Contract was 12,912 GJs per day.

There is similarly no merit to TransAlta's suggestion that STAR applied to the Old Contract. STAR does not apply to distribution contracts; as the name implies, it relates to storage and transmission (or transportation).

STAR does not apply in connection with the Obligated DCQ requirement in the Old Contract. STAR creates requirements for non-discriminatory access to transportation capacity (section 2). Nothing in STAR purports to apply to the terms of distribution contracts like the Obligated DCQ requirement.

---

[1] T1/T2 Contract, Sched. 1, Tab 2

Finally, contrary to the TransAlta Letter, the simple fact that Union is subject to STAR in relation to other activities undertaken by it does not render STAR applicable in this context.

The Board has no Jurisdiction to Award Damages

In substance, TransAlta is seeking a determination by the Board that Union breached the Old Contract and an award of damages in respect of that alleged breach. In Union's submission, the Board has no jurisdiction to make this award.

None of the provisions of the *Ontario Energy Board Act, 1998* to which TransAlta refers give the Board jurisdiction to alter, interpret or give effect to the terms of the Old Contract, which is a private commercial agreement entered into between Union and TransAlta, both sophisticated commercial parties, where no concerns are raised relating to the rate or terms of service presently applicable to TransAlta. Any dispute as to the meaning of the terms in the Old Contract, and any legal proceeding to determine amounts owed under the Contract, is properly the subject of civil litigation before the courts, not of a proceeding before the Board.

Indeed, in an analogous case, the Court of Appeal confirmed that the interpretation of storage leases and the granting of remedies pursuant to those contracts is within the jurisdiction of the courts and is not within the exclusive jurisdiction of the Board.[2] Further, in *Garland*, the Supreme Court of Canada expressly held that the Board does not have jurisdiction to award damages.[3] Although the dispute in that case involved a rate order, at its heart it was a private law matter within the competence of the civil courts and the Board did not have jurisdiction to order the remedy sought by the plaintiff.

Likewise, the Board has no jurisdiction to compel Union and TransAlta to arbitrate a dispute. A private dispute is only subject to arbitration if both parties consent. Union does not consent to arbitrating this dispute with TransAlta. The proper forum to resolve TransAlta's complaints in the Ontario Superior Court of Justice. As Union has already advised TransAlta, Union is prepared to consent to having the dispute brought before the Superior Court of Justice's Commercial List.

TransAlta appears to be taking the position that the Board may refer the dispute to arbitration by applying section 5.1.1 of STAR. As set out above, STAR does not apply. In any event, section 5.1.1 provides only that gas storage companies, transmitters and integrated utilities must develop a dispute resolution process and post the process on their website. Nothing in STAR purports to require parties to submit to binding arbitration, even where STAR does apply.

---

[2] *Tribute Resources v. 2195002 Ont. Inc*, 2012 ONSC 25 at para. 24, aff'd 2013 ONCA 576 at para. 29; *Tribute Resources v. McKinley Farms*, 2010 ONCA 392 at paras. 18-19.

[3] *Garland v. Consumers Gas Co.*, 2004 SCC 25 at para. 70.

Yours truly,

Crawford Smith

CS/tm

11229-2113 18551474.2

Tab 6

zizzoallandemarco LLP

Zizzo Allan DeMarco LLP
41-A Avenue Road
Toronto, ON M5R 2G3
416.817.5140
lisa@zizzoallan.com

January 12, 2015

Kirsten Walli
Board Secretary
Ontario Energy Board
P.O. Box 2319, 27th Floor
2300 Yonge Street
Toronto ON M4P 1E4

Dear Ms. Walli:

Re: TransAlta Corporation, TransAlta Generation Partnership and TransAlta Cogeneration L.P. ("TransAlta") Complaint – Daily Contract Quantity ("DCQ") Obligation Interpretation – Preliminary Issues
Board File No. EB-2014-0363

We have received the letter dated January 5, 2015 from Crawford Smith on behalf of Union in the above-captioned matter (the "Union Letter"), and would like to provide the following clarifications in response to the Union Letter. We attach our original December 3, 2014 letter (the "TransAlta Letter") in support of the Board's unique and specialized expertise and jurisdiction relating to this matter for your reference.

First, Union makes reference to the "Old Contract" and "New Contract", and suggests that TransAlta was not forthright about the existence of a New Contract. TransAlta was very clear about the fact that the contract that led to a number of the matters at issue was in place from November 1, 2012 until October 31, 2014, after which the New Contract came into effect.

Union also implies that the matter of the DCQ interpretation as part of the Board's standard terms and tariffs is resolved. With respect, this is not the case. While TransAlta has attempted to take all reasonable steps within its power to prevent further future losses resulting from the ambiguous Old Contract, this does not resolve the issue and/or interfere with the Board's unique and specialized expertise and jurisdiction to determine this important matter associated with the standard terms of a utility contract for utility storage and distribution services under the regulatory compact and the jurisdiction of the Board. In accordance with the utility construct, the issue is within the expertise and jurisdiction of the Board relating to the interpretation of posted utility terms and tariffs. A finding that the Board does not have jurisdiction over such terms and tariffs of a utility contract with its customers may have far-reaching and unintended consequences for the Board in future matters. Similarly, the Board is best placed to

ensure compliance with the Storage and Transportation Access Rule ("STAR") that is clearly within the Board's jurisdiction.

The Union Letter indicates that: "(l)ast winter, TransAlta regularly delivered 17904 GJs of gas to Union at Dawn". The Union Letter fails to note that the delivery of 17904 GJ of gas during that time period was made under written protest by TransAlta and the threat of penalty and service interruption by Union (see TransAlta Letter at pages 2-3).

The Union Letter indicates that the Board has no jurisdiction to refer this dispute to arbitration, and argues that if STAR applies, it only requires that parties develop and post a dispute resolution process on its website—the inference being that the development without full implementation of a dispute resolution process is sufficient to discharge the obligation set out in section 2.3.4(viii) of the STAR. Union further notes that it is "prepared to consent to having the dispute brought before the Superior Court of Justice's Commercial List."

TransAlta respectfully submits that the posting of a dispute resolution process without the full implementation of a dispute resolution mechanism, other than consent access to the courts, effectively

(i) renders the requirements of s.2.3.4(viii) of the STAR meaningless, and
(ii) undermines the purpose and intent of such dispute resolution provision, which is meant to facilitate resolution through an alternative to costly and cumbersome litigation through the courts of general jurisdiction.

The inclusion of dispute resolution as a requirement of the STAR reflects the fact that arbitration and related dispute resolution is most applicable in complex and specialized utility matters in and of the nature of the current issue. TransAlta therefore requests that the Board give full effect to s.2.3.4(viii) of the STAR and mandate that, at a minimum, the matter be resolved through binding arbitration in the unlikely event that the Board determines that it does not have sufficient jurisdiction to address the matter directly.

Sincerely,

Per: Elizabeth L. DeMarco

CC: Crawford Smith

Encl.

Tab 7

** Preliminary Version **

Case Name:

ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)

City of Calgary, appellant/respondent on cross-appeal;
v.
ATCO Gas and Pipelines Ltd., respondent/appellant on cross-appeal, and
Alberta Energy and Utilities Board, Ontario Energy Board, Enbridge Gas Distribution Inc. and Union Gas Limited, interveners.

[2006] S.C.J. No. 4

[2006] A.C.S. no 4

2006 SCC 4

2006 CSC 4

[2006] 1 S.C.R. 140

[2006] 1 R.C.S. 140

263 D.L.R. (4th) 193

344 N.R. 293

[2006] 5 W.W.R. 1

J.E. 2006-358

54 Alta. L.R. (4th) 1

380 A.R. 1

39 Admin. L.R. (4th) 159

145 A.C.W.S. (3d) 725

EYB 2006-100901

2006 CarswellAlta 139

File No.: 30247.

Supreme Court of Canada

Heard: May 11, 2005;
Judgment: February 9, 2006.

Present: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish and Charron JJ.

(149 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA

Subsequent History:

NOTE: This document is subject to editorial revision before its reproduction in final form in the Canada Supreme Court Reports.

Catchwords:

Administrative law -- Boards and tribunals -- Regulatory boards -- Jurisdiction -- Doctrine of jurisdiction by necessary implication -- Natural gas public utility applying to Alberta Energy and Utilities Board to approve sale of buildings and land no longer required in supplying natural gas -- Board approving sale subject to condition that portion of sale proceeds be allocated to ratepaying customers of utility -- Whether Board had explicit or implicit jurisdiction to allocate proceeds of sale -- If so, whether Board's decision to exercise discretion to protect public interest by allocating proceeds of utility asset sale to customers reasonable -- Alberta Energy and Utilities Board Act, R.S.A. 2000, c. A-17, s. 15(3) -- Public Utilities Board Act, R.S.A. 2000, c. P-45, s. 37 -- Gas Utilities Act, R.S.A. 2000, c. G-5, s. 26(2).

Administrative law -- Judicial review -- Standard of review -- Alberta Energy and Utilities Board -- Standard of review applicable to Board's jurisdiction to allocate proceeds from sale of public utility assets to ratepayers -- Standard of review applicable to Board's decision to exercise discretion to allocate proceeds of sale -- Alberta Energy and Utilities Board Act, R.S.A. 2000, c. A-17, s. 15(3) -- Public Utilities Board Act, R.S.A. 2000, c. P-45, s. 37 -- Gas Utilities Act, R.S.A. 2000, c. G-5, s. 26(2).

Summary:

ATCO is a public utility in Alberta which delivers natural gas. A division of ATCO filed an application with the Alberta Energy and Utilities Board for approval of the sale of buildings and land located in Calgary, as required by the *Gas Utilities Act* ("GUA"). According to ATCO, the property was no longer used or useful for the provision of utility services, and the sale would not cause any harm to ratepaying customers. ATCO requested that the Board approve the sale transaction, as well as the proposed disposition of the sale proceeds: to retire the remaining book value of the sold assets, to recover the disposition costs, and to recognize that the balance of the profits resulting from the sale should be paid to ATCO's shareholders. The customers' interests were represented by the City of Calgary, who opposed ATCO's position with respect to the disposition of the sale proceeds to shareholders.

Persuaded that customers would not be harmed by the sale, the Board approved the sale transaction on the basis that customers would not "be exposed to the risk of financial harm as a result of the Sale that could not be examined in a future proceeding". In a second decision, the Board determined the allocation of net sale proceeds. The Board held that it had the jurisdiction to approve a proposed disposition of sale proceeds subject to appropriate conditions to protect the public interest, pursuant to the powers granted to it under s. 15(3) of the *Alberta Energy and Utilities Board Act* ("AEUBA"). The Board applied a formula which recognizes profits realized when proceeds of sale exceed the original cost can be shared between customers and shareholders, and allocated a portion of the net gain on the sale to the ratepaying customers. The Alberta Court of Appeal set aside the Board's decision, referring the matter back to the Board to allocate the entire remainder of the proceeds to ATCO.

Held (McLachlin C.J. and Binnie and Fish JJ. dissenting): The appeal is dismissed and the cross-appeal is allowed.

Per **Bastarache**, LeBel, Deschamps and Charron JJ.: When the relevant factors of the pragmatic and functional approach are properly considered, the standard of review applicable to the Board's decision on the issue of jurisdiction is correctness. Here, the Board did not have the jurisdiction to allocate the proceeds of the sale of the utility's asset. The Court of Appeal made no error of fact or law when it concluded that the Board acted beyond its jurisdiction by misapprehending its statutory and common law authority. However, the Court of Appeal erred when it did not go on to conclude that the Board has no jurisdiction to allocate *any* portion of the proceeds of sale of the property to ratepayers. [paras. 21-34]

The interpretation of the AEUBA, the *Public Utilities Board Act* ("PUBA") and the GUA can lead to only one conclusion: the Board does not have the prerogative to decide on the distribution of the net gain from the sale of assets of a utility. On their grammatical and ordinary meaning, s. 26(2) GUA, s. 15(3) AEUBA and s. 37 PUBA are silent as to the Board's power to deal with sale proceeds. Section 26(2) GUA conferred on the Board the power to approve a transaction without more. The intended meaning of the Board's power pursuant to s. 15(3) AEUBA to impose conditions on an order that the Board considers necessary in the public interest, as well as the general power in s. 37 PUBA, is lost when the provisions are read in isolation. They are, on their own, vague and open-ended. It would be absurd to allow the Board an unfettered discretion to attach any condition it wishes to any order it makes. While the concept of "public interest" is very wide and elastic, the Board cannot be given total discretion over its limitations. These seemingly broad powers must be

interpreted within the entire context of the statutes which are meant to balance the need to protect consumers as well as the property rights retained by owners, as recognized in a free market economy. The context indicates that the limits of the Board's powers are grounded in its main function of fixing just and reasonable rates and in protecting the integrity and dependability of the supply system. [para. 7] [paras. 41-46]

An examination of the historical background of public utilities regulation in Alberta generally, and the legislation in respect of the powers of the Alberta Energy and Utilities Board in particular, reveals that nowhere is there a mention of the authority for the Board to allocate proceeds from a sale or the discretion of the Board to interfere with ownership rights. Moreover, although the Board may seem to possess a variety of powers and functions, it is manifest from a reading of the AEUBA, the PUBA and the GUA that the principal function of the Board in respect of public utilities, is the determination of rates. Its power to supervise the finances of these companies and their operations, although wide, is in practice incidental to fixing rates. The goals of sustainability, equity and efficiency, which underlie the reasoning as to how rates are fixed, have resulted in an economic and social arrangement which ensures that all customers have access to the utility at a fair price -- nothing more. The rates paid by customers do not incorporate acquiring ownership or control of the utility's assets. The object of the statutes is to protect both the customer and the investor, and the Board's responsibility is to maintain a tariff that enhances the economic benefits to consumers and investors of the utility. This well-balanced regulatory arrangement does not, however, cancel the private nature of the utility. The fact that the utility is given the opportunity to make a profit on its services and a fair return on its investment in its assets should not and cannot stop the utility from benefiting from the profits which follow the sale of assets. Neither is the utility protected from losses incurred from the sale of assets. The Board misdirected itself by confusing the interests of the customers in obtaining safe and efficient utility service with an interest in the underlying assets owned only by the utility. [para. 7] [paras. 54-69]

Not only is the power to allocate the proceeds of the sale absent from the explicit language of the legislation, but it cannot be implied from the statutory regime as necessarily incidental to the explicit powers. For the doctrine of jurisdiction by necessary implication to apply, there must be evidence that the exercise of that power is a practical necessity for the Board to accomplish the objects prescribed by the legislature, something which is absent in this case. Not only is the authority to attach a condition to allocate the proceeds of a sale to a particular party unnecessary for the Board to accomplish its role, but deciding otherwise would lead to the conclusion that broadly drawn powers, such as those found in the AEUBA, the GUA and the PUBA, can be interpreted so as to encroach on the economic freedom of the utility, depriving it of its rights. If the Alberta legislature wishes to confer on ratepayers the economic benefits resulting from the sale of utility assets, it can expressly provide for this in the legislation. [para. 39] [paras. 77-80]

Notwithstanding the conclusion that the Board lacked jurisdiction, its decision to exercise its discretion to protect the public interest by allocating the sale proceeds as it did to ratepaying customers did not meet a reasonable standard. When it explicitly concluded that no harm would ensue to customers from the sale of the asset, the Board did not identify any public interest which required protection and there was, therefore, nothing to trigger the exercise of the discretion to allocate the proceeds of sale. Finally, it cannot be concluded that the Board's allocation was reasonable when it wrongly assumed that ratepayers had acquired a proprietary interest in the utility's assets because assets were a factor in the rate-setting process. [paras. 82-85]

Per McLachlin C.J. and **Binnie** and Fish JJ. (dissenting) : The Board's decision should be restored. Section 15(3) AEUBA authorized the Board, in dealing with ATCO's application to approve the sale of the subject land and buildings, to "impose any additional conditions that the Board considers necessary in the public interest". In the exercise of that authority, and having regard to the Board's "general supervision over all gas utilities, and the owners of them" pursuant to s. 22(1) GUA, the Board made an allocation of the net gain for public policy reasons. The Board's discretion is not unlimited and must be exercised in good faith for its intended purpose. Here, in allocating one third of the net gain to ATCO and two thirds to the rate base, the Board explained that it was proper to balance the interests of both shareholders and ratepayers. In the Board's view to award the entire gain to the ratepayers would deny the utility an incentive to increase its efficiency and reduce its costs, but on the other hand to award the entire gain to the utility might encourage speculation in non-depreciable property or motivate the utility to identify and dispose of properties which have appreciated for reasons other than the best interest of the regulated business. Although it was open to the Board to allow ATCO's application for the entire profit, the solution it adopted in this case is well within the range of reasonable options. The "public interest" is largely and inherently a matter of opinion and discretion. While the statutory framework of utilities regulation varies from jurisdiction to jurisdiction, Alberta's grant of authority to its Board is more generous than most. The Court should not substitute its own view of what is "necessary in the public interest". The Board's decision made in the exercise of its jurisdiction was within the range of established regulatory opinion, whether the proper standard of review in that regard is patent unreasonableness or simple reasonableness. [paras. 91-92] [paras. 98-99] [para. 110] [para. 113] [para. 122] [para. 148]

ATCO's submission that an allocation of profit to the customers would amount to a confiscation of the corporation's property overlooks the obvious difference between investment in an unregulated business and investment in a regulated utility where the ratepayers carry the costs and the regulator sets the return on investment, not the marketplace. The Board's response cannot be considered "confiscatory" in any proper use of the term, and is well within the range of what is regarded in comparable jurisdictions as an appropriate regulatory allocation of the gain on sale of land whose original investment has been included by the utility itself in its rate base. Similarly, ATCO's argument that the Board engaged in impermissible retroactive ratemaking should not be accepted. The Board proposed to apply a portion of the expected profit to future ratemaking. The effect of the order is prospective not retroactive. Fixing the going-forward rate of return, as well as general supervision of "all gas utilities and the owners of them", were matters squarely within the Board's statutory mandate. ATCO also submits in its cross-appeal that the Court of Appeal erred in drawing a distinction between gains on sale of land whose original cost is not depreciated and depreciated property, such as buildings. A review of regulatory practice shows that many, but not all, regulators reject the relevance of this distinction. The point is not that the regulator must reject any such distinction but, rather, that the distinction does not have the controlling weight as contended by ATCO. In Alberta, it is up to the Board to determine what allocations are necessary in the public interest as conditions of the approval of sale. Finally, ATCO's contention that it alone is burdened with the risk on land that declines in value overlooks the fact that in a falling market the utility continues to be entitled to a rate of return on its original investment, even if the market value at the time is substantially less than its original investment. Further, it seems such losses are taken into account in the ongoing rate-setting process. [para. 93] [paras. 123-147]

Cases Cited

By Bastarache J.

Referred to: ATCO Gas and Pipelines Ltd., Alta. E.U.B. Decision 2001-78; ATCO Gas-North, A Division of ATCO Gas and Pipelines Ltd., Alta. E.U.B. Decision 2001-65; TransAlta Utilities Corp. v. Public Utilities Board (Alta.) (1986), 68 A.R. 171; TransAlta Utilities Corp., Alta. E.U.B. Decision 2001-41; Pushpanathan v. Canada (Minister of Citizenship and Immigration), [1998] 1 S.C.R. 982; United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City), [2004] 1 S.C.R. 485, 2004 SCC 19; Consumers' Gas Co. v. Ontario (Energy Board), [2001] O.J. No. 5024 (QL); Coalition of Citizens Impacted by the Caroline Shell Plant v. Alberta (Energy Utilities Board) (1996), 41 Alta. L.R. (3d) 374; Atco Ltd. v. Calgary Power Ltd., [1982] 2 S.C.R. 557; Dome Petroleum Ltd. v. Public Utilities Board (Alberta) (1976), 2 A.R. 453, aff'd [1977] 2 S.C.R. 822; Barrie Public Utilities v. Canadian Cable Television Assn., [2003] 1 S.C.R. 476, 2003 SCC 28; Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27; Bell ExpressVu Limited Partnership v. Rex, [2002] 2 S.C.R. 559, 2002 SCC 42; H.L. v. Canada (Attorney General), [2005] 1 S.C.R. 401, 2005 SCC 25; Marche v. Halifax Insurance Co., [2005] 1 S.C.R. 47, 2005 SCC 6; Contino v. Leonelli-Contino, 2005 SCC 63; Alberta Government Telephones (1984), Alta. P.U.B. Decision No. E84081; TransAlta Utilities Corp. (1984), Alta. P.U.B. Decision No. E84116; TransAlta Utilities Corp. (Re), [2002] A.E.U.B.D. No. 30 (QL); ATCO Electric Ltd. (Re), [2003] A.E.U.B.D. No. 92 (QL); Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Assn., [1993] 3 S.C.R. 724; Bristol-Myers Squibb Co. v. Canada (Attorney General), [2005] 1 S.C.R. 533, 2005 SCC 26; Chieu v. Canada (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 84, 2002 SCC 3; Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission), [1989] 1 S.C.R. 1722; R. v. McIntosh, [1995] 1 S.C.R. 686; Re Dow Chemical Canada Inc. and Union Gas Ltd. (1982), 141 D.L.R. (3d) 641, aff'd (1983), 42 O.R. (2d) 731; Interprovincial Pipe Line Ltd. v. National Energy Board, [1978] 1 F.C. 601; Canadian Broadcasting League v. Canadian Radio-television and Telecommunications Commission, [1983] 1 F.C. 182, aff'd [1985] 1 S.C.R. 174; Northwestern Utilities Ltd. v. City of Edmonton, [1929] S.C.R. 186; Northwestern Utilities Ltd. v. City of Edmonton, [1979] 1 S.C.R. 684; Re Gas Utilities Act and Public Utilities Board Act (1984), Alta. P.U.B. Decision No. E84113; Re Union Gas Ltd. and Ontario Energy Board (1983), 1 D.L.R. (4th) 698; Duquesne Light Co. v. Barasch, 488 U.S. 299 (1989); Market St. Ry. Co. v. Railroad Commission of State of California, 324 U.S. 548 (1945); Re Coseka Resources Ltd. and Saratoga Processing Co. (1981), 126 D.L.R. (3d) 705, leave to appeal refused, [1981] 2 S.C.R. vii; Re Consumers' Gas Co. (1987), E.B.R.O. 410-II, 411-II, 412-II; National Energy Board Act (Can.) (Re), [1986] 3 F.C. 275; Pacific National Investments Ltd. v. Victoria (City), [2000] 2 S.C.R. 919, 2000 SCC 64; Leiriao v. Val-Bélair (Town), [1991] 3 S.C.R. 349; Hongkong Bank of Canada v. Wheeler Holdings Ltd., [1993] 1 S.C.R. 167.

By Binnie J. (dissenting)

Atco Ltd. v. Calgary Power Ltd., [1982] 2 S.C.R. 557; C.U.P.E. v. Ontario (Minister of Labour), [2003] 1 S.C.R. 539, 2003 SCC 29; TransAlta Utilities Corp. v. Public Utilities Board (Alta.) (1986), 68 A.R. 171; Dr. Q v. College of Physicians and Surgeons of British Columbia, [2003] 1 S.C.R. 226, 2003 SCC 19; Calgary Power Ltd. v. Copithorne, [1959] S.C.R. 24; United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd., [1993] 2 S.C.R. 316; Pezim v. British Columbia (Superintendent of Brokers), [1994] 2 S.C.R. 557; Memorial Gardens Association (Canada) Ltd. v. Colwood Cemetery Co., [1958] S.C.R. 353; Union Gas Co. of Canada v. Sydenham Gas and Petroleum Co., [1957] S.C.R. 185; Re C.T.C. Dealer Holdings Ltd. and Ontario Securities Commission (1987), 59 O.R. (2d) 79; Committee for the Equal Treatment of

Asbestos Minority Shareholders v. Ontario (Securities Commission), [2001] 2 S.C.R. 132, 2001 SCC 37; Re Consumer's Gas Co. (1976), E.B.R.O. 341-I; Re Boston Gas Co. (1982), 49 P.U.R. 4th 1; Re Consumer's Gas Co. (1991), E.B.R.O. 465; Re Natural Resource Gas Ltd., RP-2002-0147, EB-2002-0446; Yukon Energy Corp. v. Utilities Board (1996), 74 B.C.A.C. 58, 121 W.A.C. 58; Re Arizona Public Service Co. (1988), 91 P.U.R. 4th 337, 1988 WL 391394; Re Southern California Water Co. (1992), 43 C.P.U.C. 2d 596, 1992 WL 584058; Re Southern California Gas Co. (1990), 39 C.P.U.C. 2d 166, 118 P.U.R. 4th 81, 1990 WL 488654; Democratic Central Committee of the District of Columbia v. Washington Metropolitan Area Transit Commission, 485 F.2d 786 (1973); Board of Public Utility Commissioners v. New York Telephone Co., 271 U.S. 23 (1926); North-western Utilities Ltd. v. City of Edmonton, [1979] 1 S.C.R. 684; New York Water Service Corp. v. Public Service Commission, 208 N.Y.S.2d 587 (1960); Re Compliance with the Energy Policy Act of 1992 (1995), 62 C.P.U.C. 2d 517; Re California Water Service Co. (1996), 66 C.P.U.C. 2d 100, 1996 WL 293205; TransAlta Utilities Corp. (1984), Alta. P.U.B. Decision No. E84116; Alberta Government Telephones (1984), Alta. P.U.B. Decision No. E84081; TransAlta Utilities Corp. (1984), Alta. P.U.B. Decision No. E84115; Re Gas Utilities Act and Public Utilities Board Act (1984), Alta. P.U.B. Decision No. E84113.

Statutes and Regulations Cited

Alberta Energy and Utilities Board Act, R.S.A. 2000, c. A-17, ss. 13, 15, 26(1), (2), 27.

Gas Utilities Act, R.S.A. 2000, c. G-5, ss. 16, 17, 22, 24, 26, 27(1), 36-45, 59.

Interpretation Act, R.S.A. 2000, c. I-8, s. 10.

Public Utilities Act, S.A. 1915, c. 6, ss. 21, 23, 24, 29(g).

Public Utilities Board Act, R.S.A. 2000, c. P-45, ss. 36, 37, 80, 85(1), 87, 89-95, 101(1), (2), 102(1).

Authors Cited

Anisman, Philip, and Robert F. Reid. Administrative Law Issues and Practice. Scarborough, Ont.: Carswell, 1995.

Black, Alexander J. "Responsible Regulation: Incentive Rates for Natural Gas Pipelines" (1992), 28 Tulsa L.J. 349.

Blake, Sara. Administrative Law in Canada, 3rd ed. Markham, Ont.: Butterworths, 2001.

Brown, David M. Energy Regulation in Ontario. Aurora, Ont.: Canada Law Book, 2001 (loose-leaf updated November 2004, release 3).

Brown, Donald J. M., and John M. Evans. Judicial Review of Administrative Action in Canada. Toronto: Canvasback, 1998 (loose-leaf updated July 2005).

Brown-John, C. Lloyd. Canadian Regulatory Agencies: Quis custodiet ipsos custodes? Toronto: Butterworths, 1981.

Canadian Institute of Resources Law. Canada Energy Law Service: Alberta. Edited by Steven A. Kennett. Toronto: Thomson Carswell, 1981 (loose-leaf updated 2005, release 2).

Côté, Pierre-André. The Interpretation of Legislation in Canada, 3rd ed. Scarborough, Ont.: Carswell, 2000.

Cross, Philli S. "Rate Treatment of Gain on Sale of Land: Ratepayer Indifference, A New Standard?" (1990), 126 Public Utilities Fortnightly 44.

Depoorter, Ben W. F. "Regulation of Natural Monopoly", in B. Bouckaert and G. De Geest, eds., Encyclopedia of Law and Economics, vol. III, The Regulation of Contracts. Northampton, Mass.: Edward Elgar, 2000.

Driedger, Elmer A. Construction of Statutes, 2nd ed. Toronto: Butterworths, 1983.

Green, Richard, and Martin Rodriguez Pardina, Resetting Price Controls for Privatized Utilities: A Manual for Regulators. Washington, D.C.: World Bank, 1999.

Kahn, Alfred E. The Economics of Regulation: Principles and Institutions, vol. 1, Economic Principles. Cambridge, Mass.: MIT Press, 1988.

MacAvoy, Paul W., and J. Gregory Sidak. "The Efficient Allocation of Proceeds from a Utility's Sale of Assets", (2001), 22 Energy L.J. 233.

Milner, H. R. "Public Utility Rate Control in Alberta" (1930), 8 Can. Bar Rev. 101.

Mullan, David J. Administrative Law. Toronto: Irwin Law, 2001.

Netz, Janet S. "Price Regulation: A (Non-Technical) Overview", in B. Bouckaert and G. De Geest, eds., Encyclopedia of Law and Economics, vol. III, The Regulation of Contracts. Northampton, Mass.: Edward Elgar, 2000.

Reid, Robert F., and Hillel David. Administrative Law and Practice, 2nd ed. Toronto: Butterworths, 1978.

Sullivan, Ruth. Sullivan and Driedger on the Construction of Statutes, 4th ed. Markham, Ont.: Butterworths, 2002.

Trebilcock, Michael J. "The Consumer Interest and Regulatory Reform", in G. B. Doern, ed., The Regulatory Process in Canada. Toronto: Macmillan of Canada, 1978, 94.

History and Disposition:

APPEAL and CROSS-APPEAL from a judgment of the Alberta Court of Appeal (Wittmann J.A. and LoVecchio J. (ad hoc)) (2004), 24 Alta. L.R. (4th) 205, 339 A.R. 250; 312 W.A.C. 250, [2004] 4 W.W.R. 239, [2004] A.J. No. 45 (QL), 2004 ABCA 3, reversing a decision of the Alberta Energy and Utilities Board, Decision No. 2002-037, [2002] A.E.U.B.D. No. 52 (QL). Appeal dismissed and cross-appeal allowed, McLachlin C.J. and Binnie and Fish JJ. dissenting.

Counsel:

Brian K. O'Ferrall and Daron K. Naffin, for the appellant/respondent on cross-appeal.

Clifton D. O'Brien, Q.C., Lawrence E. Smith, Q.C., H. Martin Kay, Q.C., and Laurie A. Goldbach, for the respondent/appellant on cross-appeal.

J. Richard McKee and Renée Marx, for the intervener the Alberta Energy and Utilities Board.

Written submissions only by George Vegh and Michael W. Lyle, for the intervener the Ontario Energy Board.

Written submissions only by Michael D. Schafler and J.L. McDougall, Q.C., for the intervener Enbridge Gas Distribution Inc.

Written submissions only by Michael A. Penny and Susan Kushneryk, for the intervener Union Gas Limited.

[Editor's note: A corrigendum was published by the Court April 24, 2006. The corrections have been incorporated in this document and the text of the corrigendum is appended to the end of the judgment.]

The judgment of Bastarache, LeBel, Deschamps and Charron JJ. was delivered by

BASTARACHE J.:--

1. Introduction

1 At the heart of this appeal is the issue of the jurisdiction of an administrative board. More specifically, the Court must consider whether, on the appropriate standard of review, this utility board appropriately set out the limits of its powers and discretion.

2 Few areas of our lives are now untouched by regulation. Telephone, rail, airline, trucking, foreign investment, insurance, capital markets, broadcasting licences and content, banking, food, drug and safety standards, are just a few of the objects of public regulations in Canada: M. J. Trebilcock, "The Consumer Interest and Regulatory Reform", in G. B. Doern, ed., *The Regulatory Process in Canada* (1978), 94. Discretion is central to the regulatory agency policy process, but this discretion will vary from one administrative body to another (see C. L. Brown-John, *Canadian Regulatory Agencies: Quis custodiet ipsos custodes?* (1981), at p. 29). More importantly, in exercising this discretion, statutory bodies must respect the confines of their jurisdiction: they cannot trespass in areas where the legislature has not assigned them authority (see D. J. Mullan, *Administrative Law* (2001), at pp. 9-10).

3 The business of energy and utilities is no exception to this regulatory framework. The respondent in this case is a public utility in Alberta which delivers natural gas. This public utility is nothing more than a private corporation subject to certain regulatory constraints. Fundamentally, it is like any other privately held company: it obtains the necessary funding from investors through public issues of shares in stock and bond markets; it is the sole owner of the resources, land and other assets; it constructs plants, purchases equipment, and contracts with employees to provide the services; it realizes profits resulting from the application of the rates approved by the Alberta Energy and Utilities Board (the "Board") (see P. W. MacAvoy and J. G. Sidak, "The Efficient Allocation of Proceeds from a Utility's Sale of Assets" (2001), 22 Energy L.J. 233, at p. 234). That said, one cannot ignore the important feature which makes a public utility so distinct: it must answer to a regulator. Public utilities are typically natural monopolies: technology and demand are such that fixed costs are lower for a single firm to supply the market than would be the case where there is duplication of services by different companies in a competitive environment (see A. E. Kahn, *The Economics of Regulation: Principles and Institutions* (1988), vol. 1, at p. 11; B. W. F. Depoorter, "Reg-

ulation of Natural Monopoly", in B. Bouckaert and G. De Geest, eds., *Encyclopedia of Law and Economics* (2000), vol. III, 498; J. S. Netz, "Price Regulation: A (Non-Technical) Overview", in B. Bouckaert and G. De Geest, eds., *Encyclopedia of Law and Economics* (2000), vol. III, 396, at p. 398; A. J. Black, "Responsible Regulation: Incentive Rates for Natural Gas Pipelines" (1992), 28 *Tulsa L.J.* 349, at p. 351). Efficiency of production is promoted under this model. However, governments have purported to move away from this theoretical concept and have adopted what can only be described as a "regulated monopoly". The 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 (see Kahn, at p. 11).

4 As in any business venture, public utilities make business decisions, their ultimate goal being to maximize the residual benefits to shareholders. However, the regulator limits the utility's managerial discretion over key decisions, including prices, service offerings and the prudency of plant and equipment investment decisions. And more relevant to this case, the utility, outside the ordinary course of business, is limited in its right to sell assets it owns: it must obtain authorization from its regulator before selling an asset previously used to produce regulated services (see MacAvoy and Sidak, at p. 234).

5 Against this backdrop, the Court is being asked to determine whether the Board has jurisdiction pursuant to its enabling statutes to allocate a portion of the net gain on the sale of a now discarded utility asset to the rate-paying customers of the utility when approving the sale. Subsequently, if this first question is answered affirmatively, the Court must consider whether the Board's exercise of its jurisdiction was reasonable and within the limits of its jurisdiction: was it allowed, in the circumstances of this case, to allocate a portion of the net gain on the sale of the utility to the rate-paying customers?

6 The customers' interests are represented in this case by the City of Calgary (the "City") which argues that the Board can determine how to allocate the proceeds pursuant to its power to approve the sale and protect the public interest. I find this position unconvincing.

7 The interpretation of the *Alberta Energy and Utilities Board Act*, R.S.A. 2000, c. A-17 ("AEUBA"), the *Public Utilities Board Act*, R.S.A. 2000, c. P-45 ("PUBA"), and the *Gas Utilities Act*, R.S.A. 2000, c. G-5 ("GUA") (see Appendix for the relevant provisions of these three statutes), can lead to only one conclusion: the Board does not have the prerogative to decide on the distribution of the net gain from the sale of assets of a utility. The Board's seemingly broad powers to make any order and to impose any additional conditions that are necessary in the public interest has to be interpreted within the entire context of the statutes which are meant to balance the need to protect consumers as well as the property rights retained by owners, as recognized in a free market economy. The limits of the powers of the Board 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.

1.1 *Overview of the Facts*

8 ATCO Gas - South ("AGS"), which is a division of ATCO Gas and Pipelines Ltd. ("ATCO"), filed an application by letter with the Board pursuant to s. 25.1(2) (now s. 26(2)) of the GUA, for approval of the sale of its properties located in Calgary known as Calgary Stores Block (the "property"). The property consisted of land and buildings; however, the main value was in the land, and the purchaser intended to and did eventually demolish the buildings and redevelop the land. According to AGS, the property was no longer used or useful for the provision of utility services, and

the sale would not cause any harm to customers. In fact, AGS suggested that the sale would result in cost savings to customers, by allowing the net book value of the property to be retired and withdrawn from the rate base, thereby reducing rates. ATCO requested that the Board approve the sale transaction and the disposition of the sale proceeds to retire the remaining book value of the sold assets, to recover the disposition costs, and to recognize the balance of the profits resulting from the sale of the plant should be paid to shareholders. The Board dealt with the application in writing, without witnesses or an oral hearing. Other parties making written submissions to the Board were the City of Calgary, the Federation of Alberta Gas Co-ops Ltd., Gas Alberta Inc. and the Municipal Interveners , who all opposed ATCO's position with respect to the disposition of the sale proceeds to shareholders.

1.2 *Judicial History*

1.2.1 Alberta Energy and Utilities Board

1.2.1.1 *Decision 2001-78 (Atco Gas and Pipelines Ltd.)*

9 In a first decision, which considered ATCO's application to approve the sale of the property, the Board employed a "no-harm" test, assessing the potential impact on both rates and the level of service to customers and the prudence of the sale transaction, taking into account the purchaser and tender or sale process followed. The Board was of the view that the test had been satisfied. It was persuaded that customers would not be harmed by the sale, given that a prudent lease arrangement to replace the sold facility had been concluded. The Board was satisfied that there would not be a negative impact on customers' rates, at least during the five-year initial term of the lease. In fact, the Board concluded that there would be cost savings to the customers and that there would be no impact on the level of service to customers as a result of the sale. It did not make a finding on the specific impact on future operating costs; for example, it did not consider the costs of the lease arrangement entered into by ATCO. The Board noted that those costs could be reviewed by the Board in a future general rate application brought by interested parties.

1.2.1.2 *Decision 2002-037*, [2002] A.E.U.B. No. 52 (QL)

10 In a second decision, the Board determined the allocation of net sale proceeds. It reviewed the regulatory policy and general principles which affected the decision, although no specific matters are enumerated for consideration in the applicable legislative provisions. The Board had previously developed a "no-harm" test, and it reviewed the rationale for the test as summarized in its Alta. E.U.B. Decision 2001-65, *Atco Gas-North, A Division of Atco Gas and Pipelines Ltd.*: "The Board considers that its power to mitigate or offset potential harm to customers by allocating part or all of the sale proceeds to them, flows from its very broad mandate to protect consumers in the public interest (p. 16)."

11 The Board went on to discuss the implications of the Alberta Court of Appeal decision in *TransAlta Utilities Corp. v. Public Utilities Board (Alta.)* (1986), 68 A.R. 171, referring to various decisions it had rendered in the past. Quoting from Alta. E.U.B. Decision 2000-41 (*TransAlta Utilities Corp.*), the Board summarized the "*TransAlta Formula*" (para. 27):

> In subsequent decisions, the Board has interpreted the Court of Appeal's conclusion to mean that where the sale price exceeds the original cost of the assets, shareholders are entitled to net book value (in historical dollars), customers

> are entitled to the difference between net book value and original cost, and any appreciation in the value of the assets (i.e. the difference between original cost and the sale price) is to be shared by shareholders and customers. The amount to be shared by each is determined by multiplying the ratio of sale price/original cost to the net book value (for shareholders) and the difference between original cost and net book value (for customers). However, where the sale price does not exceed original cost, customers are entitled to all of the gain on sale.

The Board also referred to Decision 2001-65, where it had clarified the following (para. 28):

> In the Board's view, if the TransAlta Formula yields a result greater than the no-harm amount, customers are entitled to the greater amount. If the Trans-Alta Formula yields a result less than the no-harm amount, customers are entitled to the no-harm amount. In the Board's view, this approach is consistent with its historical application of the TransAlta Formula.

12 On the issue of its jurisdiction to allocate the net proceeds of a sale, the Board in the present case stated, at paras. 47-49:

> The fact that a regulated utility must seek Board approval before disposing of its assets is sufficient indication of the limitations placed by the legislature on the property rights of a utility. In appropriate circumstances, the Board clearly has the power to prevent a utility from disposing of its property. In the Board's view it also follows that the Board can approve a disposition subject to appropriate conditions to protect customer interests.
>
> Regarding AGS's argument that allocating more than the no-harm amount to customers would amount to retrospective ratemaking, the Board again notes the decision in the TransAlta Appeal. The Court of Appeal accepted that the Board could include in the definition of "revenue" an amount payable to customers representing excess depreciation paid by them through past rates. In the Board's view, no question of retrospective ratemaking arises in cases where previously regulated rate base assets are being disposed of out of rate base and the Board applies the TransAlta Formula.
>
> The Board is not persuaded by the Company's argument that the Stores Block assets are now 'non-utility' by virtue of being 'no longer required for utility service'. The Board notes that the assets could still be providing service to regulated customers. In fact, the services formerly provided by the Stores Block assets continue to be required, but will be provided from existing and newly leased facilities. Furthermore, the Board notes that even when an asset and the associated service it was providing to customers is no longer required the Board has previously allocated more than the no-harm amount to customers where proceeds have exceeded the original cost of the asset.

13 The Board went on to apply the no-harm test to the present facts. It noted that in its decision on the application for the approval of the sale, it had already considered the no-harm test to be satisfied. However, in that first decision, it had not made a finding with respect to the specific impact on future operating costs, including the particular lease arrangement being entered into by ATCO.

14 The Board then reviewed the submissions with respect to the allocation of the net gain and rejected the submission that if the new owner had no use of the buildings on the land, this should affect the allocation of net proceeds. The Board held that the buildings did have some present value but did not find it necessary to fix a specific value. The Board recognized and confirmed that the *TransAlta Formula* was one whereby the "windfall" realized when the proceeds of sale exceed the original cost could be shared between customers and shareholders. It held that it should apply the formula in this case and that it would consider the gain on the transaction as a whole, not distinguishing between the proceeds allocated to land separately from the proceeds allocated to buildings.

15 With respect to allocation of the gain between customers and shareholders of ATCO, the Board tried to balance the interests of both the customers' desire for safe reliable service at a reasonable cost with the provision of a fair return on the investment made by the company (paras. 112-13):

> To award the entire net gain on the land and buildings to the customers, while beneficial to the customers, could establish an environment that may deter the process wherein the company continually assesses its operation to identify, evaluate, and select options that continually increase efficiency and reduce costs.
>
> Conversely, to award the entire net gain to the company may establish an environment where a regulated utility company might be moved to speculate in non-depreciable property or result in the company being motivated to identify and sell existing properties where appreciation has already occurred.

16 The Board went on to conclude that the sharing of the net gain on the sale of the land and buildings collectively, in accordance with the *TransAlta Formula*, was equitable in the circumstances of this application and was consistent with past Board decisions.

17 The Board determined that from the gross proceeds of $6,550,000, ATCO should receive $465,000 to cover the cost of disposition ($265,000) and the provision for environmental remediation ($200,000), the shareholders should receive $2,014,690, and $4,070,310 should go to the customers. Of the amount credited to shareholders, $225,245 was to be used to remove the remaining net book value of the property from ATCO's accounts. Of the amount allocated to customers, $3,045,813 was allocated to ATCO Gas - South customers and $1,024,497 to ATCO Pipelines - South customers.

1.2.2 Court of Appeal of Alberta ((2004), 24 Alta. L.R. (4th) 205, 2004 ABCA 3)

18 ATCO appealed the Board's decision. It argued that the Board did not have any jurisdiction to allocate the proceeds of sale and that the proceeds should have been allocated entirely to the shareholders. In its view, allowing customers to share in the proceeds of sale would result in them benefiting twice, since they had been spared the costs of renovating the sold assets and would enjoy cost savings from the lease arrangements. The Court of Appeal of Alberta agreed with ATCO, al-

lowing the appeal and setting aside the Board's decision. The matter was referred back to the Board, and the Board was directed to allocate the entire amount appearing in Line 11 of the allocation of proceeds, entitled "Remainder to be Shared" to ATCO. For the reasons that follow, the Court of Appeal's decision should be upheld, in part; it did not err when it held that the Board did not have the jurisdiction to allocate the proceeds of the sale to ratepayers.

2. Analysis

2.1 *Issues*

19 There is an appeal and a cross-appeal in this case: an appeal by the City in which it submits that, contrary to the Court of Appeal's decision, the Board had jurisdiction to allocate a portion of the net gain on the sale of a utility asset to the rate-paying customers, even where no harm to the public was found at the time the Board approved the sale, and a cross-appeal by ATCO in which it questions the Board's jurisdiction to allocate any of ATCO's proceeds from the sale to customers. In particular, ATCO contends that the Board has no jurisdiction to make an allocation to rate-paying customers, equivalent to the accumulated depreciation calculated for prior years. No matter how the issue is framed, it is evident that the crux of this appeal lies in whether the Board has the jurisdiction to distribute the gain on the sale of a utility company's asset.

20 Given my conclusion on this issue, it is not necessary for me to consider whether the Board's allocation of the proceeds in this case was reasonable. Nevertheless, as I note at para. 82, I will direct my attention briefly to the question of the exercise of discretion in view of my colleague's reasons.

2.2 *Standard of Review*

21 As this appeal stems from an administrative body's decision, it is necessary to determine the appropriate level of deference which must be shown to the body. Wittman J.A., writing for the Court of Appeal, concluded that the issue of jurisdiction of the Board attracted a standard of correctness. ATCO concurs with this conclusion. I agree. No deference should be shown for the Board's decision with regard to its jurisdiction on the allocation of the net gain on sale of assets. An inquiry into the factors enunciated by this Court in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, confirms this conclusion, as does the reasoning in *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485, 2004 SCC 19.

22 Although it is not necessary to conduct a full analysis of the standard of review in this case, I will address the issue briefly in light of the fact that Binnie J. deals with the exercise of discretion in his reasons for judgment. The four factors that need to be canvassed in order to determine the appropriate standard of review of an administrative tribunal decision are: 1) the existence of a privative clause; 2) the expertise of the tribunal/board; 3) the purpose of the governing legislation and the particular provisions; and 4) the nature of the problem (*Pushpanathan*, at paras. 29-38).

23 In the case at bar, one should avoid a hasty characterizing of the issue as "jurisdictional" and subsequently be tempted to skip the pragmatic and functional analysis. A complete examination of the factors is required.

24 First, s. 26(1) of the AEUBA grants a right of appeal, but in a limited way. Appeals are allowed on a question of jurisdiction or law and only after leave to appeal is obtained from a judge:

> **26(1)** Subject to subsection (2), an appeal lies from the Board to the Court of Appeal on a question of jurisdiction or on a question of law.
>
> **(2)** Leave to appeal may be obtained from a judge of the Court of Appeal only on an application made
>
> (a) within 30 days from the day that the order, decision or direction sought to be appealed from was made, or
>
> (b) within a further period of time as granted by the judge where the judge is of the opinion that the circumstances warrant the granting of that further period of time.

In addition, the AEUBA includes a privative clause which states that every action, order, ruling or decision of the Board is final and shall not be questioned, reviewed or restrained by any proceeding in the nature of an application for judicial review or otherwise in any court (s. 27).

25 The presence of a statutory right of appeal on questions of jurisdiction and law suggests a more searching standard of review and less deference to the Board on those questions (see *Pushpanathan*, at para. 30). However, the presence of the privative clause and right to appeal are not decisive, and one must proceed with the examination of the nature of the question to be determined and the relative expertise of the tribunal in those particular matters.

26 Second, as observed by the Court of Appeal, no one disputes the fact that the Board is a specialized body with a high level of expertise regarding Alberta's energy resources and utilities (see, e.g., *Consumers' Gas Co. v. Ontario (Energy Board)*, [2001] O.J. No. 5024 (QL), (Div. Ct.), at para. 2 ; *Coalition of Citizens Impacted by the Caroline Shell Plant v. Alberta (Energy Utilities Board)* (1996), 41 Alta. L.R. (3d) 374 (C.A.), at para. 14. In fact, the Board is a permanent tribunal with a long-term regulatory relationship with the regulated utilities.

27 Nevertheless, the Court is concerned not with the general expertise of the administrative decision maker, but with its expertise in relation to the specific nature of the issue before it. Consequently, while normally one would have assumed that the Board's expertise is far greater than that of a court, the nature of the problem at bar, to adopt the language of the Court of Appeal (para. 35), "neutralizes" this deference. As I will elaborate below, the expertise of the Board is not engaged when deciding the scope of its powers.

28 Third, the present case is governed by three pieces of legislation: the PUBA, the GUA and the AEUBA. These statutes give the Board a mandate to safeguard the public interest in the nature and quality of the service provided to the community by public utilities: *Atco Ltd. v. Calgary Power Ltd.*, [1982] 2 S.C.R. 557, at p. 576; *Dome Petroleum Ltd. v. Public Utilities Board (Alberta)* (1976), 2 A.R. 453 (C.A.), at paras. 20-22, aff'd [1977] 2 S.C.R. 822. The legislative framework at hand has as its main purpose the proper regulation of a gas utility in the public interest, more specifically the regulation of a monopoly in the public interest with its primary tool being rate setting, as I will explain later.

29 The particular provision at issue, s. 26(2)(d)(i) of the GUA, which requires a utility to obtain the approval of the regulator before it sells an asset, serves to protect the customers from adverse results brought about by any of the utility's transactions by ensuring that the economic benefits to customers are enhanced (MacAvoy and Sidak, at pp. 234-36).

30 While at first blush the purposes of the relevant statutes and of the Board can be conceived as a delicate balancing between different constituencies, i.e., the utility and the customer, and therefore entail determinations which are polycentric (*Pushpanathan*, at para. 36), the interpretation of the enabling statutes and the particular provisions under review (s. 26(2)(d) GUA and s. 15(3)(d) AEUBA) is not a polycentric question, contrary to the conclusion of the Court of Appeal. It is an inquiry into whether a proper construction of the enabling statutes gives the Board jurisdiction to allocate the profits realized from the sale of an asset. The Board was not created with the main purpose of interpreting the AEUBA, the GUA or the PUBA in the abstract, where no policy consideration is at issue, but rather to ensure that utility rates are always just and reasonable (see *Atco Ltd.*, at p. 576). In the case at bar, this protective role does not come into play. Hence, this factor points to a less deferential standard of review.

31 Fourth, the nature of the problem underlying each issue is different. The parties are in essence asking the Court to answer two questions (as I have set out above), the first of which is to determine whether the power to dispose of the proceeds of sale falls within the Board's statutory mandate. The Board, in its decision, determined that it had the power to allocate a portion of the proceeds of a sale of utility assets to the ratepayers; it based its decision on its statutory powers, the equitable principles rooted in the "regulatory compact" (see para. 63 of these reasons) and previous practice. This question is undoubtedly one of law and jurisdiction. The Board would arguably have no greater expertise with regard to this issue than the courts. A court is called upon to interpret provisions that have no technical aspect, in contrast with the provision disputed in *Barrie Public Utilities v. Canadian Cable Television Assn.*, [2003] 1 S.C.R. 476, 2003 SCC 28, at para. 86. The interpretation of general concepts such as "public interest" and "conditions" (as found in s. 15(3)(d) of the AEUBA) is not foreign to courts and is not derived from an area where the tribunal has been held to have greater expertise than the courts. The second question is whether the method and actual allocation in this case were reasonable. To resolve this issue, one must consider case law, policy justifications and the practice of other boards, as well as the details of the particular allocation in this case. The issue here is most likely characterized as one of mixed fact and law.

32 In light of the four factors, I conclude that each question requires a distinct standard of review. To determine the Board's power to allocate proceeds from a sale of utility assets suggests a standard of review of correctness. As expressed by the Court of Appeal, the focus of this inquiry remains on the particular provisions being invoked and interpreted by the tribunal (s. 26(2)(d) of the GUA and s. 15(3)(d) of the AEUBA) and "goes to jurisdiction" (*Pushpanathan*, at para. 28). Moreover, keeping in mind all the factors discussed, the generality of the proposition will be an additional factor in favour of the imposition of a correctness standard, as I stated in *Pushpanathan*, at para. 38:

> ... the broader the propositions asserted, and the further the implications of such decisions stray from the core expertise of the tribunal, the less likelihood that deference will be shown. Without an implied or express legislative intent to the contrary as manifested in the criteria above, legislatures should be assumed to have left highly generalized propositions of law to courts.

33 The second question regarding the Board's actual method used for the allocation of proceeds likely attracts a more deferential standard. On the one hand, the Board's expertise, particularly in this area, its broad mandate, the technical nature of the question and the general purposes of the legislation, all suggest a relatively high level of deference to the Board's decision. On the other hand, the absence of a privative clause on questions of jurisdiction and the reference to law needed to answer this question all suggest a less deferential standard of review which favours reasonableness. It is not necessary, however, for me to determine which specific standard would have applied here.

34 As will be shown in the analysis below, I am of the view that the Court of Appeal made no error of fact or law when it concluded that the Board acted beyond its jurisdiction by misapprehending its statutory and common law authority. However, the Court of Appeal erred when it did not go on to conclude that the Board has no jurisdiction to allocate any portion of the proceeds of sale of the property to ratepayers.

2.3 *Was the Board's Decision as to its Jurisdiction Correct?*

35 Administrative tribunals or agencies are statutory creations: they cannot exceed the powers that were granted to them by their enabling statute; they must "adhere to the confines of their statutory authority or 'jurisdiction'[; and t]hey cannot trespass in areas where the legislature has not assigned them authority": Mullan, at pp. 9-10 (see also S. Blake, *Administrative Law in Canada*, (3rd ed. 2001), at pp. 183-184).

36 In order to determine whether the Board's decision that it had the jurisdiction to allocate proceeds from the sale of a utility's asset was correct, I am required to interpret the legislative framework by which the Board derives its powers and actions.

2.3.1 General Principles of Statutory Interpretation

37 For a number of years now, the Court has adopted E. A. Driedger's modern approach as the method to follow for statutory interpretation (*Construction of Statutes* (2nd ed. 1983), at p. 87):

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

(See, e.g., see *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21; *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42, at para. 26; *H.L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401, 2005 SCC 25, at paras. 186-87; *Marche v. Halifax Insurance Co.*, [2005] 1 S.C.R. 47, 2005 SCC 6, at para. 54; *Barrie Public Utilities*, at paras. 20 and 86; *Contino v. Leonelli-Contino*, 2005 SCC 63, at para. 19.)

38 But more specifically in the area of administrative law, tribunals and boards obtain their jurisdiction over matters from two sources: 1) express grants of jurisdiction under various statutes (explicit powers); and 2) the common law, by application of the doctrine of jurisdiction by necessary implication (implicit powers) (see also D. M. Brown, *Energy Regulation in Ontario* (loose-leaf ed.), at p. 2-15).

39 The City submits that it is both implicit and explicit within the express jurisdiction that has been conferred upon the Board to approve or refuse to approve the sale of utility assets, that the

Board can determine how to allocate the proceeds of the sale in this case. ATCO retorts that not only is such a power absent from the explicit language of the legislation, but it cannot be "implied" from the statutory regime as necessarily incidental to the explicit powers. I agree with ATCO's submissions and will elaborate in this regard.

2.3.2 Explicit Powers: Grammatical and Ordinary Meaning

40 As a preliminary submission, the City argues that given that ATCO applied to the Board for approval of both the sale transaction and the disposition of the proceeds of sale, this suggests that ATCO recognized that the Board has authority to allocate the proceeds as a condition of a proposed sale. This argument does not hold any weight in my view. First, the application for approval cannot be considered on its own an admission by ATCO of the jurisdiction of the Board. In any event, an admission of this nature would not have any bearing on the applicable law. Moreover, knowing that in the past the Board had decided that it had jurisdiction to allocate the proceeds of a sale of assets and had acted on this power, one can assume that ATCO was asking for the approval of the disposition of the proceeds should the Board not accept their argument on jurisdiction. In fact, a review of past Board decisions on the approval of sales shows that utility companies have constantly challenged the Board's jurisdiction to allocate the net gain on the sale of assets (see, e.g., *TransAlta Utilities Corp.*, Alta. E.U.B. Decision 2000-41; *ATCO Gas-North, A Division of ATCO Gas and Pipelines Ltd.*, Alta. E.U.B. Decision 2001-65; *Alberta Government Telephones* (1984), Alta. P.U.B. Decision No. E84081; *TransAlta Utilities Corp.* (1984), Alta. P.U.B. Decision No. E84116; *TransAlta Utilities Corp. (Re)*, [2002] A.E.U.B.D. No. 30 (QL); *ATCO Electric Ltd. (Re)*, [2003] A.E.U.B.D. No. 92 (QL)).

41 The starting point of the analysis requires that the Court examine the ordinary meaning of the sections at the centre of the dispute, s. 26(2)(d)(i) of the GUA, ss. 15(1) and (3)(d) of the AEUBA and s. 37 of the PUBA. For ease of reference, I reproduce these provisions:

> GUA
>
> **26.** ...
>
> **(2)** No owner of a gas utility designated under subsection (1) shall
>
> ...
>
> (d) without the approval of the Board,
>
> (i) sell, lease, mortgage or otherwise dispose of or encumber its property, franchises, privileges or rights, or any part of it or them
>
> ...
>
> and a sale, lease, mortgage, disposition, encumbrance, merger or consolidation made in contravention of this clause is void, but nothing in this clause shall be construed to prevent in any way the sale, lease, mortgage, disposition, encumbrance, merger or consolidation of any of the property of an owner of a gas utility designated under subsection (1) in the ordinary course of the owner's business.

AEUBA

15(1) For the purposes of carrying out its functions, the Board has all the powers, rights and privileges of the ERCB [Energy Resources Conservation Board] and the PUB [Public Utilities Board] that are granted or provided for by any enactment or by law.

...

(3) Without restricting subsection (1), the Board may do all or any of the following:

...

(d) with respect to an order made by the Board, the ERCB or the PUB in respect of matters referred to in clauses (a) to (c), make any further order and impose any additional conditions that the Board considers necessary in the public interest;

...

PUBA

37 In matters within its jurisdiction the Board may order and require any person or local authority to do forthwith or within or at a specified time and in any manner prescribed by the Board, so far as it is not inconsistent with this Act or any other Act conferring jurisdiction, any act, matter or thing that the person or local authority is or may be required to do under this Act or under any other general or special Act, and may forbid the doing or continuing of any act, matter or thing that is in contravention of any such Act or of any regulation, rule, order or direction of the Board.

42 Some of the above provisions are duplicated in the other two statutes (see, e.g., PUBA, ss. 85(1) and 101(2)(d)(i); GUA, s. 22(1); see Appendix).

43 There is no dispute that s. 26(2) of the GUA contains a prohibition against, among other things, the owner of a utility selling, leasing, mortgaging or otherwise disposing of its property outside of the ordinary course of business without the approval of the Board. As submitted by ATCO, the power conferred is to approve without more. There is no mention in s. 26 of the grounds for granting or denying approval or of the ability to grant conditional approval, let alone the power of the Board to allocate the net profit of an asset sale. I would note in passing that this power is sufficient to alleviate the fear expressed by the Board that the utility might be tempted to sell assets on which it might realize a large profit to the detriment of ratepayers if it could reap the benefits of the sale.

44 It is interesting to note that s. 26(2) does not apply to all types of sales (and leases, mortgages, dispositions, encumbrances, mergers or consolidations). It excludes sales in the ordinary course of the owner's business. If the statutory scheme was such that the Board had the power to allocate

the proceeds of the sale of utility assets, as argued here, s. 26(2) would naturally apply to all sales of assets or, at a minimum, exempt only those sales below a certain value. It is apparent that allocation of sale proceeds to customers is not one of its purposes. In fact, s. 26(2) can only have limited, if any, application to non-utility assets not related to utility function (especially when the sale has passed the "no-harm" test). The provision can only be meant to ensure that the asset in question is indeed non-utility, so that its loss does not impair the utility function or quality.

45 Therefore, a simple reading of s. 26(2) of the GUA does permit one to conclude that the Board does not have the power to allocate the proceeds of an asset sale.

46 The City does not limit its arguments to s. 26(2); it also submits that the AEUBA, pursuant to s. 15(3), is an express grant of jurisdiction because it authorizes the Board to impose any condition to any order so long as the condition is necessary in the public interest. In addition, it relies on the general power in s. 37 of the PUBA for the proposition that the Board may, in any matter within its jurisdiction, make any order pertaining to that matter that is not inconsistent with any applicable statute. The intended meaning of these two provisions, however, is lost when the provisions are simply read in isolation as proposed by the City: R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at p. 21; *Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Assn.*, [1993] 3 S.C.R. 724, at p. 735; *Marche*, at paras. 59-60; *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, [2005] 1 S.C.R. 533, 2005 SCC 26, at para. 105). These provisions on their own are vague and open-ended. It would be absurd to allow the Board an unfettered discretion to attach any condition it wishes to an order it makes. Furthermore, the concept of "public interest" found in s. 15(3) is very wide and elastic; the Board cannot be given total discretion over its limitations.

47 While I would conclude that the legislation is silent as to the Board's power to deal with sale proceeds after the initial stage in the statutory interpretation analysis, because the provisions can nevertheless be said to reveal some ambiguity and incoherence, I will pursue the inquiry further.

48 This Court has stated on numerous occasions that the grammatical and ordinary sense of a section is not determinative and does not constitute the end of the inquiry. The Court is obliged to consider the total context of the provisions to be interpreted, no matter how plain the disposition may seem upon initial reading (see *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, 2002 SCC 3, at para. 34; Sullivan, at pp. 20-21). I will therefore proceed to examine the purpose and scheme of the legislation, the legislative intent and the relevant legal norms.

2.3.3 Implicit Powers: Entire Context

49 The provisions at issue are found in statutes which are themselves components of a larger statutory scheme which cannot be ignored:

> As the product of a rational and logical legislature, the statute is considered to form a system. Every component contributes to the meaning as a whole, and the whole gives meaning to its parts: "each legal provision should be considered in relation to other provisions, as parts of a whole" ...
>
> (P.-A. Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 308)

As in any statutory interpretation exercise, when determining the powers of an administrative body, courts need to examine the context that colours the words and the legislative scheme. The ultimate goal is to discover the clear intent of the legislature and the true purpose of the statute while preserving the harmony, coherence and consistency of the legislative scheme (*Bell ExpressVu*, at para. 27; see also *Interpretation Act*, R.S.A. 2000, c. I-8, s. 10 (in Appendix)). "[S]tatutory interpretation is the art of finding the legislative spirit embodied in enactments": *Bristol-Myers Squibb Co.*, at para. 102.

50 Consequently, a grant of authority to exercise a discretion as found in s. 15(3) of the AEUBA and s. 37 of the PUBA does not confer unlimited discretion to the Board. As submitted by ATCO, the Board's discretion is to be exercised 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 (see Sullivan, at pp. 154-55). In the same vein, it is useful to refer to the following passage from *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722, at p. 1756:

> The powers of any administrative tribunal must of course be stated in its enabling statute but they may also exist by necessary implication from the wording of the act, its structure and its purpose. Although courts must refrain from unduly broadening the powers of such regulatory authorities through judicial law-making, they must also avoid sterilizing these powers through overly technical interpretations of enabling statutes.

51 The mandate of this Court is to determine and apply the intention of the legislature (*Bell ExpressVu*, at para. 62) without crossing the line between judicial interpretation and legislative drafting (see *R. v. McIntosh*, [1995] 1 S.C.R. 686, at para. 26; *Bristol-Myers Squibb Co.*, at para. 174). That being said, this rule allows for the application of the "doctrine of jurisdiction by necessary implication"; the powers conferred by an enabling statute are construed to include not only those expressly granted but also, by implication, all powers which are practically necessary for the accomplishment of the object intended to be secured by the statutory regime created by the legislature (see Brown, at p. 2-16.2; *Bell Canada*, at p. 1756). Canadian courts have in the past applied the doctrine to ensure that administrative bodies have the necessary jurisdiction to accomplish their statutory mandate:

> When legislation attempts to create a comprehensive regulatory framework, the tribunal must have the powers which by practical necessity and necessary implication flow from the regulatory authority explicitly conferred upon it.

Re Dow Chemical Canada Inc. and Union Gas Ltd. (1982), 141 D.L.R. (3d) 641 (Ont. H.C.J.), at pp. 658-59, aff'd (1983), 42 O.R. (2d) 731 (C.A.) (see also *Interprovincial Pipe Line Ltd. v. National Energy Board*, [1978] 1 F.C. 601 (C.A.); *Canadian Broadcasting League v. Canadian Radio-television and Telecommunications Commission*, [1983] 1 F.C. 182 (C.A.), aff'd. [1985] 1 S.C.R. 174).

52 I understand the City's arguments to be as follows : 1) the customers acquire a right to the property of the owner of the utility when they pay for the service and are therefore entitled to a return on the profits made at the time of the sale of the property; and 2) the Board has, by necessity, because of its jurisdiction to approve or refuse to approve the sale of utility assets, the power to al-

locate the proceeds of the sale as a condition of its order. The doctrine of jurisdiction by necessary implication is at the heart of the City's second argument. I cannot accept either of these arguments which are, in my view, diametrically contrary to the state of the law. This is revealed when we scrutinize the entire context which I will now endeavour to do.

53 After a brief review of a few historical facts, I will probe into the main function of the Board, rate setting, and I will then explore the incidental powers which can be derived from the context.

2.3.3.1 *Historical Background and Broader Context*

54 The history of public utilities regulation in Alberta originated with the creation in 1915 of the Board of Public Utility Commissioners by *The Public Utilities Act*, S.A. 1915, c. 6. This statute was based on similar American legislation: H. R. Milner, "Public Utility Rate Control in Alberta" (1930), 8 *Can. Bar Rev.* 101, at p. 101. While the American jurisprudence and texts in this area should be considered with caution given that Canada and the United States have very different political and constitutional-legal regimes, they do shed some light on the issue.

55 Pursuant to *The Public Utilities Act*, the first public utility board was established as a three-member tribunal to provide general supervision of all public utilities (s. 21), to investigate rates (s. 23), to make orders regarding equipment (s. 24), and to require every public utility to file with it complete schedules of rates (s. 23). Of interest for our purposes, the 1915 statute also required public utilities to obtain the approval of the Board of Public Utility Commissioners before selling any property when outside the ordinary course of their business (s. 29(g)).

56 The Alberta Energy and Utilities Board was created in February 1995 by the amalgamation of the Energy Resources Conservation Board and the Public Utilities Board (see Canadian Institute of Resources Law, *Canada Energy Law Service: Alberta* (loose-leaf ed.), at p. 30-3101). Since then, all matters under the jurisdiction of the Energy Resources Conservation Board and the Public Utilities Board have been handled by the Alberta Energy and Utilities Board and are within its exclusive jurisdiction. The Board has all of the powers, rights and privileges of its two predecessor boards (AEUBA, ss. 13, 15(1); GUA, s. 59).

57 In addition to the powers found in the 1915 statute, which have remained virtually the same in the present PUBA , the Board now benefits from the following express powers to:

1. make an order respecting the improvement of the service or commodity (PUBA, s. 80(b))
2. approve the issue by the public utility of shares, stocks, bonds and other evidences of indebtedness (GUA, s. 26(2)(a)); PUBA, s. 101(2)(a));
3. approve the lease, mortgage, disposition or encumbrance of the public utility's property, franchises, privileges or rights (GUA, s. 26(2)(d)(i); PUBA, s. 101(2)(d)(i));
4. approve the merger or consolidation of the public utility's property, franchises, privileges or rights (GUA, s. 26(2)(d)(ii); PUBA, s. 101(2)(d)(ii)); and
5. authorize the sale or permit to be made on the public utility's book a transfer of any share of its capital stock to a corporation that would result in the

> vesting in that corporation of more than 50% of the outstanding capital stock of the owner of the public utility (GUA, 27(1); PUBA, s. 102(1)).

58 It goes without saying that public utilities are very limited in the actions they can take, as evidenced from the above list. Nowhere is there a mention of the authority to allocate proceeds from a sale or the discretion of the Board to interfere with ownership rights.

59 Even in 1995 when the legislature decided to form the Alberta Energy and Utilities Board, it did not see fit to modify the PUBA or the GUA to provide the new Board with the power to allocate the proceeds of a sale even though the controversy surrounding this issue was full-blown (see, e.g., *Alberta Government Telephones* (1984), Alta. P.U.B. Decision No. E84081; *TransAlta Utilities Corp.* (1984), Alta. P.U.B. Decision No. E84116). It is a well-established principle that the legislature is presumed to have a mastery of existing law, both common law and statute law (see Sullivan, at pp. 154-55). It is also presumed to have known all of the circumstances surrounding the adoption of new legislation.

60 Although the Board may seem to possess a variety of powers and functions, it is manifest from a reading of the AEUBA, the PUBA and the GUA that the principal function of the Board in respect of public utilities is the determination of rates. Its power to supervise the finances of these companies and their operations, although wide, is in practice incidental to fixing rates (see Milner, at p. 102; Brown, at p. 2-16.6). Estey J., speaking for the majority of this Court in *Atco Ltd.*, at p. 576, echoed this view when he said:

> It is evident from the powers accorded to the Board by the legislature in both statutes mentioned above that the legislature has given the Board a mandate of the widest proportions to safeguard the public interest in the nature and quality of the service provided to the community by the public utilities. Such an extensive regulatory pattern must, for its effectiveness, include the right to control the combination or, as the legislature says, "the union" of existing systems and facilities. This no doubt has a direct relationship with the rate-fixing function which ranks high in the authority and functions assigned to the Board [Emphasis added.]

In fact, even the Board itself, on its website (http://www.eub.gov.ab.ca/BBS/eubinfo/default.htm), describes its functions as follows:

> We regulate the safe, responsible, and efficient development of Alberta's energy resources: oil, natural gas, oil sands, coal, and electrical energy; and the pipelines and transmission lines to move the resources to market. On the utilities side, we regulate rates and terms of service of investor-owned natural gas, electric, and water utility services, as well as the major intra-Alberta gas transmission system, to ensure that customers receive safe and reliable service at just and reasonable rates. [Emphasis added.]

61 The process by which the Board sets the rates is therefore central and deserves some attention in order to ascertain the validity of the City's first argument.

2.3.3.2 *Rate Setting*

62 Rate regulation serves several aims - sustainability, equity and efficiency - which underlie the reasoning as to how rates are fixed:

> ... the regulated company must be able to finance its operations, and any required investment, so that it can continue to operate in the future. Equity is related to the distribution of welfare among members of society. The objective of sustainability already implies that shareholders should not receive "too low" a return (and defines this in terms of the reward necessary to ensure continued investment in the utility), while equity implies that their returns should not be "too high".
>
> (R. Green and M. Rodriguez Pardina, *Resetting Price Controls for Privatized Utilities: A Manual for Regulators* (1999), at p. 5)

63 These goals have resulted in an economic and social arrangement dubbed the "regulatory compact", which ensures that all customers have access to the utility at a fair price - nothing more. As I will further explain, it does not transfer onto the customers any property right. Under the regulatory compact, the regulated utilities are given exclusive rights to sell their services within a specific area at rates that will provide companies the opportunity to earn a fair return for their investors. In return for this right of exclusivity, utilities assume a duty to adequately and reliably serve all customers in their determined territories, and are required to have their rates and certain operations regulated (see Black, at pp. 356-57; Milner, at p. 101; *Atco*, at p. 576; *Northwestern Utilities Ltd. v. City of Edmonton*, [1929] S.C.R. 186, at pp. 192-93 (hereinafter "*Northwestern 1929*")).

64 Therefore, when interpreting the broad powers of the Board, one cannot ignore this well-balanced regulatory arrangement which serves as a backdrop for contextual interpretation. The object of the statutes is to protect both the customer and the investor (Milner, at p. 101). The arrangement does not, however, cancel the private nature of the utility. In essence, the Board is responsible for maintaining a tariff that enhances the economic benefits to consumers and investors of the utility.

65 The Board derives its power to set rates from both the GUA (ss. 16, 17 and 36 to 45) and the PUBA (ss. 89 to 95). The Board is mandated to fix "just and reasonable ... rates" (PUBA, s. 89(a), GUA, s. 36(a)). In the establishment of these rates, the Board is directed to "determine a rate base for the property of the owner" and "fix a fair return on the rate base" (GUA, s. 37(1)). This Court, in *Northwestern Utilities Ltd. v. City of Edmonton*, [1979] 1 S.C.R. 684, at p. 691 (hereinafter "*Northwestern 1979*"), adopted the following description of the process:

> The PUB approves or fixes utility rates which are estimated to cover expenses plus yield the utility a fair return or profit. This function is generally performed in two phases. In Phase I the PUB determines the rate base, that is the amount of money which has been invested by the company in the property, plant and equipment plus an allowance for necessary working capital all of which must be determined as being necessary to provide the utility service. The revenue required to pay all reasonable operating expenses plus provide a fair return to the utility on its rate base is also determined in Phase I. The total of the operating expenses plus the return is called the revenue requirement. In Phase II rates are set, which, under normal temperature conditions are expected to produce the es-

> timates of "forecast revenue requirement". These rates will remain in effect until changed as the result of a further application or complaint or the Board's initiative. Also in Phase II existing interim rates may be confirmed or reduced and if reduced a refund is ordered.

(See also *Re Gas Utilities Act and Public Utilities Board Act* (1984), Alta. P.U.B. Decision No. E84113, at p. 23; *Re Union Gas Ltd. and Ontario Energy Board* (1983), 1 D.L.R. (4th) 698 (Ont. Div. Ct.), at pp. 701-702.)

66 Consequently, when determining the rate base, the Board is to give due consideration (GUA, s. 37(2)):

> (a) to the cost of the property when first devoted to public use and to prudent acquisition cost to the owner of the gas utility, less depreciation, amortization or depletion in respect of each, and
> (b) to necessary working capital.

67 The fact that the utility is given the opportunity to make a profit on its services and a fair return on its investment in its assets should not and cannot stop the utility from benefiting from the profits which follow the sale of assets. Neither is the utility protected from losses incurred from the sale of assets. In fact, the wording of the sections quoted above suggests that the ownership of the assets is clearly that of the utility; ownership of the asset and entitlement to profits or losses upon its realization are one and the same. The equity investor expects to receive the net revenues after all costs are paid, equal to the present value of original investment at the time of that investment. The disbursement of some portions of the residual amount of net revenue, by after-the-fact reallocation to rate-paying customers, undermines that investment process: MacAvoy and Sidak, at p. 244. In fact, speculation would accrue even more often should the public utility, through its shareholders, not be the one to benefit from the possibility of a profit, as investors would expect to receive a larger premium for their funds through the only means left available, the return on their original investment. In addition, they would be less willing to accept any risk.

68 Thus, can it be said, as alleged by the City, that the customers have a property interest in the utility? Absolutely not: that cannot be so, as it would mean that fundamental principles of corporate law would be distorted. Through the rates, the customers pay an amount for the regulated service that equals the cost of the service and the necessary resources. They do not by their payment implicitly purchase the asset from the utility's investors. The payment does not incorporate acquiring ownership or control of the utility's assets. The ratepayer covers the cost of using the service, not the holding cost of the assets themselves: "A utility's customers are not its owners, for they are not residual claimants": MacAvoy and Sidak, at p. 245 (see also p. 237). Ratepayers have made no investment. Shareholders have and they assume all risks as the residual claimants to the utility's profit. Customers have only "the risk of a price change resulting from any (authorized) change in the cost of service. This change is determined only periodically in a tariff review by the regulator" (MacAvoy and Sidak, p. 245).

69 In this regard, I agree with ATCO when it asserts in its factum, at para. 38:

> The property in question is as fully the private property of the owner of the utility as any other asset it owns. Deployment of the asset in utility service does not create or transfer any legal or equitable rights in that property for ratepayers.

> Absent any such interest, any taking such as ordered by the Board is confiscatory ...

Wittmann J.A., at the Court of Appeal, said it best when he stated:

> Consumers of utilities pay for a service, but by such payment, do not receive a proprietary right in the assets of the utility company. Where the calculated rates represent the fee for the service provided in the relevant period of time, ratepayers do not gain equitable or legal rights to non-depreciable assets when they have paid only for the use of those assets. [Emphasis added; para. 64.]

I fully adopt this conclusion. The Board misdirected itself by confusing the interests of the customers in obtaining safe and efficient utility service with an interest in the underlying assets owned only by the utility. While the utility has been compensated for the services provided, the customers have provided no compensation for receiving the benefits of the subject property. The argument that assets purchased are reflected in the rate base should not cloud the issue of determining who is the appropriate owner and risk bearer. Assets are indeed considered in rate setting, as a factor, and utilities cannot sell an asset used in the service to create a profit and thereby restrict the quality or increase the price of service. Despite the consideration of utility assets in the rate-setting process, shareholders are the ones solely affected when the actual profits or losses of such a sale are realized; the utility absorbs losses and gains, increases and decreases in the value of assets, based on economic conditions and occasional unexpected technical difficulties, but continues to provide certainty in service both with regard to price and quality. There can be a default risk affecting ratepayers, but this does not make ratepayers residual claimants. While I do not wish to unduly rely on American jurisprudence, I would note that the leading U.S. case on this point is *Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989), which relies on the same principle as was adopted in *Market St. Ry. Co. v. Railroad Commission of State of California*, 324 US 548 (1945).

70 Furthermore, one has to recognize that utilities are not Crown entities, fraternal societies or cooperatives, or mutual companies, although they have a "public interest" aspect which is to supply the public with a necessary service (in the present case, the provision of natural gas). The capital invested is not provided by the public purse or by the customers; it is injected into the business by private parties who expect as large a return on the capital invested in the enterprise as they would receive if they were investing in other securities possessing equal features of attractiveness, stability and certainty (see *Northwestern 1929*, at p. 192). This prospect will necessarily include any gain or loss that is made if the company divests itself of some of its assets, i.e., land, buildings, etc.

71 From my discussion above regarding the property interest, the Board was in no position to proceed with an implicit refund by allocating to ratepayers the profits from the asset sale because it considered ratepayers had paid excessive rates for services in the past. As such, the City's first argument must fail. The Board was seeking to rectify what it perceived as a historic over-compensation to the utility by ratepayers. There is no power granted in the various statutes for the Board to execute such a refund in respect of an erroneous perception of past over-compensation. It is well established throughout the various provinces that utilities boards do not have the authority to retroactively change rates (*Northwestern 1979*, at p. 691; *Re Coseka Resources Ltd. and Saratoga Processing Co.* (1981), 126 D.L.R. (3d) 705 (Alta. C.A.), at p. 715, leave to appeal refused, [1981] 2 S.C.R. vii; *Re Dow Chemical Canada Inc.* (C.A.), at pp. 734-35). But more importantly, it cannot even be said that there was over-compensation: the rate-setting process is a speculative procedure in

which both the ratepayers and the shareholders jointly carry their share of the risk related to the business of the utility (see MacAvoy and Sidak, at pp. 238-39).

2.3.3.3 *The Power to Attach Conditions*

72 As its second argument, the City submits that the power to allocate the proceeds from the sale of the utility's assets is necessarily incidental to the express powers conferred on the Board by the AEUBA, the GUA and the PUBA. It argues that the Board must necessarily have the power to allocate sale proceeds as part of its discretionary power to approve or refuse to approve a sale of assets. It submits that this results from the fact that the Board is allowed to attach any condition to an order it makes approving such a sale. I disagree.

73 The City seems to assume that the doctrine of jurisdiction by necessary implication applies to "broadly drawn powers" as it does for "narrowly drawn powers"; this cannot be. The Ontario Energy Board in its decision in *Re Consumers' Gas Co.* (1987), E.B.R.O. 410-II/411-II/412-II, at para. 4.73, enumerated the circumstances when the doctrine of jurisdiction by necessary implication may be applied:

1. when the jurisdiction sought is necessary to accomplish the objects of the legislative scheme and is essential to the Board fulfilling its mandate;
2. when the enabling act fails to explicitly grant the power to accomplish the legislative objective;
3. when the mandate of the Board is sufficiently broad to suggest a legislative intention to implicitly confer jurisdiction;
4. when the jurisdiction sought is not one which the Board has dealt with through use of expressly granted powers, thereby showing an absence of necessity; and
5. when the legislature did not address its mind to the issue and decide against conferring the power to the Board. (See also Brown, at p. 2-16.3.)

74 In light of the above, it is clear that the doctrine of jurisdiction by necessary implication will be of less help in the case of broadly drawn powers than for narrowly drawn ones. Broadly drawn powers will necessarily be limited to only what is rationally related to the purpose of the regulatory framework. This is explained by Professor Sullivan, at p. 228:

> In practice, however, purposive analysis makes the powers conferred on administrative bodies almost infinitely elastic. Narrowly drawn powers can be understood to include "by necessary implication" all that is needed to enable the official or agency to achieve the purpose for which the power was granted. Conversely, broadly drawn powers are understood to include only what is rationally related to the purpose of the power. In this way the scope of the power expands or contracts as needed, in keeping with the purpose. [Emphasis added.]

75 In the case at bar, s. 15 of the AEUBA, which allows the Board to impose additional conditions when making an order, appears at first glance to be a power having infinitely elastic scope. However, in my opinion, the attempt by the City to use it to augment the powers of the Board in s. 26(2) of the GUA must fail. The Court must construe s. 15(3) of the AEUBA in accordance with the purpose of s. 26(2).

76 MacAvoy and Sidak, in their article, at pp. 234-36, suggest three broad reasons for the requirement that a sale must be approved by the Board:

1. It prevents the utility from degrading the quality, or reducing the quantity, of the regulated service so as to harm consumers;
2. It ensures that the utility maximizes the aggregate economic benefits of its operations, and not merely the benefits flowing to some interest group or stakeholder; and
3. It specifically seeks to prevent favoritism toward investors.

77 Consequently, in order to impute jurisdiction to a regulatory body to allocate proceeds of a sale, there must be evidence that the exercise of that power is a practical necessity for the regulatory body to accomplish the objects prescribed by the legislature, something which is absent in this case (see *National Energy Board Act (Can.) (Re)*, [1986] 3 F.C. 275 (C.A.)). In order to meet these three goals, it is not necessary for the Board to have control over which party should benefit from the sale proceeds. The public interest component cannot be said to be sufficient to impute to the Board the power to allocate all the profits pursuant to the sale of assets. In fact, it is not necessary for the Board in carrying out its mandate to order the utility to surrender the bulk of the proceeds from a sale of its property in order for that utility to obtain approval for a sale. The Board has other options within its jurisdiction which do not involve the appropriation of the sale proceeds, the most obvious one being to refuse to approve a sale that will, in the Board's view, affect the quality and/or quantity of the service offered by the utility or create additional operating costs for the future. This is not to say that the Board can never attach a condition to the approval of sale. For example, the Board could approve the sale of the assets on the condition that the utility company gives undertakings regarding the replacement of the assets and their profitability. It 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.

78 In my view, allowing the Board to confiscate the net gain of the sale under the pretence of protecting rate-paying customers and acting in the "public interest" would be a serious misconception of the powers of the Board to approve a sale; to do so would completely disregard the economic rationale of rate setting, as I explained earlier in these reasons. Such an attempt by the Board to appropriate a utility's excess net revenues for ratepayers would be highly sophisticated opportunism and would, in the end, simply increase the utility's capital costs (MacAvoy and Sidak, at p. 246). At the risk of repeating myself, a public utility is first and foremost a private business venture which has as its goal the making of profits. This is not contrary to the legislative scheme, even though the regulatory compact modifies the normal principles of economics with various restrictions explicitly provided for in the various enabling statutes. None of the three statutes applicable here provides the Board with the power to allocate the proceeds of a sale and therefore affect the property interests of the public utility.

79 It is well established that potentially confiscatory legislative provision ought to be construed cautiously so as not to strip interested parties of their rights without the clear intention of the legislation (see Sullivan, at pp. 400-403; Côté, at pp. 482-86; *Pacific National Investments Ltd. v. Victoria (City)*, [2000] 2 S.C.R. 919, 2000 SCC 64, at para. 26; *Leiriao v. Val-Bélair (Town)*, [1991] 3 S.C.R. 349, at p. 357; *Hongkong Bank of Canada v. Wheeler Holdings Ltd.*, [1993] 1 S.C.R. 167, at p. 197). Not only is the authority to attach a condition to allocate the proceeds of a sale to a particular party unnecessary for the Board to accomplish its role, but deciding otherwise would lead to the

conclusion that a broadly drawn power can be interpreted so as to encroach on the economic freedom of the utility, depriving it of its rights. This would go against the above principles of interpretation.

80 If the Alberta legislature wishes to confer on ratepayers the economic benefits resulting from the sale of utility assets, it can expressly provide for this in the legislation, as was done by some states in the United States (e.g., Connecticut).

2.4 *Other Considerations*

81 Under the regulatory compact, customers are protected through the rate-setting process, under which the Board is required to make a well-balanced determination. The record shows that the City did not submit to the Board a general rate review application in response to ATCO's application requesting approval for the sale of the property at issue in this case. Nonetheless, if it chose to do so, this would not have stopped the Board, on its own initiative, from convening a hearing of the interested parties in order to modify and fix just and reasonable rates to give due consideration to any new economic data anticipated as a result of the sale (PUBA, s. 89(a); GUA, ss. 24, 36(a), 37(3), 40) (see Appendix).

2.5 *If Jurisdiction Had Been Found, Was the Board's Allocation Reasonable?*

82 In light of my conclusion with regard to jurisdiction, it is not necessary to determine whether the Board's exercise of discretion by allocating the sale proceeds as it did was reasonable. Nonetheless, given the reasons of my colleague Binnie J., I will address the issue very briefly. Had I not concluded that the Board lacked jurisdiction, my disposition of this case would have been the same, as I do not believe the Board met a reasonable standard when it exercised its power.

83 I am not certain how one could conclude that the Board's allocation was reasonable when it wrongly assumed that ratepayers had acquired a proprietary interest in the utility's assets because assets were a factor in the rate-setting process, and, moreover, when it explicitly concluded that no harm would ensue to customers from the sale of the asset. In my opinion, when reviewing the substance of the Board's decision, a court must conduct a two-step analysis: first, it must determine whether the order was warranted given the role of the Board to protect the customers, (i.e., was the order necessary in the public interest?); and second, if the first question is answered in the affirmative, a court must then examine the validity of the Board's application of the *TransAlta Formula* (see para. 12 of these reasons), which refers to the difference between net book value and original cost, on the one hand, and appreciation in the value of the asset on the other. For the purposes of this analysis, I view the second step as a mathematical calculation and nothing more. I do not believe it provides the criteria which guides the Board to determine if it should allocate part of the sale proceeds to ratepayers. Rather, it merely guides the Board on what to allocate and how to allocate it (if it should do so in the first place). It is also interesting to note that there is no discussion of the fact that the book value used in the calculation must be referable solely to the financial statements of the utility.

84 In my view, as I have already stated, the power of the Board to allocate proceeds does not even arise in this case. Even by the Board's own reasoning, it should only exercise its discretion to act in the public interest when customers would be harmed or would face some risk of harm. But the Board was clear: there was no harm or risk of harm in the present situation (Decision 2002-037; para. 54):

> With the continuation of the same level of service at other locations and the acceptance by customers regarding the relocation, the Board is convinced there should be no impact on the level of service to customers as a result of the Sale. In any event, the Board considers that the service level to customers is a matter that can be addressed and remedied in a future proceeding if necessary.

After declaring that the customers would not, on balance, be harmed, the Board maintained that, on the basis of the evidence filed, there appeared to be a cost savings to the customers. There was no legitimate customer interest which could or needed to be protected by denying approval of the sale, or by making approval conditional on a particular allocation of the proceeds. Even if the Board had found a possible adverse effect arising from the sale, how could it allocate proceeds now based on an unquantified future potential loss? Moreover, in the absence of any factual basis to support it, I am also concerned with the presumption of bad faith on the part of ATCO that appears to underlie the Board's determination to protect the public from some possible future menace. In any case, as mentioned earlier in these reasons, this determination to protect the public interest is also difficult to reconcile with the actual power of the Board to prevent harm to ratepayers from occurring by simply refusing to approve the sale of a utility's asset. To that, I would add that the Board has considerable discretion in the setting of future rates in order to protect the public interest, as I have already stated.

85 In consequence, I am of the view that, in the present case, the Board did not identify any public interest which required protection and there was, therefore, nothing to trigger the exercise of the discretion to allocate the proceeds of sale. Hence, notwithstanding my conclusion on the first issue regarding the Board's jurisdiction, I would conclude that the Board's decision to exercise its discretion to protect the public interest did not meet a reasonable standard.

3. Conclusion

86 This Court's role in this case has been one of interpreting the enabling statutes using the appropriate interpretive tools, i.e. context, legislative intention and objective. Going further than required by reading in unnecessary powers of an administrative agency under the guise of statutory interpretation is not consistent with the rules of statutory interpretation. It is particularly dangerous to adopt such an approach when property rights are at stake.

87 The Board did not have the jurisdiction to allocate the proceeds of the sale of the utility's asset; its decision did not meet the correctness standard. Thus, I would dismiss the City's appeal and allow ATCO's cross-appeal, both with costs. I would also set aside the Board's decision and refer the matter back to the Board to approve the sale of the property belonging to ATCO, recognizing that the proceeds of the sale belong to ATCO.

The reasons of McLachlin C.J. and Binnie and Fish JJ. were delivered by

88 BINNIE J.:-- The respondent ATCO Gas and Pipelines Ltd. ("ATCO") is part of a large entrepreneurial company that directly and through various subsidiaries operates both regulated businesses and unregulated businesses. The Alberta Energy and Utilities Board (the "Board") believes it not to be in the public interest to encourage utility companies to mix together the two types of undertakings. In particular, the Board has adopted policies to discourage utilities from using their regulated businesses as a platform to engage in land speculation to increase their return on investment outside the regulatory framework. By awarding part of the profit to the utility (and its shareholders),

the Board rewards utilities for diligence in divesting themselves of assets that are no longer productive, or that could be more productively employed elsewhere. However, by crediting part of the profit on the sale of such property to the utility's rate base (i.e. as a set-off to other costs), the Board seeks to dampen any incentive for utilities to skew decisions in their regulated business to favour such profit taking unduly. Such a balance, in the Board's view, is necessary in the interest of the public which allows ATCO to operate its utility business as a monopoly. In pursuit of this balance, the Board approved ATCO's application to sell land and warehousing facilities in downtown Calgary, but denied ATCO's application to keep for its shareholders the entire profit resulting from appreciation in the value of the land, whose cost of acquisition had formed part of the rate base on which gas rates had been calculated since 1922. The Board ordered the profit on the sale to be allocated one third to ATCO and two thirds as a credit to its cost base, thereby helping keep utility rates down, and to that extent benefiting ratepayers.

89 I have read with interest the reasons of my colleague Bastarache J. but, with respect, I do not agree with his conclusion. As will be seen, the Board has authority under s. 15(3) of the *Alberta Energy and Utilities Board Act*, R.S.A. 2000, c. A-17 ("AEUBA") to impose on the sale "any additional conditions that the Board considers necessary in the public interest". Whether or not the conditions of approval imposed by the Board were necessary in the public interest was for the Board to decide. The Alberta Court of Appeal overruled the Board but, with respect, the Board is in a better position to assess necessity in this field for the protection of the public interest than either that court or this Court. I would allow the appeal and restore the Board's decision.

I. Analysis

90 ATCO's argument boils down to the proposition announced at the outset of its factum:

> In the absence of any property right or interest and of any harm to the customers arising from the withdrawal from utility service, there was no proper ground for reaching into the pocket of the utility. In essence this case is about property rights.
>
> (Respondent's factum, para. 2)

91 For the reasons which follow I do not believe the case is about property rights. ATCO chose to make its investment in a regulated industry. The return on investment in the regulated gas industry is fixed by the Board, not the free market. In my view, the essential issue is whether the Alberta Court of Appeal was justified in limiting what the Board is allowed to "conside[r] necessary in the public interest".

A. *The Board's Statutory Authority*

92 The first question is one of jurisdiction. What gives the Board the authority to make the order ATCO complains about? The Board's answer is threefold. Section 22(1) of the *Gas Utilities Act*, R.S.A. 2000, c. G-5 ("GUA") provides in part that "[t]he Board shall exercise a general supervision over all gas utilities, and the owners of them ...". This, the Board says, gives it a broad jurisdiction to set policies that go beyond its specific powers in relation to specific applications, such as rate setting. Of more immediate pertinence, s. 26(2)(d)(i) of the same Act prohibits the regulated utility from selling, leasing or otherwise encumbering any of its property without the Board's approval. (To the same effect, see s. 101(2)(d)(i) of the *Public Utilities Board Act*, R.S.A. 2000, c. P-45.) It is

common ground that this restraint on alienation of property applies to the proposed sale of ATCO's land and warehouse facilities in downtown Calgary, and that the Board could, in appropriate circumstances, simply have denied ATCO's application for approval of the sale. However, the Board was of the view to allow the sale subject to conditions. The Board ruled that the greater power (i.e. to deny the sale) must include the lesser (i.e. to allow the sale, subject to conditions) (Decision 2002-037, [2002] A.E.U.B.D. No. 52 (QL), para. 47).

> In appropriate circumstances, the Board clearly has the power to prevent a utility from disposing of its property. In the Board's view it also follows that the Board can approve a disposition subject to appropriate conditions to protect customer interests.

There is no need to rely on any such implicit power to impose conditions, however. As stated, the Board's explicit power to impose conditions is found in s. 15(3) of the AEUBA, which authorizes the Board to "make any further order and impose any additional conditions that the Board considers necessary in the public interest". In *Atco Ltd. v. Calgary Power Ltd.*, [1982] 2 S.C.R. 557, at p. 576, Estey, J., for the majority, stated:

> It is evident from the powers accorded to the Board by the legislature in both statutes mentioned above that the legislature has given the Board a mandate of the widest proportions to safeguard the public interest in the nature and quality of the service provided to the community by the public utilities. [Emphasis added.]

The legislature says in s. 15(3) that the conditions are to be what the Board considers necessary. Of course, the discretionary power to impose conditions thus granted is not unlimited. It must be exercised in good faith for its intended purpose: *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, 2003 SCC 29. ATCO says the Board overstepped even these generous limits. In ATCO's submission:

> Deployment of the asset in utility service does not create or transfer any legal or equitable rights in that property for ratepayers. Absent any such interest, any taking such as ordered by the Board is confiscatory.
>
> (Respondent's factum, para. 38)

In my view, however, the issue before the Board was how much profit ATCO was entitled to earn on its investment in a regulated utility.

93 ATCO argues in the alternative that the Board engaged in impermissible "retroactive rate making". But Alberta is an "original cost" jurisdiction, and no one suggests that the Board's original cost rate making during the 80-plus years this investment has been reflected in ATCO's ratebase was wrong. The Board proposed to apply a portion of the expected profit to future rate making. The effect of the order is prospective, not retroactive. Fixing the going-forward rate of return as well as general supervision of "all gas utilities, and the owners of them" were matters squarely within the Board's statutory mandate.

B. *The Board's Decision*

94 ATCO argues that the Board's decision should be seen as a stand-alone decision divorced from its rate making responsibilities. However, I do not agree that the hearing under s. 26 of the GUA can be isolated in this way from the Board's general regulatory responsibilities. ATCO argues in its factum that

> ... the subject application by [ATCO] to the Board did not concern or relate to a rate application, and the Board was not engaged in fixing rates (if that could provide any justification, which is denied).
>
> (Respondent's factum, para. 98)

95 It seems the Board proceeded with the s. 26 approval hearing separately from a rate setting hearing firstly because ATCO framed the proceeding in that way and secondly because this is the procedure approved by the Alberta Court of Appeal in *TransAlta Utilities Corp. v. Public Utilities Board (Alta.)* (1986), 68 A.R. 171. That case (which I will refer to as *TransAlta (1986)*) is a leading Alberta authority dealing with the allocation of the gain on the disposal of utility assets and the source of what is called the *TransAlta Formula* applied by the Board in this case. Kerans J.A. had this to say, at p. 174.

> I observe parenthetically that I now appreciate that it suits the convenience of everybody involved to resolve issues of this sort, if possible, before a general rate hearing so as to lessen the burden on that already complex procedure.

96 Given this encouragement from the Alberta Court of Appeal, I would place little significance on ATCO's procedural point. As will be seen, the Board's ruling is directly tied into the setting of general rates because two thirds of the profit is taken into account as an offset to ATCO's costs from which its revenue requirement is ultimately derived. As stated, ATCO's profit on the sale of the Calgary property will be a current (not historical) receipt and, if the Board has its way, two thirds of it will be applied to future (not retroactive) rate making.

97 The s. 26 hearing proceeded in two phases. The Board first determined that it would not deny its approval to the proposed sale as it met a "no-harm test" devised over the years by Board practice (it is not to be found in the statutes) (Decision 2001-78). However, the Board linked its approval to subsequent consideration of the financial ramifications, as the Board itself noted (Decision 2002-037):

> The Board approved the Sale in Decision 2001-78 based on evidence that customers did not object to the Sale [and] would not suffer a reduction in services nor would they be exposed to the risk of financial harm as a result of the Sale *that could not be examined in a future proceeding*. On that basis the Board determined that the no-harm test had been satisfied and that the Sale could proceed. [Emphasis added; para. 13.]

98 In effect, ATCO ignores the italicized words. It argues that the Board was *functus* after the first phase of its hearing. However, ATCO itself had agreed to the two-phase procedure, and indeed the second phase was devoted to ATCO's own application for an allocation of the profits on the sale.

99 In the second phase of the s. 26 approval hearing, the Board allocated one third of the net gain to ATCO and two thirds to the rate base (which would benefit ratepayers). The Board spelled out why it considered these conditions to be necessary in the public interest. The Board explained that it was necessary to balance the interests of both shareholders and ratepayers within the framework of what it called "the regulatory compact" (Decision 2002-037, at para. 44). In the Board's view:

> (a) there ought to be a balancing of the interests of the ratepayers and the owners of the utility;
> (b) decisions made about the utility should be driven by both parties' interests;
> (c) to award the entire gain to the ratepayers would deny the utility an incentive to increase its efficiency and reduce its costs; and
> (d) to award the entire gain to the utility might encourage speculation in non-depreciable property or motivate the utility to identify and dispose of properties which have appreciated for reasons other than the best interest of the regulated business.

100 For purposes of this appeal, it is important to set out the Board's policy reasons in its own words:

> To award the entire net gain on the land and buildings to the customers, while beneficial to the customers, could establish an environment that may deter the process wherein the company continually assesses its operation to identify, evaluate, and select options that continually increase efficiency and reduce costs.
>
> Conversely, to award the entire net gain to the company may establish an environment where a regulated utility company might be moved to speculate in non-depreciable property or result in the company being motivated to identify and sell existing properties where appreciation has already occurred.
>
> The Board believes that some method of balancing both parties' interests will result in optimization of business objectives for both the customer and the company. Therefore, the Board considers that sharing of the net gain on the sale of the land and buildings collectively in accordance with the TransAlta Formula is equitable in the circumstances of this application and is consistent with past Board decisions. [Emphasis added; paras. 112-14.]

101 The Court was advised that the two-third share allocated to ratepayers would be included in ATCO's rate calculation to set off against the costs included in the rate base and amortized over a number of years.

C. *Standard of Review*

102 The Court's modern approach to this vexed question was recently set out by McLachlin C.J. in *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19, at para. 26:

> In the pragmatic and functional approach, the standard of review is determined by considering four contextual factors - the presence or absence of a privative clause or statutory right of appeal; the expertise of the tribunal relative to that of the reviewing court on the issue in question; the purposes of the legislation and the provision in particular; and, the nature of the question - law, fact, or mixed law and fact. The factors may overlap. The overall aim is to discern legislative intent, keeping in mind the constitutional role of the courts in maintaining the rule of law.

103 I do not propose to cover the ground already set out in the reasons of my colleague Bastarache J. We agree that the standard of review on matters of jurisdiction is correctness. We also agree that the Board's *exercise* of its jurisdiction calls for greater judicial deference. Appeals from the Board are limited to questions of law or jurisdiction. The Board knows a great deal more than the courts about gas utilities, and what limits it is necessary to impose "in the public interest" on their dealings with assets whose cost is included in the rate base. Moreover, it is difficult to think of a broader discretion than that conferred on the Board to "impose any additional conditions that the Board considers necessary in the public interest". The identification of a subjective discretion in the decision maker ("the Board considers necessary"), the expertise of that decision maker and the nature of the decision to be made ("in the public interest"), in my view, call for the most deferential standard, patent unreasonableness.

104 As to the phrase "the Board considers necessary", Martland J. stated in *Calgary Power Ltd. v. Copithorne*, [1959] S.C.R. 24, at p. 34:

> The question as to whether or not the respondent's lands were "necessary" is not one to be determined by the Courts in this case. The question is whether the Minister "deemed" them to be necessary.

See also D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf ed.), vol. 1, at para. 14:2622: *"Objective" and "Subjective" Grants of Discretion*.

105 The expert qualifications of a regulatory Board are of "utmost importance in determining the intention of the legislator with respect to the degree of deference to be shown to a tribunal's decision in the absence of a full privative clause", as stated by Sopinka J. in *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316, at p. 335. He continued:

> Even where the tribunal's enabling statute provides explicitly for appellate review, as was the case in *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722], it has been stressed that deference should be shown by the appellate tribunal to the opinions of the specialized lower tribunal on matters squarely within its jurisdiction.

(This *dictum* was cited with approval in *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, at p. 592.)

106 A regulatory power to be exercised "in the public interest" necessarily involves accommodation of conflicting economic interests. It has long been recognized that what is "in the public interest" is not really a question of law or fact but is an opinion. In *TransAlta (1986)*, the Alberta

Court of Appeal (at para. 24) drew a parallel between the scope of the words "public interest" and the well-known phrase "public convenience and necessity" in its citation of *Memorial Gardens Association (Canada) Ltd. v. Colwood Cemetery Co.*, [1958] S.C.R. 353, where this Court stated, at p. 357:

> [T]he question whether public convenience and necessity requires a certain action is not one of fact. It is predominantly the formulation of an opinion. Facts must, of course, be established to justify a decision by the Commission but that decision is one which cannot be made without a substantial exercise of administrative discretion. In delegating this administrative discretion to the Commission the Legislature has delegated to that body the responsibility of deciding, in the public interest, ... [Emphasis added.]

107 This passage reiterated the *dictum* of Rand J. in *Union Gas Co. of Canada v. Sydenham Gas and Petroleum Co.*, [1957] S.C.R. 185, at p. 190:

> It was argued, and it seems to have been the view of the Court, that the determination of public convenience and necessity was itself a question of fact, but with that I am unable to agree: it is not an objective existence to be ascertained; the determination is the formulation of an opinion, in this case, the opinion of the Board and of the Board only. [Emphasis added.]

108 Of course even such a broad power is not untrammelled. But to say that such a power is capable of abuse does not lead to the conclusion that it should be truncated. I agree on this point with Reid J. (co-author of R. F. Reid and H. David, *Administrative Law and Practice* (2nd ed. 1978), and co-editor of P. Anisman and R. F. Reid, *Administrative Law Issues and Practice* (1995)) who wrote in *Re C.T.C. Dealer Holdings Ltd. and Ontario Securities Commission* (1987), 59 O.R. (2d) 79 (Div. Ct.), in relation to the powers of the Ontario Securities Commission, at p. 97:

> ... when the Commission has acted *bona fide*, with an obvious and honest concern for the public interest, and with evidence to support its opinion, the prospect that the breadth of its discretion might someday tempt it to place itself above the law by misusing that discretion is not something that makes the existence of the discretion bad *per se*, and requires the decision to be struck down.

(The *C.T.C. Dealer Holdings* decision was referred to with apparent approval by this Court in *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 S.C.R. 132, 2001 SCC 37, at para. 42.)

109 "Patent unreasonableness" is a highly deferential standard:

> A correctness approach means that there is only one proper answer. A patently unreasonable one means that there could have been many appropriate answers, but not the one reached by the decision maker.
>
> (*C.U.P.E.*, at para. 164)

110 Having said all that, in my view nothing much turns on the result on whether the proper standard in that regard is patent unreasonableness (as I view it) or simple reasonableness (as my

colleague sees it). As will be seen, the Board's response is well within the range of established regulatory opinions. Hence, even if the Board's conditions were subject to the less deferential standard, I would find no cause for the Court to interfere.

D. *Did the Board Have Jurisdiction to Impose the Conditions It Did on the Approval Order "In the Public Interest"?*

111 ATCO says the Board had no jurisdiction to impose conditions that are "confiscatory". Framing the question in this way, however, assumes the point in issue. The correct point of departure is not to assume that ATCO is entitled to the net gain and then ask if the Board can confiscate it. ATCO's investment of $83,000 was added in increments to its regulatory cost base as the land was acquired from time to time between 1922 and 1965. It is in the nature of a regulated industry that the question of what is a just and equitable return is determined by a board and not by the vagaries of the speculative property market.

112 I do not think the legal debate is assisted by talk of "confiscation". ATCO is prohibited by statute from disposing of the asset without Board approval, and the Board has statutory authority to impose conditions on its approval. The issue thus necessarily turns not on the *existence* of the jurisdiction but on the *exercise* of the Board's jurisdiction to impose the conditions that it did, and in particular to impose a shared allocation of the net gain.

E. *Did the Board Improperly Exercise the Jurisdiction it Possessed to Impose Conditions the Board Considered "Necessary in the Public Interest"?*

113 There is no doubt that there are many approaches to "the public interest". Which approach the Board adopts is largely (and inherently) a matter of opinion and discretion. While the statutory framework of utilities regulation varies from jurisdiction to jurisdiction, and practice in the United States must be read in light of the constitutional protection of property rights in that country, nevertheless Alberta's grant of authority to its Board is more generous than most. ATCO concedes that its "property" claim would have to give way to a contrary legislative intent, but ATCO says such intent cannot be found in the statutes.

114 Most if not all regulators face the problem of how to allocate gains on property whose original cost is included in the rate base but is no longer required to provide the service. There is a wealth of regulatory experience in many jurisdictions that the Board is entitled to (and does) have regard to in formulating its policies. Striking the correct balance in the allocation of gains between ratepayers and investors is a common preoccupation of comparable boards and agencies:

> First, it prevents the utility from degrading the quality, or reducing the quantity, of the regulated service so as to harm consumers. Second, it ensures that the utility maximizes the aggregate economic benefits of its operations, and not merely the benefits flowing to some interest group or stakeholder. Third, it specifically seeks to prevent favouritism toward investors to the detriment of ratepayers affected by the transaction.
>
> ("The Efficient Allocation of Proceeds from a Utility's Sale of Assets", by P. W. MacAvoy and J. G. Sidak (2001) 22 Energy L.J. 233, at p. 234)

115 The concern with which Canadian regulators view utilities under their jurisdiction that are speculating in land is not new. In *Re Consumers' Gas Co.* (1976), E.B.R.O. 341-I, the Ontario Energy Board considered how to deal with a real estate profit on land which was disposed of at an after-tax profit of over $2 million. The Board stated:

> The Station "B" property was not purchased by Consumers' for land speculation but was acquired for utility purposes. This investment, while non-depreciable, was subject to interest charges and risk paid for through revenues and, until the gas manufacturing plant became obsolete, disposal of the land was not a feasible option. If, in such circumstances, the Board were to permit real estate profit to accrue to the shareholders only, it would tend to encourage real estate speculation with utility capital. In the Board's opinion, the shareholders and the ratepayers should share the benefits of such capital gains. [Emphasis added; para. 326.]

116 Some U.S. regulators also consider it good regulatory policy to allocate part or all of the profit to offset costs in the rate base. In *Re Boston Gas Company* (1982), 49 P.U.R. 4th 1 (Mass. D.P.U.), the regulator allocated a gain on the sale of land to ratepayers, stating:

> The company and its shareholders have received a return on the use of these parcels while they have been included in rate base, and are not entitled to any additional return as a result of their sale. To hold otherwise would be to find that a regulated utility company may speculate in nondepreciable utility property and, despite earning a reasonable rate of return from its customers on that property, may also accumulate a windfall through its sale. We find this to be an uncharacteristic risk/reward situation for a regulated utility to be in with respect to its plant in service. [Emphasis added.]

117 Canadian regulators other than the Board are also concerned with the prospect that decisions of utilities in their regulated business may be skewed under the undue influence of prospective profits on land sales. In *Re Consumers' Gas Co.* (1991), E.B.R.O. 465, the Ontario Energy Board determined that a $1.9 million gain on sale of land should be divided equally between shareholders and ratepayers. It held that

> ... the allocation of 100 percent of the profit from land sales to either the shareholders or the ratepayers might diminish the recognition of the valid concerns of the excluded party. For example, the timing and intensity of land purchase and sales negotiations could be skewed to favour or disregard the ultimate beneficiary (para. 3.3.8).

118 The Board's principle of dividing the gain between investors and ratepayers is consistent, as well, with *Re Natural Resource Gas Ltd.*, RP-2002-0147; EB-2002-0446, in which the Ontario Energy Board addressed the allocation of a profit on the sale of land and buildings and again stated:

> The Board finds that it is reasonable in the circumstances that the capital gains be shared equally between the Company and its customers. In making this

> finding the Board has considered the non-recurring nature of this transaction (para. 45).

119 The wide variety of regulatory treatment of such gains was noted by Kerans J.A. in *Trans-Alta (1986)*, at pp. 175-76, including *Re Boston Gas Co.* mentioned earlier. In *TransAlta (1986)*, the Board characterized TransAlta's gain on the disposal of land and buildings included in its Edmonton "franchise" as "revenue" within the meaning of the *Hydro and Electric Energy Act*, R.S.A. 1980, c. H-13. (The case therefore did not deal with the power to impose conditions "the Board considers necessary in the public interest".) Kerans J.A. said (at p. 176):

> I do not agree with the Board's decision for reasons later expressed, but it would be fatuous to deny that its interpretation [of the word "revenue"] is one which the word can reasonably bear.

Kerans J.A. went on to find that in that case "[t]he compensation was, for all practical purposes, compensation for loss of franchise" (p. 180) and on that basis the gain in these "unique circumstances" (p. 179) could not, as a matter of law, be characterized as revenue, i.e. applying a correctness standard. The range of regulatory practice on the "gains on sale" issue was similarly noted by Goldie J.A. in *Yukon Energy Corp. v. Utilities Board* (1996), 74 B.C.A.C. 58; 121 W.A.C. 58 (Y.C.A.), at para. 85.

120 A survey of recent regulatory experience in the United States reveals the wide variety of treatment in that country of gains on the sale of undepreciated land. The range includes proponents of ATCO's preferred allocation as well as proponents of the solution adopted by the Board in this case:

> Some jurisdictions have concluded that as a matter of equity, shareholders alone should benefit from any gain realized on appreciated real estate, because ratepayers generally pay only for taxes on the land and do not contribute to the cost of acquiring the property and pay no depreciation expenses. Under this analysis, ratepayers assume no risk for losses and acquire no legal or equitable interest in the property, but rather pay only for the use of the land in utility service.
>
> Other jurisdictions claim that ratepayers should retain some of the benefits associated with the sale of property dedicated to utility service. Those jurisdictions that have adopted an equitable sharing approach agree that a review of regulatory and judicial decisions on the issue does not reveal any general principle that requires the allocation of benefits solely to shareholders; rather, the cases show only a general prohibition against sharing benefits on the sale property that has never been reflected in utility rates.
>
> (P. S. Cross, "Rate Treatment of Gain on Sale of Land: Ratepayer Indifference, A New Standard?" (1990), *Public Utilities Fortnightly* 44, at p. 44)

Regulatory opinion in the United States favourable to the solution adopted here by the Board is illustrated by *Re Arizona Public Service Co.* (1988), 91 P.U.R. 4th 337, 1988 WL 391394 (Ariz. C.C.):

> To the extent any general principles can be gleaned from the decisions in other jurisdictions they are: (1) the utility's stockholders are not automatically entitled to the gains from all sales of utility property; and (2) ratepayers are not entitled to all or any part of a gain from the sale of property which has never been reflected in the utility's rates.

121 Assets purchased with capital reflected in the rate base come and go, but the utility itself endures. What was done by the Board in this case is quite consistent with the "enduring enterprise" theory espoused, for example, in *Re Southern California Water Co.* (1992), 43 C.P.U.C. 2d 596, 1992 WL 584058. In that case, Southern California Water had asked for approval to sell an old headquarters building and the issue was how to allocate its profits on the sale. The Commission held:

> Working from the principle of the "enduring enterprise", the gain-on-sale from this transaction should remain within the utility's operations rather than being distributed in the short run directly to either ratepayers or shareholders. The "enduring enterprise" principle, is neither novel nor radical. It was clearly articulated by the Commission in its seminal 1989 policy decision on the issue of gain-on-sale, D. 89-07-016, 32 Cal. P.U.C. 2d 233 (Redding). Simply stated, to the extent that a utility realizes a gain-on-sale from the liquidation of an asset and replaces it with another asset or obligation while at the same time its responsibility to serve its customers is neither relieved nor reduced, then any gain-on-sale should remain within the utility's operation.

122 In my view, neither the Alberta statutes nor regulatory practice in Alberta and elsewhere dictates the answer to the problems confronting the Board. It would have been open to the Board to allow ATCO's application for the entire profit. But the solution it adopted was quite within its statutory authority and does not call for judicial intervention.

F. *ATCO's Arguments*

123 Most of ATCO's principal submissions have already been touched on but I will repeat them here for convenience. ATCO does not really dispute the Board's ability to impose conditions on the sale of land. Rather, ATCO says that what the Board did here violates a number of basic legal protections and principles. It asks the Court to clip the Board's wings.

124 Firstly, ATCO says that customers do not acquire any proprietary right in the company's assets. ATCO, rather than its customers, originally purchased the property, held title to it, and therefore was entitled to any gain on its sale. An allocation of profit to the customers would amount to a confiscation of the corporation's property.

125 Secondly, ATCO says its retention of 100% of the gain has nothing to do with the so-called "regulatory compact". The gas customers paid what the Board regarded over the years as a fair price for safe and reliable service. That is what the ratepayers got and that is all they were entitled to. The

Board's allocation of part of the profit to the ratepayers amounts to impermissible "retroactive" rate setting.

126 Thirdly, utilities are not entitled to include in the rate base an amount for *depreciation* on land and ratepayers have therefore not repaid ATCO any part of ATCO's original cost, let alone the present value. The treatment accorded gain on sales of depreciated property therefore does not apply.

127 Fourthly, ATCO complains that the Board's solution is asymmetrical. Ratepayers are given part of the benefit of an increase in land values without, in a falling market, bearing any part of the burden of losses on the disposition of land.

128 In my view, these are all arguments that should be (and were) properly directed to the Board. There are indeed precedents in the regulatory field for what ATCO proposes, just as there are precedents for what the ratepayers proposed. It was for the Board to decide what conditions in these particular circumstances were necessary in the public interest. The Board's solution in this case is well within the range of reasonable options, as I will endeavour to demonstrate.

1. The Confiscation Issue

129 In its factum, ATCO says that "[t]he property belonged to the owner of the utility and the Board's proposed distribution cannot be characterized otherwise than as being confiscatory" (respondent's factum, para. 6). ATCO's argument overlooks the obvious difference between investment in an unregulated business and investment in a regulated utility where the regulator sets the return on investment, not the market place. In *Re Southern California Gas Co.* (1990), 38 C.P.U.C. 2d 166, 118 P.U.R. 4th 81, 1990 WL 488654 ("*SoColGas*"), the regulator pointed out:

> In the non-utility private sector, investors are not guaranteed to earn a fair return on such sunk investment. Although shareholders and bondholders provide the initial capital investment, the ratepayers pay the taxes, maintenance, and other costs of carrying utility property in rate base over the years, and thus insulate utility investors from the risk of having to pay those costs. Ratepayers also pay the utility a fair return on property (including land) while it is in rate base, compensate the utility for the diminishment of the value of its depreciable property over time through depreciation accounting, and bear the risk that they must pay depreciation and a return on prematurely retired rate base property.

(It is understood, of course, that the Board does not appropriate the actual proceeds of sale. What happens is that an amount *equivalent* to two-thirds of the profit is included in the calculation of ATCO's current cost base for rate making purposes. In that way, there is a notional distribution of the benefit of the gain amongst the competing stakeholders.)

130 ATCO's argument is frequently asserted in the United States under the flag of constitutional protection for "property". Constitutional protection has not however prevented allocation of all or part of such gains to the U.S. ratepayers. One of the leading U.S. authorities is *Democratic Central Committee of the District of Columbia v. Washington Metropolitan Area Transit Commission*, 485 F.2d 786 (D.C. Cir. 1973). In that case, the assets at issue were parcels of real estate which had been employed in mass transit operations but which were no longer needed when the transit system converted to buses. The regulator awarded the profit on the appreciated land values to the shareholders

but the Court of Appeals reversed the decision, using language directly applicable to ATCO's "confiscation" argument:

> We perceive no impediment, constitutional or otherwise, to recognition of a ratemaking principle enabling ratepayers to benefit from appreciations in value of utility properties accruing while in service. We believe the doctrinal consideration upon which pronouncements to the contrary have primarily rested has lost all present-day vitality. Underlying these pronouncements is a basic legal and economic thesis - sometimes articulated, sometimes implicit - that utility assets, though dedicated to the public service, remain exclusively the property of the utility's investors, and that growth in value is an inseparable and inviolate incident of that property interest. The precept of private ownership historically pervading our jurisprudence led naturally to such a thesis, and early decisions in the ratemaking field lent some support to it; if still viable, it strengthens the investor's claim. We think, however, after careful exploration, that the foundations for that approach, and the conclusion it seemed to indicate, have long since eroded away (p. 800).

The court's reference to "pronouncements" which have "lost all present-day vitality" likely includes *Board of Public Utility Commissioners v. New York Telephone Co.*, 271 U.S. 23 (1926), a decision relied upon in this case by ATCO. In that case, the Supreme Court of the United States said (at p. 31):

> Customers pay for service, not for the property used to render it. Their payments are not contributions to depreciation or other operating expenses or to capital of the company. By paying bills for service they do not acquire any interest, legal or equitable, in the property used for their convenience or in the funds of the company. Property paid for out of moneys received for service belongs to the company just as does that purchased out of proceeds of its bonds and stock.

In that case, the regulator belatedly concluded that the level of depreciation allowed the New York Telephone Company had been excessive in past years and sought to remedy the situation in the current year by retroactively adjusting the cost base. The court held that the regulator had no power to re-open past rates. The financial fruits of the regulator's errors in past years now belonged to the company. That is not this case. No one contends that the Board's prior rates, based on ATCO's original investment, were wrong. In 2001, when the matter came before the Board, the Board had jurisdiction to approve or not approve the proposed sale. It was not a done deal. The receipt of any profit by ATCO was prospective only. As explained in *Re Arizona Public Service Co.*:

> In New York Telephone, the issue presented was whether a state regulatory commission could use excessive depreciation accruals from prior years to reduce rates for future service and thereby set rates which did not yield a just return. ... the Court simply reiterated and provided the reasons for a ratemaking truism: rates must be designed to produce enough revenue to pay current [reasonable] operating expenses and provide a fair return to the utility's investors. If it turns out that, for whatever reason, existing rates have produced too much or too little

> income, the past is past. Rates are raised or lowered to reflect current conditions; they are not designed to pay back past excessive profits or recoup past operating losses. In contrast, the issue in this proceeding is whether for ratemaking purposes a utility's test year income from sales of utility service can include its income from sales of utility property. The United States Supreme Court's decision in New York Telephone does not address that issue. [Emphasis added.]

131 More recently, the allocation of gain on sale was addressed by the California Public Utilities Commission in *SoCalGas*. In that case, as here, the utility (SoCalGas) wished to sell land and buildings located (in that case) in downtown Los Angeles. The Commission apportioned the gain on sale between the shareholders and the ratepayers, concluding that:

> We believe that the issue of who owns the utility property providing utility service has become a red herring in this case, and that ownership alone does not determine who is entitled to the gain on the sale of the property providing utility service when it is removed from rate base and sold.

132 ATCO argues in its factum that ratepayers "do not acquire any interest, legal or equitable, in the property used to provide the service or in the funds of the owner of the utility" (para. 2). In *SoCalGas,* the regulator disposed of this point as follows:

> No one seriously argues that ratepayers acquire title to the physical property assets used to provide utility service; DRA [Division of Ratepayer Advocates] argues that the gain on sale should reduce future revenue requirements not because ratepayers own the property, but rather because they paid the costs and faced the risks associated with that property while it was in rate base providing public service.

This "risk" theory applies in Alberta as well. Over the last 80 years, there have been wild swings in Alberta real estate, yet through it all, in bad times and good, the ratepayers have guaranteed ATCO a just and equitable return on its investment in *this* land and *these* buildings.

133 The notion that the division of risk justifies a division of the net gain was also adopted by the regulator in *SoCalGas*:

> Although the shareholders and bondholders provided the initial capital investment, the ratepayers paid the taxes, maintenance, and other costs of carrying the land and buildings in rate base over the years, and paid the utility a fair return on its unamortized investment in the land and buildings while they were in rate base.

In other words, even in the United States, where property rights are constitutionally protected, ATCO's "confiscation" point is rejected as an oversimplification.

134 My point is not that the Board's allocation in this case is necessarily correct in all circumstances. Other regulators have determined that the public interest requires a different allocation. The Board proceeds on a "case-by-case" basis. My point simply is that the Board's response in this case cannot be considered "confiscatory" in any proper use of the term, and is well within the range of what are regarded in comparable jurisdictions as appropriate regulatory responses to the allocation of the gain on sale of land whose original investment has been included by the utility itself in its rate

base. The Board's decision is protected by a deferential standard of review and in my view it should not have been set aside.

2. The Regulatory Compact

135 The Board referred in its decision to the "regulatory compact" which is a loose expression suggesting that in exchange for a statutory monopoly and receipt of revenue on a cost plus basis, the utility accepts limitations on its rate of return and its freedom to do as it wishes with property whose cost is reflected in its rate base. This was expressed in the *Washington Metropolitan Area Transit* case by the U.S. Court of Appeals as follows (at p. 806):

> The ratemaking process involves fundamentally "a balancing of the investor and the consumer interests." The investor's interest lies in the integrity of his investment and a fair opportunity for a reasonable return thereon. The consumer's interest lies in governmental protection against unreasonable charges for the monopolistic service to which he subscribes. In terms of property value appreciations, the balance is best struck at the point at which the interests of both groups receive maximum accommodation.

136 ATCO considers that the Board's allocation of profit violated the regulatory compact not only because it is confiscatory but because it amounts to "retroactive rate making". In *Northwestern Utilities Ltd. v. City of Edmonton*, [1979] 1 S.C.R. 684, Estey J. stated, at p. 691:

> It is clear from many provisions of *The Gas Utilities Act* that the Board must act prospectively and may not award rates which will recover expenses incurred in the past and not recovered under rates established for past periods.

137 As stated earlier, the Board in this case was addressing a prospective receipt and allocated two thirds of it to a prospective (not retroactive) rate making exercise. This is consistent with regulatory practice, as is illustrated by *New York Water Service Corp. v. Public Service Commission*, 208 N.Y.S. 2d 587 (1960). In that case, a utility commission ruled that gains on the sale of real estate should be taken into account to reduce rates annually over the following period of 17 years (p. 864):

> If land is sold at a profit, it is required that the profit be added to, i.e., "credited to", the depreciation reserve, so that there is a corresponding reduction of the rate base and resulting return.

The regulator's order was upheld by the New York State Supreme Court (Appellate Division).

138 More recently, in *Re Compliance with the Energy Policy Act of 1992* (1995), 62 C.P.U.C. 2d 517, WL 768628, the regulator commented:

> ... we found it appropriate to allocate the principal amount of the gain to offset future costs of headquarters facilities, because ratepayers had borne the burden of risks and expenses while the property was in ratebase. At the same time, we found that it was equitable to allocate a portion of the benefits from the gain-on-sale to shareholders in order to provide a reasonable incentive to the util-

> ity to maximize the proceeds from selling such property and compensate shareholders for any risks borne in connection with holding the former property.

139 The emphasis in all these cases is on balancing the interests of the shareholders and the ratepayers. This is perfectly consistent with the "regulatory compact" approach reflected in the Board doing what it did in this case.

3. Land as a Non-Depreciable Asset

140 The Alberta Court of Appeal drew a distinction between gains on sale of land, whose original cost is not depreciated (and thus is not repaid in increments through the rate base) and depreciated property such as buildings where the rate base does include a measure of capital repayment and which in that sense the ratepayers have "paid for". The Alberta Court of Appeal held that the Board was correct to credit the rate base with an amount equivalent to the depreciation paid in respect of the buildings (this is the subject matter of ATCO's cross-appeal). Thus in this case, the land was still carried on ATCO's books at its original price of $83,720 whereas the original $596,591 cost of the buildings had been depreciated through the rates charged customers to a net book value of $141,525.

141 Regulatory practice shows that many (not all) regulators also do not accept the distinction (for this purpose) between depreciable and non-depreciable assets. In *Re Boston Gas Co.* for example (cited in *TransAlta (1986)*, at p. 176), the regulator held:

> ... the company's ratepayers have been paying a return on this land as well as all other costs associated with its use. The fact that land is a nondepreciable asset because its useful value is not ordinarily diminished through use is, we find, irrelevant to the question of who is entitled to the proceeds on the sales of this land.

142 In *SoCalGas*, as well, the Commission declined to make a distinction between the gain on sale of depreciable, as compared to non-depreciable, property, stating "We see little reason why land sales should be treated differently." The decision continued:

> In short, whether an asset is depreciated for ratemaking purposes or not, ratepayers commit to paying a return on its book value for as long as it is used and useful. Depreciation simply recognizes the fact that certain assets are consumed over a period of utility service while others are not. The basic relationship between the utility and its ratepayers is the same for depreciable and non-depreciable assets. [Emphasis added.]

143 In *Re California Water Service Co.* (1996), 66 C.P.U.C. 2d 100, 1996 WL 293205, the regulator commented that:

> Our decisions generally find no reason to treat gain on the sale of nondepreciable property, such as bare land, different[ly] than gains on the sale of depreciable rate base assets and land in PHFU [plant held for future use].

144 Again, my point is not that the regulator *must* reject any distinction between depreciable and non-depreciable property. Simply, my point is that the distinction does not have the controlling

weight as contended by ATCO. In Alberta, it is up to the Board to determine what allocations are necessary in the public interest as conditions of the approval of sale. ATCO's attempt to limit the Board's discretion by reference to various doctrine is not consistent with the broad statutory language used by the Alberta legislature and should be rejected.

4. Lack of Reciprocity

145 ATCO argues that the customers should not profit from a rising market because if the land loses value it is ATCO, and not the ratepayers, that will absorb the loss. However, the material put before the Court suggests that the Board takes into account both gains *and* losses. In the following decisions the Board stated, repeated, and repeated again its "general rule" that

> ... the Board considers that any profit or loss (being the difference between the net book value of the assets and the sale price of those assets) resulting from the disposal of utility assets should accrue to the customers of the utility and not to the owner of the utility. [Emphasis added.]

(See *TransAlta Utilities Corp.* (1984), Alta. P.U.B. Decision No. E84116, at p. 17; *TransAlta Utilities Corp.* (1984), Alta. P.U.B. Decision No. E84115, at p. 12; *Re Gas Utilities Act and Public Utilities Board Act*, (1984), Alta. P.U.B. Decision No. E84113, at p. 23.)

146 In *Alberta Government Telephones*, the Board reviewed a number of regulatory approaches (including *Re Boston Gas Co.*, previously mentioned) with respect to gains on sale and concluded with respect to its own practice, at p. 12:

> The Board is aware that it has not applied any consistent formula or rule which would automatically determine the accounting procedure to be followed in the treatment of gains or losses on the disposition of utility assets. The reason for this is that the Board's determination of what is fair and reasonable rests on the merits or facts of each case.

147 ATCO's contention that it alone is burdened with the risk on land that *declines* in value overlooks the fact that in a falling market, the utility continues to be entitled to a rate of return on its original investment even if the market value at the time is substantially less than its original investment. As pointed out in *SoCalGas*:

> If the land actually does depreciate in value below its original cost, then one view could be that the steady rate of return [the ratepayers] have paid for the land over time has actually overcompensated investors. Thus, there is symmetry of risk and reward associated with rate base land just as there is with regard to depreciable rate base property.

II. Conclusion

148 In summary, s. 15(3) of the AEUBA authorized the Board in dealing with ATCO's application to approve the sale of the subject land and buildings to "impose any additional conditions that the Board considers necessary in the public interest". In the exercise of that authority, and having regard to the Board's "general supervision over all gas utilities, and the owners of them" (GUA, s. 22(1)), the Board made an allocation of the net gain for the public policy reasons which it articulat-

ed in its decision. Perhaps not every regulator and not every jurisdiction would exercise the power in the same way, but the allocation of the gain on an asset ATCO sought to withdraw from the rate base was a decision the Board was mandated to make. It is not for the Court to substitute its own view of what is "necessary in the public interest".

III. Disposition

149 I would allow the appeal, set aside the decision of the Alberta Court of Appeal, and restore the decision of the Board, with costs to the City of Calgary both in this Court and in the court below. ATCO's cross-appeal should be dismissed with costs.

* * * * *

APPENDIX

Alberta Energy and Utilities Board Act, R.S.A. 2000, c. A-17

[Jurisdiction]

13 All matters that may be dealt with by the ERCB or the PUB under any enactment or as otherwise provided by law shall be dealt with by the Board and are within the exclusive jurisdiction of the Board.

[Powers of the Board]

15(1) For the purposes of carrying out its functions, the Board has all the powers, rights and privileges of the ERCB and the PUB that are granted or provided for by any enactment or by law.

(2) In any case where the ERCB, the PUB or the Board may act in response to an application, complaint, direction, referral or request, the Board may act on its own initiative or motion.

(3) Without restricting subsection (1), the Board may do all or any of the following:

(a) make any order that the ERCB or the PUB may make under any enactment;
(b) with the approval of the Lieutenant Governor in Council, make any order that the ERCB may, with the approval of the Lieutenant Governor in Council, make under any enactment;
(c) with the approval of the Lieutenant Governor in Council, make any order that the PUB may, with the approval of the Lieutenant Governor in Council, make under any enactment;
(d) with respect to an order made by the Board, the ERCB or the PUB in respect of matters referred to in clauses (a) to (c), make any further order and impose any additional conditions that the Board considers necessary in the public interest;
(e) make an order granting the whole or part only of the relief applied for;
(f) where it appears to the Board to be just and proper, grant partial, further or other relief in addition to, or in substitution for, that applied for as fully and in all respects as if the application or matter had been for that partial, further or other relief.

[Appeals]

26(1) Subject to subsection (2), an appeal lies from the Board to the Court of Appeal on a question of jurisdiction or on a question of law.

(2) Leave to appeal may be obtained from a judge of the Court of Appeal only on an application made

(a) within 30 days from the day that the order, decision or direction sought to be appealed from was made, or
(b) within a further period of time as granted by the judge where the judge is of the opinion that the circumstances warrant the granting of that further period of time.

[Exclusion of prerogative writs]

27 Subject to section 26, every action, order, ruling or decision of the Board or the person exercising the powers or performing the duties of the Board is final and shall not be questioned, reviewed or restrained by any proceeding in the nature of an application for judicial review or otherwise in any court.

Gas Utilities Act, R.S.A. 2000, c. G-5

[Supervision]

22(1) The Board shall exercise a general supervision over all gas utilities, and the owners of them, and may make any orders regarding equipment, appliances, extensions of works or systems, reporting and other matters, that are necessary for the convenience of the public or for the proper carrying out of any contract, charter or franchise involving the use of public property or rights.

(2) The Board shall conduct all inquiries necessary for the obtaining of complete information as to the manner in which owners of gas utilities comply with the law, or as to any other matter or thing within the jurisdiction of the Board under this Act.

[Investigation of gas utility]

24(1) The Board, on its own initiative or on the application of a person having an interest, may investigate any matter concerning a gas utility.

[Designated gas utilities]

26(1) The Lieutenant Governor in Council may by regulation designate those owners of gas utilities to which this section and section 27 apply.

(2) No owner of a gas utility designated under subsection (1) shall

(a) issue any

(i) of its shares or stock, or
(ii) bonds or other evidences of indebtedness, payable in more than one year from the date of them,

unless it has first satisfied the Board that the proposed issue is to be made in accordance with law and has obtained the approval of the Board for the purposes of the issue and an order of the Board authorizing the issue,

(b) capitalize

(i) its right to exist as a corporation,
(ii) a right, franchise or privilege in excess of the amount actually paid to the Government or a municipality as the consideration for it, exclusive of any tax or annual charge, or
(iii) a contract for consolidation, amalgamation or merger,

(c) without the approval of the Board, capitalize any lease, or
(d) without the approval of the Board,

(i) sell, lease, mortgage or otherwise dispose of or encumber its property, franchises, privileges or rights, or any part of it or them, or
(ii) merge or consolidate its property, franchises, privileges or rights, or any part of it or them,

and a sale, lease, mortgage, disposition, encumbrance, merger or consolidation made in contravention of this clause is void, but nothing in this clause shall be construed to prevent in any way the sale, lease, mortgage, disposition, encumbrance, merger or consolidation of any of the property of an owner of a gas utility designated under subsection (1) in the ordinary course of the owner's business.

[Prohibited share transactions]

27(1) Unless authorized to do so by an order of the Board, the owner of a gas utility designated under section 26(1) shall not sell or make or permit to be made on its books any transfer of any share or shares of its capital stock to a corporation, however incorporated, if the sale or transfer, by itself or in connection with previous sales or transfers, would result in the vesting in that corporation of more than 50% of the outstanding capital stock of the owner of the gas utility.

[Powers of Board]

36 The Board, on its own initiative or on the application of a person having an interest, may by order in writing, which is to be made after giving notice to and hearing the parties interested,

(a) fix just and reasonable individual rates, joint rates, tolls or charges or schedules of them, as well as commutation and other special rates, which shall be imposed, observed and followed afterwards by the owner of the gas utility,
(b) fix proper and adequate rates and methods of depreciation, amortization or depletion in respect of the property of any owner of a gas utility, who shall make the owner's depreciation, amortization or depletion accounts conform to the rates and methods fixed by the Board,

(c) fix just and reasonable standards, classifications, regulations, practices, measurements or service, which shall be furnished, imposed, observed and followed thereafter by the owner of the gas utility,

(d) require an owner of a gas utility to establish, construct, maintain and operate, but in compliance with this and any other Act relating to it, any reasonable extension of the owner's existing facilities when in the judgment of the Board the extension is reasonable and practical and will furnish sufficient business to justify its construction and maintenance, and when the financial position of the owner of the gas utility reasonably warrants the original expenditure required in making and operating the extension, and

(e) require an owner of a gas utility to supply and deliver gas to the persons, for the purposes, at the rates, prices and charges and on the terms and conditions that the Board directs, fixes or imposes.

[Rate base]

37(1) In fixing just and reasonable rates, tolls or charges, or schedules of them, to be imposed, observed and followed afterwards by an owner of a gas utility, the Board shall determine a rate base for the property of the owner of the gas utility used or required to be used to provide service to the public within Alberta and on determining a rate base it shall fix a fair return on the rate base.

(2) In determining a rate base under this section, the Board shall give due consideration

(a) to the cost of the property when first devoted to public use and to prudent acquisition cost to the owner of the gas utility, less depreciation, amortization or depletion in respect of each, and

(b) to necessary working capital.

(3) In fixing the fair return that an owner of a gas utility is entitled to earn on the rate base, the Board shall give due consideration to all facts that in its opinion are relevant.

[Excess revenues or losses]

40 In fixing just and reasonable rates, tolls or charges, or schedules of them, to be imposed, observed and followed afterwards by an owner of a gas utility,

(a) the Board may consider all revenues and costs of the owner that are in the Board's opinion applicable to a period consisting of

(i) the whole of the fiscal year of the owner in which a proceeding is initiated for the fixing of rates, tolls or charges, or schedules of them,

(ii) a subsequent fiscal year of the owner, or

(iii) 2 or more of the fiscal years of the owner referred to in subclauses (i) and (ii) if they are consecutive,

and need not consider the allocation of those revenues and costs to any part of that period,

(b) the Board may give effect to that part of any excess revenue received or any revenue deficiency incurred by the owner that is in the Board's opinion applicable to the whole of the fiscal year of the owner in which a proceeding is initiated for the fixing of rates, tolls or charges, or schedules of them, that the Board determines is just and reasonable,

(c) the Board may give effect to that part of any excess revenue received or any revenue deficiency incurred by the owner after the date on which a proceeding is initiated for the fixing of rates, tolls or charges, or schedules of them, that the Board determines has been due to undue delay in the hearing and determining of the matter, and

(d) the Board shall by order approve

(i) the method by which, and

(ii) the period, including any subsequent fiscal period, during which,

any excess revenue received or any revenue deficiency incurred, as determined pursuant to clause (b) or (c), is to be used or dealt with.

[General powers of Board]

59 For the purposes of this Act, the Board has the same powers in respect of the plant, premises, equipment, service and organization for the production, distribution and sale of gas in Alberta, and in respect of the business of an owner of a gas utility and in respect of an owner of a gas utility, that are by the *Public Utilities Board Act* conferred on the Board in the case of a public utility under that Act.

Public Utilities Board Act, R.S.A. 2000, c. P-45

[Jurisdiction and powers]

36(1) The Board has all the necessary jurisdiction and power

(a) to deal with public utilities and the owners of them as provided in this Act;

(b) to deal with public utilities and related matters as they concern suburban areas adjacent to a city, as provided in this Act.

(2) In addition to the jurisdiction and powers mentioned in subsection (1), the Board has all necessary jurisdiction and powers to perform any duties that are assigned to it by statute or pursuant to statutory authority.

(3) The Board has, and is deemed at all times to have had, jurisdiction to fix and settle, on application, the price and terms of purchase by a council of a municipality pursuant to section 47 of the *Municipal Government Act*

(a) before the exercise by the council under that provision of its right to purchase and without binding the council to purchase, or

(b) when an application is made under that provision for the Board's consent to the purchase, before hearing or determining the application for its consent.

[General power]

37 In matters within its jurisdiction the Board may order and require any person or local authority to do forthwith or within or at a specified time and in any manner prescribed by the Board, so far as it is not inconsistent with this Act or any other Act conferring jurisdiction, any act, matter or thing that the person or local authority is or may be required to do under this Act or under any other general or special Act, and may forbid the doing or continuing of any act, matter or thing that is in contravention of any such Act or of any regulation, rule, order or direction of the Board.

[Investigation of utilities and rates]

80 When it is made to appear to the Board, on the application of an owner of a public utility or of a municipality or person having an interest, present or contingent, in the matter in respect of which the application is made, that there is reason to believe that the tolls demanded by an owner of a public utility exceed what is just and reasonable, having regard to the nature and quality of the service rendered or of the commodity supplied, the Board

(a) may proceed to hold any investigation that it thinks fit into all matters relating to the nature and quality of the service or the commodity in question, or to the performance of the service and the tolls or charges demanded for it,

(b) may make any order respecting the improvement of the service or commodity and as to the tolls or charges demanded, that seems to it to be just and reasonable, and

(c) may disallow or change, as it thinks reasonable, any such tolls or charges that, in its opinion, are excessive, unjust or unreasonable or unjustly discriminate between different persons or different municipalities, but subject however to any provisions of any contract existing between the owner of the public utility and a municipality at the time the application is made that the Board considers fair and reasonable.

[Supervision by Board]

85(1) The Board shall exercise a general supervision over all public utilities, and the owners of them, and may make any orders regarding extension of works or systems, reporting and other matters, that are necessary for the convenience of the public or for the proper carrying out of any contract, charter or franchise involving the use of public property or rights.

[Investigation of public utility]

87(1) The Board may, on its own initiative, or on the application of a person having an interest, investigate any matter concerning a public utility.

(2) When in the opinion of the Board it is necessary to investigate a public utility or the affairs of its owner, the Board shall be given access to and may use any books, documents or records with respect to the public utility and in the possession of any owner of the public utility or municipality or under the control of a board, commission or department of the Government.

(3) A person who directly or indirectly controls the business of an owner of a public utility within Alberta and any company controlled by that person shall give the Board or its agent access to any of the books, documents and records that relate to the business of the owner or shall furnish any information in respect of it required by the Board.

[Fixing of rates]

89 The Board, either on its own initiative or on the application of a person having an interest, may by order in writing, which is to be made after giving notice to and hearing the parties interested,

(a) fix just and reasonable individual rates, joint rates, tolls or charges, or schedules of them, as well as commutation, mileage or kilometre rate and other special rates, which shall be imposed, observed and followed subsequently by the owner of the public utility;
(b) fix proper and adequate rates and methods of depreciation, amortization or depletion in respect of the property of any owner of a public utility, who shall make the owner's depreciation, amortization or depletion accounts conform to the rates and methods fixed by the Board;
(c) fix just and reasonable standards, classifications, regulations, practices, measurements or service, which shall be furnished, imposed, observed and followed subsequently by the owner of the public utility;
(d) repealed;
(e) require an owner of a public utility to establish, construct, maintain and operate, but in compliance with other provisions of this or any other Act relating to it, any reasonable extension of the owner's existing facilities when in the judgment of the Board the extension is reasonable and practical and will furnish sufficient business to justify its construction and maintenance, and when the financial position of the owner of the public utility reasonably warrants the original expenditure required in making and operating the extension.

[Determining rate base]

90(1) In fixing just and reasonable rates, tolls or charges, or schedules of them, to be imposed, observed and followed subsequently by an owner of a public utility, the Board shall determine a rate base for the property of the owner of a public utility used or required to be used to provide service to the public within Alberta and on determining a rate base it shall fix a fair return on the rate base.

(2) In determining a rate base under this section, the Board shall give due consideration

(a) to the cost of the property when first devoted to public use and to prudent acquisition cost to the owner of the public utility, less depreciation, amortization or depletion in respect of each, and
(b) to necessary working capital.

(3) In fixing the fair return that an owner of a public utility is entitled to earn on the rate base, the Board shall give due consideration to all those facts that, in the Board's opinion, are relevant.

[Revenue and costs considered]

91(1) In fixing just and reasonable rates, tolls or charges, or schedules of them, to be imposed, observed and followed by an owner of a public utility,

(a) the Board may consider all revenues and costs of the owner that are in the Board's opinion applicable to a period consisting of

(i) the whole of the fiscal year of the owner in which a proceeding is initiated for the fixing of rates, tolls or charges, or schedules of them,
(ii) a subsequent fiscal year of the owner, or
(iii) 2 or more of the fiscal years of the owner referred to in subclauses (i) and (ii) if they are consecutive,

and need not consider the allocation of those revenues and costs to any part of such a period,

(b) the Board shall consider the effect of the *Small Power Research and Development Act* on the revenues and costs of the owner with respect to the generation, transmission and distribution of electric energy,
(c) the Board may give effect to that part of any excess revenue received or any revenue deficiency incurred by the owner that is in the Board's opinion applicable to the whole of the fiscal year of the owner in which a proceeding is initiated for the fixing of rates, tolls or charges, or schedules of them, as the Board determines is just and reasonable,
(d) the Board may give effect to such part of any excess revenue received or any revenue deficiency incurred by the owner after the date on which a proceeding is initiated for the fixing of rates, tolls or charges, or schedules of them, as the Board determines has been due to undue delay in the hearing and determining of the matter, and
(e) the Board shall by order approve the method by which, and the period (including any subsequent fiscal period) during which, any excess revenue received or any revenue deficiency incurred, as determined pursuant to clause (c) or (d), is to be used or dealt with.

[Designated public utilities]

101(1) The Lieutenant Governor in Council may by regulation designate those owners of public utilities to which this section and section 102 apply.

(2) No owner of a public utility designated under subsection (1) shall

(a) issue any

(i) of its shares or stock, or
(ii) bonds or other evidences of indebtedness, payable in more than one year from the date of them,

unless it has first satisfied the Board that the proposed issue is to be made in accordance with law and has obtained the approval of the Board for the purposes of the issue and an order of the Board authorizing the issue,

(b) capitalize

(i) its right to exist as a corporation,
(ii) a right, franchise or privilege in excess of the amount actually paid to the Government or a municipality as the consideration for it, exclusive of any tax or annual charge, or
(iii) a contract for consolidation, amalgamation or merger,

(c) without the approval of the Board, capitalize any lease, or
(d) without the approval of the Board,

(i) sell, lease, mortgage or otherwise dispose of or encumber its property, franchises, privileges or rights, or any part of them, or
(ii) merge or consolidate its property, franchises, privileges or rights, or any part of them,

and a sale, lease, mortgage, disposition, encumbrance, merger or consolidation made in contravention of this clause is void, but nothing in this clause shall be construed to prevent in any way the sale, lease, mortgage, disposition, encumbrance, merger or consolidation of any of the property of an owner of a public utility designated under subsection (1) in the ordinary course of the owner's business.

[Prohibited share transaction]

102(1) Unless authorized to do so by an order of the Board, the owner of a public utility designated under section 101(1) shall not sell or make or permit to be made on its books a transfer of any share of its capital stock to a corporation, however incorporated, if the sale or transfer, in itself or in connection with previous sales or transfers, would result in the vesting in that corporation of more than 50% of the outstanding capital stock of the owner of the public utility.

Interpretation Act, R.S.A. 2000, c. I-8

[Enactments remedial]

10 An enactment shall be construed as being remedial, and shall be given the fair, large and liberal construction and interpretation that best ensures the attainment of its objects.

Solicitors:

Solicitors for the appellant/respondent on cross-appeal: McLennan Ross, Calgary.

Solicitors for the respondent/appellant on cross-appeal: Bennett Jones, Calgary.

Solicitor for the intervener the Alberta Energy and Utilities Board: J. Richard McKee, Calgary.

Solicitor for the intervener the Ontario Energy Board: Ontario Energy Board, Toronto.

Solicitors for the intervener Enbridge Gas Distribution Inc.: Fraser Milner Casgrain, Toronto.

Solicitors for the intervener Union Gas Limited: Torys, Toronto.

* * * * *

Corrigendum, released April 24, 2006

Please note also the following change in *Atco Gas & Pipelines Ltd. v. Alberta (Energy Utilities Board)*, 2006 SCC 4, released February 9, 2006. In para. 8, line 3 of the English version, "s. 25.1(1)" should read "s. 25.1(2)".

Tab 8

Case Name:

Tribute Resources Inc. v. 2195002 Ontario Inc.

RE: Tribute Resources Inc., (Applicant), and 2195002 Ontario Inc., (Respondent)

[2012] O.J. No. 55

2012 ONSC 25

Court File No. 5186/2011

Ontario Superior Court of Justice

A.W. Bryant J.

Heard: November 16-18, 2011.
Judgment: January 6, 2012.

(26 paras.)

Counsel:

Christopher Lewis, for the Applicant.

William Mitches, for the Respondent.

ENDORSEMENT

A.W. BRYANT J.:--

I. Background

1 McKinley Farms Limited ("McKinley") is a private corporation which owns 200 acres of land in the Township of Stanley, County of Huron. McKinley provides care to poultry breeder stock and leases out surplus lands. Tribute Resources Inc. ("Tribute") is a publically traded company which carries on the business of gas exploration, production and storage.

2 On October 13, 1977, Tribute (or its predecessor) and McKinley (or its predecessor) entered into the Tribute Oil and Gas Lease for oil and gas extraction. This lease was amended by the Unit

Operation Agreement dated November 30, 1984. On September 24, 1998, Tribute and McKinley entered into a Gas Storage Lease to store gas beneath McKinley lands.

3 On March 4, 2009, McKinley and 2195002 Ontario Inc. ("219 Ontario") entered into an Oil and Gas Lease ("219 Ontario Oil and Gas Lease") and a Gas Storage Lease ("219 Ontario Gas Storage Lease"). McKinley and 219 Ontario are related corporations.

4 Tribute and McKinley's disagreement on the interpretation and validity of these leases has resulted in litigation the subject matter of which is relevant to the current proceedings between 219 Ontario and Tribute.

II. Analysis and Decision

5 In late 2008, McKinley took the position that the Tribute Oil and Gas Lease and the Tribute Gas Storage Lease were void. On December 10, 2008, Tribute filed an application in the Superior Court for: (1) a declaration that the Tribute Oil and Gas Lease is a valid and subsisting lease; and, (2) a declaration that the Tribute Gas Storage Lease is a valid and subsisting lease.

6 On January 16, 2009, McKinley filed a cross-application in the Superior Court for: (1) a declaration that the Tribute Oil and Gas Lease was invalid and void; and, (2) a declaration that the Tribute Gas Storage Lease was invalid and void.

7 On June 17 and 18, 2009, the two applications were argued together before Justice T. David Little. On June 29, 2009, the applications' judge held that the Tribute Oil and Gas Lease terminated in 2001 and the Tribute Gas Storage Lease expired in 1999. Tribute appealed the decision of the applications' judge to the Ontario Court of Appeal ("the Appeal").

8 On September 21, 2009, prior to the hearing of the Appeal, Tribute applied to the Ontario Energy Board ("Board") under sections 36.1, s. 38(1), 38(3), 40(1) and 90(1) of the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Schedule B ("*Act"*). The applications, if granted, would allow Tribute to develop natural gas storage pools in the geographic areas of the County of Huron including the Stanley Pool, part of which is beneath the McKinley lands.

9 On February 9, 2010, the Board issued Procedural Order No. 1 in relation to Tribute's September 21, 2009 (as amended on December 15, 2009) application to the Board. The Board noted that on January 26, 2010, the Court of Appeal had heard Tribute's appeal of the applications' judge's decision that the Tribute Oil and Gas Lease and Tribute Gas Storage Lease were void. The Board requested submissions from Tribute and McKinley regarding whether the pending proceedings before the Board with respect to the Stanley Pool should be stayed until the Court of Appeal's decision on the Appeal.

10 On February 12, 2010, Tribute requested the Board to stay the scheduled hearings pending the decision of the Ontario Court of Appeal. In Procedural Order No. 2, dated March 12, 2009, the Board reported that its staff supported the stay of the proceedings pending the decision of the Court of Appeal. The Board stayed Tribute's application pending notification of the decision of the Court of Appeal.

11 On April 7, 2010, the Ontario Court of Appeal released its judgment in *Snopko v. Union Gas Ltd.*, 2010 ONCA 248, [2010] O.J. No. 1335. Sharpe J.A. held that under the *Act*, the Board has a broad jurisdiction to regulate the storage of natural gas, to designate an area as a gas storage area, to authorize the injection of gas into that storage area, and to order compensation to the owners of the property overlaying the storage area (para. 22). Sharpe J.A. recognized that the Board has the au-

thority to hear and determine all questions of law and fact in all matters within its jurisdiction. He stated that the substance of the claim, and not its legal characterization, should determine jurisdiction. He held that if the substance of the claim falls within s. 38 of the *Act*, the Board has jurisdiction regardless of the legal label of the claim (paras. 24 and 27).

12 The Court of Appeal, through John Kromkamp, Senior Legal Officer, requested counsel for Tribute and McKinley to file written submissions regarding the impact, if any, of the Court of Appeal's decision in *Snopko, supra,* on the Appeal and whether counsel for the Board should be invited to make submissions regarding the jurisdiction of the Board to deal with issues central to the Appeal.

13 Counsel for Tribute filed written submissions dated May 4, 2010, to the Court of Appeal. Counsel submitted that in *Snopko, supra,* the Board had issued an order in 1993 designating an area as a storage pool and that the Board had granted Union Gas' application under s. 38(1) of the Act authorizing it to inject, store and remove gas from the designated storage areas. Counsel further submitted that the Board had made the designation under s. 38 of the *Act* because it had exclusive jurisdiction to determine all aspects of compensation in the absence of any agreement under s. 38(3). Counsel further submitted that the Board should not be invited to make submissions regarding its jurisdiction to deal with issues that are central to the Appeal.

14 On May 6, 2010, Counsel for McKinley filed brief concurring written submissions. Counsel further submitted that the *Snopko* decision had no impact on the Appeal and that the Board should not be invited to make submissions regarding its jurisdiction to deal with issues that are central to the Appeal.

15 On June 2, 2010, the Court of Appeal released its decision in *Tribute Resources Inc. v. McKinley Farms Ltd*. 2010 ONCA 392, [2010] O.J. No. 2293. The Court held that the Tribute Gas Storage Lease was terminated in 1999 but that the Tribute Oil and Gas Lease was valid.

16 On April 20, 2011, Tribute withdrew its September 21, 2009, application to the Board and filed a fresh application to the Board for an order designating proposed storage areas, including the Stanley Pool, and other orders under the *Act*. On August 4, 2011, Tribute sought to amend its application for orders pursuant to s. 38(1) and s. 38(3). The amended applications were for: the development and operation of a proposed gas storage area referred to as the Stanley Pool; a proposal for the designation of the Stanley Pool as a gas storage area; and, a request for licenses to drill injection/withdrawal wells.

17 The Board found that the application under s. 38(3) was incomplete and stayed the application. On August 24, 2011, Tribute pre-filed evidence and the Board amended the notices of application.

18 On September 1, 2011, 219 Ontario filed an application in the Superior Court of Justice for: (1) a declaration that there are "no gas sands" in, on or under the lands owned by McKinley; (2) a declaration that the Tribute Oil and Gas Lease does not permit Tribute to store gas in or under McKinley lands; and, (3) a declaration that the 219 Ontario Gas Storage Lease permits the injection into, storage under, and withdrawal of, stored gas from beneath the McKinley lands. The Board has not made an order under sections 36.1(1), 38(1), 38(3) or 40(1) of the *Act* in relation to Tribute's application as of September 1, 2011.

19 On September 21, 2011, Tribute filed an application for: (1) a declaration that the Superior Court does not have jurisdiction to grant the relief sought by 219 Ontario in its September 1, 2011 application which application should be dismissed; and, (2) a declaration that the Ontario Energy Board has exclusive jurisdiction in respect of the relief sought by 219 Ontario in connection with the storage rights beneath the McKinley lands.

20 On November 8, 2011, the Board stayed Tribute's pending applications until the hearing and adjudication of Tribute's jurisdictional application in the Superior Court.

21 In my view, the Ontario Court of Appeal decision in *Tribute v. McKinley, supra* resolves the jurisdictional issue raised by Tribute. Tribute's written submissions, dated May 4, 2010, to the Court of Appeal on the question of jurisdiction stated:

> The issues in the pending Appeal involve the interpretation and validity of a Petroleum and Natural Gas Lease and Grant [Tribute Oil and Gas Lease and Tribute Gas Storage Lease] between Tribute and McKinley. The OEB has not made an order under s. 36.1 of the Act designating any part of the McKinley lands as a gas storage area nor has it made an order under s. 38(1) of the Act authorizing any person to inject gas into, store gas in and remove gas from a designated gas storage area involving McKinley lands. Because neither of these orders has been made by the OEB in connection with the subject matter of this pending Appeal, the privative clause set out in section 38(3) of the Act is not operative in respect of the issues before this Court in this Appeal. The issues in this Appeal do not include the issue of compensation payable under s. 38 of the Act. It is therefore submitted that the *Snopko* decision has no impact on this Appeal. This Court has inherent jurisdiction[1] to deal with the issues on this Appeal, which jurisdiction is not displaced by section 38(3) of the Act.

As mentioned above, counsel for McKinley concurred with Tribute's written submissions to the Court of Appeal.

22 The Court of Appeal in *Tribute v. McKinley, supra*, at paras. 18 and 19 stated:

> The parties are agreed that the recent decision of this court in *Snopko et al. v. Union Gas Ltd.*, 2010 ONCA 248, does not apply to this case. In *Snopko*, this court examined the scope of the privative clause set out in s. 38(3) of the *Ontario Energy Board Act*, 1998, S.O. 1998, c. 15, Sched. B (the "Act"), which states as follows:
>
> > No action or other proceeding lies in respect of compensation payable under this section and, failing agreement, the amount shall be determined by the Board.
>
> Section 38(1) provides that the OEB may make a designation order authorizing a person to "inject gas into, store gas in and remove gas from a designated gas storage area, and to enter into and upon the land in the area and use the land for that purpose" and such an authorized person is required under s. 38(2) to make "just and equitable compensation" for the right to store gas or for any damage

resulting from the authority to do so. The substances of the claims in this case do not fall within the language of s. 38(2) as no designation order has been made by the OEB in relation to these lands. The court's jurisdiction to determine the questions on appeal is not at issue.

23 The pending application filed by 219 Ontario, dated September 1, 2011, requests a judge of the Superior Court to interpret the Tribute Oil and Gas Lease and the 219 Ontario Gas Storage Lease. The Board has not "designated a gas storage area" or "authorized a person to inject gas into, store gas in and remove gas from a designated gas storage area and to enter into and upon the land in the area and use the land for that purpose" or made a compensation order under s. 36.1, s. 38(1) s 38(2) or s. 38(3) of the *Act*. Although the Board has power to require the preparation of evidence prior to a hearing, the Board cannot make an order under the *Act* until it holds a hearing (s. 21(2)).

24 In my view, the substance of the claims made by 219 Ontario in its application to the Superior Court for the interpretation of leases does not fall within the language of s. 36.1, s. 38(1) or s. 38(2) of the *Act*. I find that judges of the Superior Court regularly interpret leases and other contracts and have the jurisdiction to interpret the contracts at issue and to grant the relief sought by 219 Ontario. I further find that the interpretation of the leases is not within the exclusive jurisdiction of the Board because the Board has not made an order designating the proposed storage areas under s. 36.1 or 38 of the *Act* (*Tribute v. McKinley, supra*, at paras. 18 and 19).

25 Tribute's application is dismissed for the above reasons.

26 The Court fixes costs in the amount of $13,000.00 payable forthwith.

A.W. BRYANT J.

cp/e/qlafr/qlvxw

1 The Superior Court of Ontario has inherent jurisdiction but the Ontario Court of Appeal is a statutory Court (*Courts of Justice Act* R.S.O. 1990, Chap. C-43, s. 2(1), 6(1) and 11(2)).

Tab 9

Case Name:

2195002 Ontario Inc. v. Tribute Resources Inc.

Between
2195002 Ontario Inc., Applicant (Respondent in Appeal), and
Tribute Resources Inc., Respondent (Appellant in Appeal)

[2013] O.J. No. 4367

2013 ONCA 576

312 O.A.C. 382

117 O.R. (3d) 192

Docket: C56232

Ontario Court of Appeal
Toronto, Ontario

D.H. Doherty, J.M. Simmons and S.E. Pepall JJ.A.

Heard: June 11, 2013.
Judgment: September 26, 2013.

(61 paras.)

Natural resources law -- Oil and gas -- Lease or licence for production -- Terms and conditions -- Termination -- Conservation and licensing -- Provincial regulation -- Ontario -- Storage -- Gas -- Contracts -- Appeal by Tribute Resources Inc from judgment interpreting oil and gas contractual rights in favour of 2195002 Ontario Inc dismissed -- Tribute entered into agreements with landowner in 1977, 1984 and 1998 -- Trial judge correctly found 1998 agreement replaced rather than supplemented prior agreements on issue of gas storage rights given incompatibility of payment and termination provisions -- Prior litigation determined 1998 agreement was terminated and 2195002 Ontario was entitled to disputed rights under 2009 agreement with landowner -- Post-trial Energy Board designation of lands did not oust court's jurisdiction to hear appeal -- Courts of Justice Act, s. 6(1)(b) -- Ontario Energy Board Act, ss. 38, 38(3).

Appeal by Tribute Resources Inc from a judgment interpreting oil and gas contractual rights in favour of 2195002 Ontario Inc. The parties each claimed the right to inject and store gas into and un-

der the McKinley Lands based on agreements with the landowner, McKinley Farms Limited. The trial judge found 2195002 Ontario was entitled to the disputed rights under a 2009 Gas Storage Lease. The judge rejected Tribute's claims to the rights under a 1977 Oil and Gas Lease as amended by a 1984 Unit Operation Agreement. The judge accepted Tribute's agreements conveyed certain gas storage rights but ruled the terms of a 1998 Gas Storage Lease agreement with Tribute replaced those rights. Prior litigation concluded the 1998 agreement terminated in 2008. Termination of the 1998 Tribute Gas Storage Lease left Tribute without any right to store gas on the McKinley Lands. The 2195002 Ontario 2009 Gas Storage Lease was thus the only agreement that permitted gas storage rights on the McKinley Lands. Tribute appealed, contending the 1977 and 1984 agreements contained storage rights that continued to exist despite the termination of the 1998 lease. 2195002 Ontario raised a preliminary argument that the post-trial Ontario Energy Board decision designating the McKinley Lands as a gas storage area and authorizing Tribute to inject, store and remove gas ousted the court's jurisdiction. The Board stayed issues regarding compensation pending the disposition of Tribute's appeal.

HELD: Appeal dismissed. In light of Tribute's pending Energy Board application the jurisdiction issue was raised in the Superior Court. It was undisputed the trial judge had jurisdiction to make the decision under appeal, as the interpretation of the leases was not within the Board's exclusive jurisdiction. The Board had yet to make an order designating the proposed storage areas. Nothing in s. 38(3) of the Ontario Energy Board Act ousted the court's jurisdiction to entertain the appeal. The Board's subsequent decision did not turn an order interpreting contractual rights into an order for compensation under the Act. The fact the Board stayed the compensation proceeding indicated the appeal's outcome had potential relevance. The trial judge's conclusion interpreting the parties' agreements was correct. The agreements at issue demonstrated the 1998 Tribute Gas Storage Lease replaced rather than supplemented the earlier agreements on the issue of gas storage in a detailed and comprehensive manner. The two sets of documents could not co-exist given the nature of the payment and termination provisions. Tribute failed to establish the trial judgment resulted from any procedural unfairness.

Statutes, Regulations and Rules Cited:

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 6, s. 6(1)(b)

Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Sched. B, s. 19, s. 19(1), s. 19(6), s. 36.1, s. 36.1(1)(a), s. 37, s. 38, s. 38(1), s. 38(2), s. 38(3)

Appeal From:

On appeal from the judgment of Justice Helen A. Rady of the Superior Court of Justice, dated October 18, 2012, with reasons reported at 2012 ONSC 5412, 113 O.R. (3d) 67.

Counsel:

Christopher A. Lewis, for the appellant.

William Mitches, for the respondent.

The following judgment was delivered by

1 THE COURT:-- This appeal involves a dispute over the interpretation of various oil and gas agreements and whether they confer a right to inject and store gas into and under certain lands now owned by McKinley Farms Limited (the "McKinley Lands"). Both the appellant, Tribute Resources Inc. ("Tribute"), and the respondent, 2195002 Ontario Inc. ("219 Ontario"), claim the right to inject and store gas into and under the McKinley Lands under agreements made with the landowner.

2 The application judge held that 219 Ontario was entitled to the disputed rights by virtue of a Gas Storage Lease made in March 2009 (the "219 Ontario Gas Storage Lease"). She rejected Tribute's claim to those rights under an Oil and Gas Lease dated October 12, 1977 (the "1977 Oil and Gas Lease") as amended by a Unit Operation Agreement dated November 30, 1984 (the "1984 Unit Operation Agreement").

3 Although the application judge accepted that the 1977 Oil and Gas Lease and the 1984 Unit Operation Agreement conveyed certain gas storage rights that were in turn subsequently assigned to Tribute, she found that those rights were replaced by the terms of a Gas Storage Lease entered into by Tribute and McKinley Farms Limited on September 24, 1998 (the "1998 Tribute Gas Storage Lease").

4 Previous litigation that reached this court determined that the 1998 Tribute Gas Storage Lease terminated in September 2008: see *Tribute Resources Inc. v. McKinley Farms Ltd.*, 2010 ONCA 392, 263 O.A.C. 214. The application judge concluded that the termination of the 1998 Tribute Gas Storage Lease left Tribute without any right to store gas on the McKinley Lands. Any of Tribute's gas storage rights with respect to the land had been replaced by the terms of the now terminated 1998 Tribute Gas Storage Lease. The 219 Ontario Gas Storage Lease was, therefore, the only agreement permitting gas storage rights on the McKinley Lands.

5 On appeal, Tribute argues that the 1977 Oil and Gas Lease and the 1984 Unit Operation Agreement do contain gas storage rights and that those rights continue to exist despite the termination of the 1998 Tribute Gas Storage Lease. Tribute's argument turns primarily on the interaction of the relevant provisions of these three documents and, in essence, involves an issue of contractual interpretation.

6 219 Ontario submits that the application judge properly interpreted the relevant documents. However, 219 Ontario also raises a preliminary argument that this court's jurisdiction to hear this appeal has been ousted because of an order made by the Ontario Energy Board (the "OEB") after the application judge's decision.

7 For the reasons that follow, we reject 219 Ontario's preliminary argument and, in addition, we dismiss Tribute's appeal.

A. 219 ONTARIO'S PRELIMINARY ARGUMENT

8 As a preliminary argument, 219 Ontario submits that although the application judge had jurisdiction to determine the contractual rights of the parties under the various agreements, this court has no jurisdiction to entertain an appeal from the application judge's decision because of an order made by the OEB four months after the application judge's decision in respect of the McKinley Lands.

9 On December 21, 2012, at the request of Tribute, the OEB made an order under s. 36.1 of *Ontario Energy Board Act*, 1998, S.O. 1998, c. 15, Sched. B (the "Energy Act") designating the

McKinley Lands as a gas storage area and a further order under s. 38 of the Energy Act authorizing Tribute to inject, store and remove gas from those lands. In addition, the OEB stayed the pending compensation application in relation to those lands pending conclusion of "all related court proceedings ... including any appeal of [the application judge's decision]." Presumably, 219 Ontario's contractual rights in the lands, if any, would be relevant to any compensation order made by the OEB.

10 219 Ontario's preliminary argument is premised on various provisions of the Energy Act that deal with the OEB's authority to regulate gas storage areas and on this court's decision in *Snopko v. Union Gas Ltd.*, 2010 ONCA 248, 100 (O.R.) (3d) 161, interpreting those provisions.

11 As described in *Snopko*, at para. 22:

> [u]nder the [Energy] Act, the [OEB] has broad jurisdiction to regulate the storage of natural gas, to designate an area as a gas storage area, to authorize the injection of gas into that area, and to order the person so authorized to pay just and equitable compensation to the owners of the property overlaying the storage area.

12 Under s. 36.1(a) of the Energy Act, the OEB may "designate an area as a gas storage area for the purposes of the Act."

13 Section 37 prohibits the injection of gas for storage into a geological formation:

> "unless the geological formation is within a designated gas storage area" and, in relation to gas storage areas designated after January 31, 1962, "unless ... authorization has been obtained"..

14 Under s. 38(1) of the Energy Act, the OEB may authorize the injection, storage and removal of gas from a designated gas storage area.

15 Subject to any agreement, s. 38(2) requires a person authorized to inject, store and remove gas from a designated gas storage area to make "just and equitable compensation" to the owners of such rights with respect to those rights and for any damage resulting from their exercise.

16 Notably, s. 38(3) of the Energy Act gives the OEB exclusive jurisdiction to deal with compensation issues relating to authorized injection and storage rights and prohibits civil proceedings with respect to such issues:

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

17 Further, s. 19 of the Energy Act gives the OEB the authority to hear and determine all questions of fact and law falling within its jurisdiction together with exclusive jurisdiction in respect of all matters in which jurisdiction is conferred on it by the Energy Act:

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

> (6) The Board has exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it by this or any other Act.

18 In *Snopko*, this court upheld a decision dismissing for want of jurisdiction an action brought by land owners against a company authorized to inject and store gas on their lands where the action was commenced after a s. 38 compensation order had been made.

19 In *Snopko*, the landowners' action was framed in misrepresentation, breach of contract, unjust enrichment, nuisance and negligence. This court held that in determining whether an action or proceeding falls within the prohibition contained in s. 38(3), it is the substance and not the form of the claim that governs. On the facts of that case, this court found that despite their legal labels, in substance, the landowners' claims fell within the scope of "just and equitable compensation" as described in s. 38(2) of the Energy Act.

20 Relying on *Snopko* and on the various provision of the Energy Act to which we have referred, 219 Ontario contends that the orders designating the McKinley Lands as a gas storage area under the Energy Act and authorizing Tribute to inject, store and remove gas into and from those lands had the effect of ousting the court's jurisdiction to further adjudicate the issues of contractual interpretation in dispute on this appeal.

21 We do not accept 219 Ontario's submissions. The issue of jurisdiction was raised in the Superior Court. It is now undisputed that the application judge had jurisdiction to make her decision. In our view, nothing in s. 38(3) of the Energy Act ousts the jurisdiction of this court to entertain an appeal on the merits from a final order of a Superior Court judge made within its jurisdiction.

22 Tribute brought a preliminary application in the Superior Court objecting to that court's jurisdiction to entertain the application because of its pending application to the OEB for orders under ss. 36.1 and 38 of the Act. In an endorsement dated January 6, 2012, Bryant J. dismissed Tribute's objection: see *Tribute Resources Inc. v. 2195002 Ontario Inc.*, 2012 ONSC 25.

23 In his endorsement, Bryant J. concluded that this court's decision in the previous litigation between the parties, *Tribute Resources Inc. v. McKinley Farms*, resolved the jurisdiction issue.

24 At the time of the appeal hearing in the previous litigation, Tribute had a prior application pending before the OEB for an order designating the McKinley Lands as a gas storage area and for injection and storage rights.

25 At paras. 18 and 19 of this court's previous decision, Juriansz J.A. held that s. 38(3) of the Energy Act did not affect the court's jurisdiction:

> The parties are agreed that the recent decision of this court in *Snopko v. Union Gas Ltd.* (citations omitted), does not apply to this case. In *Snopko*, this court examined the scope of the privative clause set out in s. 38(3) of the [Energy Act] ...
>
> Section 38(1) provides that the OEB may make a designation order authorizing a person to "inject gas into, store gas in and remove gas from a designated gas storage area and, and to enter into and upon the land in the area and use the land for that purpose" and such an authorized person is required under s. 38(2) to make "just and equitable compensation" for the right to store gas or for any

> damage resulting from the authority to do so. *The substances of the claims in this case do not fall within the language of s. 38(2) as no designation order has been made by the OEB in relation to these lands.* The court's jurisdiction to determine the questions on appeal is not at issue. [Emphasis added.]

26 At paras. 23 and 24 of his endorsement, Bryant J. adopted this reasoning. He held that the interpretation of the leases was not within the OEB's exclusive jurisdiction because the OEB had not yet made an order designating the proposed storage areas under the Energy Act.

> The pending application filed by 219 [Ontario], dated September 1, 2011, requests a judge of the Superior Court to interpret the Tribute Oil and Gas Lease and the 219 Ontario Gas Storage Lease. The Board has not "designated a gas storage area" or "authorized a person to inject gas into, store gas in and remove gas from a designated gas storage area and to enter into and upon the land in the area and use the land for that purpose" or made a compensation order under s. 36.1, s. 38(1), s. 38(2) or s. 38(3) of the [Energy Act] ....
>
> In my view, the substance of the claims made by 219 Ontario in its application to the Superior Court for the interpretation of leases does not fall within the language of s. 36.1, s. 38(1) or s. 38(2) of the [Energy Act]. I find that judges of the Superior Court regularly interpret leases and other contracts and have the jurisdiction to interpret the contacts at issue and to grant the relief sought by 219 Ontario. I further find that the interpretation of the leases is not within the exclusive jurisdiction of the Board because the Board has not made an order designating the proposed storage areas under s. 36.1 or 38 of the Act [Energy Act]. [Footnotes omitted.] (*Tribute v. McKinley*, *supra*, at paras. 18 and 19).

27 Bryant J.'s decision was not appealed.

28 The jurisdiction of this court to entertain this appeal derives from s. 6 of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43 (the "CJA"). Under s. 6(1)(b) of the CJA, this court has jurisdiction to entertain an appeal from the application judge's decision because it is a final order of a Superior Court judge.

29 The parties agree that the application judge had jurisdiction to render her judgment interpreting the relevant contractual documents. Her judgment is a final order and nothing in s. 38(3) of the Energy Act ousts this court's jurisdiction to entertain an appeal under s. 6(1)(b) of the CJA. Neither the decision of the application judge, nor this decision, address compensation under the Energy Act. The order of the OEB made some four months after the decision of the application judge cannot turn what was an order interpreting contractual rights into an order for compensation under the Energy Act.

30 The questions of what, if any, effect this court's decision will have on the OEB's determination of the compensation issues now outstanding under the Energy Act and whether this appeal may now be moot are different issues than the jurisdictional issue raised by 219 Ontario.

31 The fact that this court has jurisdiction to entertain an appeal from the application judge's decision does not determine the question of the effect, if any, of this court's decision on the compensation issues under the Energy Act.

32 We make no comment on that subject, which will be a matter for the OEB to determine.

33 To the extent that 219 Ontario may be arguing that this court should not entertain this appeal because the OEB is entitled to make its own determination of the issues decided by the application judge thus making this appeal moot, we would not give effect to that argument in the circumstances of this case. Although 219 Ontario submits that this court should not hear this appeal, it also submits that the OEB is bound by the application judge's decision. We reject that position. 219 Ontario cannot have it both ways. If the OEB decides it is bound by the application judge's decision, the issues before this court are not moot.

34 In any event, as we have said, in its December 21, 2012, decision, the OEB stayed the compensation application in relation to the McKinley Lands pending the conclusion "of all related Court proceedings ... including any appeal of Superior Court File No. 5041/2011." The terms of this order indicate that from the perspective of the OEB, the outcome of this appeal has potential relevance to the terms of any compensation order to be made by the OEB. Accordingly, even if this appeal is now technically moot because the OEB is entitled to make its own determination of the issues determined by the application judge, we would exercise our discretion to decide it: see *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, at p. 353.

B. THE INTERPRETATION ISSUE

35 The application judge gave several reasons for holding that the 1998 Tribute Gas Storage Lease replaced the gas storage rights conveyed under the 1977 Oil and Gas Lease as amended by the 1984 Unit Operation Agreement. Tribute raises multiple grounds of appeal relating to those reasons. In our view, it is unnecessary that we address all of Tribute's arguments because an examination of the agreements at issue demonstrates that the application judge's conclusion is correct.

(1) The Agreements at Issue

36 In her reasons, the application judge briefly reviewed the agreements at issue. In doing so, she reproduced relevant provisions of the 1977 Oil and Gas Lease that refer to storage rights:

> That the Land Owner ... does hereby grant, demise, and lease to Operator for the term of ten years and so long thereafter as oil or gas are produced in paying quantities, or storage operations are being conducted, ... and Land Owner also leases to Operator the exclusive right to drill for, produce, **store**, treat, transport and remove by any method all oil and gas found in or under the said lands, **to store in any gas sands on the premises and withdraw their from gas originally produced from other lands** ...
>
> If, at any time prior to the termination of this lease, the Operator should decide to utilize **any underlying productive gas sand as a storage reservoir for the gas originally produced from other lands**, Operator agrees to notify Land Owner of such utilization, and thenceforth to pay Land Owner double the herein specified acreage rental amount as full compensation for the storage rates hearing granted and in lieu of all delay rental ...
>
> [Emphasis added by application judge.]

37 The application judge noted that gas was discovered on the McKinley Lands by Tribute's predecessor in 1982 and 1983.Following that discovery, the 1977 Oil and Gas Lease was amended by the 1984 Unit Operation Agreement, which included detailed provisions relating to production royalties and which replaced the royalty provisions in the 1977 Oil and Gas Lease. Once again, the application judge reproduced relevant portions of the 1984 Unit Operation Agreement that refer to storage rights:

> AND WHEREAS it is believed that the Salina and Guelph-Lockport formation underlying those certain lands listed and described in Schedule "B" hereunto annexed and a part hereof, (and which include all or part of the said lands) contain a gas as or gas and oil reservoir or pool known as the Stanley 4-7-XI Pool as hereinafter defined;
>
> AND WHEREAS for the purpose of protecting the Stanley 4-7-XI Pool ... and for the protection of their correlative rights ... the parties hereto desire to amend the said lease and to unite and combine that portion of the said lands which is included in Schedule "B" ... with all of the other lands in the said schedule, into a single operative unit
>
> ...
>
> 12. If, at any time prior to the termination of this Agreement, the Lessee should decide to utilize **the underlying productive gas sand as a storage reservoir** for gas originally produced from other lands, the Lessee agrees to notify the Lessor of such utilization, and thenceforth to pay Lessor double the herein specified acreage rental amount as full compensation for the storage rights herein granted and in lieu of all delay rental in event there is a productive well or wells on these lands at the date of said notification **the Lessee shall not commence utilization of the lands as a storage reservoir without first entering into an agreement with the Lessor to settle the value of the Lessor's royalty**
>
> ...
>
> 16. Excepting as herein hereby expressly modified or amended, **the said lease shall continue in all respects in full force and effect for so long as therein provided, and the same as so amended or modified is ratified and confirmed** ... [Emphasis added by application judge.]

38 As for the 1998 Tribute Gas Storage Lease, the application judge noted that it included, among others, the following terms:

> The Lessor doth hereby demise and lease unto the Lessee ... the said lands save and except the surface rights thereto ... to be held by the Lessee subject to the oil and gas lease, as tenant for a term of Ten (10) years from the date hereof, subject to renewal as hereinafter provided, for the purpose of injecting, storing and withdrawing gas, natural and/or artificial, ... within or from the devised lands

...

16. **Subject to its rights, if any, under the oil and gas** lease, the Lessee shall not inject gas into the demised lands under the provisions hereof unless

...

21. This Agreement expresses and constitutes the entire agreement between the Parties, no implied covenant or liability of any kind is created or shall arise by reason of these present or anything herein contained. [Emphasis added by application judge.]

39 In addition, the application judge referred to the following terms contained in Schedule B to the 1998 Tribute Gas Storage Lease:

* a termination provision;
* the 1998 compensation rates for crop damage and the mechanism for their calculation in ensuing years; and
* a term stating, "all provisions in this schedule shall be additional and shall be paramount with any of the terms contained in the original agreement."

(2) The Application Judge's Reasons

40 After reviewing the agreements at issue and the legal principles relevant to the interpretation of commercial contracts, the application judge turned to her analysis. She concluded that the 1998 Tribute Gas Storage Lease was intended to replace gas storage rights contained in the 1977 Oil and Gas Lease and in the 1984 Unit Operation Agreement for several reasons.

41 First, the 1998 Tribute Gas Storage Lease contained an entire agreement clause. The application judge said, "[t]his must mean that all matters pertaining to storage are contained in that lease."

42 Second, Schedule B to the 1998 Tribute Gas Storage Lease stated "all provisions in this schedule shall be additional and shall be paramount with any of the terms contained in the original agreement." The application judge concluded that this was a "clear expression of the parties' intention that the [1998 Tribute Gas Storage Lease] was to prevail [over the earlier agreements], at least in respect of those matters dealt with in the schedule."

43 Third, in the application judge's view, the 1984 Unit Operation Agreement supported her conclusion. The 1984 Unit Operation Agreement contemplated that a further agreement would be entered into prior to the lessee beginning to use the lands as a gas storage reservoir. Further, while the 1984 Unit Operation Agreement specifically provided that except as modified by it, the 1977 Oil and Gas Lease remained in full force and effect, the 1998 Tribute Gas Storage Lease contained no such language.

44 Fourth, the 1998 Tribute Gas Storage Lease contained broader storage rights and more detailed provisions relating to storage rights than the earlier agreements. In the application judge's view:

> [t]he parties' subsequent conduct in executing a specific storage lease support[ed] the common sense conclusion that they considered that the earlier lease dealt primarily with drilling and extraction rights and did not adequately provide for storage.

In her view, it was "disingenuous" for Tribute to assert that the 1998 Tribute Gas Storage Lease was created to "supplement" the earlier agreements. The broader rights and privileges included in the 1998 Tribute Gas Storage Lease were:

> strong objective evidence that the parties intended the storage lease to provide for all of the contractual rights and obligations governing storage and that it was to replace rather than supplement the earlier agreement.

(3) Tribute's Position on Appeal

45 Tribute submits that the application judge made multiple errors in her interpretation of the 1998 Tribute Gas Storage Lease:

* she failed to consider and give meaning to the four references in the 1998 Tribute Gas Storage Lease to that agreement being "subject to the oil and gas lease";
* she erred in relying on the entire agreement clause in the 1998 Tribute Gas Storage Lease as supporting her interpretation that the 1998 Tribute Gas Storage Lease replaces the earlier agreements;
* she erred in failing to accept the uncontradicted evidence of Tribute's representative that the 1998 Tribute Gas Storage Lease was intended to supplement the earlier agreements and to provide Tribute with a modern form of gas lease to submit to the OEB;
* she erred in concluding that the words "original agreement" in Schedule B to the 1998 Tribute Gas Storage Lease referred to the 1977 Oil and Gas Lease as opposed to the pre-printed section of the 1998 Tribute Gas Storage Lease; and
* she erred in concluding that the language of the 1984 Unit Operation Agreement supported her interpretation.

46 In addition, Tribute asserts that the application judge's findings are procedurally unfair because she referred in her reasons to six decisions not relied on by 219 Ontario and because her central conclusion that the 1998 Tribute Gas Storage Lease was intended to replace gas storage rights contained in earlier documents was not anchored in the pleadings.

(4) Discussion

47 As we have said, in our view, an examination of the agreements at issue demonstrates that the 1998 Tribute Gas Storage Lease was intended to replace the earlier agreements insofar as they related to gas storage rights. We note, first of all, that the 1998 Tribute Gas Storage Lease is, on its face, a detailed document designed specifically to address gas storage rights, whereas the 1977 Oil and Gas Lease as amended by the 1984 Unit Operation Agreement addresses the issue of gas storage rights somewhat peripherally.

48 Both the title and terms of the 1998 Tribute Gas Storage Lease demonstrate that the agreement was designed specifically to address gas storage rights. The document is called, and registered on title as, a Gas Storage Lease Agreement. The demising clause states that the lands (save and except the surface rights) are leased "for the purpose of injecting, storing and withdrawing gas, natural and/or artificial ... within or from the demised lands". The terms of the 1998 Tribute Gas Storage Lease are detailed and make more specific provision for matters addressed in less detail in the earlier agreements.

49 For example, Schedule B to the 1998 Tribute Gas Storage Lease makes specific provision for the 1998 compensation rates for crop damage for individual crops and the mechanism for calculation of crop damage rates in ensuing years.

50 By way of contrast, the 1977 Oil and Gas Lease as amended by the 1984 Unit Operation Agreement deals primarily with oil production and royalties issues. Although gas storage rights are provided for, they are not the main focus and are not dealt with in the same level of detail as in the 1998 Tribute Gas Storage Lease.

51 Perhaps more importantly, the payment provisions of the 1998 Tribute Gas Storage Lease are different than, and inconsistent with, the payment provisions of the 1977 Oil and Gas Lease as amended by the 1984 Unit Operation Agreement.

52 The latter documents provide a per acreage charge for gas storage rates and require that the parties enter into a further agreement to address residual royalties. Clause 12 of the 1984 Unit Operation Agreement states:

> 12. If, at any time prior to the termination of this Agreement, the Lessee should decide to utilize the underlying productive gas sand as a storage reservoir for gas originally produced from other lands, the Lessee agrees to notify the Lessor of such utilization, and thenceforth to pay Lessor double the herein specified acreage rental amount as full compensation for the storage rights herein granted and in lieu of all delay rental in event there is a productive well or wells on these lands at the date of said notification the Lessee shall not commence utilization of the lands as a storage reservoir without first entering into an agreement with the Lessor to settle the value of the Lessor's royalty.

53 In contrast, the 1998 Tribute Gas Storage Lease provides that the lessee will serve a notice of what it proposes to pay for gas storage rights and that if the parties cannot agree, the issue will be determined by arbitration. Clauses 16-18 of the 1998 Tribute Gas Storage Lease read as follows:

> 16. Subject to its rights, if any, under the oil and gas lease, the Lessee shall not inject gas into the demised lands under the provisions hereof until it has offered to the Lessor the additional acreage rental to be paid to the Lessor in respect of its storage operations to be conducted hereunder in the manner hereinafter provided and until it has offered to purchase from the Lessor, as hereinafter provided, the Lessor's interest in such of the gas and oil and related hydrocarbons (hereinafter called "the petroleum substances") contained in the demised lands as are liable on the withdrawal of the gas so injected to be co-mingled indistinguishably therewith as to their respective volumes, or as are liable to be rendered commercially unrecoverable by reason of such injection or the storage operations to be con-

ducted by the Lessee hereunder. Nothing herein shall prevent the Lessee from and it is hereby given the right at any time and from time to time to purchase the Lessor's interest in any or all the other petroleum substances contained in the demised lands.

17. The purchase price of any of the petroleum substances to be purchased by the Lessee under Clause 16 hereof shall be computed as follows:

...

18. In the event that the Lessee desires to purchase any of the petroleum substances as provided in Clauses 16 and 17 hereof, it shall give written notice to the Lessor of the quantity thereof to be purchased, the price therefor computed as provided in Clause 17(a) and the effective date of such purchase. The Lessee shall in addition state the additional acreage rental to be paid by the Lessee in respect of its storage operations to be conducted hereunder. The Lessor shall within Thirty (30) days from the receipt of the aforesaid notice advise the Lessee that it disputes either the purchase price or the additional acreage rental or both of them and in default of such notice of dispute the Lessor shall be deemed to have agreed thereto and the same shall become final and binding upon the Lessor and the Lessee. In the event that the Lessor gives such notice of dispute, such purchase price and additional acreage rental and any other compensation payable to the Lessor in respect of the Lessee's storage rights hereunder shall be determined by a board of arbitration in the manner provided under the Energy Board Act of Ontario and the regulations thereunder or any act or regulations in amendment or substitution therefor.

54 In our view, this difference in the payment provisions makes it clear that the 1998 Tribute Gas Storage Lease was intended to replace the earlier agreements and not merely to supplement them. Because of the difference in the payment provisions, the two sets of documents could not co-exist.

55 Equally compelling evidence that the 1998 Tribute Gas Storage Lease was intended to replace the earlier agreements is the fact that this agreement provides that it would terminate if the issue of designation of the lands as a Gas Storage Area had not been taken to the OEB within ten years.

56 The 1998 Tribute Gas Storage Lease had a term of ten years. Clause 3 of the main body of the agreement provides for automatic renewal of the agreement upon the expiry of the ten year term unless the lessee provided written notice of its desire not to renew the agreement.

57 However, Schedule B to the 1998 Tribute Gas Storage Lease states:

> This Gas Storage Lease Agreement shall terminate on the tenth anniversary date, if and only if, the Lessee or some other person has not applied to the Ontario Energy Board to have the said lands or any part thereof designated as a Gas Storage area on or before the tenth anniversary date hereof.

58 In our view, when read in conjunction with clause 3 of the 1998 Tribute Gas Storage Lease providing for the automatic renewal of that agreement, the termination provision in Schedule B

demonstrates that the parties intended Tribute's gas storage rights to come to an end if the issue of gas storage rights had not been taken to the OEB within the ten year term. The automatic renewal provision ensured that Tribute's gas storage rights were to continue indefinitely and that they were to do so on the terms set out in the 1998 Tribute Gas Storage Lease. However, they would only continue indefinitely if the issue of gas storage rights had been taken to the OEB during the initial term of the 1998 Tribute Gas Storage Lease. Otherwise, gas storage rights would end.

59 Based on our review of the relevant agreements, we are satisfied that the application judge was correct in holding that the 1998 Tribute Gas Storage Lease was intended to replace the earlier agreements.

60 Further, we reject Tribute's claim that it has suffered procedural unfairness. The issue before the application judge was the proper interpretation of the agreements at issue. Tribute has had a full opportunity to present and respond to arguments concerning that issue.

C. DISPOSITION

61 Based on the foregoing reasons, we reject 219 Ontario's preliminary argument that this court lacks jurisdiction to entertain this appeal and we dismiss Tribute's appeal. Costs of the appeal are to 219 Ontario fixed in the amount of $26,150 inclusive of disbursements and applicable taxes as agreed upon by the parties.

D.H. DOHERTY J.A.
J.M. SIMMONS J.A.
S.E. PEPALL J.A.

Tab 10

Case Name:

Tribute Resources Inc. v. McKinley Farms Ltd.

Between
Tribute Resources Inc., Applicant (Appellant), and
McKinley Farms Ltd., Respondent (Respondent in Appeal)
And between
McKinley Farms Ltd., Applicant (Respondent in Appeal), and
Tribute Resources Inc., Respondent (Appellant)

[2010] O.J. No. 2293

2010 ONCA 392

263 O.A.C. 214

Docket: C50782

Ontario Court of Appeal
Toronto, Ontario

R.P. Armstrong, S.E. Lang and R.G. Juriansz and JJ.A.

Heard: January 26, 2010.
Judgment: June 2, 2010.

(31 paras.)

Contracts -- Terms -- Classification -- Conditions -- Condition precedent -- Express terms -- Term and termination -- Renewal -- Appeal by lessee of oil and gas rights and gas storage facility from dismissal of application for declaration leases were valid allowed in part -- Judge erred in finding oil and gas lease terminated -- Amending agreement provided for continuation of oil and gas lease as long as rental payments being made -- Judge properly held application for Energy Board approval of lands subject to gas storage lease was condition precedent for extending gas storage lease beyond 10-year term -- No application made within term so gas storage lease terminated -- Oil and gas lease continued to be valid as payments made.

Natural resources law -- Oil and gas -- Lease or license for production -- Terms and conditions -- Obligation to pay -- Terms -- Termination -- Contracts -- Terms and conditions -- Appeal by lessee of oil and gas rights and gas storage facility from dismissal of application for declaration leases

were valid allowed in part -- Judge erred in finding oil and gas lease terminated -- Amending agreement provided for continuation of oil and gas lease as long as rental payments being made -- Judge properly held application for Energy Board approval of lands subject to gas storage lease was condition precedent for extending gas storage lease beyond 10-year term -- No application made within term so gas storage lease terminated -- Oil and gas lease continued to be valid as payments made -- Ontario Energy Board Act, s. 38.

Appeal by Tribute from the dismissal of its application for a declaration that two leases were valid. Tribute's predecessor executed an Oil and Gas Lease with McKinley's predecessor in 1977. The lease gave Tribute oil and gas rights in exchange for monthly payments. The term was 10 years and so long thereafter as oil and gas were produced in paying quantities. In 1984, the parties amended the Oil and Gas Lease with a Unit Operating Agreement. The Agreement replaced the terms of the Oil and Gas Lease dealing with rental payments, and substituted a term requiring Tribute to make an annual per-acre rental payment for the lands subject to the lease. The Agreement also provided, in the same section dealing with payment, that the lease would continue as long as rental payments were made. As of July 2001, gas was no longer produced in paying quantities, but Tribute continued to make the annual rental payments set out in the Agreement, some of which were tendered and accepted late. In September 1998, the parties entered into a Gas Storage Lease, pursuant to which Tribute leased certain land from McKinley for the purpose of constructing and operating a gas storage facility. The Gas Storage Lease provided that it was to terminate in 10 years, unless one of the parties made an application to the Ontario Energy Board to have the subject lands designated as a gas storage area. No such application was ever made, but Tribute nonetheless made a rental payment pursuant to the Gas Storage Lease after 10 years had passed and McKinley accepted the payment. In October 2008, Tribute asked McKinley to enter into a Gas Storage Agreement for one more year, to give it time to make the application to the Board. McKinley declined, and returned the payment Tribute proffered for that period. A judge found both leases had terminated in dismissing an application by Tribute for a declaration that they were both valid. The judge found the Oil and Gas Lease terminated in 2001 when gas was no longer produced in paying quantities. He construed the Unit Operating Agreement against Tribute, the author of the Agreement. He found the payment section of the Agreement ineffective to extend the term of the original Oil and Gas Lease, as McKinley would not have expected such a term to be buried in a clause dealing with payment. The judge also found the Gas Storage Lease had terminated based on its clear requirement that an application to the Board within its 10-year term was required to extend the term.

HELD: Appeal allowed in part. The Oil and Gas Lease was valid but the Gas Storage Lease had terminated. The judge properly interpreted the Gas Storage Lease. It was clear that an application to the Board prior to the expiry of the 10-year term was a condition precedent to the extension of the term. The judge erred in his determination that the Oil and Gas Lease had terminated. All the agreements between the parties were sophisticated commercial documents. There was no evidence that the term in the Unit Operating Agreement providing for an extension of the Oil and Gas Lease was camouflaged or buried by Tribute in the document. Because Tribute continued to make and McKinley continued to accept rental payments, the Oil and Gas Lease continued.

Statutes, Regulations and Rules Cited:

Ontario Energy Board Act, 1998, S.O. 1998, c. 15, s. 38(1), s. 38(2), s. 38(3)

Ontario Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 14.05

Appeal From:

On appeal from the judgment of Justice T. David Little of the Superior Court of Justice dated June 29, 2009.

Counsel:

Christopher A. Lewis, for the appellant.

Jed Chinneck and William Mitches, for the respondent.

[Editor's note: Corrections were released by the Court July 23 and 27, 2010; the changes have been made to the text and the corrections are appended to this document.]

The judgment of the Court was delivered by

1 R.G. JURIANSZ J.A.:-- Tribute Resources Inc. ("Tribute") appeals from the dismissal of its application to declare valid two leases: an Oil and Gas Lease and a Gas Storage Lease. The same judgment granted the respondent, McKinley Farms Ltd. ("McKinley"), declarations that these leases were terminated. At issue in this appeal is the validity of the two leases.

2 For the reasons that follow, I would allow the appeal in part. I would find the Oil and Gas Lease is valid and subsisting, but that the Gas Storage Lease terminated.

A. FACTS

3 Tribute, through its predecessor, executed an Oil and Gas Lease with the predecessor of McKinley Farms Inc. ("McKinley") on October 12, 1977, by which McKinley leased certain oil and gas rights to Tribute for annual rental payments. The term of the Oil and Gas Lease was "ten years and so long thereafter as oil or gas are produced in paying quantities, or storage operations are being conducted".

4 The Oil and Gas Lease was amended by a Unit Operating Agreement dated October 30, 1984. Paragraph three of the Unit Operating Agreement dealt with payments to be made by Tribute to McKinley "in lieu of all payments under the said lease". One of the payments required to be made or tendered was an annual rental payment of $2.50 for every acre of the lands retained by Tribute. Section 3(b) of the Unit Operating Agreement provided, in part, as follows:

> And as long as the payments in this clause provided are made or tendered, operations for the production of the leased substances from the unit area shall be deemed to be conducted by the lessee on the said lands under the said lease, and the said lease as hereby amended shall remain in full force and effect as to all of the said lands retained by the lessee under the said lease and/or this agreement.

5 As of July 31st, 2001, gas was no longer produced in paying quantities. Tribute continued to pay McKinley the annual rental payments pursuant to the Unit Operating Agreement, some of which were tendered and accepted late.

6 The parties entered into a Gas Storage Lease Agreement dated September 24, 1998. Under this lease, which is subject to the (amended) Oil and Gas Lease, Tribute leased certain of McKinley's land for the purpose of constructing and operating a gas storage facility. The term of the Gas Storage Lease was 10 years. Schedule B of this lease provided that "all provisions of the schedule shall be additional and shall be paramount with any of the terms in the original agreement". One term in Schedule B stated as follows:

> This Gas Storage Lease Agreement shall terminate on the tenth anniversary date, if and only if, the lessee or some other person has not applied to the Ontario Energy Board to have the said lands or any part thereof designated as a gas storage area on or before the tenth anniversary date hereof.

7 No application was made to the Ontario Energy Board ("OEB") before the tenth anniversary of the lease on September 24, 2008. However, in August 2008 Tribute had delivered to McKinley a cheque for the gas storage rental for the period of September 24, 2008 to September 23, 2009. Though the cheque was dated September 19, McKinley was able to deposit it to its account on August 25, 2008.

8 In October 2008, Tribute asked McKinley to enter into a Gas Storage Lease Amendment which would allow Tribute an additional year, until September 24, 2009, to make an application to the OEB to designate the lands as a gas storage area. McKinley sought legal advice. Eventually, McKinley, by a letter from its lawyer dated December 9, 2008, declined to execute the Gas Storage Lease Amendment, took the position that the Gas Storage Lease had terminated on September 24, 2008, returned the rental payment for the ensuing year, and invited an offer "for a fair market value lump-sum payment to reflect the value of acquiring control of the reservoir". It also took the position that the Oil and Gas Lease had terminated in 2001 when oil or gas were no longer produced in paying quantities.

9 Tribute applied to the court pursuant to rule 14.05 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, seeking declarations that the two leases each remained valid and McKinley applied for declarations that each of the leases had terminated.

B. THE APPLICATIONS JUDGE'S DECISION

10 The applications judge first considered the Oil and Gas Lease by itself. The Oil and Gas Lease's term of 10 years would be extended so long as oil and gas were being produced in paying quantities. He found that when production in paying quantities ceased in 2001 and the "well ran dry", the Oil and Gas Lease terminated.

11 The applications judge then considered whether this result was affected by s. 3(b) of the Unit Operating Agreement, which I have quoted above. He observed first that s. 3 dealt with "payments" under the original lease, and did not purport to amend the term of the lease. He described it as "camouflaged under a section one would expect dealt solely with compensation". Second, he observed, that s. 3(b) refers only to "deemed production" and not "deemed production 'in paying quantities'". As both the Oil and Gas Lease and the Unit Operating Agreement had been drafted by Tribute or its predecessor, the *contra proferentum* principle applied. Therefore, the applications judge concluded that "the failure to incorporate the necessary wording 'in paying quantities' is fatal" and that "[e]xact wording would have to be used in order to make that deemed production clause effective."

12 The applications judge added that there was no reason to expect that a party signing such an amending agreement "would anticipate finding, buried in a sub-clause dealing with payment, the potential change of the duration and term of the lease."

13 The applications judge declared that therefore the Oil and Gas Lease had terminated in 2001.

14 The applications judge's analysis of the Gas Storage Lease was straightforward. The clause in Schedule B was clear -- it provided that the lease would terminate automatically on the tenth anniversary date if no application was made to the OEB. That clause was paramount to the renewal clauses in the Gas Storage Lease itself.

15 The applications judge reasoned that it did not matter whether either party knew about the term in the lease or what actions they took subsequent to the lease. The automatic termination clause did not require Tribute to make an application to the OEB. Therefore its failure to do so could not be regarded as a default from which relief against forfeiture could be claimed. The reason that no application was made within the 10 year time limit did not matter. No application was made and the lease came to an end. The applications judge concluded that no contractual or equitable remedy was available to revive the Gas Storage Lease.

16 Therefore the applications judge granted a declaration that the Gas Storage Lease terminated on September 24, 2008.

17 Having found in McKinley's favour that both leases were terminated, the applications judge ordered Tribute to pay McKinley costs in the amount of $81,135.37 all inclusive.

C. ANALYSIS

18 The parties are agreed that the recent decision of this court in *Snopko et al. v. Union Gas Ltd.*, 2010 ONCA 248, does not apply to this case. In *Snopko*, this court examined the scope of the privative clause set out in s. 38(3) of the *Ontario Energy Board Act*, 1998, S.O. 1998, c. 15, Sched. B (the "Act"), which states as follows:

> No action or other proceeding lies in respect of compensation payable under this section and, failing agreement, the amount shall be determined by the Board.

19 Section 38(1) provides that the OEB may make a designation order authorizing a person to "inject gas into, store gas in and remove gas from a designated gas storage area, and to enter into and upon the land in the area and use the land for that purpose" and such an authorized person is required under s. 38(2) to make "just and equitable compensation" for the right to store gas or for any damage resulting from the authority to do so. The substances of the claims in this case do not fall within the language of s. 38(2) as no designation order has been made by the OEB in relation to these lands. The court's jurisdiction to determine the questions on appeal is not at issue.

20 Turning to those questions, I begin with the Gas Storage Lease. I agree with the analysis of the applications judge that the automatic termination clause of Schedule B is a true condition precedent. It provides that the Gas Storage Lease will terminate on the tenth anniversary date "if and only if" Tribute or "some other person" has not made an application to the OEB. The words of the clause and the contract read as a whole do not indicate that the automatic termination provision was for the benefit of one party or the other. Rather, the parties chose a particular event, the non-occurrence of which would terminate the contract. The clause does not place any obligation of

performance on Tribute that McKinley could waive. The applications judge was correct to find that the initial acceptance of the rental payment for the ensuing year could not constitute a waiver or estoppel by conduct on the part of McKinley.

21 The applications judge was correct to grant the declaration that the Gas Storage Lease terminated on September 24, 2008.

22 I do not, however, agree with the result reached by the applications judge in regard to the Oil and Gas Lease. The Oil and Gas Lease and the Unit Operating Agreement are composed entirely of fine print. While Tribute is an oil and gas company and McKinley operates a farm, these are commercial documents that create a sophisticated and long-term commercial arrangement. I see no issue of a "camouflaged" clause or of language being "buried in a sub-clause". McKinley must be taken to have assented to the contents of the documents that it, or its predecessor, executed. All that is necessary is to construe the language of the contract.

23 The language of the contract does not support the distinction the applications judge made between "deemed production" and "deemed production in paying quantities". I repeat the language of para. 3 of the Unit Operating Agreement for convenience:

> And as long as the payments in this clause provided are made or tendered, operations for the production of the leased substances from the unit area shall be deemed to be conducted by the lessee on the said lands under the said lease, and the said lease as hereby amended shall remain in full force and effect as to all of the said lands retained by the lessee under the said lease and/or this agreement.

24 What is deemed are "operations for the production of the leased substances from the unit area". These operations are deemed "to be conducted by the lessee on the said lands under the said lease". The words "under the said lease" imply production in paying quantities because that is what the lease is about. The more important point is that the clause provides that "deemed production" keeps the lease in full force and effect. Moreover, I cannot agree that the location of the clause in the Unit Operating Agreement can be taken to mean it applies to compensation only and not to the term of the lease. The words that the lease as amended shall "remain in full force and effect" could not be a clearer reference to the duration and term of the lease.

25 I would conclude that the "deemed production clause" extended the lease as long as the annual rental payments continued to be made. The rental payments were made, though some were late.

26 The applications judge did not find it necessary to deal with McKinley's alternative submission that the Oil and Gas Lease terminated automatically when Tribute failed to make the annual rental payments by January 20 of every year. As noted above, McKinley accepted the payments in the years in which they were made late. I would not give effect to McKinley's submission.

27 The Oil and Gas Lease, as I read it, does not stipulate that failure to make the rental payments on time should operate to automatically terminate the contract. Such a construction is inconsistent with the provision of the Oil and Gas Lease that provides:

> In the event of default on the part of the Operator in making any payments hereunder or in complying with any of the conditions herein contained, the Land Owner shall notify the Operator by registered mail of his intention to cancel this

> lease. The Operator shall have 30 days from the receipt of such notice in which to remedy such default failing which the Land Owner may proceed to cancel this lease according to law.

28 McKinley never gave Tribute notice of default and intention to cancel the lease but accepted the late payments.

29 I would conclude that the applications judge erred by declaring that the Oil and Gas Lease terminated when the production of gas in paying quantities ceased in 2001. Operations for such production were deemed to continue by Tribute making annual rental payments, and the lease remained in full force and effect.

D. CONCLUSION

30 I would allow the appeal in part by setting aside the applications judge's declaration that the Oil and Gas Lease terminated. I would grant a declaration that it is a valid and subsisting lease. I would dismiss the appeal in regard to the applications judge's declaration that the Gas Storage Lease terminated.

31 I would fix the appellant's costs of the appeal in the amount of $15,000 including disbursements and GST. As success before the applications judge should have been divided, I would set aside the applications judge's disposition of costs and replace it with an order of no costs.

R.G. JURIANSZ J.A.
R.P. ARMSTRONG J.A.:-- I agree.
S.E. LANG J.A.:-- I agree.

* * * * *

Correction
Released: July 23, 2010

In the title page the judges are not listed in seniority order.

* * * * *

Correction
July 27, 2010

The cost amount in paragraph 17 should be **$81,135.37** instead of $18,125,37.

cp/e/qllxr/qljxr/qljxh/qljyw

Tab 11

Case Name:

Garland v. Consumers' Gas Co.

Gordon Garland, appellant;
v.
Enbridge Gas Distribution Inc., previously known as Consumers' Gas Company Limited, respondent, and Attorney General of Canada, Attorney General for Saskatchewan, Toronto Hydro-Electric System Limited, Law Foundation of Ontario and Union Gas Limited, interveners.

[2004] S.C.J. No. 21

[2004] A.C.S. no 21

2004 SCC 25

2004 CSC 25

[2004] 1 S.C.R. 629

[2004] 1 R.C.S. 629

237 D.L.R. (4th) 385

319 N.R. 38

J.E. 2004-931

186 O.A.C. 128

43 B.L.R. (3d) 163

9 E.T.R. (3d) 163

2004 CanLII 25

130 A.C.W.S. (3d) 32

2004 CarswellOnt 1558

2004 CarswellOnt 1559

File No.: 29052.

Supreme Court of Canada

Heard: October 9, 2003;
Judgment: April 22, 2004.

Present: Iacobucci, Major, Bastarache, Binnie, LeBel, Deschamps and Fish JJ.

(91 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Catchwords:

Restitution -- Unjust enrichment -- Late payment penalty -- Customers of regulated gas utility claiming restitution for unjust enrichment arising from late payment penalties levied by utility in excess of interest limit prescribed by s. 347 of Criminal Code -- Whether customers have claim for unjust enrichment -- Defences that can be mounted by utility to resist claim -- Whether other ancillary orders necessary.

Summary:

The respondent gas utility, whose rates and payment policies are governed by the Ontario Energy Board ("OEB"), bills its customers on a monthly basis, and each bill includes a due date for the payment of current charges. Customers who do not pay by the due date incur a late payment penalty ("LPP") calculated at five percent of the unpaid charges for that month. The LPP is a one-time penalty, and does not compound or increase over time. The appellant and his wife paid approximately $75 in LPP charges between 1983 and 1995. The appellant commenced a class action seeking restitution for unjust enrichment of LPP charges received by the respondent in violation of s. 347 of the *Criminal Code*. He also sought a preservation order. In a previous appeal to this Court, it was held that charging the LPPs amounted to charging a criminal rate of interest under s. 347 and the matter was remitted back to the trial court for further consideration. As the case raised no factual dispute, the parties brought cross-motions for summary judgment. The motions judge granted the respondent's motion for summary judgment, finding that the action was a collateral attack on the OEB's orders. The Court of Appeal disagreed, but dismissed the appellant's appeal on the grounds that his unjust enrichment claim could not be made out.

Held: The appeal should be allowed. The respondent is ordered to repay LPPs collected from the appellant in excess of the interest limit stipulated in s. 347 of the *Code* after the action was commenced in 1994 in an amount to be determined by the trial judge.

The test for unjust enrichment has three elements: (1) an enrichment of the defendant; (2) a corresponding deprivation of the plaintiff; and (3) an absence of juristic reason for the enrichment. The proper approach to the juristic reason analysis is in two parts. The plaintiff must show that no juristic reason from an established category exists to deny recovery. The established categories include a contract, a disposition of law, a donative intent, and other valid common law, equitable or statutory obligations. If there is no juristic reason from an established category, then the plaintiff has made out a *prima facie* case. The *prima facie* case is rebuttable, however, where the defendant can show that there is another reason to deny recovery. Courts should have regard at this point to two factors: the reasonable expectations of the parties and public policy considerations.

Here, the appellant has a claim for restitution. The respondent received the monies represented by the LPPs and had that money available for use in the carrying on of its business. The transfer of those funds constitutes a benefit to the respondent. The parties are agreed that the second prong of the test has been satisfied. With respect to the third prong, the only possible juristic reason from an established category that could justify the enrichment in this case is the existence of the OEB orders creating the LPPs under the "disposition of law" category. The OEB orders, however, do not constitute a juristic reason for the enrichment because they are inoperative to the extent of their conflict with s. 347 of the *Criminal Code*. The appellant has thus made out a *prima facie* case for unjust enrichment.

The respondent's reliance on the orders is relevant when determining the reasonable expectations of the parties at the rebuttal stage of the juristic reason analysis even though it would not provide a defence if the respondent was charged under s. 347 of the *Code*. However, the overriding public policy consideration in this case is the fact that the LPPs were collected in contravention of the *Criminal Code*. As a matter of public policy, criminals should not be permitted to keep the proceeds of their crime. In weighing these considerations, the respondent's reliance on the inoperative OEB orders from 1981-1994, prior to the commencement of this action, provides a juristic reason for the enrichment. After the action was commenced and the respondent was put on notice that there was a serious possibility its LPPs violated the *Criminal Code*, it was no longer reasonable to rely on the OEB rate orders to authorize the LPPs. Given that conclusion, it is only necessary to consider the respondent's defences for the period after 1994.

The respondent cannot avail itself of any defence. The change of position defence is not available to a defendant who is a wrongdoer. Since the respondent in this case was enriched by its own criminal misconduct, it should not be permitted to avail itself of the defence. Section 18 (now s. 25) of the *Ontario Energy Board Act* should be read down so as to exclude protection from civil liability damage arising out of *Criminal Code* violations. As a result, the defence does not apply in this case and it is not necessary to consider the constitutionality of the section.

This action does not constitute an impermissible collateral attack on the OEB's orders. The OEB does not have exclusive jurisdiction over this dispute, which is a private law matter under the competence of civil courts, nor does it have jurisdiction to order the remedy sought by the appellant. Moreover, the specific object of the action is not to invalidate or render inoperative the OEB's orders, but rather to recover money that was illegally collected by the respondent as a result of OEB orders. In order for the regulated industries defence to be available to the respondent, Parliament needed to have indicated, either expressly or by necessary implication, that s. 347 of the *Code* granted leeway to those acting pursuant to a valid provincial regulatory scheme. Section 347 does not contain any such indication.

The *de facto* doctrine does not apply in this case because it only attaches to government and its officials in order to protect and maintain the rule of law and the authority of government. An extension of the doctrine to a private corporation regulated by a government authority is not supported by the case law and does not further the doctrine's underlying purpose.

A preservation order is not appropriate in this case. The respondent has ceased to collect the LPPs at a criminal rate, so there would be no future LPPs to which a preservation order could attach. Even with respect to the LPPs paid between 1994 and the present, a preservation order should not be granted because it would serve no practical purpose, because the appellant has not satisfied the criteria in the Ontario *Rules of Civil Procedure*, and because *Amax* can be distinguished from this case. A declaration that the LPPs need not be paid would similarly serve no practical purpose and should not be made.

Cases Cited

Applied: Peter v. Beblow, [1993] 1 S.C.R. 980; explained: Pettkus v. Becker, [1980] 2 S.C.R. 834; Peel (Regional Municipality) v. Canada, [1992] 3 S.C.R. 762; referred to: Garland v. Consumers' Gas Co., [1998] 3 S.C.R. 112; Sprint Canada Inc. v. Bell Canada (1997), 79 C.P.R. (3d) 31; Ontario Hydro v. Kelly (1998), 39 O.R. (3d) 107; Mahar v. Rogers Cablesystems Ltd. (1995), 25 O.R. (3d) 690; Berardinelli v. Ontario Housing Corp., [1979] 1 S.C.R. 275; Sharwood & Co. v. Municipal Financial Corp. (2001), 53 O.R. (3d) 470; Rural Municipality of Storthoaks v. Mobil Oil Canada, Ltd., [1976] 2 S.C.R. 147; RBC Dominion Securities Inc. v. Dawson (1994), 111 D.L.R. (4th) 230; Rathwell v. Rathwell, [1978] 2 S.C.R. 436; Reference re Goods and Services Tax, [1992] 2 S.C.R. 445; Mack v. Canada (Attorney General) (2002), 60 O.R. (3d) 737; Multiple Access Ltd. v. McCutcheon, [1982] 2 S.C.R. 161; M & D Farm Ltd. v. Manitoba Agricultural Credit Corp., [1999] 2 S.C.R. 961; Transport North American Express Inc. v. New Solutions Financial Corp., [2004] 1 S.C.R. 249, 2004 SCC 7; Oldfield v. Transamerica Life Insurance Co. of Canada, [2002] 1 S.C.R. 742, 2002 SCC 22; Lipkin Gorman v. Karpnale Ltd., [1992] 4 All E.R. 512; Toronto (City) v. C.U.P.E., Local 79, [2003] 3 S.C.R. 77, 2003 SCC 63; Wilson v. The Queen, [1983] 2 S.C.R. 594; R. v. Litchfield, [1993] 4 S.C.R. 333; Attorney General of Canada v. Law Society of British Columbia, [1982] 2 S.C.R. 307; R. v. Jorgensen, [1995] 4 S.C.R. 55; Reference re Manitoba Language Rights, [1985] 1 S.C.R. 721; Amax Potash Ltd. v. Government of Saskatchewan, [1977] 2 S.C.R. 576.

Statutes and Regulations Cited

Civil Code of Quebec, S.Q. 1991, c. 64, arts. 1493, 1494.

Constitution Act, 1867, ss. 91(19), (27), 92(13).

Criminal Code, R.S.C. 1985, c. C-46, ss. 15, 347.

Municipal Franchises Act, R.S.O. 1990, c. M.55.

Ontario Energy Board Act, R.S.O. 1990, c. O.13, s. 18.

Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Sch. B, s. 25.

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, r. 45.02.

Authors Cited

Constantineau, Albert. A Treatise on the De Facto Doctrine. Toronto: Canada Law Book, 1910.

Fridman, Gerald Henry Louis. Restitution, 2nd ed. Scarborough, Ont.: Carswell, 1992.

Goff of Chieveley, Robert Goff, Baron, and Gareth Jones. The Law of Restitution, 6th ed. London: Sweet & Maxwell, 2002.

Lange, Donald J. The Doctrine of Res Judicata in Canada. Markham, Ont.: Butterworths, 2000.

Maddaugh, Peter D., and John D. McCamus. The Law of Restitution. Aurora, Ont.: Canada Law Book, 1990.

McInnes, Mitchell. "Unjust Enrichment -- Restitution -- Absence of Juristic Reason: Campbell v. Campbell" (2000), 79 Can. Bar Rev. 459.

Smith, Lionel. "The Mystery of 'Juristic Reason'" (2000), 12 S.C.L.R. (2d) 211.

Ziegel, Jacob S. "Criminal Usury, Class Actions and Unjust Enrichment in Canada" (2002), 18 J. Cont. L. 121.

History and Disposition:

APPEAL from a judgment of the Ontario Court of Appeal (2001), 57 O.R. (3d) 127, 208 D.L.R. (4th) 494, 152 O.A.C. 244, 19 B.L.R. (3d) 10, [2001] O.J. No. 4651 (QL), affirming a decision of the Superior Court of Justice (2000), 185 D.L.R. (4th) 536, [2000] O.J. No. 1354 (QL). Appeal allowed.

Counsel:

Michael McGowan, Barbara L. Grossman, Dorothy Fong and Christopher D. Woodbury, for the appellant.

Fred D. Cass, John D. McCamus and John J. Longo, for the respondent.

Christopher M. Rupar, for the intervener the Attorney General of Canada.

Thomson Irvine, for the intervener the Attorney General for Saskatchewan.

Alan H. Mark and Kelly L. Friedman, for the intervener Toronto Hydro-Electric System Limited.

Mark M. Orkin, Q.C., for the intervener the Law Foundation of Ontario.

Patricia D. S. Jackson and M. Paul Michell, for the intervener Union Gas Limited.

The judgment of the Court was delivered by

1 IACOBUCCI J.:-- At issue in this appeal is a claim by customers of a regulated utility for restitution for unjust enrichment arising from late payment penalties levied by the utility in excess of the interest limit prescribed by s. 347 of the *Criminal Code*, R.S.C. 1985, c. C-46. More specifically, the issues raised include the necessary ingredients to a claim for unjust enrichment, the defences that can be mounted to resist the claim, and whether other ancillary orders are necessary.

2 For the reasons that follow, I am of the view to uphold the appellant's claim for unjust enrichment and therefore would allow the appeal.

I. Facts

3 The respondent Consumers' Gas Company Limited, now known as Enbridge Gas Distribution Inc., is a regulated utility which provides natural gas to commercial and residential customers throughout Ontario. Its rates and payment policies are governed by the Ontario Energy Board ("OEB" or "Board") pursuant to the *Ontario Energy Board Act*, R.S.O. 1990, c. O.13 ("*OEBA*"), and the *Municipal Franchises Act*, R.S.O. 1990, c. M.55. The respondent cannot sell gas or charge for gas-related services except in accordance with rate orders issued by the Board.

4 Consumers' Gas bills its customers on a monthly basis, and each bill includes a due date for the payment of current charges. Customers who do not pay by the due date incur a late payment penalty ("LPP") calculated at five percent of the unpaid charges for that month. The LPP is a one-time penalty, and does not compound or increase over time.

5 The LPP was implemented in 1975 following a series of rate hearings conducted by the OEB. In granting Consumers' Gas's application to impose the penalty, the Board noted that the primary purpose of the LPP is to encourage customers to pay their bills promptly, thereby reducing the cost to Consumers' Gas of carrying accounts receivable. The Board also held that such costs, along with any special collection costs arising from late payments, should be borne by the customers who cause them to be incurred, rather than by the customer base as a whole. In approving a flat penalty of five percent, the OEB rejected the alternative course of imposing a daily interest charge on overdue accounts. The Board reasoned that an interest charge would not provide sufficient incentive to pay by a named date, would give little weight to collection costs, and might seem overly complicated. The Board recognized that if a bill is paid very soon after the due date, the penalty would, if calculated as an interest charge, be a very high rate of interest. However, it noted that customers could avoid such a charge by paying their bills on time, and that, in any event, in the case of the average bill the dollar amount of the penalty would not be very large.

6 The appellant Gordon Garland is a resident of Ontario and has been a Consumers' Gas customer since 1983. He and his wife paid approximately $75 in LPP charges between 1983 and 1995. In a class action on behalf of over 500,000 Consumers' Gas customers, Garland asserted that the LPPs violate s. 347 of the *Criminal Code*. That case also reached the Supreme Court of Canada, which held that charging the LPPs amounted to charging a criminal rate of interest under s. 347 and remitted the matter back to the trial court for further consideration (*Garland v. Consumers' Gas Co.*, [1998] 3 S.C.R. 112 ("*Garland No. 1*")). Both parties have now brought cross-motions for summary judgment.

7 The appellant now seeks restitution for unjust enrichment of LPP charges received by the respondent in violation of s. 347 of the *Code*. He also seeks a preservation order requiring Consumers' Gas to hold LPPs paid during the pendency of the litigation subject to possible repayment.

8 The motions judge granted the respondent's motion for summary judgment, finding that the action was a collateral attack on the OEB order. He dismissed the application for a preservation order. A majority of the Court of Appeal disagreed with the motions judge's reasons, but dismissed the appeal on the grounds that the appellant's unjust enrichment claim could not be made out.

II. Relevant Statutory Provisions

9 *Ontario Energy Board Act*, R.S.O. 1990, c. O.13

> **18.** An order of the Board is a good and sufficient defence to any proceeding brought or taken against any person in so far as the act or omission that is the subject of the proceeding is in accordance with the order.

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

> **25.** An order of the Board is a good and sufficient defence to any proceeding brought or taken against any person in so far as the act or omission that is the subject of the proceeding is in accordance with the order.

Criminal Code, R.S.C. 1985, c. C-46

> **15.** No person shall be convicted of an offence in respect of an act or omission in obedience to the laws for the time being made and enforced by persons in *de facto* possession of the sovereign power in and over the place where the act or omission occurs.

> **347.** (1) Notwithstanding any Act of Parliament, every one who
>
> (*a*) enters into an agreement or arrangement to receive interest at a criminal rate, or
>
> (*b*) receives a payment or partial payment of interest at a criminal rate,
>
> is guilty of
>
> (*c*) an indictable offence and is liable to imprisonment for a term not exceeding five years, or
>
> (*d*) an offence punishable on summary conviction and is liable to a fine not exceeding twenty-five thousand dollars or to imprisonment for a term not exceeding six months or to both.

III. Judicial History

A. *Ontario Superior Court of Justice* (2000), 185 D.L.R. (4th) 536

10 As this case raised no factual disputes, all parties agreed that summary judgment was the proper procedure on the motion. Winkler J. found that the appellant's claim could not succeed in law and that there was no serious issue to be tried. In so finding, he held that the "regulated industries defence" was not a complete defence to the claim. On his reading of the relevant case law, the dominant consideration was whether the express statutory language afforded a degree of flexibility to provincial regulators. Section 347 affords no such flexibility, so the defence is not available.

11 Nor, in Winkler J.'s view, did s. 15 of the *Criminal Code* act as a defence. Section 15 was a provision of very limited application, originally enacted to ensure that persons serving the Monarch *de facto* could not be tried for treason for remaining faithful to the unsuccessful claimant to the throne. While it could have a more contemporary application, it was limited on its face to actions or omissions occurring pursuant to the authority of a sovereign power. As the OEB was not a sovereign power, it did not apply.

12 Winkler J. found that the proposed action was a collateral attack on the OEB's orders. The *OEBA* indicated repeatedly that the OEB has exclusive control over matters within its jurisdiction. In addition, interested parties were welcome to participate in OEB hearings, and OEB orders were reviewable. The appellant did not avail himself of any of these opportunities, choosing instead to challenge the validity of the OEB orders in the courts. Winkler J. found that, unless attacked directly, OEB orders are valid and binding upon the respondent and its consumers. The OEB was not a party to the instant proceeding and its orders were not before the court. Winkler J. noted that the setting of rates is a balancing exercise, with LPPs being one factor under consideration. Applying *Sprint Canada Inc. v. Bell Canada* (1997), 79 C.P.R. (3d) 31 (Ont. Ct. (Gen. Div.)), *Ontario Hydro v. Kelly* (1998), 39 O.R. (3d) 107 (Gen. Div.), and *Mahar v. Rogers Cablesystems Ltd.* (1995), 25 O.R. (3d) 690 (Gen. Div.), Winkler J. found that the instant action, although framed as a private dispute between two contractual parties, was in reality an impermissible collateral attack on the validity of OEB orders. It would be inappropriate for the court to determine matters that fall squarely within the OEB's jurisdiction. Moreover, this Court's decision in *Garland No. 1* with respect to s. 347 provided the OEB with ample legal guidance to deal with the matter.

13 In case he was incorrect in that finding, Winkler J. went on to find that s. 18 of the *OEBA* provided a complete defence to the proposed action. He held that s. 18 was constitutionally valid because it did not interfere with Parliament's jurisdiction over interest and the criminal law, or, to the extent that it did, the interference was incidental. Although the respondent did not strictly comply with the OEB order in that it waived LPPs for some customers, this did not preclude the respondent from relying on s. 18.

14 In case that finding was also mistaken, Winkler J. went on to consider whether the appellant's claim for restitution was valid. The parties had conceded that the appellant had suffered a deprivation, and Winkler J. was satisfied that the respondent had received a benefit. However, he found that the OEB's rate order constituted a valid juristic reason for the respondent's enrichment.

15 Having reached those conclusions, Winkler J. declined to make a preservation order, as requested by the appellant, allowed the respondent's motion for summary judgment and dismissed the appellant's action. By endorsement, he ordered costs against the appellant.

B. *Ontario Court of Appeal* (2001), 208 D.L.R. (4th) 494

16 McMurtry C.J.O., for the majority, found that Winkler J. was incorrect in finding that there had been an impermissible collateral attack on a decision of the OEB because the appellant was not challenging the merits or legality of the OEB order or attempting to raise a matter already dealt with by the OEB. Rather, the proposed class action was based on the principles of unjust enrichment and raised issues over which the OEB had no jurisdiction. As such, the courts had jurisdiction over the proposed class action.

17 McMurtry C.J.O. further found that s. 25 of the 1998 *OEBA* (the equivalent provision to s. 18 of the 1990 *OEBA*) did not provide grounds to dismiss the appellant's action. He did not agree

that the respondent's failure to comply strictly with the OEB orders made s. 25 inapplicable. Instead, he found that while s. 25 provides a defence to any proceedings in so far as the act or omission at issue is in accordance with the OEB order, legislative provisions restricting citizen's rights of action attract strict construction (*Berardinelli v. Ontario Housing Corp.*, [1979] 1 S.C.R. 275). The legislature could not reasonably be believed to have contemplated that an OEB order could mandate criminal conduct, and even wording as broad as that found in s. 25 could not provide a defence to an action for restitution arising from an OEB order authorizing criminal conduct. He noted that this decision was based on the principles of statutory interpretation, not on the federal paramountcy doctrine.

18 Section 15 of the *Criminal Code* did not provide the respondent with a defence, either. It was of limited application and is largely irrelevant in modern times. As for the "regulated industries defence", it did not apply because the case law did not indicate that a company operating in a regulatory industry could act directly contrary to the *Criminal Code*.

19 Nonetheless, McMurtry C.J.O. held that the appellant's unjust enrichment claim could not be made out. It had been conceded that the appellant suffered a deprivation, but McMurtry C.J.O. held that the appellant failed to establish the other two elements of the claim for unjust enrichment. While payment of money will normally be a benefit, McMurtry C.J.O. found that the payment of the late penalties in this case did not confer a benefit on the respondent. Taking the "straightforward economic approach" to the first two elements of unjust enrichment, as recommended in *Peter v. Beblow*, [1993] 1 S.C.R. 980, McMurtry C.J.O. noted that the OEB sets rates with a view to meeting the respondent's overall revenue requirements. If the revenue available from LPPs had been set lower, the other rates would have been set higher. Therefore, the receipt of the LPPs was not an enrichment capable of giving rise to a restitutionary claim.

20 In case that conclusion was wrong, McMurtry C.J.O. went on to find that there was a juristic reason for any presumed enrichment. Under this aspect of the test, moral and policy questions were open for consideration, and it was necessary to consider what was fair to both the plaintiff and the defendant. It was therefore necessary to consider the statutory regime within which the respondent operated. McMurtry C.J.O. noted that the respondent was required by statute to apply the LPPs; it had been ordered to collect them and they were taken into account when the OEB made its rate orders. He found that it would be contrary to the equities in this case to require the respondent to repay all the LPP charges collected since 1981. Such an order would affect all of the respondent's customers, including the vast majority who consistently pay on time.

21 The appellant argued that a preservation order was required even if his arguments on restitution were not successful because he could still be successful in arguing that the respondent could not enforce payment of the late penalties. As he had found no basis for ordering restitution, McMurtry C.J.O. saw no reason to make a preservation order. Moreover, the order requested would serve no practical purpose because it gave the respondent the right to spend the monies at stake. He dismissed the appeal and the appellant's action. In so doing, he agreed with the motions judge that the appellant's claims for declaratory and injunctive relief should not be granted.

22 As to costs, McMurtry C.J.O. found that there were several considerations that warranted overturning the order that the appellant pay the respondent's costs. First, the order required him to pay the costs of his successful appeal to the Supreme Court of Canada. Second, even though the respondent was ultimately successful, it failed on two of the defences it raised at the motions stage

and three of the defences it raised at the Court of Appeal. Third, the proceedings raised novel issues. McMurtry C.J.O. found that each party should bear its own costs.

23 Borins J.A., writing in dissent, was of the opinion that the appeal should be allowed. He agreed with most of McMurtry C.J.O.'s reasons, but found that the plaintiff class was entitled to restitution. In his opinion, the motions judge's finding that the LPPs had enriched the respondent by causing it to have more money than it had before was supported by the evidence and the authorities. Absent material error, he held, it was not properly reviewable.

24 However, Borins J.A. found that the motions judge had erred in law in finding that there was a juristic reason for the enrichment. The motions judge had failed to consider the effect of the Supreme Court of Canada decision that the charges amount to interests at a criminal rate and that s. 347 of the *Criminal Code* prohibits the receipt of such interest. As a result of this decision, Borins J.A. felt that the rate orders ceased to have any legal effect and could not provide a juristic reason for the enrichment. A finding that the rate orders constituted a juristic reason for contravening s. 347 also allowed orders of a provincial regulatory authority to override federal criminal law and removed a substantial reason for compliance with s. 347. Thus, he held that allowing the respondent to retain the LPPs was contrary to the federal paramountcy doctrine.

25 According to Borins J.A., finding the OEB orders to constitute a juristic reason would also be contrary to the authorities which have applied s. 347 in the context of commercial obligations. This line of cases required consideration of when restitution should have been ordered and for what portion of the amount paid. Finally, it would allow the respondent to profit from its own wrongdoing.

26 Borins J.A. was not sympathetic to the respondent's claims that its change of position should allow it to keep the money it had collected in contravention of s. 347, even if it could have recovered the same amount of money on an altered rate structure. He also noted that, in his opinion, the issue of recoverability should have been considered in the context of the class action, not on the basis of the representative plaintiff's claim for $75. Borins J.A. would have allowed the appeal, set aside the judgment dismissing the appellant's claim, granted partial summary judgment, and dismissed the respondent's motion for summary judgment. The appellant would have been required to proceed to trial with respect to damages. He would also have declared that the charging and receipt of LPPs by the respondent violates s. 347(1)(*b*) of the *Criminal Code* and that the LPPs need not be paid by the appellant, and would have ordered that the respondent repay the LPPs received from the appellant, as determined by the trial judge. He would also have ordered costs against the respondent.

27 It should be noted that on January 9, 2003, McLachlin C.J. stated the following constitutional question:

> Are s. 18 of the *Ontario Energy Board Act*, R.S.O. 1990, c. O.13, and s. 25 of the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sched. B, constitutionally inoperative by reason of the paramountcy of s. 347 of the *Criminal Code*, R.S.C. 1985, c. C-46?

As will be clear from the reasons below, I have found it unnecessary to answer the constitutional question.

IV. Issues

28 1. Does the appellant have a claim for restitution?

(a) Was the respondent enriched?
(b) Is there a juristic reason for the enrichment?

2. Can the respondent avail itself of any defence?

(a) Does the change of position defence apply?
(b) Does s. 18 (now s. 25) of the *OEBA* ("s. 18/25") shield the respondent from liability?
(c) Is the appellant engaging in a collateral attack on the orders of the Board?
(d) Does the "regulated industries" defence exonerate the respondent?
(e) Does the *de facto* doctrine exonerate the respondent?

3. Other orders sought by the appellant

(a) Should this Court make a preservation order?
(b) Should this Court make a declaration that the LPPs need not be paid?
(c) What order should this Court make as to costs?

V. Analysis

29 My analysis will proceed as follows. First, I will assess the appellant's claim in unjust enrichment. Second, I will determine whether the respondent can avail itself of any defences to the appellant's claim. Finally, I will address the other orders sought by the appellant.

A. *Unjust Enrichment*

30 As a general matter, the test for unjust enrichment is well established in Canada. The cause of action has three elements: (1) an enrichment of the defendant; (2) a corresponding deprivation of the plaintiff; and (3) an absence of juristic reason for the enrichment (*Pettkus v. Becker*, [1980] 2 S.C.R. 834, at p. 848; *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762, at p. 784). In this case, the parties are agreed that the second prong of the test has been satisfied. I will thus address the first and third prongs of the test in turn.

(a) Enrichment of the Defendant

31 In *Peel, supra*, at p. 790, McLachlin J. (as she then was) noted that the word "enrichment" connotes a tangible benefit which has been conferred on the defendant. This benefit, she writes, can be either a positive benefit, such as the payment of money, or a negative benefit, for example, sparing the defendant an expense which he or she would otherwise have incurred. In general, moral and policy arguments have not been considered under this head of the test. Rather, as McLachlin J. wrote in *Peter, supra*, at p. 990, "[t]his Court has consistently taken a straightforward economic approach to the first two elements of the test for unjust enrichment". Other considerations, she held, belong more appropriately under the third element -- absence of juristic reason.

32 In this case, the transactions at issue are payments of money by late payers to the respondent. It seems to me that, as such, under the "straightforward economic approach" to the benefit analysis, this element is satisfied. Winkler J. followed this approach and was satisfied that the respondent had received a benefit. "Simply stated", he wrote at para. 95, "as a result of each LPP received by Consumers' Gas, the company has more money than it had previously and accordingly is enriched."

33 The majority of the Court of Appeal for Ontario disagreed. McMurtry C.J.O. found that while payment of money would normally be a benefit, it was not in this case. He claimed to be applying the "straightforward economic approach" as recommended in *Peter, supra*, but accepted the respondent's argument that because of the rate structure of the OEB, the respondent had not actually been enriched. Because LPPs were part of a scheme designed to recover the respondent's overall revenue, any increase in LPPs was off-set by a corresponding decrease in regular rates. Thus McMurtry C.J.O. concluded, "[t]he enrichment that follows from the receipt of LPPs is passed on to all [Consumers' Gas] customers in the form of lower gas delivery rates" (para. 65). As a result, the real beneficiary of the scheme is not the respondent but is rather all of the respondent's customers.

34 In his dissent, Borins J.A. disagreed with this analysis. He would have held that where there is payment of money, there is little controversy over whether or not a benefit was received and since a payment of money was received in this case, a benefit was conferred on the respondent.

35 The respondent submits that it is not enough that the plaintiff has made a payment; rather, it must also be shown that the defendant is "in possession of a benefit". It argues that McMurtry C.J.O. had correctly held that the benefit had effectively been passed on to the respondent's customers, so the respondent could not be said to have retained the benefit. The appellant, on the other hand, maintains that the "straightforward economic approach" from *Peter, supra*, should be applied and any other moral or policy considerations should be considered at the juristic reason stage of the analysis.

36 I agree with the analysis of Borins J.A. on this point. The law on this question is relatively clear. Where money is transferred from plaintiff to defendant, there is an enrichment. Transfer of money so clearly confers a benefit that it is the main example used in the case law and by commentators of a transaction that meets the threshold for a benefit (see *Peel, supra*, at p. 790; *Sharwood & Co. v. Municipal Financial Corp.* (2001), 53 O.R. (3d) 470 (C.A.), at p. 478; P. D. Maddaugh and J. D. McCamus, *The Law of Restitution* (1990), at p. 38; Lord Goff and G. Jones, *The Law of Restitution* (6th ed. 2002), at p. 18). There simply is no doubt that Consumers' Gas received the monies represented by the LPPs and had that money available for use in the carrying on of its business. The availability of those funds constitutes a benefit to Consumers' Gas. We are not, at this stage, concerned with what happened to this benefit in the ongoing operation of the regulatory scheme.

37 While the respondent rightly points out that the language of "received and retained" has been used with respect to the benefit requirement (see, for example, *Peel, supra*, at p. 788), it does not make sense that it is a requirement that the benefit be retained permanently. The case law does, in fact, recognize that it might be unfair to award restitution in cases where the benefit was not retained, but it does so after the three steps for a claim in unjust enrichment have been made out by recognizing a "change of position" defence (see, for example, *Rural Municipality of Storthoaks v. Mobil Oil Canada, Ltd.*, [1976] 2 S.C.R. 147; *RBC Dominion Securities Inc. v. Dawson* (1994), 111 D.L.R. (4th) 230 (Nfld. C.A.)). Professor J. S. Ziegel, in his comment on the Ontario Court of Appeal decision in this case, "Criminal Usury, Class Actions and Unjust Enrichment in Canada"

(2002), 18 *J. Cont. L.* 121, at p. 126, suggests that McMurtry C.J.O.'s reliance on the regulatory framework of the LPP in finding that a benefit was not conferred "was really a change of position defence". I agree with this assessment. Whether recovery should be barred because the benefit was passed on to the respondent's other customers ought to be considered under the change of position defence.

(b) Absence of Juristic Reason

(i) *General Principles*

38 In his original formulation of the test for unjust enrichment in *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436, at p. 455 (adopted in *Pettkus, supra*, at p. 844), Dickson J. (as he then was) held in his minority reasons that for an action in unjust enrichment to succeed:

> ... the facts must display an enrichment, a corresponding deprivation, and the absence of any juristic reason -- such as a contract or disposition of law -- for the enrichment.

39 Later formulations of the test by this Court have broadened the types of factors that can be considered in the context of the juristic reason analysis. In *Peter, supra*, at p. 990, McLachlin J. held that:

> It is at this stage that the court must consider whether the enrichment and detriment, morally neutral in themselves, are "unjust".
>
> ... The test is flexible, and the factors to be considered may vary with the situation before the court.

40 The "juristic reason" aspect of the test for unjust enrichment has been the subject of much academic commentary and criticism. Much of the discussion arises out of the difference between the ways in which the cause of action of unjust enrichment is conceptualized in Canada and in England. While both Canadian and English causes of action require an enrichment of the defendant and a corresponding deprivation of the plaintiff, the Canadian cause of action requires that there be "an absence of juristic reason for the enrichment", while English courts require "that the enrichment be unjust" (see discussion in L. Smith, "The Mystery of 'Juristic Reason'" (2000), 12 S.C.L.R. (2d) 211, at pp. 212-13). It is not of great use to speculate on why Dickson J. in *Rathwell, supra*, expressed the third condition as absence of juristic reason but I believe that he may have wanted to ensure that the test for unjust enrichment was not purely subjective in order to be responsive to Martland J.'s criticism in his reasons that application of the doctrine of unjust enrichment contemplated by Dickson J. would require "immeasurable judicial discretion" (p. 473). The importance of avoiding a purely subjective standard was also stressed by McLachlin J. in her reasons in *Peel, supra*, at p. 802, in which she wrote that the application of the test for unjust enrichment should not be "case by case 'palm tree' justice".

41 Perhaps as a result of these two formulations of this aspect of the test, Canadian courts and commentators are divided in their approach to juristic reason. As Borins J.A. notes in his dissent (at para. 105), while "some judges have taken the *Pettkus* formulation literally and have attempted to decide cases by finding a 'juristic reason' for a defendant's enrichment, other judges have decided cases by asking whether the plaintiff has a positive reason for demanding restitution". In his article,

"The Mystery of 'Juristic Reason'", *supra*, which was cited at length by Borins J.A., Professor Smith suggests that it is not clear whether the requirement of "absence of juristic reason" should be interpreted literally to require that plaintiffs show the absence of a reason for the defendant to keep the enrichment or, as in the English model, the plaintiff must show a reason for reversing the transfer of wealth. Other commentators have argued that in fact there is no difference beyond semantics between the Canadian and English tests (see, for example, M. McInnes, "Unjust Enrichment -- Restitution -- Absence of Juristic Reason: *Campbell* v. *Campbell*" (2000), 79 *Can. Bar Rev.* 459).

42 Professor Smith argues that, if there is in fact a distinct Canadian approach to juristic reason, it is problematic because it requires the plaintiff to prove a negative, namely the absence of a juristic reason. Because it is nearly impossible to do this, he suggests that Canada would be better off adopting the British model where the plaintiff must show a positive reason that it would be unjust for the defendant to retain the enrichment. In my view, however, there is a distinctive Canadian approach to juristic reason which should be retained but can be construed in a manner that is responsive to Smith's criticism.

43 It should be recalled that the test for unjust enrichment is relatively new to Canadian jurisprudence. It requires flexibility for courts to expand the categories of juristic reasons as circumstances require and to deny recovery where to allow it would be inequitable. As McLachlin J. wrote in *Peel, supra*, at p. 788, the Court's approach to unjust enrichment, while informed by traditional categories of recovery, "is capable, however, of going beyond them, allowing the law to develop in a flexible way as required to meet changing perceptions of justice". But at the same time there must also be guidelines that offer trial judges and others some indication of what the boundaries of the cause of action are. The goal is to avoid guidelines that are so general and subjective that uniformity becomes unattainable.

44 The parties and commentators have pointed out that there is no specific authority that settles this question. But recalling that this is an equitable remedy that will necessarily involve discretion and questions of fairness, I believe that some redefinition and reformulation is required. Consequently, in my view, the proper approach to the juristic reason analysis is in two parts. First, the plaintiff must show that no juristic reason from an established category exists to deny recovery. By closing the list of categories that the plaintiff must canvass in order to show an absence of juristic reason, Smith's objection to the Canadian formulation of the test that it required proof of a negative is answered. The established categories that can constitute juristic reasons include a contract (*Pettkus, supra*), a disposition of law (*Pettkus, supra*), a donative intent (*Peter, supra*), and other valid common law, equitable or statutory obligations (*Peter, supra*). If there is no juristic reason from an established category, then the plaintiff has made out a *prima facie* case under the juristic reason component of the analysis.

45 The *prima facie* case is rebuttable, however, where the defendant can show that there is another reason to deny recovery. As a result, there is a *de facto* burden of proof placed on the defendant to show the reason why the enrichment should be retained. This stage of the analysis thus provides for a category of residual defence in which courts can look to all of the circumstances of the transaction in order to determine whether there is another reason to deny recovery.

46 As part of the defendant's attempt to rebut, courts should have regard to two factors: the reasonable expectations of the parties, and public policy considerations. It may be that when these factors are considered, the court will find that a new category of juristic reason is established. In other cases, a consideration of these factors will suggest that there was a juristic reason in the par-

ticular circumstances of a case which does not give rise to a new category of juristic reason that should be applied in other factual circumstances. In a third group of cases, a consideration of these factors will yield a determination that there was no juristic reason for the enrichment. In the latter cases, recovery should be allowed. The point here is that this area is an evolving one and that further cases will add additional refinements and developments.

47 In my view, this approach to the juristic reason analysis is consistent with the general approach to unjust enrichment endorsed by McLachlin J. in *Peel, supra*, where she stated that courts must effect a balance between the traditional "category" approach according to which a claim for restitution will succeed only if it falls within an established head of recovery, and the modern "principled" approach according to which relief is determined with reference to broad principles. It is also, as discussed by Professor Smith, *supra*, generally consistent with the approach to unjust enrichment found in the civil law of Quebec (see, for example, arts. 1493 and 1494 of the *Civil Code of Quebec*, S.Q. 1991, c. 64).

(ii) *Application*

48 In this case, the only possible juristic reason from an established category that could be used to justify the enrichment is the existence of the OEB orders creating the LPPs under the "disposition of law" category. The OEB orders, however, do not constitute a juristic reason for the enrichment because they are rendered inoperative to the extent of their conflict with s. 347 of the *Criminal Code.* The plaintiff has thus made out a *prima facie* case for unjust enrichment.

49 Disposition of law is well established as a category of juristic reason. In *Rathwell, supra*, Dickson J. gave as examples of juristic reasons "a contract or disposition of law" (p. 455). In *Reference re Goods and Services Tax*, [1992] 2 S.C.R. 445 ("*GST Reference*"), Lamer C.J. held that a valid statute is a juristic reason barring recovery in unjust enrichment. This was affirmed in *Peter, supra*, at p. 1018. Most recently, in *Mack v. Canada (Attorney General)* (2002), 60 O.R. (3d) 737, the Ontario Court of Appeal held that the legislation which created the Chinese head tax provided a juristic reason which prevented recovery of the head tax in unjust enrichment. In the leading Canadian text, *The Law of Restitution, supra*, McCamus and Maddaugh discuss the phrase "disposition of law" from *Rathwell, supra*, stating, at p. 46:

> ... it is perhaps self-evident that an unjust enrichment will not be established in any case where enrichment of the defendant at the plaintiff's expense is required by law.

It seems clear, then, that valid legislation can provide a juristic reason which bars recovery in restitution.

50 Consumers' Gas submits that the LPPs were authorized by the Board's rate orders which qualify as a disposition of law. It seems to me that this submission is predicated on the validity and operability of this scheme. The scheme has been challenged by the appellant on the basis that it conflicts with s. 347 of the *Criminal Code* and, as a result of the doctrine of paramountcy, is consequently inoperative. In the *GST Reference, supra*, Lamer C.J. held that legislation provides a juristic reason "unless the statute itself is *ultra vires*" (p. 477). Given that legislation that would have been *ultra vires* the province cannot provide a juristic reason, the same principle should apply if the provincial legislation is inoperative by virtue of the paramountcy doctrine. This position is contemplated by Borins J.A. in his dissent when he wrote, at para. 149:

> In my view, it would be wrong to say that the rate orders do not provide [Consumers' Gas] with a defence under s. 18 of the *OEBA* because they have been rendered inoperative by the doctrine of federal paramountcy, and then to breathe life into them for the purpose of finding that they constitute a juristic reason for [Consumers' Gas's] enrichment.

51 As a result, the question of whether the statutory framework can serve as a juristic reason depends on whether the provision is held to be inoperative. If the OEB orders are constitutionally valid and operative, they provide a juristic reason which bars recovery. Conversely, if the scheme is inoperative by virtue of a conflict with s. 347 of the *Criminal Code*, then a juristic reason is not present. In my view, the OEB rate orders are constitutionally inoperative to the extent of their conflict with s. 347 of the *Criminal Code*.

52 The OEB rate orders require the receipt of LPPs at what is often a criminal rate of interest. Such receipt is prohibited by s. 347 of the *Criminal Code*. Both the OEB rate orders and s. 347 of the *Criminal Code* are *intra vires* the level of government that enacted them. The rate orders are *intra vires* the province by virtue of s. 92(13) (property and civil rights) of the *Constitution Act, 1867*. Section 347 of the *Criminal Code* is *intra vires* the federal government by virtue of s. 91(19) (interest) and s. 91(27) (criminal law power).

53 It should be noted that the Board orders at issue did not require Consumers' Gas to collect the LPPs within a period of 38 days. One could then make the argument that this was not an express operational conflict. But to my mind this is somewhat artificial. I say this because at bottom it is a necessary implication of the OEB orders to require payment within this period. In that respect it should be treated as an express order for purposes of the paramountcy analysis. Consequently, there is an express operational conflict between the rate orders and s. 347 of the *Criminal Code* in that it is impossible for Consumers' Gas to comply with both provisions. Where there is an actual operational conflict, it is well settled that the provincial law is inoperative to the extent of the conflict (*Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, at p. 191; *M & D Farm Ltd. v. Manitoba Agricultural Credit Corp.*, [1999] 2 S.C.R. 961). As a result, the Board orders are constitutionally inoperative. Because the Board orders are constitutionally inoperative, they do not provide a juristic reason. It therefore falls to Consumers' Gas to show that there was a juristic reason for the enrichment outside the established categories in order to rebut the *prima facie* case made out by the appellant.

54 The second stage of juristic reason analysis requires a consideration of reasonable expectations of the parties and public policy considerations.

55 When the reasonable expectations of the parties are considered, Consumers' Gas's submissions are at first blush compelling. Consumers' Gas submits, on the one hand, that late payers cannot have reasonably expected that there would be no penalty for failing to pay their bills on time and, on the other hand, that Consumers' Gas could reasonably have expected that the OEB would not authorize an LPP scheme that violated the *Criminal Code*. Because Consumers' Gas is operating in a regulated environment, its reliance on OEB orders should be given some weight. An inability to rely on such orders would make it very difficult, if not impossible, to operate in this environment. At this point, it should be pointed out that the reasonable expectation of the parties regarding LPPs is achieved by restricting the LPPs to the limit prescribed by s. 347 of the *Criminal Code* and also

would be consistent with this Court's decision in *Transport North American Express Inc. v. New Solutions Financial Corp.*, [2004] 1 S.C.R. 249, 2004 SCC 7.

56 Consumers' Gas's reliance on the orders would not provide a defence if it was charged under s. 347 of the *Criminal Code* because the orders are inoperative to the extent of their conflict with s. 347. However, its reliance on the orders is relevant in the context of determining the reasonable expectations of the parties in this second stage of the juristic reason analysis.

57 Finally, the overriding public policy consideration in this case is the fact that the LPPs were collected in contravention of the *Criminal Code*. As a matter of public policy, a criminal should not be permitted to keep the proceeds of his crime (*Oldfield v. Transamerica Life Insurance Co. of Canada*, [2002] 1 S.C.R. 742, 2002 SCC 22, at para. 11; *New Solutions, supra*). Borins J.A. focussed on this public policy consideration in his dissent. He held that, in light of this Court's decision in *Garland No. 1*, allowing Consumers' Gas to retain the LPPs collected in violation of s. 347 would let Consumers' Gas profit from a crime and benefit from its own wrongdoing.

58 In weighing these considerations, from 1981-1994, Consumers' Gas's reliance on the inoperative OEB orders provides a juristic reason for the enrichment. As the parties have argued, there are three possible dates from which to measure the unjust enrichment: 1981, when s. 347 of the *Criminal Code* was enacted, 1994, when this action was commenced, and 1998, when this Court held in *Garland No. 1* that the LPPs were limited by s. 347 of the *Criminal Code*. For the period between 1981 and 1994, when the current action was commenced, there is no suggestion that Consumers' Gas was aware that the LPPs violated s. 347 of the *Criminal Code*. This mitigates in favour of Consumers' Gas during this period. The reliance of Consumers' Gas on the OEB orders, in the absence of actual or constructive notice that the orders were inoperative, is sufficient to provide a juristic reason for Consumers' Gas's enrichment during this first period.

59 However, in 1994, when this action was commenced, Consumers' Gas was put on notice of the serious possibility that it was violating the *Criminal Code* in charging the LPPs. This possibility became a reality when this Court held that the LPPs were in excess of the s. 347 limit. Consumers' Gas could have requested that the OEB alter its rate structure until the matter was adjudicated in order to ensure that it was not in violation of the *Criminal Code* or asked for contingency arrangements to be made. Its decision not to do this, as counsel for the appellant pointed out in oral submissions, was a "gamble". After the action was commenced and Consumers' Gas was put on notice that there was a serious possibility the LPPs violated the *Criminal Code*, it was no longer reasonable for Consumers' Gas to rely on the OEB rate orders to authorize the LPPs.

60 Moreover, once this Court held that LPPs were offside, for purposes of unjust enrichment, it is logical and fair to choose the date on which the action for redress commenced. Awarding restitution from 1981 would be unfair to the respondent since it was entitled to reasonably rely on the OEB orders until the commencement of this action in 1994. Awarding restitution from 1998 would be unfair to the appellant. This is because it would permit the respondent to retain LPPs collected in violation of s. 347 after 1994 when it was no longer reasonable for the respondent to have relied on the OEB orders and the respondent should be presumed to have known the LPPs violated the *Criminal Code*. Further, awarding restitution from 1998 would deviate from the general rule that monetary remedies like damages and interest are awarded as of the date of occurrence of the breach or as of the date of action rather than the date of judgment.

61 Awarding restitution from 1994 appropriately balances the respondent's reliance on the OEB orders from 1981-1994 with the appellant's expectation of recovery of monies that were charged in violation of the *Criminal Code* once the serious possibility that the OEB orders were inoperative had been raised. As a result, as of the date this action was commenced in 1994, it was no longer reasonable for Consumers' Gas to rely on the OEB orders to insulate them from liability in a civil action of this type for collecting LPPs in contravention of the *Criminal Code*. Thus, after the action was commenced in 1994, there was no longer a juristic reason for the enrichment of the respondent, so the appellant is entitled to restitution of the portion of monies paid to satisfy LPPs that exceeded an interest rate of 60 percent, as defined in s. 347 of the *Criminal Code*.

B. *Defences*

62 Having held that the appellant's claim for unjust enrichment is made out for LPPs paid after 1994, it remains to be determined whether the respondent can avail itself of any defences raised. It is only necessary to consider the defences for the period after 1994, when the elements of unjust enrichment are made out, and thus I will not consider whether the defences would have applied if there had been unjust enrichment before 1994. I will address each defence in turn.

(a) Change of Position Defence

63 Even where the elements of unjust enrichment are made out, the remedy of restitution will be denied where an innocent defendant demonstrates that it has materially changed its position as a result of an enrichment such that it would be inequitable to require the benefit to be returned (*Storthoaks, supra*). In this case, the respondent says that any "benefit" it received from the unlawful charges was passed on to other customers in the form of lower gas delivery rates. Having "passed on" the benefit, it says, it should not be required to disgorge the amount of the benefit (a second time) to overcharged customers such as the appellant. The issue here, however, is not the ultimate destination within the regulatory system of an amount of money equivalent to the unlawful overcharges, nor is this case concerned with the net impact of these overcharges on the respondent's financial position. The issue is whether, as between the overcharging respondent and the overcharged appellant, the passing of the benefit on to other customers excuses the respondent of having overcharged the appellant.

64 The appellant submits that the defence of change of position is not available to a defendant who is a wrongdoer and that, since the respondent in this case was enriched by its own criminal misconduct, it should not be permitted to avail itself of the defence. I agree. The rationale for the change of position defence appears to flow from considerations of equity. G. H. L. Fridman writes that "[o]ne situation which would appear to render it inequitable for the defendant to be required to disgorge a benefit received from the plaintiff in the absence of any wrongdoing on the part of the defendant would be if he has changed his position for the worse as a result of the receipt of the money in question" (*Restitution* (2nd ed. 1992), at p. 458). In the leading British case on the defence, *Lipkin Gorman v. Karpnale Ltd.*, [1992] 4 All E.R. 512 (H.L.), Lord Goff stated (at p. 533):

> [I]t is right that we should ask ourselves: why do we feel that it would be unjust to allow restitution in cases such as these [where the defendant has changed his or her position]? The answer must be that, where an innocent defendant's position is so changed that he will suffer an injustice if called upon to repay or to repay in

> full, the injustice of requiring him so to repay outweighs the injustice of denying the plaintiff restitution.

65 If the change of position defence is intended to prevent injustice from occurring, the whole of the plaintiff's and defendant's conduct during the course of the transaction should be open to scrutiny in order to determine which party has a better claim. Where a defendant has obtained the enrichment through some wrongdoing of his own, he cannot then assert that it would be unjust to return the enrichment to the plaintiff. In this case, the respondent cannot avail itself of this defence because the LPPs were obtained in contravention of the *Criminal Code* and, as a result, it cannot be unjust for the respondent to have to return them.

66 Thus, the change of position defence does not help the respondent in this case. Even assuming that the respondent would have met the other requirements set out in *Storthoaks, supra*, the respondent cannot avail itself of the defence because it is not an "innocent" defendant given that the benefit was received as a result of a *Criminal Code* violation. It is not necessary, as a result, to discuss change of position in a comprehensive manner and I leave a fuller development of the other elements of this defence to future cases.

(b) Section 18/25 of the *Ontario Energy Board Act*

67 The respondent raises a statutory defence found formerly in s. 18 and presently in s. 25 of the 1998 *OEBA*. The former and the present sections are identical, and read:

> An order of the Board is a good and sufficient defence to any proceeding brought or taken against any person in so far as the act or omission that is the subject of the proceeding is in accordance with the order.

I agree with McMurtry C.J.O. that this defence should be read down so as to exclude protection from civil liability damage arising out of *Criminal Code* violations. As a result, the defence does not apply in this case and we do not have to consider the constitutionality of the section.

68 McMurtry C.J.O. was correct in his holding that legislative provisions purporting to restrict a citizen's rights of action should attract strict construction (*Berardinelli, supra*). In this case, I again agree with McMurtry C.J.O. that the legislature could not reasonably be believed to have contemplated that an OEB order could mandate criminal conduct, despite the broad wording of the section. Section 18/25, thus, cannot provide a defence to an action for restitution arising from an OEB order authorizing criminal conduct. As a consequence, like McMurtry C.J.O., I find the argument on s. 18/25 to be unpersuasive.

69 Because I find that it could not have been the intention of the legislature to bar civil claims stemming from acts that offend the *Criminal Code*, on a strict construction, s. 18/25 cannot protect Consumers' Gas from these types of claims. If the provincial legislature had wanted to eliminate the possibility of such actions, it should have done so explicitly in the provision. In the absence of such explicit provision, s. 18/25 must be read so as to exclude from its protection civil actions arising from violations of the *Criminal Code* and thus does not provide a defence for the respondent in this case.

(c) Exclusive Jurisdiction and Collateral Attack

70 McMurtry C.J.O. was also correct in his holding that the OEB does not have exclusive jurisdiction over this dispute. While the dispute does involve rate orders, at its heart it is a private law matter under the competence of civil courts and consequently the Board does not have jurisdiction to order the remedy sought by the appellant.

71 In addition, McMurtry C.J.O. is correct in holding that this action does not constitute an impermissible collateral attack on the OEB's order. The doctrine of collateral attack prevents a party from undermining previous orders issued by a court or administrative tribunal (see *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63; D. J. Lange, *The Doctrine of Res Judicata in Canada* (2000), at pp. 369-70). Generally, it is invoked where the party is attempting to challenge the validity of a binding order in the wrong forum, in the sense that the validity of the order comes into question in separate proceedings when that party has not used the direct attack procedures that were open to it (i.e., appeal or judicial review). In *Wilson v. The Queen*, [1983] 2 S.C.R. 594, at p. 599, this Court described the rule against collateral attack as follows:

> It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally -- and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment.

Based on a plain reading of this rule, the doctrine of collateral attack does not apply in this case because here the specific object of the appellant's action is not to invalidate or render inoperative the Board's orders, but rather to recover money that was illegally collected by the respondent as a result of Board orders. Consequently, the collateral attack doctrine does not apply.

72 Moreover, the appellant's case lacks other hallmarks of collateral attack. As McMurtry C.J.O. points out at para. 30 of his reasons, the collateral attack cases all involve a party, bound by an order, seeking to avoid the effect of that order by challenging its validity in the wrong forum. In this case, the appellant is not bound by the Board's orders, therefore the rationale behind the rule is not invoked. The fundamental policy behind the rule against collateral attack is to "maintain the rule of law and to preserve the repute of the administration of justice" (*R. v. Litchfield*, [1993] 4 S.C.R. 333, at p. 349). The idea is that if a party could avoid the consequences of an order issued against it by going to another forum, this would undermine the integrity of the justice system. Consequently, the doctrine is intended to prevent a party from circumventing the effect of a decision rendered against it.

73 In this case, the appellant is not the object of the orders and thus there can be no concern that he is seeking to avoid the orders by bringing this action. As a result, a threat to the integrity of the system does not exist because the appellant is not legally bound to follow the orders. Thus, this action does not appear, in fact, to be a collateral attack on the Board's orders.

(d) The Regulated Industries Defence

74 The respondent submits that it can avail itself of the "regulated industries defence" to bar recovery in restitution because an act authorized by a valid provincial regulatory scheme cannot be contrary to the public interest or an offence against the state and, as a result, the collection of LPPs

pursuant to orders issued by the OEB cannot be considered to be contrary to the public interest and thus cannot be contrary to s. 347 of the *Criminal Code*.

75 Winkler J. held that the underlying purpose of the defence, regulation of monopolistic industries in order to ensure "just and reasonable" rates for consumers, would be served in the circumstances and as a result the defence would normally apply. However, because of the statutory language of s. 347, Winkler J. determined that the defence was not permitted in this case. He wrote, at para. 34, "[t]he defendant can point to no case which allows the defence unless the federal statute in question uses the word 'unduly' or the phrase 'in the public interest'". Absent such recognition in the statute of "public interest", he held, no leeway for provincial exceptions exist.

76 I agree with the approach of Winkler J. The principle underlying the application of the defence is delineated in *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307, at p. 356:

> When a federal statute can be properly interpreted so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to another applicable construction which would bring about a conflict between the two statutes.

Estey J. reached this conclusion after canvassing the cases in which the regulated industries defence had been applied. Those cases all involved conflict between federal competition law and a provincial regulatory scheme, but the application of the defence in those cases had to do with the particular wording of the statutes in question. While I cannot see a principled reason why the defence should not be broadened to apply to cases outside the area of competition law, its application should flow from the above enunciated principle.

77 Winkler J. was correct in concluding that, in order for the regulated industries defence to be available to the respondent, Parliament needed to have indicated, either expressly or by necessary implication, that s. 347 of the *Criminal Code* granted leeway to those acting pursuant to a valid provincial regulatory scheme. If there were any such indication, I would say that it should be interpreted, in keeping with the above principle, not to interfere with the provincial regulatory scheme. But s. 347 does not contain the required indication for exempting a provincial scheme.

78 This view is further supported by this Court's decision in *R. v. Jorgensen*, [1995] 4 S.C.R. 55. In that case, the accused was charged with "'knowingly' selling obscene material 'without lawful justification or excuse'" (para. 44). The accused argued that the Ontario Film Review Board had approved the videotapes, therefore it had a lawful justification or excuse. This Court considered whether approval by a provincial body could displace a criminal charge. Sopinka J., for the majority, held that in order to exempt acts taken pursuant to a provincial regulatory body from the reach of the criminal law, Parliament must unequivocally express this intention in the legislative provision in issue (at para. 118):

> While Parliament has the authority to introduce dispensation or exemption from criminal law in determining what is and what is not criminal, and may do so by authorizing a provincial body or official acting under provincial legislation to issue licences and the like, an intent to do so must be made plain.

79 The question of whether the regulated industries defence can apply to the respondent is actually a question of whether s. 347 of the *Criminal Code* can support the notion that a valid provincial regulatory scheme cannot be contrary to the public interest or an offence against the state. In the previous cases involving the regulated industries defence, the language of "the public interest" and "unduly" limiting competition has always been present. The absence of such language from s. 347 of the *Criminal Code* precludes the application of this defence in this case.

(e) *De Facto* Doctrine

80 Consumers' Gas submits that because it was acting pursuant to a disposition of law that was valid at the time -- the Board orders -- they should be exempt from liability by virtue of the *de facto* doctrine. This argument cannot succeed. Consumers' Gas is not a government official acting under colour of authority. While the respondent points to the Board orders as justification for its actions, this does not bring the respondent into the purview of the *de facto* doctrine because the case law does not support extending the doctrine's application beyond the acts of government officials. The underlying purpose of the doctrine is to preserve law and order and the authority of the government. These interests are not at stake in the instant litigation. As a result, Consumers' Gas cannot rely on the *de facto* doctrine to resist the plaintiff's claim.

81 Furthermore, the *de facto* doctrine attaches to government and its officials in order to protect and maintain the rule of law and the authority of government. An extension of the doctrine to a private corporation that is simply regulated by a government authority is not supported by the case law and in my view does not further the underlying purpose of the doctrine. In *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, this Court held, at p. 756, that:

> There is only one true condition precedent to the application of the doctrine: the *de facto* officer must occupy his or her office under colour of authority.

It cannot be said that Consumers' Gas was a *de facto* officer acting under colour of authority when it charged LPPs to customers. Consumers' Gas is a private corporation acting in a regulatory context, not an officer vested with some sort of authority. When charging LPPs, Consumers' Gas is engaging in commerce, not issuing a permit or passing a by-law.

82 In rejecting the application of the *de facto* doctrine here, I am cognizant of the passage in *Reference re Manitoba Language Rights*, at p. 757, cited by the intervener Toronto Hydro and which, at first glance, appears to imply that the *de facto* doctrine might apply to private corporations:

> ... the *de facto* doctrine will save those rights, obligations and other effects which have arisen out of actions performed pursuant to invalid Acts of the Manitoba Legislature by public and private bodies corporate, courts, judges, persons exercising statutory powers and public officials. [Emphasis added.]

83 While this passage appears to indicate that "private bodies corporate" are protected by the doctrine, it must be read in the context of the entire judgment. Earlier, at p. 755, the Court referred to the writings of Judge A. Constantineau in *The De Facto Doctrine* (1910), at pp. 3-4. The following excerpt from that passage is relevant:

> The de facto doctrine is a rule or principle of law which ... recognizes the existence of, and protects from collateral attack, public or private bodies corporate, which, though irregularly or illegally organized, yet, under color of law, openly exercise the powers and functions of regularly created bodies ... . [Emphasis added.]

In this passage, I think it is clear that the Court's reference to "private bodies corporate" is limited to issues affecting the creation of the corporation, for example where a corporation was incorporated under an invalid statute. It does not suggest that the acts of the corporation are shielded from liability by virtue of the *de facto* doctrine.

84 This view finds further support in the following passage from the judgment (at p. 755) :

> That the foundation of the principle is the more fundamental principle of the rule of law is clearly stated by Constantineau in the following passage (at pp. 5-6):
>
> > Again, the doctrine is necessary to maintain the supremacy of the law and to preserve peace and order in the community at large, since any other rule would lead to such uncertainty and confusion, as to break up the order and quiet of all civil administration. Indeed, if any individual or body of individuals were permitted, at his or their pleasure, to challenge the authority of and refuse obedience to the government of the state and the numerous functionaries through whom it exercises its various powers, or refuse to recognize municipal bodies and their officers, on the ground of irregular existence or defective titles, insubordination and disorder of the worst kind would be encouraged, which might at any time culminate in anarchy.

The underlying purpose of the doctrine is to preserve law and order and the authority of the government. These interests are not at stake in the instant litigation. In sum, I find no merit in Consumers' Gas's argument that the *de facto* doctrine shields it from liability and as a result this doctrine should not be a bar to the appellant's recovery.

C. *Other Orders Requested*

(a) Preservation Order

85 The appellant, Garland, requests an "*Amax*-type" preservation order on the basis that the LPPs continue to be collected at a criminal rate during the pendency of this action, and these payments would never have been made but for the delays inherent in litigation (*Amax Potash Ltd. v. Government of Saskatchewan*, [1977] 2 S.C.R. 576). In my view, however, a preservation order is not appropriate in this case. Consumers' Gas has now ceased to collect the LPPs at a criminal rate. As a result, if a preservation order were made, there would be no future LPPs to which it could attach. Even with respect to the LPPs paid between 1994 and the present, to which such an order could attach, a preservation order should not be granted for three further reasons: (1) such an order would serve no practical purpose, (2) the appellant has not satisfied the criteria in the Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, and (3) *Amax* can be distinguished from this case.

86 First, the appellant has not alleged that Consumers' Gas is an impecunious defendant or that there is any other reason to believe that Consumers' Gas would not satisfy a judgment against it.

Even if there were some reason to believe that Consumers' Gas would not satisfy such a judgment, an *Amax*-type order allows the defendant to spend the monies being held in the ordinary course of business -- no actual fund would be created. So the only thing that a preservation order would achieve would be to prevent Consumers' Gas from spending the money earned from the LPPs in a non-ordinary manner (for example, such as moving it off-shore) which the appellant has not alleged is likely to occur absent the order.

87 Second, the respondent submits that by seeking a preservation order the appellant is attempting to avoid Rule 45.02 of the Ontario *Rules of Civil Procedure,* the only source of jurisdiction in Ontario to make a preservation order. The *Rules of Civil Procedure* apply to class proceedings and do not permit such an order in these circumstances. Rule 45.02 provides that, "[w]here the right of a party to a specific fund is in question, the court may order the fund to be paid into court or otherwise secured on such terms as are just" (emphasis added). The respondent submits that the appellant is not in fact claiming a specific fund here. In the absence of submissions by the appellant on this issue, I am of the view that the appellant has not satisfied the criteria set out in the Ontario *Rules of Civil Procedure* and that this Court could refuse to grant the order requested on this basis.

88 Finally, the appellant's use of *Amax, supra*, as authority for the type of order sought is without merit. The appellant has cited the judgment very selectively. The portion of the judgment the appellant cites in his written submissions reads in full (at p. 598) :

> Apart from the Rules this Court has the discretion to make an order as requested by appellants directing the Province of Saskatchewan to hold, as stakeholder, such sums as are paid by the appellants pursuant to the impugned legislation but with the right to use such sums in the interim for Provincial purposes, and with the obligation to repay them with interest in the event the legislation is ultimately held to be *ultra vires*. Such an order, however, would be novel, in giving the stakeholder the right to spend the moneys at stake, and I cannot see that it would serve any practical purpose. [Emphasis added.]

The Court in *Amax* went on to refuse to make the order. So while the appellant is right that the Court in *Amax* failed to reject the hypothetical possibility of making such an order in the future, it seems to me that in this case, as in *Amax*, such an order would serve no practical purpose. For these reasons, I find there is no basis for making a preservation order in this case.

(b) Declaration That the LPPs Need Not Be Paid

89 The appellant also seeks a declaration that the LPPs need not be paid. Given that the respondent asserts that the LPP is no longer charged at a criminal rate, issuing such a declaration would serve no practical purpose and as a result such a declaration should not be made.

(c) Costs

90 The appellant is entitled to his costs throughout. This should be understood to mean that, regardless of the outcome of any future litigation, the appellant is entitled to his costs in the proceedings leading up to and including *Garland No. 1* and this appeal. In addition, in oral submissions counsel for the Law Foundation of Ontario made the point that in order to reduce costs in future class actions, "litigation by installments", as occurred in this case, should be avoided. I agree. On this issue, I endorse the comments of McMurtry C.J.O., at para. 76 of his reasons:

> In this context, I note that the protracted history of these proceedings cast some doubt on the wisdom of hearing a case in instalments, as was done here. Before employing an instalment approach, it should be considered whether there is potential for such a procedure to result in multiple rounds of proceedings through various levels of court. Such an eventuality is to be avoided where possible, as it does little service to the parties or to the efficient administration of justice.

VI. Disposition

91 For the foregoing reasons, I would allow the appeal with costs throughout, set aside the judgment of the Ontario Court of Appeal, and substitute therefor an order that Consumers' Gas repay LPPs collected from the appellant in excess of the interest limit stipulated in s. 347 after the action was commenced in 1994 in an amount to be determined by the trial judge.

Solicitors:

Solicitors for the appellant: McGowan Elliott & Kim, Toronto.

Solicitors for the respondent: Aird & Berlis, Toronto.

Solicitor for the intervener the Attorney General of Canada: Deputy Attorney General of Canada, Ottawa.

Solicitor for the intervener the Attorney General for Saskatchewan: Deputy Attorney General for Saskatchewan, Regina.

Solicitors for the intervener Toronto Hydro-Electric System Limited: Ogilvy Renault, Toronto.

Solicitor for the intervener the Law Foundation of Ontario: Mark M. Orkin, Toronto.

Solicitors for the intervener Union Gas Limited: Torys, Toronto.

Tab 12

Ontario Energy Board

Commission de l'Énergie de l'Ontario

EB-2010-0018

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

AND IN THE MATTER OF an Application by Natural Resource Gas Limited for an Order or Orders approving or fixing just and reasonable rates and other charges for the sale, distribution, transmission and storage of gas and other discrete issues.

BEFORE: Ken Quesnelle
Presiding Member

Paul Sommerville
Board Member

DECISION AND ORDER – PHASE 2
May 17, 2012

Natural Resource Gas Limited ("NRG" or the "Applicant"), filed an application dated February 10, 2010 with the Ontario Energy Board under section 36 of the *Ontario Energy Board Act*, *1998,* S.O. c.15, for an Order or Orders approving or fixing just and reasonable rates and other charges for the sale, distribution, transmission and storage of gas for the 2011 fiscal year, commencing October 1, 2010.

NRG is a privately owned utility that sells and distributes natural gas within Southern Ontario. The utility supplies natural gas to Aylmer and surrounding areas to approximately 7,000 customers with its service territory stretching from south of Highway 401 to the shores of Lake Erie, from Port Bruce to Clear Creek.

The Board issued a Notice of Application dated March 1, 2010. The Town of Aylmer, Union Gas Limited ("Union"), Integrated Grain Processors Co-Operative Inc. ("IGPC")

and Vulnerable Energy Consumers Coalition ("VECC") applied for and were granted intervenor status.

The Board issued a decision and order on December 6, 2010 that determined rates for the 2011 rate year (effective October 1, 2010). The Board also accepted NRG's request to address the IRM component of the Application for 2012 and beyond (and certain other discrete issues) in a second phase to the proceeding ("Phase 2").

Phase 2 Proceeding

NRG filed a revised IRM plan on May 6, 2011 that adopted the same architecture as the Board's 3rd Generation Incentive Rate Mechanism for electricity distributors in Ontario.

In addition, on July 18, 2011, NRG completed its Phase 2 filing requirements by filing an independent system integrity study that identified alternatives to maintaining system pressure in NRG's southern service area as opposed to purchasing gas from the related company, NRG Corp.

A settlement conference was held on September 26, 2011. A settlement agreement was reached on two of the three issues before the Board in Phase 2; the price for gas purchased from NRG Corp. (a related company) remained unsettled. NRG filed a settlement agreement on November 11, 2011. The Board accepted the settlement agreement at the oral hearing held on November 30, 2011.

In addition, on June 7, 2011, IGPC filed a letter requesting the Board to hear a motion (the "Motion") that it had filed on August 3, 2010 related to its dispute over the construction costs of the pipeline built by NRG to serve the IGPC ethanol plant. At the oral hearing in the first phase of the proceeding, the Board determined that its decision would only address issues that had potential rate impacts. The Board indicated at that time that IGPC would be free to recast its Motion on the remaining issues should there be any at a later date.

NRG filed a letter on June 22, 2011 submitting that the Board in its Decision of December 6, 2010 had already determined the capital cost of the IGPC pipeline and that the Board did not have jurisdiction to revisit the issue. NRG maintained that if IGPC

believed that there were issues remaining in the motion then it needed to recast the motion and file the relevant materials.

In a letter filed on July 6, 2010, IGPC clarified the elements of its Motion that were, in IGPC's view, still outstanding. IGPC submitted that the capital cost of the pipeline was still in dispute and before the Board in the Motion filed by IGPC. The specific items listed by IGPC include; (i) the administrative penalty; (ii) NRG's claimed legal costs; (iii) the costs claimed in respect of Mr. Mark Bristoll; and (iv) interest and other costs.

In Procedural Order No. 7, the Board invited submissions from parties on whether the matters raised in the Motion are properly before the Board. IGPC, Board staff and NRG filed submissions on the revised Motion. IGPC filed a supplemental submission on August 19, 2011 in response to the submission made by Board staff and NRG. The Board accepted the supplemental submission of IGPC but provided NRG an opportunity to file a response if needed.

The two remaining issues before the Board in Phase 2 of the proceeding are the cost of gas purchased from NRG Corp. and the Revised Motion brought forward by IGPC.

Cost of Gas Purchased from NRG Corp.

NRG has purchased natural gas from NRG Corp., a related company for over 30 years. During that time, NRG's system has expanded significantly, from essentially a gathering system for local production to a gas utility serving more than 7,000 customers.

NRG Corp. has approximately 41 wells serving NRG and, according to the Argument-in-Chief, NRG Corp. has been drilling its wells and bringing on production for the sole purpose of supplying gas to NRG Distribution Ltd[1]. NRG has argued that this arrangement has worked well for ratepayers and if NRG had not had local supply from NRG Corp., NRG's system customers would have collectively paid an extra $2 million for gas from fiscal 2007 to 2011[2].

[1] NRG Argument-in-Chief December 23, 2011, page 10
[2] NRG Argument-in-Chief December 23, 2011, page 13

NRG has pointed to other benefits of sourcing local gas including reduced charges from Union Gas Limited as a result of requiring less gas at its interconnecting points with Union Gas Limited and lower distribution rates resulting from the avoidance of costly capital additions to supply gas to NRG's southern service area. The second benefit comes from a study undertaken by NRG to identify alternatives to buying gas from NRG Corp. while maintaining system pressure within the southern distribution area. NRG argues that, because of the manner in which its system was developed over time, it can have system pressure issues in the southern part of its service territory on days where demand for gas is particularly high. NRG maintains that the best way to address this issue is to continue to use locally produced gas (in particular that provided by NRG Corp.), as it feeds into the system closer to the problem areas.

The study presented three alternatives to purchasing gas from NRG Corp. All alternatives recommended the construction of a new pipeline of varying lengths with costs ranging from $8 million to $23 million. NRG has estimated the new pipeline costs to be in the range of $200 per customer and it is in this context that NRG believes that purchasing gas from the related company at a premium represents a good deal for customers.

NRG has proposed that it be permitted to buy gas at $8.486 per mcf from NRG Corp. whenever the market price for natural gas is $9.999 per mcf or less, and to pay the market price when natural gas is $10.00 per mcf or more.

Board staff in its submission argued that the price of $8.486 is significantly higher than the current market price and NRG has offered limited evidence of how this premium benefits ratepayers.

Board staff further argued that the system integrity study did not look at all alternatives. There was no discussion with Union Gas on how they could assist in resolving the issue. Board staff argued that a new interconnect with Union in the area experiencing the problem in the simulation might resolve the issue. The study also did not examine the volumes required to maintain system integrity. This made it difficult for the Board according to Board staff to understand the magnitude of the issue and for other potential suppliers to know if they could alleviate the problem.

Board staff further pointed out an apparent conflict of interest that NRG Corp. had in finding other potential suppliers. NRG Corp. confirmed at the hearing that NRG Ltd. does not possess the expertise to source gas and it is NRG Corp. that performs this activity on behalf of NRG Ltd[3]. Board staff was of the opinion that it was not in the best interest of NRG Corp. to source gas from other suppliers for NRG Ltd. when it is in the business of selling gas itself. Board staff submitted that in such circumstances the Board should be cautious in allowing for payment of anything more than a market price for gas, and that the onus for establishing a different price rests firmly with NRG.

The second concern expressed by Board staff was that NRG had made no serious attempt to look for other possible local gas providers in the area. Mr. Graat who as an officer of NRG Corp. is a competitor with other local suppliers, indicated at the hearing that he considered all other suppliers as being unreliable and unable to provide gas on a consistent basis[4].

In light of the above arguments, Board staff submitted that NRG had not sufficiently demonstrated that a price floor for gas from NRG Corp. was the most effective solution to the system integrity issue.

Board staff offered the following recommendations in its submission:

1. To conduct another independent study under the supervision of intervenors (such as an intervenor steering committee) that could assist in developing the scope of the study. The study should conduct a detailed examination of the NRG system, the Union interconnects, local producers within the area and the amount of gas required to maintain system integrity on a daily/weekly/monthly basis.

2. To order NRG to request quotes from all suppliers within the area that are willing to commit to providing the required quantities of gas. NRG Corp. indicated that some producers have shut their gas because of low prices[5]. The Board could allow a premium over the market price (for example: a 10% to 15% premium) in the RFQ considering that it is fulfilling peak demand and this could incite other

[3] Transcript Phase 2, Volume 1, page 51
[4] Transcript Phase 2, Volume 1, pages 53 and 118
[5] Transcript Phase 2, Volume 1, page 136

dormant producers within the area to respond to the request. This premium would still be significantly lower than that proposed by NRG Corp.

3. To keep in place the current maximum of 2.4 million cubic meters representing system integrity gas.

VECC in its submission noted the unusual situation where the sole buyer for NRG Corp.'s gas is a related utility and the gas is being sold at a premium. VECC submitted that it is inappropriate to set floor prices ($8.486 per mcf) that should be paid by a utility to an unregulated related party that guarantees up to a point a premium above market prices. VECC further submitted that the negotiations between NRG Ltd. and NRG Corp. appear to have been dominated by NRG Corp.'s take-it-or-leave-it offer, with the utility having little latitude in the talks. VECC was of the opinion that the floor price was indicative of market power, exercised by a dominant or a critical supplier.

VECC submitted that there was no evidence to substantiate that it was not in the best financial interest of NRG Corp. to sell below the floor price and in that case a market-based methodology was more appropriate. VECC supported the position of Board staff that in the absence of an RFP process, the Board should continue with the current Board approved pricing methodology. VECC also supported Board staff recommendations of another independent engineering study that included a more robust sensitivity analysis and an independent RFP process that included other potential suppliers within NRG's franchise area.

In Reply, NRG dismissed the suggestions of Board staff and VECC to undertake an additional engineering study to consider other technical and physical options to solve the system integrity issue, and ordering NRG to put out an RFP to solicit additional sources of gas supply. NRG submitted that the only issue that needs to be resolved by the Board is the pricing methodology governing gas commodity purchases from NRG Corp. NRG further submitted that the Board should determine a pricing methodology that should stay in place until NRG's next cost of service proceeding.

NRG submitted that Board staff and VECC were suggesting ways to ensure that NRG does not have to buy gas from NRG Corp. NRG clarified that it plans to continue to buy gas from NRG Corp. because it makes good sense for NRG and its ratepayers. NRG

did not consider buying gas from NRG Corp. as a problem and it submitted that it did not make sense to spend a significant amount of time and money to come up with alternatives to buying gas from NRG Corp. NRG submitted that the actual issue was fairly narrow and centered around determining an appropriate pricing methodology.

NRG pointed to several benefits of purchasing gas from NRG Corp. which included a guaranteed local supply, reduced charges from Union Gas, avoidance of costly capital additions and lower gas commodity costs as compared to gas from third parties.

NRG further submitted that the study completed by Aecon Utility Engineering was complete and the terms of reference were approved by the Board prior to initiating the study. NRG submitted that although there could be other alternatives and scenarios to examine, at some point the cost of studying the system integrity issue would outweigh the benefits. NRG indicated that irrespective of there being a system integrity issue, it still made sense for NRG to buy gas from NRG Corp. NRG claimed that it is almost impossible to determine a single amount of system integrity gas that is required given that the system is fairly dynamic.

NRG in Reply refuted Board staff's suggestion that Union Gas could provide a solution. NRG pointed to the hearing transcript in which Mr. Graat confirmed that the problem was not getting gas from Union but distributing it in the franchise area[6].

NRG dismissed the recommendations of Board staff and VECC for seeking alternative suppliers within the area for the simple reason that there were no real acceptable supply prospects in the area. NRG submitted that any RFP ordered by the Board would have to contain numerous conditions including that potential suppliers would need to have wells in the problem area, namely, NRG's southern service area. Potential suppliers would need to build and pay for pipelines to connect to NRG's distribution system and would have to be prepared to enter into a contract with no fixed quantity and be able to supply on demand. NRG further indicated that potential suppliers would need to provide some form of security such as a letter of credit or performance bond to ensure delivery under the contract.

[6] Transcript Phase 2, Volume 1, pg. 50

NRG in Reply reiterated its firm belief that there are no acceptable suppliers that would agree to or be able to supply on such conditions. NRG therefore submitted that the Board should reject the arguments of Board staff and VECC with respect to an additional engineering study and an RFP and adopt the pricing proposal of NRG.

Board Findings

Although NRG Ltd. and NRG Corp. are not technically affiliates as defined in the Board's Affiliate Relationships Code, they share a very close relationship. Mr. Graat is a controlling officer of both companies and this makes NRG Ltd. in effect a vertically integrated utility. NRG buys a portion of its gas supply needs from NRG Corp. and as the evidence as it currently stands suggests that NRG apparently has few options to replace gas purchased from NRG Corp.

The issue before the Board is not so much the fact that it is inappropriate to purchase gas from a related company but rather that the pricing mechanism being sought by NRG seems to demonstrate that NRG Corp. exercises market power within the utility's franchise area. Gas prices are at historical lows and NRG Corp. is unwilling to sell gas at market rates. In fact, NRG Corp. has testified that it is unwilling to sell below the requested rate of $8.486 per mcf and will suspend production if it was asked to sell at market rates. This means that NRG ratepayers could face a situation where supply is suspended and gas not being available in certain areas or in required quantities. The Board is concerned that NRG's customers could face a potential shutdown of services or if service is provided, customers would pay significantly higher than market rates for what could be a material portion of their gas supply.

The evidence indicates that there has been a contract between NRG and NRG Corp, although there does not seem to be an executed copy for the current time period.

Furthermore, under the terms of the agreement, NRG Corp. is not obligated to provide gas to the utility and the contractual obligation can best be described as ambiguous. NRG has testified that it needs gas from NRG Corp. to maintain system integrity and the report submitted by NRG shows that the pressure could drop to unacceptable levels in the southern service area if NRG Corp. wells were shut off on a very cold day (-28 degrees Celsius).

The study however did not identify the volume of gas that is required to maintain system integrity and accordingly system integrity demand is largely theoretical at this stage. In fact, NRG stated in Reply that it is impossible to precisely define a single amount of system integrity gas that is required. Notwithstanding that, NRG is seeking a firm rate of $8.486 per mcf for all gas purchased from NRG Corp, and asks that there be no cap on how much gas NRG can purchase from NRG Corp. at this price.

The issue before the Board is fairly complex and may require a two-step process before a long term resolution emerges. In the meantime, customers will require a reliable supply and an interim solution is required.

NRG has estimated 2.4 million cubic meters as system integrity gas. There is no evidentiary basis for this estimate and the system integrity study has been unable to confirm this number. However, in response to an undertaking[7], Mr. Chan of Aecon Utility Engineering has provided a broad range for the number of customers that could potentially lose service should the temperature dip to -28 degree Celsius and all NRG Corp. wells are shut off. The estimate varies between 300 and 3,000.

The Board believes that the number of 2.4 million cubic meters is fairly high and considers 1.0 million cubic meters to better represent the demand related to system integrity. This number represents the approximate average annual demand of 5% (353) of NRG's Rate 1 customers, an approach that is at least somewhat consonant with the information appearing in the Aecon report.

The Board will allow NRG to recover from ratepayers a maximum annual quantity of 1.0 million cubic meters of natural gas at the rate of 8.486 per mcf. Any additional quantities beyond 1.0 million cubic meters that are purchased from NRG Corp. would only be eligible for recovery from ratepayers at current market rates that would be determined quarterly as per the methodology outlined in the Board's Decision of December 6, 2010.

[7] Undertaking J1.3

The Board is aware that there are several potential suppliers in the franchise area of NRG. The argument of NRG that other potential suppliers will not be able to fulfill the requirements of its system has not been adequately demonstrated, and there is little evidentiary basis to support it. The interest of NRG's ratepayers must be protected where a related company seeks a significant premium to current market rates to supply the commodity and, at least in part, meet its own expansion plans. In addition, the Board does not have any financial information regarding NRG Corp. that demonstrates that the price that it is seeking represents a fair price for NRG customers. The Board is not necessarily opposed to NRG purchasing gas from NRG Corp. The issue is the nature, scope and extent of the premium that ratepayers are being asked to bear for this purchase option.

Board staff and VECC have recommended procurement of an independent study that would look at all relevant alternatives and conduct a more robust sensitivity analysis. The Board sees merit in this recommendation.

Accordingly, the Board will require the formation of a steering committee comprised of Board staff, intervenors and NRG that will be responsible for drafting an RFP and terms of reference for an independent study, the findings of which will be presented to the Board.

The Board invites all intervenors to be a part of the steering committee. Reasonable costs of participation, consistent with the Board's *Practice Direction on Cost Awards* will be recoverable. The committee will be responsible for selecting an independent consultant and providing directions to the consultant as to the scope of the study and the deliverables. NRG must make itself available for the committee meetings and provide all of the required data and assistance that the consultant may require.

The Board expects the study to look at the technical and engineering aspects of NRG's system and arrive at firm conclusions with respect to the amount of system integrity gas that NRG may require under different scenarios, including, but not limited to a single design day. The Board also expects the consultant to review the gas supply available within NRG's franchise area and provide an analysis on whether a competitive market can exist within NRG's franchise area and if so, the mechanics of establishing such a market. This includes identifying other potential suppliers within the area and

determining if they can be a viable and reliable supply option. The study could also examine if the Union Gas system could provide any cost effective solutions. The cost of the study will be borne by ratepayers. The resulting report will be filed with the Board no later than **September 30, 2012**. If for some reason the consultant chosen to prepare the report is unable to do so within this timeframe, the panel can be petitioned to extend it. The Board, as part of this direction approves the creation of a deferral account to capture the costs associated with the study.

Based on the recommendations of the study, the Board may order NRG to issue an RFP that would solicit alternative suppliers within the NRG franchise area.

IGPC Revised Motion

In the Revised Motion IGPC claims that the actual total cost of the pipeline has still not been directly addressed by the Board. The specific items that IGPC believes have yet to be determined include: (i) the administrative penalty; (ii) NRG's claimed legal costs; (iii) the costs claimed in respect of Mr. Mark Bristoll; and (iv) interest and other costs.

The Board sought submissions on the Recast Motion. Board staff, NRG and IGPC filed submissions.

Board staff in its submission referred to Article IX of the Pipeline Cost Recovery Agreement ("PCRA") which states on page 17:

ARTICLE IX – DISPUTE RESOLUTION

9.1 In the event of any dispute arising between the Parties regarding the subject matter of this Agreement, then the parties shall negotiate in good faith to resolve such matters.

9.2 In the event the Parties are unable to resolve a dispute, then either Party may refer to the matter to the OEB for resolution.

Board staff submitted that neither IGPC nor NRG appear to have consulted with the Board regarding the Board's proposed role of dispute arbitrator, nor was the Board aware of this provision until the PCRA was filed with the Board after it had been executed.

Board staff submitted that the Board is a quasi-judicial regulatory tribunal. Its powers, like those of all tribunals, are granted through legislation. The Board can only act in accordance with those powers specifically provided by legislation, either directly or through the doctrine of necessary implication. The Board has no legislative authority to act as an arbitrator for contractual disputes, and no provision in a contract (such as Article IX to the PCRA) can give the Board such a power. To a certain degree, the Board has already acted to resolve this dispute by determining the appropriate costs of the pipeline for ratemaking purposes. However, the Board has no further statutory powers to resolve the remaining issues concerning the total costs of the pipeline. Board staff therefore submitted that the Board should decline the invitation to act as an arbitrator.

Section 11.2(b) of the PCRA indicates that the courts of Ontario shall have exclusive jurisdiction to determine all disputes arising out of this agreement. Board staff in its submission suggested that to the extent the parties cannot come to an agreement on the total cost of the pipeline, the courts are the appropriate forum in which this dispute should be resolved.

Contrary to Board staff's submission, IGPC was of the view that the Board did have jurisdiction to determine the issues that were raised in the Motion. IGPC submitted that the powers of the Board were fairly broad and pursuant to section 19(6) of the OEB Act, the Board has exclusive authority over matters within its jurisdiction. IGPC submitted that where a capital expenditure is required by the utility for the distribution of natural gas, the process includes the potential for a one-time payment in the form of a contribution in aid of construction, combined with a series of periodic payments. IGPC submitted that a utility cannot escape regulatory oversight and charge rates that are not just and reasonable by forcing a customer to pay a contribution in aid of construction relating to unreasonable and imprudently incurred costs.

In reviewing the actual capital expenditures of NRG, IGPC submitted that certain of the expenditures claimed by NRG were imprudent and unreasonable. IGPC was thus owed a refund by NRG.

IGPC quoted Part VII.1 of the OEB Act that provides the Board with the authority to take steps to remedy the contravention, or potential contravention of an enforceable provision. IGPC submitted that in the current context, NRG had failed to fulfill the requirements of the charges it was authorized to impose and has thereby contravened an enforceable provision within the meaning of the OEB Act.

Rejecting the submission of Board staff, IGPC submitted that Board staff's position was discriminatory as it permits consumers who do not pay a contribution in aid of construction to be able to review all capital expenditures related to their project whereas consumers that pay a contribution in aid of construction are limited with respect to capital expenditures that can be reviewed (those costs that only impact rates).

IGPC further noted that Article IX of the PCRA not only appointed the Board as an arbitrator but more importantly recognized the role of the Board as the industry regulator.

NRG in its submission quoted the PCRA that confirms that the courts of Ontario have exclusive jurisdiction to determine all disputes arising out of the agreement between NRG and IGPC. Section 11(2)(b) of the PCRA states:

> 11.2 This Agreement
>
> *(b) shall be construed and enforced in accordance with, and the rights of the parties shall be governed by the laws of the Province of Ontario and the laws of Canada applicable therein, and the courts of Ontario shall have exclusive jurisdiction to determine all dispute arising out of this Agreement;*

NRG referred to the 2004 Supreme Court of Canada decision, *Garland v. Consumers' Gas Co.* [2004] 1 S.C.R. 629, that was a class proceeding started in 1994 by the plaintiff against Consumers' Gas Company Limited ("Consumers"). The plaintiff sought a restitutionary payment of $112 million, representing late payment penalties ("LPPs") paid by over 500,000 of Consumers' customers since 1981. The plaintiff also sought declaratory relief that the LPPs charged contravened s. 347 of the Criminal Code and need not be paid by the proposed plaintiff class. The rates and payment policies including the late penalty payments were governed by the Board.

Chief Justice McMurtry of the Ontario Court of Appeal noted that the restitutionary issue arising from the receipt of LPPs by Consumers for the past twenty years was an issue over which the courts have jurisdiction. He further added that the Board's jurisdiction to fix rates for gas and to set penalties for late payment does not empower it to impose a restitutionary order of the type sought by the plaintiff. Justice Iacobucci writing for a majority of the Supreme Court adopted the findings of the Court of Appeal and noted that although the dispute involved rate orders, the primary issue here was a private law matter suited to civil courts and the Board did not have jurisdiction to order the remedy sought by the plaintiff.

NRG cited this case and noted that the Supreme Court was very clear that the disputed issues are private law matters and the Board does not have jurisdiction to hear them. NRG also supported the arguments made by Board staff which noted that many of the issues in IGPC's Motion were beyond the purview of the Board.

Based on the above arguments, NRG submitted that the matters raised in IGPC's Motion were not properly before the Board.

Board Findings

The Board has already determined the rates for NRG and as part of that process addressed many of the issues raised by IGPC.

The Board substantially agrees with the submissions of Board Staff on this issue.

The Board can only act in accordance with those powers specifically provided by legislation, either directly or through the doctrine of necessary implication. The Board has no legislative authority to act as an arbitrator for contractual disputes, and no provision in a contract (such as Article IX to the PCRA) can give the Board such a power. The Board has no further statutory powers to resolve the remaining issues concerning the total costs of the pipeline.

Section 11.2(b) of the PCRA indicates that the courts of Ontario shall have exclusive jurisdiction to determine all disputes arising out of this agreement. Board staff in its submission suggested that to the extent the parties cannot come to an agreement on

the total cost of the pipeline, the courts are the appropriate forum in which this dispute should be resolved.

IGPC is seeking a refund. The issue between IGPC and NRG is essentially a contractual dispute between two private entities. The Board does not have jurisdiction to consider or remedy contractual disputes.

DATED at Toronto May 17, 2012

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary

Tab 13

Indexed as:

Kaverit Steel and Crane Ltd. v. Kone Corp (Alta. C.A.)

Between
Kaverit Steel and Crane Ltd. 299565 Alberta Ltd., Kelly Viinikka, Eric Viinikka and James Caldwell, Respondents (Plaintiffs), and
Kone Corporation, Kone Holdings (Canada) Inc., Kone Inc. and Kone Cranes Incorporated, Appellants (Defendants)

[**1992] A.J. No. 40**

87 D.L.R. (4th) 129

[1992] 3 W.W.R. 716

85 Alta. L.R. (2d) 287

120 A.R. 346

4 C.P.C. (3d) 99

40 C.P.R. (3d) 161

8 W.A.C. 346

30 A.C.W.S. (3d) 1105

Appeal No. 9103-0326-AC

Alberta Court of Appeal

Kerans, Hetherington and Irving JJ.A.

January 16, 1992

(20 pp.)

STATUTES, REGULATIONS AND RULES CITED:

International Commercial Arbitration Act, S.A. 1986, c. I-6.6, s. 2, 2(1).

Courts -- Jurisdiction -- Parties to licensing agreement agreeing to arbitration -- Claim alleging breach of contract among other things -- Added parties not subject to arbitration -- Action stayed with respect to issues resting on breach of contract.

This was an appeal from a decision refusing a stay of proceedings. The plaintiff distributor and others commenced an action against the licensor and others for, among other things, breach of the agreement between the licensor and distributor. The agreement provided for arbitration. The plaintiffs' claim contained allegations beyond simple breach of contract. The judge below held that he could not refer any of the claims of any of the added parties to arbitration.

HELD: The appeal was allowed. All the issues between the distributor and the licensor that rested upon the existence of the contract were ordered to be stayed and referred to arbitration for decision. The claim for conspiracy to harm by unlawful acts, because the unlawful acts were alleged to be unlawful breach of contract, had to go to arbitration. The law required that the parties be held to their bargain.

J.E. Redmond Q.C., for the Respondents.
Richard C. Secord, for the Appellants.

[Ed. note: Corrigendum, released February 6, 1992, appended and corrections made to judgment.]

The judgment of the Court was delivered by

REASONS FOR JUDGMENT

KERANS J.A. (allowing the Appeal):-- The appellant and defendant Kone Corporation is a Finnish manufacturer of industrial cranes and hoists that holds international patents on some devices. The respondent and plaintiff Kaverit Steel and Crane Ltd., an Albertan corporation, operates an industrial supplies business throughout Western Canada. In 1983, the two firms entered into licence and distributorship agreements whereby, according to the statement of claim, the distributor Kaverit received the exclusive right to manufacture and sell materials of the design or manufacture of the licensor Kone.

The distributor has commenced an action in Queen's Bench of Alberta alleging, among other matters, a breach of the agreement by the licensor. The substance of the complaint is that the licensor has, or its subsidiaries have, begun to Compete with the distributor in Western Canada in breach of the exclusive distributorship granted in the contract. No defence has yet been filed.

The licence and distributorship agreement provides that Alberta law governs any dispute but also contains this arbitration clause:

> Any dispute arising out of or in connection with this Agreement shall be finally settled without recourse to the courts, in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Com-

> merce, by one or more arbitrators designated in conformity with those Rules. The arbitrator or arbitrators shall have power to rule on their own competence and on the validity of the agreement to submit to arbitration place of arbitration shall be Stockholm, Sweden.

The licensor sought a stay of the suit in Queen's Bench on the sole ground that the dispute should be referred to arbitration. It lost and appeals. Before us, some confusion arose about the request for a stay. One might stay a suit as a consequence of a reference to arbitration, or for many other reasons. I understand that the only relief sought here was a stay to achieve a reference to arbitration.

The arbitration question is complicated by two factors. First, the suit adds parties, both defendant and plaintiff, who are not party to the agreement containing the arbitration clause. Second, the claim by the distributor contains allegations beyond simple breach of that contract.

The resolution of these issues engages novel questions of law. The parties agree that the International Commercial Arbitration Act S.A. 1986 cap I-6.6 (assented to August 15, 1986) governs. This case brings that statute before this Court for the first time.

The learned chambers judge decided that the submission, by which I mean the clause in the contract providing for arbitration, did govern some of the issues raised in the statement of claim, but not all. See [1991] Alta. D. 251-01. With some exceptions, with which I will later deal in detail, I agree with his analysis of what may and may not be within the scope of the clause. He then decided that, because of these other issues, nothing should go to arbitration. Faced with the prospect of inconveniently overlapping litigation and thus conflicting decisions, he decided that the prospect of this evil warranted a refusal to refer anything.

With respect, I am of the view that the applicable provisions of the International Commercial Arbitration Act under review do not permit that approach. For the reasons I shall give, I am of the view that the statute commands that what may go to arbitration shall go. No convenience test limits references.

I

The statement of claim expands upon the claim for breach of the contract both by adding parties arguably not privy and by adding issues arguably distinguishable.

I shall first deal with the extra parties. The claim adds both parties plaintiff and defendant. The extra plaintiffs are 299565 Alberta Ltd., Kelly Viinikka, Eric Viinikka and James Caldwell. The numbered company is the sole shareholder of the distributor, and the individuals are shareholders in the numbered company.

The extra defendants are three corporations that are, according to the statement of claim, wholly owned "subsidiaries" of the licensor. I take it this allegation amounts to a claim that they are controlled by the licensor, and do its bidding. Before us, the licensor conceded that none of these extra parties was a party to the submission. The real thrust of the complaint of the licensor about the extra plaintiffs was that they had no cause of action because the claims they made were "derivative", meaning they relied only upon rights held by a corporation in which they were shareholders.

This complaint is quite different from the demand for arbitration. As I said during argument, no motion to strike on this basis has been made. I will not deal with the issue. Beyond that, I agree with the learned chambers judge that he has no authority to order these other plaintiffs to submit

their claims to arbitration. (I do observe that he can stay claims pending arbitration if indeed they are derivative and must await the arbitration decision.)

Similarly, I agree with the learned Queen's Bench judge that he cannot send the distributor's claims against the licensor's subsidiaries to arbitration in the absence of consent by all the parties. Again, Counsel for the licensor accepted this point during argument. (Again I note that a judge might stay a suit against them if the arbitration will effectively resolve the claim against them.)

Associated and connected parties like subsidiaries, shareholders, directors, employees, agents and the like might be required to join an arbitration in one of three ways: by the governing law, by the submission itself, to the extent the parties to the contract can bind other parties, or by the later agreement of the other parties. None of these three yet applies here.

Mr. Secord for the licensor cites Roussel-Uclaf v. G. D. Searle (U.K.) [1978] 1 L.L.R. 225 (Ch.) as authority for bringing associated parties into an arbitration over their objection. In that case, however, the English statute under review permitted a reference of all those claiming "through or under" a party to the submission. The Alberta-International Commercial Arbitration Act, however, adopts the test in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, which is scheduled to the Act. The Convention applies, according to Article II s. 1, only to ". . . an agreement in writing under which the parties undertake to submit to arbitration . . .". Article II s. 2 clarifies that "parties" are the parties signatory: "The term 'agreement in writing' shall include an arbitral clause in a contract ... signed by the parties...".

Alberta, like the United Kingdom, could have sent to arbitration claims by or against those who claim through or under an agreement containing a submission. It has not, and perhaps this is to be regretted.

Mr. Secord also cites Isover Saint Gobain v. Dow Chemical France IX Yearbook (1984) 131 (1983) J.D.I. 899 to support his argument. That is the report of the arbitrators' decision to entertain the claims of Dow France, Dow U.S.A., Dow Zurich and Dow Europe against M. Gobain alleging that he alone was liable for the use of a product called Roofmate in France and must answer the claims pending in the French Courts against companies in the Dow family. He objected that he had not signed a submission with Dow France or Dow U.S.A., only the other Dow companies. The arbitrators nevertheless took jurisdiction over all claims on the ground that it had been the "mutual intention of all parties" that the other companies be "veritable" parties or that the contracts be for their benefit. See p. 136. In short, the decision turned on an interpretation of the submission in the circumstances of that case. I accept that the tribunal also supported its conclusion on the ground that the rule it accepted was "sensible and practical".

I can find nothing in the submission in this case, or in the surrounding circumstances, to warrant a similar conclusion. I accept that forcing the subsidiaries to partake in the arbitration may well be sensible and practical. I insist only that it is for the parties or the Legislature, not me, to decide what procedure is right for these cases.

I think it prudent to emphasize the limited nature of this ruling. One must distinguish between jurisdiction to grant relief and jurisdiction to consider actions. The subsidiaries are not parties to the arbitration in the sense that the claimant might get relief against them directly. But arbitrators might nevertheless decide that, for the purpose of relief against the principal, they can rely upon what the subsidiaries did. Moreover, the arbitrators might decide that the actions of the subsidiaries make the principal liable, and might offer relief against the principal for what they did.

I agree with the learned Queen's Bench judge that he cannot refer any of the claims of any of the "extra" parties to arbitration. I add only that he might nevertheless stay claims pending arbitration when it would appear just and equitable to do so. He might also strike a claim for failure to disclose a cause of action. Both opportunities await another day in Queen's Bench. Subject to the right to apply in Queen's Bench for another kind of stay, I would reject these grounds of appeal.

II

I now turn to the question whether some issues raised in the statement of claim are arbitrable.

They include a claim for inducing a breach of contract. The particulars allege that one of the defendants hired away an employee of one of the plaintiffs. The learned Queen's Bench judge held that this claim could not go to arbitration. Before us, counsel for the licensor accepted that this ruling was correct.

The extra claims also include allegations against all the defendants of conspiracy to harm all plaintiffs. Mr. Redmond for the distributor says that this pleading relies on tort, not contract, and offers two alternatives: conspiracy to harm by unlawful acts and conspiracy to harm by lawful acts. Are either caught by the submission? The learned chambers judge, no doubt because he did not need to give his view of the case, did not deal with this issue separately. I must.

The mere fact that a claim sounds in tort does not exclude arbitration. Section 2 of the International Commercial Arbitration Act limits its scope to ". . . differences arising out of commercial legal relationships, whether contractual or not...". This is permitted by Article 1 s. 3 of the Convention, which leaves to signatory states the decision whether the Convention applies to just those differences, as opposed to all manner of differences.

The Convention and Act thus covers both contractual and non-contractual commercial relationships. They thus extend their scope to liability in tort so long as the relationship that creates liability is one that can fairly be described as "commercial". In my view, a claim that a corporation conspired with its subsidiaries to cause harm to a person with whom it has a commercial relationship raises a dispute "arising out of a commercial legal relationship, whether contractual or not."

One must take care not to render this meaningless by equating "contractual" with "commercial". But I need not hazard an exhaustive definition of the test because, for the purposes of this case, it is enough to say that the relationship between these corporations as alleged in the pleadings was manifestly commercial and nothing but commercial. I reject the argument by Mr. Redmond that the dispute must turn on the terms of the contract and its breach. I therefore conclude that the Act and the Convention contemplate that claims like the claims based upon conspiracy to harm can fall for arbitration.

The next step is to interpret the submission. This is because the Convention, and therefore the Act, contemplate a narrow submission. Not all arbitrable issues must be arbitrated. This is left for the parties to decide in their negotiation of the terms of the submission. Article II s. 1 of the Convention refers to agreements that submit "all or any differences". The parties might agree to submit not all but some.

The submission before us limits itself to disputes "arising out of or in connection with" the contract. I agree with the Comments of Evans, J. in Overseas Union Insce. v. AA Mutual [1988] 2 Lloyd's Law Reports 63 (U.K.Q.B.) at p. 67. He first described a narrower form of submission, typically using only the words "under the contract", where only rights and obligations created by the

contract can be referred. He contrasted that to the form of submission before us when he said, at p. 67:

> Conversely, if the parties agree to refer disputes arising 'in relation to' or 'in connection with' their contract, a fortiori if the clause covers disputes arising 'during the execution of this contract' (The Damianos, [1971] 1 Lloyd's Rep. 502; [1971] 2 Q.B. 588) or in relation to the work to be carried out hereunder', a common form in construction contracts, then both as a matter of language and of authority some wider category may be intended.

In my view, this submission extends beyond rights and duties created by the contract. A dispute meets the test set by the submission if either claimant or defendant relies on the existence of a contractual obligation as a necessary element to create the claim, or to defeat it. Thus, the pleading here that relies upon a claim of a conspiracy by unlawful means to harm the distributor meets the test. This is because a breach of the contract is relied upon as the source of the "unlawfulness". That dispute should be referred to arbitration.

With respect, I am not persuaded that ODC Exhibit Systems Ltd. v. Lee et al. (1988) 41 B.L.R. 286. (B.C.S.C.), upon which the distributor relies, is a contrary authority. In that case, two firms made, but later cancelled, a contract naming one firm as the exclusive sales agent of a product of the other. The cancellation agreement contained a submission. Later, the ex-agent sued several people in tort, alleging, among other things, that they conspired to induce the supplier to negotiate the Cancellation agreement. The Court refused (at p. 293) to make a reference on the terse ground that:

> The action here does not arise out of 'this agreement'. It arises out of something allegedly done by the defendants ... before the conciliation agreement came into being. The plaintiff alleges that it was induced by their conspiracy, deceit and fraud to execute the conciliation agreement. It cannot be reasonably said that these allegations which induced the plaintiff to enter into the conciliation agreement, were matters which the parties had agreed (or had even contemplated) as being among those to be settled by arbitration
>
> . . . .

I grant that one might argue that the claim, or at least the defence, under review in that case relied upon the existence of the contract. On the other hand, one might argue that the claimant was caught by the rule in Heyman v. Darwins Limited [1942] A.C. 356 at 366: the validity of the submission itself is not arbitrable as boot-strapping. But in any event I see nothing in the reasoning in that decision that persuades me that I am wrong in my view.

The alternative pleading raises greater difficulties. This is a claim for conspiracy to cause harm, but does not rely on any unlawful act. The pleading is:

> 20. Further, or in the further alternative to paragraphs 17 to 19, the Defendants KONE and KONE CRANES - ACM, USA have conspired with intent to harm the Plaintiff KAVERIT and have in fact harmed the Plaintiff KAVERIT:

(a) by having the Defendant KONE CRANES - ACM, USA open and Carry on in the Territory the business called "KONE CRANES Maintenance Services";
(b) by holding out, in the advertisement by "KONE CRANES Maintenance Services" heretofore described, that the services offered by "KONE CRANES Maintenance Services" are superior to those offered by the Plaintiff KAVERIT; and
(c) by holding out, in the advertisement by "KONE CRANES Maintenance Services" heretofore described, that KONE equipment can be obtained by customers at lower prices when purchased from "KONE CRANES Maintenance Services".

The first particular I have quoted essentially alleges nothing more than that the defendants competed with the plaintiff. Mr. Redmond insisted that such a cause of action existed even if no unlawful means are employed. As I said before, no motion to strike is before us.

I observe that the claim makes no obvious reference to or reliance on the agreement containing the submission. Is it a quite separate matter? Mr. Secord argued before us that, in cases of doubt, one should simply stay the suit and refer the question. If the arbitrators decline jurisdiction, the stay would be lifted. The simple answer to that is that the Court must do its work.

In the absence of particulars, I can only say that the claim in question must be and is referred to arbitration if it relies upon the existence of a contract between the parties. If a claim can be made out free of that reliance, it can go to trial. The risk lies with the plaintiff. In effect, I read down the pleading to add the prefatory words "Apart from any contract or contractual obligations and without reliance upon them,". I should add that I am sceptical that the plea, so adjusted, discloses a cause of action. But that, as I have said, is for another day.

The second and third particulars in that pleading do not rely on the existence of any contract between the parties. On the contrary, they are the sorts of claim that a competitor might make. Mr. Redmond will not deny that the facts relied upon to support the claim might include some also relied upon to show a breach of contract. But I accept that they are qualitatively different sorts of claims.

I cannot say that a dispute arises out of or in connection with a contract unless the existence of the contract is germane either to the claim or the defence. It is not enough to say that the events that give rise to the claim also give rise to a claim for breach of contract. One must be able to say that the other claim relies on the existence of the contractual obligation.

Mr. Secord asks for a broader rule, and relies on several cases. He first cites Lonhro Ltd. (U.K.) et al. v. The Shell Petroleum Co. Ltd. (U.K.) et al. (1979) IV ICCA Yearbook Commercial Arbitration 320 (Ch D). The Court there referred all allegations to arbitration notwithstanding that the claims sounded in tort and other branches of the law, including treason. Brightman, J. held:

> In the present case the claims in tort have the closest possible connection with the Shippers' Agreement. If it is found that Shell and BP have complied in all respects with the terms of the Shippers' Agreement, the Plaintiffs can have no

> claims in tort against them.
> (p.321-322)

For the reasons given, I cannot say that about all the pleadings in this case.

In Landgericht Hamburg IV Yearbook Comm. Arb 261 (1979) a German Court faced a similar issue. The brief report says that the Court said that tort Claims should go to arbitration because "It would be illogical to suppose that the parties would have wanted a "split" jurisdiction" See p. 262. I do not agree. Indeed, the argument might be used against a reference, as it indeed was in this case by the learned chambers judge.

I can find nothing in Boart Sweden A.B. v. NYA Stromnes A.B. et al. (1989) 41 B.L.R. (295) (Ont. H.C.) to help the licensor on this point. On the contrary, Campbell, J. there refused to send the tort claims to arbitration. He did so because they "involve additional issues and parties outside the four corners of the agreement". Because he did not elucidate, I cannot tell whether his view is consistent or not with what I have said. He then stayed the tort suit pending the outcome of the arbitration, but that is not relevant to the issue under consideration.

In Government of New Zealand v. Mobil Oil New Zealand (June, 1987) High Court of Wellington, N.Z., XIII Yearbook Comm. Arb. 638 (1988), the dispute between the parties was whether the contract, which included a submission, contravened a New Zealand statute prohibiting agreements that lessen competition. Notwithstanding that the submission dealt only with disputes "under" the agreement, Heron, J., after noting that the arbitrator was to decide legal questions on application of New Zealand law, held this implied that the enforceability or validity of the contract under New Zealand law was a matter for arbitration. Nothing in that persuades me that I am wrong.

I therefore agree in part with the learned chambers judge that some of the non-contractual issues cannot go to arbitration. I am, however, of the view that the claim by the distributor for conspiracy to harm by unlawful acts, because the unlawful acts are alleged to be unlawful breach of contract, must go to arbitration. Claims of interference with competition not based upon the existence of the contract may proceed in Alberta.

III

I turn now to the key finding of the learned chambers judge. To him, the case did not turn on whether this or that issue was arbitrable. Rather, the question was whether the entire dispute conveniently could be resolved by arbitration. He said:

> The nub of the issue in this case is whether the Plaintiff has, by its Statement of Claim, proliferated the issues and thereby the parties with the result that the arbitration provision is frustrated. If so the Plaintiff's action should not deprive the Defendant of the stay. On the other hand, if litigants in this action, who are not party to the arbitration provision and who are not consenting to it, have raised legitimate causes of action which are connected to the main issue of breach of contract such that all matters should be tried in the same proceedings, then the arbitration provision is, in the words of the statute, inoperative or incapable of being performed. Since arbitration is consensual in nature persons not party to the agreement cannot be compelled to submit to the method of dispute resolution.

With respect, the nub of the case is not whether the plaintiff raised "legitimate" causes that cannot go to arbitration. On the contrary, the agreement to arbitrate should be honoured and enforced whether or not the plaintiff displayed great imagination in the pleadings.

The power to grant or withhold a reference under the International Commercial Arbitration Act is very limited, and the statute does not permit a decision on the test invoked by the learned chambers judge, which resembles the forum conveniens test. For the purpose of argument, I accept the possibility (albeit I suspect very slim) of two suits at the same time, and even contradictory findings. Nevertheless, that is the method chosen by the parties. The Act directs me to hold them to their bargain. Section 2(1) of the International Commercial Arbitration Act makes the Convention part of the law of Alberta. It says that the Convention "applies in the Province." The Convention Article II s. 3 provides that:

> 3. The court of a Contracting State shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.
> [Emphasis added]

The learned chambers judge relied upon the qualifying words. He held that an inconvenient reference was an "inoperative" one. I do not agree. It may not operate conveniently, but it cannot be said to be inoperative. The view taken by the learned chambers judge adds a gloss to the word that it cannot, in all the circumstances, reasonably bear.

It is common ground that the evident purpose of Alberta's acceptance of the Convention is to promote international trade and commerce by the certainty that comes from a scheme of international arbitration. As Justice Potter Stewart said in Scherk v. Alberto-Culver (1974) 417 U.S. 506 (1974) at p. 516:

> . . . uncertainty will almost inevitably exist with respect to any contract touching two or more countries, each with its own substantive laws and conflict-of-laws rules. A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction.

That purpose would not be served by adopting an interpretation that puts the entire scheme at risk. The forum conveniens test almost always would defeat arbitration because, as Justice Stewart said in Scherk, it would invite "unseemly and mutually destructive jockeying". Indeed, one argument of the learned chambers judge relied upon the fact that, after arbitration, the parties might regurgitate some issues during enforcement proceedings in Alberta. This fear exists in every case, of course. If we yield to it, no dispute would go to arbitration. The same can be said of a leash on arbitration that is as short as the pleading of opposing counsel is long, which sacrifices certainty to wit. (I accept the statement of Mr. Redmond that the drafting of the statement of claim here occurred before the arbitration issue arose. Mr. Redmond will, I hope, take it as a compliment that I knew that before he told me: if driven, he has the skill to plead more nuanced issues than those under review.)

In modern commercial disputes, it is almost inevitable that many parties will be involved and very unlikely that all parties will have an identical submission. The problem of multiple parties, which drove the decision of the chambers judge here, will exist in almost every case. There is no question that proliferation of litigation is a possibility. Redfern and Hunter, in Law and Practice of International Commercial Arbitration (Street and Maxwell 1986) describe, at page 141 and following, the problems and some solutions, including a model submission. In any event, the Convention cannot reasonably be taken as having abandoned any attempt at arbitration when this problem arises.

In my view, the proviso about "null and void, inoperative, and incapable of being enforced" simply preserves the rule in Heyman v. Darwins Limited cited earlier. The arbitrator cannot decide whether the submission is valid. Its validity and enforceability must be pronounced upon before the referring Court can enforce it by a reference and stay. It is not valid if it, or the contract in which it is found, is, by operation of domestic law in the referring tribunal, either void or unenforceable. The proviso is an echo of the law about void contracts ("null and void"), unenforceable contracts ("inoperative"), and frustrated contracts ("incapable of being enforced"). See Paczy v. Haendler & Naterman [1981] 1 Lloyd's Law Reports 302 at 307-8.

In the result, I respectfully disagree with the decision of an Italian Court, the Tribunale di Milano, that took the opposite view in a case startlingly similar to this. See Sopac Italiana S.p.a. v. Bukama GmbH (FRG) and F.I.M.M. (Italy) (1977) II ICCA Yearbook Commercial Arbitration 248. Sopac sued for breach of a contract naming it as Bukama's exclusive vendor for Italy, and added as a defendant F.I.M.M., a subsidiary of Bukama operating in Italy in breach, Sopac said, of the contract. The contract between Sopac and Bukama contained a submission, but F.I.M.M. was not a party. The Court refused to refer the dispute on the ground that it could decide all the issues for all the parties without any risk of conflicting decisions. For the reasons given, I disagree.

IV

In the result, I would allow the appeal and direct that all issues between the distributor and the licensor that rest upon the existence of the contract be stayed and referred for decision as directed in the submission. I would also remit to Queen's Bench any issues about consequent temporary stays of other aspects of the proceedings, and any attacks on pleadings as disclosing no cause of action.

KERANS J.A.
HETHERINGTON J.A.
IRVING J.A.

* * * * *

Corrigendum

Released: February 6, 1992 P. 1, the words "Eric Viinikka" have been inserted into the style of cause after the words "Kelly Viinikka".

P. 3, line 16, the words "Eric Viinikka" have been inserted after the words "Kelly Viinikka".

P. 4, line 16, the word "investor's" have been changed to read "licensor's".

P. 4, line 18, the word "investor" has been changed to read "licensor".

P. 5, line 3, the word "investor" has been changed to read "licensor".

P. 10, line 12, the word "licensor" has been changed to read "distributor".

Tab 14

Arbitration Act, 1991

S.O. 1991, CHAPTER 17

Consolidation Period: From December 15, 2009 to the e-Laws currency date.

Last amendment: 2009, c. 33, Sched. 2, s. 5.

SKIP TABLE OF CONTENTS

CONTENTS

INTRODUCTORY MATTERS

Definitions

1. In this Act,

"arbitration agreement" means an agreement by which two or more persons agree to submit to arbitration a dispute that has arisen or may arise between them; ("convention d'arbitrage")

"arbitrator" includes an umpire; ("arbitre")

"court", except in sections 6 and 7, means the Family Court or the Superior Court of Justice; ("tribunal judiciaire")

"family arbitration" means an arbitration that,

(a) deals with matters that could be dealt with in a marriage contract, separation agreement, cohabitation agreement or paternity agreement under Part IV of the *Family Law Act*, and

(b) is conducted exclusively in accordance with the law of Ontario or of another Canadian jurisdiction; ("arbitrage familial")

"family arbitration agreement" and "family arbitration award" have meanings that correspond to the meaning of "family arbitration". ("convention d'arbitrage familial", "sentence d'arbitrage familial") 1991, c. 17, s. 1; 2006, c. 1, s. 1 (1); 2006, c. 19, Sched. C, s. 1 (1); 2009, c. 33, Sched. 2, s. 5.

Application of Act

Arbitrations conducted under agreements

2. (1) This Act applies to an arbitration conducted under an arbitration agreement unless,

(a) the application of this Act is excluded by law; or

(b) the *International Commercial Arbitration Act* applies to the arbitration. 1991, c. 17, s. 2 (1).

Tab 15

ONTARIO ENERGY BOARD

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

AND IN THE MATTER OF the Ontario Energy Board's *Storage and Transportation Access Rule*;

AND IN THE MATTER OF an application by TransAlta Generation Partnership for certain declarations and orders relating to a T1/T2 Gas Storage and Distribution Contract between TransAlta Generation Partnership and Union Gas Limited.

APPLICATION

The Parties

1. TransAlta Generation Partnership (**TransAlta**) is a Board-licensed natural gas fired electricity generator with plant operations in Sarnia, Ontario.

2. Union Gas Limited (**Union**) is a regulated public utility incorporated under the laws of Ontario and with a head office in Chatham-Kent, Ontario, and an "integrated utility" and a "natural gas transmitter" as defined in section 1.2.1 of the *Storage And Transportation Access Rules* (the **STAR**).

The Contractual Dispute

3. TransAlta and Union are parties to a T1/T2 Gas Storage and Distribution Contract dated November 1, 2012 (the **Contract**).

4. The Contract and related posted Tariff as required by the STAR provides that Union has the discretion to demand from TransAlta a Daily Contract Quantity of gas (**DCQ**).

5. DCQ is defined in Union's General Term and Conditions, which are incorporated by reference into the Contract:

> **Daily Contract Quantity** ("DCQ") means that portion of the daily parameters as set out in Schedule 1, being a quantity of Gas which Customer must deliver to Union on Firm basis. The DCQ

> (GJ/day) is equal to 12 months of consumption of end-use locations underlying the direct purchase / 365 days * heat value (GJ/m^3). If this Contract has a term greater than 12 months, the DCQ is calculated by dividing the historical consumption of the term of this Contract by the number of Days in this Contract term. The consumption of general service end-use locations is weather normalized. [emphasis added]

6. Schedule 1 to the Contract states that the obligated DCQ is 17,904 GJ/day. However, the Contract has a term greater than 12 months: the Day of First Delivery under the Contract was November 1, 2012 and the Contract is currently ongoing. Accordingly, in accordance with the definition of DCQ in Union's General Terms and Conditions, DCQ is properly calculated by dividing the historical consumption for the term of the Contract by the number of the days in the term. Applying that calculation as of February 1, 2014, the Contract DCQ is 12,912 GJ/day .

7. Notwithstanding the definition of DCQ in the General Terms and Conditions, Union has taken the position that the DCQ is 17,904 GJ/day, as stated in Schedule 1 of the Contract. Union has required TransAlta to deliver the higher DCQ amount, causing TransAlta to suffer damages thus far of $1,200,000.

Union's Non-Compliance with STAR

8. In the context of its obligations and duties under the Contract, Union is subject to the STAR:

(a) Union is a "natural gas transmitter" as defined by STAR: under the Contract, Union provides TransAlta with "transportation services" (which include distribution services); and

(b) Union is an "integrated utility" as defined by STAR: under the Contract, Union is a gas distributor that also provides TransAlta with storage services.

9. Union has failed to comply with STAR. It's non-compliance includes the following:

(a) Union's position on the Contract has resulted in discriminatory treatment of TransAlta. Union does not treat all of its transportation and storage contracts in the same manner – for example, not all Union contracts have an obligated DCQ. The result is differential treatment by Union of shippers with whom it is contracting with;

(b) contrary to s. 2.1.4, Union has failed to post on its website its method for allocating the differential treatment of TransAlta under the Contract and related access to transportation and storage services;

(c) contrary to s. 2.3.4, the Contract fails to include Alternative Dispute Resolution provisions, and Union has refused to agree to resolve the Contract dispute through Alternative Dispute Resolution;

Relief Sought by TransAlta

10. TransAlta seeks the following relief:

(a) an order declaring that the STAR apply to Union as an "integrated utility" and "natural gas transmitter" in relation to its obligations and duties under the Contract;

(b) an order declaring that Union has engaged in discriminatory treatment of TransAlta,

(c) an order declaring that under the terms of the Contract the maximum DCQ that Union has the discretion, but not the obligation, to demand shall be calculated in accordance with the definition of DCQ under section 13 of Union's General Terms and Conditions and the posted Tariff, and that calculation for the period of November 1, 2012 to January 31, 2014 amounts to 12,912 GJ/day;

(d) an order compelling Union to amend the Contract to comply with, or otherwise give effect to sections 1.1.1, 2.1.1, 2.1.4, 2.3.2, 2.3.4, and 2.3.7 of the STAR, and specifically require that Union submit to an arbitration or other alternative dispute resolution procedure for the Contract as mandated by section 2.3.4(viii) of the STAR;

(e) an order compelling Union to reimburse TransAlta all monetary amounts related to any over-calculation of the DCQ for any and all quantities of gas above 12,912 GJ/day that Union has required TransAlta to deliver;

(f) in the alternative, an order compelling Union and TransAlta submit to binding arbitration for a determination of their dispute under the Contract, in accordance with the following process:

(i) the arbitration will involve two stages: (1) determination of Union's alleged liability under the Contract, and (2) if necessary, quantification of damages;

(ii) the first stage will proceed immediately and be determined within two weeks;

(iii) the first stage will proceed in writing only and be determined by a single arbitrator; and

(iv) the procedure for the second stage will be determined by the parties and the arbitrator upon conclusion of the first stage;

(g) an order that this application be heard and disposed of on an expedited basis; and

(h) such further relief as TransAlta's counsel may advise and that the Board may deem just.

11. TransAlta requests that this application be heard in writing, subject to a direction by the Board for a partial or full oral hearing upon its review of the parties' materials.

April ●, 2014

NORTON ROSE FULBRIGHT CANADA LLP
Royal Bank Plaza, South Tower,
Suite 3800, 200 Bay Street
P.O. Box 84
Toronto, Ontario M5J 2Z4

Elisabeth DeMarco
Tel: 416.203.4431
Rahool P. Agarwal
Tel: 416.216.3943
Fax: 416.216.3930

Lawyers for the Applicant

Tab 16

Ontario Energy Board

Commission de l'énergie de l'Ontario

EB-2014-0154

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

AND IN THE MATTER OF an Application by Union Gas Limited for an order or orders approving a one-time exemption from Union Gas Limited's approved rate schedules to reduce certain penalty charges applied to direct purchase customers who did not meet their contractual obligations.

Before: Ken Quesnelle
Presiding Member and Vice Chair

Marika Hare
Member

DECISION ON MOTION AND PROCEDURAL ORDER NO. 3
July 29, 2014

Background

Union Gas Limited ("Union") filed an application dated April 3, 2014 with the Ontario Energy Board under section 36 of the *Ontario Energy Board Act, 1998*, S.O. c.15, Schedule B (the "Act"), for an order of the Board approving a one-time exemption from its approved rate schedules to reduce certain penalty charges applied to direct purchase customers who did not meet their contractual obligations during the months of February and March, 2014.

On May 27, 2014 the Board issued Procedural Order No. 1 which provided for the filing of interrogatories and intervenor evidence, among other things. Union filed responses to the interrogatories on June 17, 2014 (and updated responses on June 19, 2014).

On June 20, 2014 the Board received a motion from the intervenor TransAlta Corporation ("TransAlta") under section 27 of the Board's *Rules of Practice and Procedure*. The motion sought an order requiring Union to provide full and adequate responses to the following interrogatories (the "Subject Interrogatories"):

a) TransAlta IRs #1-12;
b) TransCanada Energy ("TCE") IR #4;
c) London Property Management Association ("LPMA") IR #4;
d) Canadian Energy Strategies ("CES") IR #1; and
e) City of Kitchener ("Kitchener") IR #2 (later amended to IR #3c[1]).

In its motion, TransAlta also requested a delay in the date for the filing of intervenor evidence.

In Procedural Order No. 2, issued on June 23, 2014, the Board rendered its determinations that the motion should be heard in writing, and that it would delay the filing of intervenor evidence and subsequent procedural steps until a decision on the motion was rendered. The Board set out the timeline for filings of submissions on the motion.

On June 25, 2014, the Board received TransAlta's submission on the motion. By June 27, 2014, the Board had received submissions supporting the motion from Kitchener, LPMA, TCE, Canadian Manufacturers & Exporters ("CME"), Association of Power Producers of Ontario ("APPrO"), and Natural Resource Gas Limited ("NRG"). On July 3, 2014, the Board received Union's response to the motion. On July 7, 2014, the Board received TransAlta's final reply submission.

Position of Parties

The Subject Interrogatories are largely related to the impact on certain customers of actions taken by Union during the winter of 2013 – 2014. TransAlta argued that the significant customer impacts and proposed remedies that are the subject matter of the EB-2014-0154 proceeding result from Union's exercise of discretion and its application of certain charges that were applied to direct purchase customers who did and did not meet their contractual obligations during the 2014 winter.

TransAlta submitted that, as one of Union's most significantly and negatively impacted customers during the winter of 2014, the responses to the Subject Interrogatories are required to allow it to participate in the proceeding in a meaningful

[1] Kitchener, in its submission on the motion, noted that Union filed an adequate response to its IR #2 and requested that Union be required to file an adequate response to its IR #3(c).

way and to exercise its right to be heard. TransAlta stated that its right to present its case fully and fairly in this proceeding depends on receiving adequate responses to the subject interrogatories.[2]

TransAlta also argued that the responses to the Subject Interrogatories are likely to be material to the Board in deciding the appropriateness of any proposed remedy to address the costs and charges that Union imposed on direct purchase customers, who did or did not meet their contractual obligations imposed by Union during the extreme weather conditions of the 2014 winter.[3] TransAlta stated that Section 9.1 of the Ontario *Statutory Powers Procedure Act* supports hearing all of the customer issues resulting from Union's conduct during the 2014 winter in the same proceeding. TransAlta submitted that hearing the issues that were raised in its interrogatories in a coordinated manner, as it has proposed, allows the Board to use its resources in the most efficient manner.[4]

Kitchener supported TransAlta's motion. Kitchener noted that Union refused to provide a response to any interrogatory that does not pertain to the specific penalty charges that it is willing to reduce. Kitchener argued that the Board should not accept the narrow scope that Union has applied to the proceeding for the reasons set out below.

The exceptional weather events that gave rise to the penalty charges which Union is prepared to reduce also gave rise to penalty charges that were applied to Kitchener. Kitchener argued that while Union is willing to reduce penalty charges for some customers, it is unwilling to do so for Kitchener. Kitchener submitted that the decision as to which customers should receive relief from the strict application of Union's tariffs should be made by the Board and not by Union.

Kitchener argued that, if the Board refuses to consider penalty charges other than those cited by Union in its application (like those incurred by Kitchener under its T3 rate schedule), customers that will not have their issues heard in this proceeding will have to seek other avenues to have their issues heard. Kitchener submitted that hearing the issues of these other customers, including Kitchener, separately from this proceeding is not efficient.

Kitchener stated that the Board's public interest mandate supports not restricting the scope of the proceeding to the particular charges that Union has asked the Board to consider. Kitchener argued that it would be best to allow parties with similar

[2] TransAlta Submission on motion, June 25, 2014, at pg. 6.
[3] Ibid at pg. 7.
[4] Ibid.

grievances, which are attributable to the weather conditions of the 2014 winter, to bring those issues forward for Board determination in this proceeding.[5]

LPMA, TCE, CME, and NRG all filed submissions supporting TransAlta's motion. These parties submitted that the information sought in the Subject Interrogatories is relevant to the proceeding and therefore the Board should require Union to file adequate responses.

APPrO indicated that it takes no direct position on the motion. However, APPrO stated that it believes the underlying issue raised by TransAlta regarding the methodology used by Union to determine whether a customer's Daily Contract Quantity ("DCQ") should be obligated or unobligated (and the methodology used to calculate the magnitude of the DCQ) is of substantial importance to customers like dispatchable generators.[6]

Union, in its response to the motion, submitted that the application before the Board, in the EB-2014-0154 proceeding, is to determine whether Union may provide a one-time exemption to direct purchase customers that did not meet their contractual obligations in February or March 2014 from the obligation to pay certain specified penalty charges. Union argued that the proceeding is not an opportunity to resolve all issues that Union's customers may have with respect to the terms of their contracts. Union submitted that the only relevant interrogatories are those that are directly associated with the issue of whether the one-time exemption, requested by Union, should be granted.[7]

Union submitted that the information sought by TransAlta and Kitchener in their interrogatories falls outside the scope of the proceeding. Union stated that the information sought by TransAlta is associated with a complaint that it has with regard to the DCQ of gas that it is required to deliver to Union. Union stated that this issue is unrelated to the one-time penalty charge reduction proposed by Union in its application. Union stated that the issue raised by Kitchener is associated with a complaint that it has with regard to the unauthorized storage withdrawal overrun charges billed to Kitchener under its T3 contract. Similarly, Union stated that this issue is not related to the one-time penalty charge reduction proposed by Union in its application.[8] Overall, Union submitted that TransAlta's motion should be dismissed.

In reply, TransAlta submitted that Union's proposed restricted scope of the proceeding unduly limits the Board's jurisdiction under the Act, is not consistent with the Board's May 6, 2014, Letter of Direction and related Notice of Application, and is

[5] Kitchener Submission on motion, June 27, 2014, at pp. 2-4.
[6] APPrO Submission on motion, June 27, 2014, at p. 1.
[7] Union Submission on motion, July 3, 2014, at p. 1.
[8] Ibid at pp. 5-8.

in contrast to the Board's consumer protection mandate and recent enhanced customer focus.

TransAlta also submitted that Union has made a number of assertions[9] that are not supported by evidence and therefore should be struck from the record of the motion or afforded no weight by the Board.

TransAlta also argued that Union has attempted to misrepresent the concerns of several intervenors in this proceeding relating to the harm caused by Union's exercise of discretion under its Board approved tariffs during the extreme weather events of the 2014 winter. TransAlta stated that Union has characterized the concerns of some intervenors as private contractual disputes. TransAlta stated that this characterization is not supported by the regulatory compact and the Board's consumer protection obligations.

Finally, TransAlta submitted that the Board's regulatory efficiency is best served by dealing with the issues that it, and other intervenors, have brought forth in this proceeding as opposed to holding multiple uncoordinated proceedings to hear the same issues.[10]

In its conclusion, TransAlta requested that the Board order Union to provide full and adequate responses to the Subject Interrogatories. TransAlta submitted that, if the Board determines that the Subject Interrogatories do not fall within the scope of the current proceeding, the Board should either revise and reissue the Board's Notice of Application in this proceeding or establish a separate proceeding in order to ensure all customers that have been negatively impacted by Union's actions over the 2014 winter are provided with the right to be heard (and potentially provided with a remedy for the harm caused by Union).[11]

Board Findings

The Board dismisses the motion for the reasons set out below.

The Board finds that the Subject Interrogatories are not within the scope of this proceeding. As set out by the Board in its May 8, 2014 Letter to NRG:

> In the EB-2014-0154 proceeding, the Board will determine whether to grant Union a one-time exemption from the use of its approved tariffs with respect to certain penalty charges applied to direct purchase customers who did not meet their contractual obligations during the months of

[9] TransAlta referred to paragraphs 20, 21, 24 and 27 of Union's Submission on the motion.
[10] TransAlta Reply Submission on motion, July 7, 2014, at pp. 1-9.
[11] Ibid at p. 9-10.

> February and March 2014. The outcome of this proceeding will be the Board setting a final penalty charge that Union will be allowed to apply to those customers who did not meet their contractual obligations during the months cited above.
>
> The Board intends to hear, as part of the EB-2014-0154 proceeding, arguments as to whether the exemption should be granted and if so, what penalty charge should be applied in its place having regard for the intended purpose of the penalty charge and its efficacy. The penalty charge set in the EB-2014-0154 proceeding will be utilized for Phase 2 of NRG's QRAM proceeding (EB-2014-0053). Therefore, the Board intends to make a final decision in this proceeding prior to making a final decision in NRG's QRAM proceeding.[12]

The Board, in this proceeding, is dealing with an application filed by Union which requested a one-time exemption from its approved rate schedules to reduce certain penalty charges applied to direct purchase customers who did not meet their contractual obligations during the months of February and March, 2014. The result of this proceeding will be a determination on Union's request as set out above. This proceeding is not a general review of all discretionary actions taken by Union during the winter of 2013 – 2014.

The Board intentionally established and communicated a narrow scope for this proceeding. As set out above, in the excerpt from the Board's Letter to NRG, the penalty charge, which will be set in this proceeding, will be utilized in Phase 2 of NRG's QRAM proceeding. The Board's Letter, dated June 17, 2014, in the EB-2014-0053 proceeding, has placed Phase 2 of NRG's QRAM proceeding on hold until after the Board has made its findings in the immediate proceeding. The Board would like to resolve the penalty reduction issue in this proceeding as expeditiously as possible in order to: (a) provide a fair and more immediate determination to those customers that are directly affected by the application of the penalty charges at issue here; and (b) move forward with Phase 2 of NRG's QRAM proceeding.

Although the issues raised by TransAlta and Kitchener in their interrogatories and motion materials do not fall within the scope of this proceeding, that does not mean that the issues raised by these parties are not valid. The issues raised could represent legitimate concerns that may fall within the jurisdiction of the Board.

TransAlta or Kitchener may wish to file a complaint with the Board by way of letter alleging that Union is failing to comply with an enforceable provision under the Act (e.g. a provision of a rate order of the Board). The matter could then to be considered by the Board to determine if a compliance review is warranted. Alternatively, if TransAlta or Kitchener accepts that Union is properly implementing a

[12] Board Letter to NRG, May 8, 2014.

rate approved by the Board, the letter could request that the Board on its own motion review the rate in question. Such a letter would have to address the Board's jurisdiction, any issue of retroactivity and the exceptional circumstances that would persuade the Board to inquire into the matter. The Board has set just and reasonable rates for Union, and the resolution of contractual disputes is generally outside the mandate of the Board.

The Board has set out the procedural steps for the remainder of the proceeding below.

THE BOARD ORDERS THAT:

1. The motion filed by TransAlta is dismissed.

2. Intervenors who wish to present evidence shall file that evidence with the Board and deliver it to Union and all intervenors no later than **August 7, 2014**.

3. Anyone (intervenor, Board staff or Union) who requires additional information related to any intervenor evidence, and that is relevant to the hearing, shall request it by written interrogatories filed with the Board and delivered to Union and all intervenors on or before **August 14, 2014**.

4. Responses to the interrogatories on intervenor evidence shall be filed with the Board and delivered to Union and all intervenors on or before **August 21, 2014**.

5. Union shall file its Argument-in-Chief with the Board and serve it on all other parties on or before **September 2, 2014**.

6. Board staff and intervenors who wish to make written submissions shall file such submissions with the Board, and deliver them to Union and other intervenors, on or before **September 12, 2014**.

7. If Union wishes to reply to the submissions of other parties, the reply shall be filed with the Board and delivered to intervenors on or before **September 19, 2014**.

All filings to the Board must quote file number **EB-2014-0154**, be made through the Board's web portal at https://www.pes.ontarioenergyboard.ca/eservice, and consist of two paper copies and one electronic copy in searchable / unrestricted PDF format.

Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Please use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at www.ontarioenergyboard.ca. If the web portal is not available you may email your document to the BoardSec@ontarioenergyboard.ca. Those who do not have internet access are required to submit all filings on a CD in PDF format, along with two paper copies. Those who do not have computer access are required to file seven paper copies. If you have submitted through the Board's web portal an e-mail is not required.

For all electronic correspondence and materials related to this proceeding, parties must include in their distribution lists the Case Manager, Lawrie Gluck at Lawrie.Gluck@ontarioenergyboard.ca and Counsel, Jennifer Lea at Jennifer.Lea@ontarioenergyboard.ca.

All communications should be directed to the attention of the Board Secretary and be received no later than **4:45 p.m**. on the required date.

ADDRESS
Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, 27th Floor
Toronto ON M4P 1E4
Attention: Board Secretary

Filings: https://www.pes.ontarioenergyboard.ca/eservice/
E-mail: boardsec@ontarioenergyboard.ca
Tel: 1-888-632-6273 (Toll free)
Fax: 416-440-7656

DATED at Toronto, July 29, 2014

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary

Tab 17

The proposed monthly customer charge for the new Rate T2 rate class has been set at $6,000. At this level, the proposed monthly customer charge recovers approximately 50% of the customer-related costs attributable to the new Rate T2. Union is proposing to set the monthly customer charge at $6,000 to ensure a smooth rate continuum between Rate T1 and Rate T2 at the daily contracted demand breakpoint of 140,870 m^3. The balance of the customer-related costs not recovered in the Rate T2 monthly customer charge are recovered in the first block demand charge, which is common to all Rate T2 customers. The revenue to cost ratio for new Rate T2 is consistent with the revenue to cost ratio for Rate T1 before rate redesign.

The two block demand rate structure for the new Rate T2 is based on a daily contracted demand breakpoint of 140,870 m^3. This is the same daily contracted demand as the current Rate T1 structure. The two block demand charge also recovers all the demand-related transportation costs. The single commodity charge recovers all the variable transportation costs.

As indicated above. Union is not proposing any changes to the storage services currently available under the current Rate T1 rate schedule. The proposed 2013 Rate T2 rate schedule, which is provided at Exhibit H3, Tab 3, Schedule 2, will include all the current Board-approved storage space and storage injection/withdrawal rights per the current approved Rate T1 rate schedule. Also, the transportation service provisions that are applicable to new and existing customers with incremental daily firm demand requirements in excess of 1,200,000 m^3/day are included in the proposed T2 rate schedule.

Tab 18

STORAGE AND TRANSPORTATION RATES
FOR CONTRACT CARRIAGE CUSTOMERS

(A) Availability

Available to customers in Union's Southern Delivery Zone.

(B) Applicability

To a customer:

a) who has a daily firm contracted demand of at least 140 870 m^3. Firm and/or interruptible daily contracted demand of less than 140,870 m^3 cannot be combined for the purposes of qualifying for this rate class; and

b) who enters into a Carriage Service Contract with Union for the transportation or the storage and transportation of Gas for use at facilities located within Union's gas franchise area; and

c) who has meters with electronic recording at each Point of Consumption; and

d) who has site specific energy measuring equipment that will be used in determining energy balances; and

e) for whom Union has determined transportation and/or storage capacity is available.

For the purposes of qualifying for a rate class, the total quantities of gas consumed or expected to be consumed on the customer's contiguous property will be used, irrespective of the number of meters installed.

(C) Rates

The following rates shall be charged for all quantities contracted or handled as appropriate. The identified rates represent maximum prices for service. These rates may change periodically. Multi-year prices may also be negotiated, which may be higher than the identified rates.

STORAGE SERVICE:

			For Customers Providing Their Own Compressor Fuel	
	Demand Charge Rate/GJ/mo	Commodity Charge Rate/GJ	Fuel Ratio	Commodity Charge Rate/GJ
a) Annual Firm Storage Space Applied to contracted Maximum Annual Storage Space	$0.011			
b) Annual Firm Injection/Withdrawal Right: Applied to the contracted Maximum Annual Firm Injection/Withdrawal Right				
Union provides deliverability Inventory	$1.625			
Customer provides deliverability Inventory (4)	$1.208			
c) Incremental Firm Injection Right: Applied to the contracted Maximum Incremental Firm Injection Right	$1.208			
d) Annual Interruptible Withdrawal Right: Applied to the contracted Maximum Annual Interruptible Withdrawal Right	$1.208			

	Demand Charge Rate/GJ/mo	Commodity Charge Rate/GJ	For Customers Providing Their Own Compressor Fuel: Fuel Ratio	For Customers Providing Their Own Compressor Fuel: Commodity Charge Rate/GJ
e) Withdrawal Commodity Paid on all quantities withdrawn from storage up to the Maximum Daily Storage Withdrawal Quantity		$0.029	0.400%	$0.008
f) Injection Commodity Paid on all quantities injected into storage up to the Maximum Daily Storage Injection Quantity		$0.029	0.400%	$0.008
g) Short Term Storage / Balancing Service Maximum		$6.000		

Notes:

1. Demand charges for Annual Services are paid monthly during the term of the contract for not less than one year unless Union, in its sole discretion, accepts a term of less than one year. Demand charges apply whether Union or the customer provides the fuel.

2. Annual Firm Injection Rights are equal to 100% of their respective Annual Firm Withdrawal Rights. Injection Rights in excess of the Annual Firm Injection Rights will be charged at the Incremental Firm Injection Right.

3. Annual Firm Storage Space

   The maximum storage space available to a customer at the rates specified herein is determined by one of the following storage allocation methodologies:

   3.1 Aggregate Excess
   Aggregate excess is the difference between a customer's gas consumption in the 151-day winter period and consumption during the balance of the year. This calculation will be done using two years of historical data (with 25% weighting for each year) and one year of forecast data (with 50% weighting). If a customer is new, or an existing customer is undergoing a significant change in operations, the allocation will be based on forecast consumption only, as negotiated between Union and the customer. Once sufficient historical information is available for the customer, the standard calculation will be done. At each contract renewal, the aggregate excess calculation will be performed to set the new space allocation.

   3.2 Obligated daily contract quantity multiple of 15
   Obligated daily contract quantity is the firm daily quantity of gas which the customer must deliver to Union. The 15 x obligated daily contract quantity calculation will be done using the daily contract quantity for the upcoming contract year. At each contract renewal, the 15 x obligated daily contract quantity calculation will be performed to set the new space allocation.

   3.3 For new, large (daily firm transportation demand requirements in excess of 1,200,000 m^3/day) gas fired power generation customers, storage space is determined by peak hourly consumption x 24 x 4 days. Should the customer elect firm deliverability less than their maximum entitlement (see Note 4.2), the maximum storage space available at the rates specified herein is 10 x firm storage deliverability contracted, not to exceed peak hourly consumption x 24 x 4 days.

   Customers may contract for less than their maximum entitlement of firm storage space.

4. Annual Injection/Withdrawal Right

   The maximum level of deliverability available to a customer at the rates specified herein is determined by one of the following methodologies:

   4.1 The greater of obligated daily contract quantity or firm daily contract demand less obligated daily contract quantity.

   4.2 For new, large (daily firm transportation demand requirements in excess of 1,200,000 m^3/day) gas fired power generation customers, the maximum entitlement of firm storage deliverability is 24 times the customer's peak hourly consumption, with 1.2% firm deliverability available at the rates specified herein.

   Customers may contract for less than their maximum entitlement of deliverability. A customer may contract up to this maximum entitlement with a combination of firm and interruptible deliverability as specified in Section (C) Storage Service.

5. Additional storage space or deliverability, in excess of the allocated entitlements per Notes 3 and 4, may be available at market prices.

6. Storage Space and Withdrawal Rights are not assignable to any other party without the prior written consent of Union.

7. Deliverability Inventory being defined as 20% of annual storage space.

8. Short Term Storage / Balancing Service is:
   - i) a combined space and interruptible deliverability service for short-term or off-peak storage in Union's storage facilities, or
   - ii) short-term firm deliverability, or
   - iii) a component of an operational balancing service offered.

   In negotiating the rate to be charged for service, the matters that are to be considered include:
   - i) The minimum amount of storage service to which a customer is willing to commit,
   - ii) Whether the customer is contracting for firm or interruptible service during Union's peak or non-peak periods,
   - iii) Utilization of facilities, and
   - iv) Competition

TRANSPORTATION CHARGES:

	Demand Charge Rate/m^3/mo	Commodity Charge Rate/m^3	For Customers Providing Their Own Compressor Fuel: Fuel Ratio (5) (6)	For Customers Providing Their Own Compressor Fuel: Commodity Charge Rate/m^3
a) Annual Firm Transportation Demand Applied to the Firm Daily Contract Demand				
First 140,870 m^3 per month	20.9163 ¢			
All over 140,870 m^3 per month	11.0637 ¢			
b) Firm Transportation Commodity Paid on all firm quantities redelivered to the customer's Point(s) of Consumption				
Commodity Charge (All volumes)		0.0661 ¢	0.279%	0.0080 ¢
c) Interruptible Transportation Commodity Paid on all interruptible quantities redelivered to the customer's Point(s) of Consumption				
Maximum		4.3094 ¢	0.279%	4.2513 ¢

Notes:

1. All demand charges are paid monthly during the term of the contract for not less than one year unless Union, at its sole discretion, accepts a term of less than one year. Demand charges apply whether Union or the customer provides the fuel.

2. Effective January 1, 2007, new customers and existing customers with incremental daily firm demand requirements in excess of 1,200,000 m^3/day and who are directly connected to i) the Dawn-Trafalgar transmission system in close proximity to Parkway or ii) a third party pipeline, have the option to pay for service using a Billing Contract Demand. The Billing Contract Demand shall be determined by Union such that the annual revenues over the term of the contract will recover the invested capital, return on capital and operating and maintenance costs associated with the dedicated service in accordance with Union's system expansion policy. The firm transportation demand charge will be applied to the Billing Contract Demand. For customers choosing the Billing Contract Demand option, the authorized transportation overrun rate will apply to all volumes in excess of the Billing Contract Demand but less than the daily firm demand requirement.

3. In negotiating the rate to be charged for the transportation of gas under Interruptible Transportation, the matters that are to be considered include:

    a) The amount of the interruptible transportation for which customer is willing to contract,

    b) The anticipated load factor for the interruptible transportation quantities,

    c) Interruptible or curtailment provisions, and

    d) Competition.

4. In each contract year, the customer shall pay for a Minimum Interruptible Transportation Activity level as specified in the Contract. Overrun activity will not contribute to the minimum activity level.

5. Transportation fuel ratios do not apply to customers served from dedicated facilities directly connected to third party transmission systems with custody transfer metering at the interconnect.

6. Firm transportation fuel ratio does not apply to new customers or existing customers with incremental daily firm demand requirements in excess of 1,200,000 m^3/day that contract for M12 Dawn to Parkway transportation service equivalent to 100% of their daily firm demand requirement. If a customer with a daily firm demand requirement in excess of 1,200,000 m^3/day contracts for M12 Dawn to Parkway transportation service at less than 100% of their firm daily demand requirement, the firm transportation fuel ratio will be applicable to daily volumes not transported under the M12 transportation contract.

7. Either Union or a customer, or potential customer, may apply to the Ontario Energy Board to fix rates and other charges different from the rates and other charges specified herein if the changed rates and other charges are considered by either party to be necessary, desirable and in the public interest.

SUPPLEMENTAL CHARGES:

Rates for supplemental services are provided in Schedule "A".

Notes:

1. All demand charges are paid monthly during the term of the contract for not less than one year unless Union, in its sole discretion, accepts a term of less than one year.

OVERRUN SERVICE:

1. Annual Storage Space

Authorized

Authorized Overrun is provided as Storage/Balancing Service. It is payable on all quantities on any Day in excess of the customer's contracted Maximum Storage Space. Overrun will be authorized by Union at is sole discretion. Storage Space Overrun equal to the customer's firm deliveries from TCPL: less the customer's Firm Daily Contract Demand, all multiplied by the Days of Interruption called during the period of November 1 to March 31, will be automatically authorized until the following July 1.

Unauthorized

If in any month, the customer has gas in storage in excess of the contracted Maximum Storage Space, and which has not been authorized by Union or provided for under a short term supplemental storage service, such an event will constitute an occurrence of Unauthorized Overrun. The Unauthorized Overrun rate will be $6.000 per GJ applied to the greatest excess for each occurrence.

If on any Day the gas storage balance for the account of the customer is less than zero, the Unauthorized Overrun charge will apply for each GJ of gas below a zero inventory level and this amount of gas shall be deemed not to have been withdrawn from storage. The gas shall be deemed to have been sold to the customer at the highest spot price at Dawn in the month of occurrence and the month following occurrence as identified in the Canadian Gas Price Reporter and shall not be less than Union's approved weighted average cost of gas If the customer has contracted to provide its own deliverability inventory, the zero inventory level shall be deemed to mean twenty percent (20%) of the Annual Firm Storage Space.

2. Injection, Withdrawals and Transportation

Authorized

The following Overrun rates are applied to any quantities transported, injected or withdrawn in excess of 103% of the Contract parameters. Overrun will be authorized by Union at its sole discretion.

Automatic authorization of Injection Overrun will be given during all Days a customer has been interrupted.

	Union Providing Fuel	For Customers Providing Their Own Compressor Fuel Firm or Interruptible Service	
	Firm or Interruptible Service	Fuel Ratio	Commodity Charge
Storage Injections	$0.108/GJ	0.859%	$0.061/GJ
Storage Withdrawals	$0.108/GJ	0.859%	$0.061/GJ
Transportation	0.7538 ¢/m³	0.279%	0.6957 ¢/m³

Unauthorized

For all quantities on any Day in excess of 103% of the customer's contractual rights, for which authorization has not been received, the customer will be charged 4.6572 ¢ per m³ or $1.216 per GJ, as appropriate.

3. Storage / Balancing Service

Authorized

The following Overrun rates are applied to any quantities stored in excess of the Contract parameters. Overrun will be authorized by Union Gas at its sole discretion.

	Firm Service Rate/GJ
Space	$6.000
Injection / Withdrawal Maximum	$6.000

OTHER SERVICES & CHARGES:

1. Monthly Charge

In addition to the rates and charges described previously for each Point of Consumption, a Monthly Charge shall be applied as follows:

Monthly Charge	$5,943.28

2. Diversion of Gas

The availability of the right to divert gas will be based on Union's ability to accommodate the diversion. The price to be charged for the right to divert shall be determined through negotiation.

3. Delivery Obligations

Effective January 1, 2007, new customers and existing customers with incremental daily firm demand requirements in excess of 1,200,000 m^3/day who are delivering gas to Union under direct purchase arrangements may be entitled to non-obligated deliveries. The delivery options available to customers are detailed at www.uniongas.com/business/account-services/unionline/contracts-rates/T1-service-features

Unless otherwise authorized by Union, all other customers who are delivering gas to Union under direct purchase arrangements must obligate to deliver at a point(s) specified by Union and must acquire and maintain firm transportation on all upstream pipeline systems. Customers initiating direct purchase arrangements, who previously received Gas Supply service, must also accept, unless otherwise authorized by Union, an assignment from Union of transportation capacity on upstream pipeline systems.

4. Nominations

Effective January 1, 2007, new customers and existing customers with incremental daily firm demand requirements in excess of 1,200,000 m^3/day who have non obligated deliveries may contract to use Union's 5 additional nomination windows (13 in total) for the purposes of delivering gas to Union. These windows are in addition to the standard NAESB and TCPL STS nomination windows. Customers taking the additional nomination window service will pay an additional monthly demand charge of $0.068/GJ/day/month multiplied by the non-obligated daily contract quantity.

5. Additional Service Information

Additional information on Union's T2 service offering can be found at:

The additional information consists of, but is not limited to, the following:
www.uniongas.com/business/account-services/unionline/contracts-rates/T1-service-features

i. Storage space and deliverability entitlement;
ii. The determination of gas supply receipt points and delivery obligations;
iii. The nomination schedule;
iv. The management of multiple redelivery points by a common fuel manager; and
v. The availability of supplemental transactional services including title transfers.

(D) Delayed Payment

The monthly late payment charge equal to 1.5% per month or 18% per annum (for an approximate effective rate of 19.56% per annum) multiplied by the total of all unpaid charges will be added to the bill if full payment is not received by the late payment effective date, which is 20 days after the bill has been issued.

Tab 19

POLICIES & GUIDELINES

Policy #: 10-DP-DCQS-009

☐ North ☒ South ☐ North and South

Subject:	**Effective**:
Setting new, and increasing or decreasing existing Daily Contract Quantity (DCQ) or Parkway Call for customers that are eligible to choose the Firm Billing Contract Demand (FBCD).	April 1, 2014

Applies to:

All new or existing T2 or T3 direct purchase customers that are eligible to choose for FBCD by having new or incremental loads greater than 1,200,000 m^3/day and that are directly connected to: i) the Dawn to Trafalgar transmission system in close proximity to Parkway; or ii) a third party pipeline.

Purpose:

This policy will ensure consistent and fair treatment for setting and changing (either increases or decreases) a T2 T3 customer's Daily Contract Quantity (DCQ).

Background: *(Not to limit the applicability of the policy)*

The direct purchase contract identifies the DCQ for the term of the contract. This policy addresses situations where either a new contract requires a DCQ to be set or a change in an existing DCQ is requested by a customer or their agent, or is required at the time of contract renewal or contract amendment.

The Firm Operational Contract Demand (FOCD) is the maximum firm daily requirement of the end use facility (i.e. 24 hours x peak hour). This has traditionally been used for the billing of demand charges.

A FBCD is a billing parameter used to recover Union's facility and ongoing costs to serve the end use location over the term of the contract. The FBCD was developed to respond to the competitive pressure of physical by-pass. Pursuant to the Natural Gas Electricity Interface Review (NGEIR) Decision, the FBCD is provided, at the customer's option, as an alternative for the billing of demand charges. The FBCD lowers the customer's demand charge commitment over the term of the initial contract. The customer's actual daily firm consumption requirement is equal to 100% of the FOCD. Daily consumption volumes that fall between the FBCD parameter and the CD parameter are firm, and will be invoiced at the T2 firm transportation Authorized Overrun Rate.

Customers initiating contracts after December 31, 2006, are eligible to choose the FBCD if new or incremental loads are greater than 1,200,000 m^3/day and are directly connected to: i) the Dawn to Trafalgar transmission system in close proximity to Parkway; or ii) a third party pipeline. If the customer does not meet these criteria, they would not be eligible for the FBCD option.

.

West of Dawn – customers' end use locations served by the PanHandle 16 and 20 inch lines as well as the Sarnia Industrial line.

East of Dawn – customers' end use locations served by the Dawn to Trafalgar transmission line.

A "New Customer", for the purpose of this policy, is a person or a legal entity that does not currently have, or has not previously had, a connection to the Union Gas Distribution system in the last three years, or that is building new physical facilities or occupying existing physical facilities that Union built natural gas plant to serve.

Summary of DCQ Calculations

- For T2/T3 customers who are eligible for and have chosen the FBCD, the DCQ is calculated as 100% of their FOCD.
- For T2/T3 customers who are eligible for and have not chosen the FBCD, the DCQ is equal to a minimum of 80% of the FOCD.

As per the EB-2013-0365 Settlement Agreement and OEB decision, a number of Direct Purchase ("DP") customers are contractually required by Union to deliver their Daily Contract Quantity ("DCQ") of gas to Parkway, at their own expense, in order for Union to more efficiently operate its system. As a consequence, DP customers with a Parkway Delivery Obligation ("PDO") are conferring a benefit on all users of the Dawn-Parkway transmission system because its size and capacity are less than would otherwise be required.

To rectify this inequity, the Parties agree that the PDO should be permanently transitioned to Dawn. Union will use excess Dawn-Kirkwall transmission capacity and other resources to facilitate the transition.

The PDCI will be paid on the obligated Parkway deliveries Union Gas requires from DP customers, for their DCQ quantities delivered at Parkway, and for quantities delivered on behalf of Union Gas sales service customers. For greater clarity, quantities voluntarily delivered to Parkway (e.g. incremental supply), rather than delivered pursuant to a PDO required by Union, will not attract the PDCI.

Ratepayer representatives and Union acknowledge that M12 turnback opportunities should be made available to FBCD customers in the same proportions as those opportunities are made available to DP customers with PDOs.

Policy:

When initiating a contract, the DCQ and, if applicable, Parkway Call will be set to reflect the historical and/or forecasted consumption for the contract term. At contract renewal/amendment, the DCQ and, if applicable, Parkway Call may be increased or decreased, to reflect the historical and/or forecasted consumption for the contract term.

Setting the DCQ for new Contract customers served under rates: T2 or T3 with new incremental consumption > 1,200,000 m^3/day.

New T2/T3 customers located **East of Dawn**

a. Who are eligible and have chosen a FBCD:
   i) Will require obligated Ontario Deliveries at Parkway equal to 100% of their FOCD; **OR**
   ii) Will contract for M12 Dawn to Parkway transportation equal to 100% of their FOCD and assign such to Union which will allow the customer to contract for non-obligated Ontario deliveries at Dawn; **OR**
   iii) Can elect any combination of options a.(i) or a.(ii) above that would sum to 100% of their FOCD.

b. Who are not eligible or have not chosen the FBCD option:
   i) Will require obligated Ontario Deliveries at Parkway equal to at least 80% of their FOCD; **OR**
   ii) Will contract for M12 Dawn to Parkway transportation equal to at least 80% of their FOCD and assign such to Union which will allow the customer to contract for non-obligated Ontario deliveries at Dawn; **OR**
   iii) Can elect any combination of options b.(i) or b.(ii) above that would sum to at least 80% of their Firm CD.

New T2/T3 customers located **West of Dawn**

i) Have an option to contract for Non-Obligated DCQ requirement at Dawn contingent on Union's facilities. Otherwise the DCQ will be an Obligated DCQ or a combination of Non-Obligated and Obligated DCQ.

Increase to DCQ for existing Contract customers served under rates T2 or T3 with a Firm Transportation Demand > 1,200,000 m^3/day.	T2/T3 customers located **East of Dawn** a. Who are eligible and have chosen a FBCD: i) The increase will be managed through additional obligated Ontario Deliveries at Parkway equal to 100% of their revised FOCD; **OR** ii) Will contract for M12 Dawn to Parkway transportation equal to 100% of their revised FOCD and assign such to Union which will allow the customer to contract for non-obligated Ontario deliveries at Dawn; **OR** iii) Can elect any combination of options a.(i) or a.(ii) above that would sum to 100% of their revised FOCD. b. Who are not eligible or have not chosen the FBCD option: i) The increase will be managed through additional obligated Ontario Deliveries at Parkway equal to at least 80% of their revised FOCD; **OR** ii) Will contract for M12 Dawn to Parkway transportation equal to at least 80% of their revised FOCD and assign such to Union which will allow the customer to contract for non-obligated Ontario deliveries at Dawn; **OR** iii) Can elect any combination of options b.(i) or b.(ii) above that would sum to at least 80% of their revised Firm CD. T2/T3 customers located **West of Dawn** i) Will have an option to contract for Non-Obligated DCQ requirement at Dawn contingent on Union's facilities. Otherwise the DCQ will be an Obligated DCQ or a combination of Non-Obligated and Obligated DCQ.
Decrease to Obligated DCQ for existing Contract customers served under rates T2 or T3 with a Firm Transportation Demand > 1,200,000 m^3/day with decreased consumption.	T2/T3 customers located **East of Dawn** a. Who are eligible and have chosen a FBCD: i) The decrease will be managed through a reduction in obligated Ontario Deliveries at Parkway equal to 100% of the reduction in their FOCD; **OR** ii) Will contract for M12 Dawn to Parkway transportation equal to 100% of their revised FOCD and assign the adjusted capacity to Union which will allow the customer to contract for non-obligated Ontario deliveries; **OR** iii) Can elect to retain any combination of options a.(i) or a.(ii) above that would sum to 100% of their revised FOCD. b. Who have not chosen the FBCD option: i) The decrease will be managed through a reduction in obligated Ontario Deliveries at Parkway equal to at least 80% of their revised FOCD; **OR** ii) Will contract for M12 Dawn to Parkway transportation equal to at least 80% of their revised Firm CD and assign the adjusted capacity to Union which will allow the customer to contract for non-obligated Ontario deliveries at Dawn; **OR** iii) Can elect anya combination of options b.(i) or b.(ii) above that would sum to at least 80% of their revised Firm CD. T2/T3 customers located **West of Dawn** i) Will have an option to reduce Non-Obligated or Obligated DCQ requirement at Dawn to meet the revised Contracted Demand.

Transition Parkway Obligation to Dawn	Starting April 1, 2014, Union began to facilitate a permanent transition of the PDO for customers who elect to change their obligated delivery point from Parkway to Dawn effective April 1, 2014 using M12 Dawn to Kirkwall Parkway capacity and other resources. A proportionate share of the aggregate PDO reduction available will be allocated to all Parkway delivery obligated direct purchase ("PDO DP") customers eligible for FBCD as follows: o Customers with PDOs above 100 GJ/day will have their proportionate share of the available PDO transferred to Dawn o Customers holding M12 Dawn to Parkway capacity to satisfy their PDO may elect to turn back the same proportionate share as their PDO. o FBCD customers who turn back their M12 Dawn to Parkway must increase their FBCD to offset the revenue lost by turning back M12 Dawn to Parkway capacity.

Procedures

1) The DCQ will be determined as outlined in the policy based on information available approximately 80 days prior to the effective date of the contract or contract renewal.

2) Where Union is able to transition a portion of Parkway Delivery Obligation to Dawn, Union will solicit customer interest. Union will allocate the transition in a method consistent with the EB-2013-0365 Settlement Agreement (all under 100 GJ/d, allocated 100%, then if any capacity remains to transition others, allocated pro-rata to those DP customers with a PDO and any capacity not so elected to transition, being shared pro-rata amongst those customers that elected more transition if it was available).

3) Customer may propose and Union Gas may accept an alternative consumption forecast (with a resulting change in DCQ provided the contract holder provides justification acceptable to Union Gas for the change. The forecast of expected consumption to support the requested DCQ must be provided no later than 54 days before the contract's renewal date. Requests received after this date will be dealt with on a reasonable efforts basis.

4) Union Gas will issue a contract or contract amendment (reflecting parameters consistent with the above policy, and the resulting balancing requirements) approximately 35 days before the effective date of the contract or contract amendment for customer signature. If applicable, an M12 contract for Dawn to Parkway transportation will also be issued to customer for signature.

5) Customer will sign and return the contract(s) or contract amendment(s) to Union Gas at least 25 days before the effective date of the amendment.

6) Union Gas will sign the contract(s) or contract amendment(s) and provide a copy to the customer approximately 1 week after receiving the signed amendment from customer.

7) Union Gas will prepare and Union Gas/customer will sign and execute temporary assignment paperwork for upstream pipelines, as necessary, in accordance with their respective schedules.

8) Customer will nominate deliveries to Union Gas reflecting the above contract(s) or contract amendment(s).