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Our File No. 231915
Date June 20, 2016

RESS

Ontario Energy Board
2300 Yonge Street, 27th Floor
Toronto, ON M4P 1E4

Attention: Kristen Walli
Board Secretary
boardsec@ontarioenergyboard.ca

Dear Ms. Walli:

Re: CPA Evidence
EB-2016-0004

We are counsel to the Canadian Propane Association (the "**CPA**"), an intervenor in this proceeding.

Enclosed are CPA's written submissions and book of authorities, in accordance with the Decision and Procedural Order No. 3, issued by the Board on May 30, 2016.

Yours truly,

Laura Brazil

/cs
Attach.

cc by email: Intervenors in EB-2016-0004 and EB-2015-0179

ONTARIO ENERGY BOARD

EB-2016-0004

Application under the Ontario Energy Board's own motion to consider potential alternative approaches to recover costs of expanding natural gas service to communities that are not currently served

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BOOK OF AUTHORITIES OF THE CANADIAN PROPANE ASSOCIATION

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TAB 1

Ontario Statutes
Ontario Energy Board Act, 1998
Part I — General

S.O. 1998, c. 15, Sched. B, s. 2

s 2. Board objectives, gas

Currency

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

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

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

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

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

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

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

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

Amendment History
2002, c. 23, s. 4(2); 2003, c. 3, s. 3; 2004, c. 23, Sched. B, s. 2; 2009, c. 12, Sched. D, s. 2

Currency
Ontario Current to Gazette Vol. 149:23 (June 4, 2016)

End of Document

Ontario Statutes
Ontario Energy Board Act, 1998
Part V — Regulation of Electricity

S.O. 1998, c. 15, Sched. B, s. 79.2

s 79.2

Currency

79.2

79.2(1)Rate assistance

The Board may, in approving just and reasonable rates for a distributor, make provision for rate assistance to rate-assisted consumers having regard to their economic circumstances.

79.2(2)Ontario Electricity Support Program

Where the Board makes provision for rate assistance in accordance with subsection (1), the rates set and the related activities undertaken by the Board may be referred to as the "Ontario Electricity Support Program" in English and "Programme ontarien d'aide relative aux frais d'électricité" in French.

79.2(3)Application

Subsections (4) to (18) apply where the Board, in approving just and reasonable rates that are effective on or after January 1, 2016 for a distributor, makes provision for the rate assistance referred to in subsection (1) for rate-assisted consumers in the distributor's service area.

79.2(4)Rate-assisted consumers, Board

The Board may, by order or by establishing or amending a code, identify one or more classes of consumers as rate-assisted consumers.

79.2(5)Rate-assisted consumers, regulations

The regulations may provide for other consumers who are rate-assisted consumers.

79.2(6)Rates, regulations

If the regulations so provide, the Board shall, in making provision for rate assistance under subsection (1), do so in accordance with any methods or directions provided for in the regulations.

79.2(7)Payments with respect to prior use

The regulations may require the IESO, distributors, unit sub-meter providers and any other persons or entities to provide payments for rate assistance to prescribed classes of rate-assisted consumers with respect to electricity consumed during a period prior to the date of the making of the regulation, but no such payment shall be required under the regulations with respect to electricity consumed before January 1, 2016.

79.2(8)Transitional

The Board may require a distributor to provide rate assistance for a rate-assisted consumer with respect to a period prior to the date on which the consumer became a rate-assisted consumer if,

(a) the consumer becomes a rate-assisted consumer within 12 months of the date on which the rates referred to in subsection (1) become applicable to the distributor for the first time; and

(b) the consumer meets all of the criteria approved by the Board.

TAB 2

1998 CarswellOnt 3950
Supreme Court of Canada

Eurig Estate, Re

1998 CarswellOnt 3950, 1998 CarswellOnt 3951, [1998] 2 S.C.R. 565, [1998] S.C.J. No. 72, [2000] 1 C.T.C. 284, 114 O.A.C. 55, 165 D.L.R. (4th) 1, 231 N.R. 55, 23 E.T.R. (2d) 1, 40 O.R. (3d) 160 (note), 40 O.R. (3d) 160, 83 A.C.W.S. (3d) 146, J.E. 98-2121

Marie Sarah Eurig, as Executor of the Estate of Donald Valentine Eurig, Appellant v. The Registrar of the Ontario Court (General Division) and the Attorney General for Ontario, Respondents and The Attorney General of Quebec, the Attorney General of British Columbia and the Attorney General for Alberta, Interveners

Lamer C.J.C., L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Major, Bastarache, Binnie JJ.

Judgment: October 22, 1998
Docket: 25866

Proceedings: reversing (1997), 31 O.R. (3d) 777 (C.A.)

Counsel: *Peter W. Hogg, Q.C., Peter T. Fallis*, and *J. Gregory Richards*, for the appellant.
Tanya Lee, for the respondents.
Monique Rousseau, for the intervener the Attorney General of Quebec.
George H. Copley, Q.C., for the intervener the Attorney General of British Columbia.
Robert J. Normey, for the intervener the Attorney General for Alberta.

Subject: Constitutional; Estates and Trusts; Provincial Tax

APPEAL by executor from judgment reported at (1997), 31 O.R. (3d) 777 (C.A.).

Pourvoi de l'executrice testamentaire à l'encontre d'un jugement publié à (1997), 31 O.R. (3d) 777 (C.A.).

Major J. (L'Heureux-Dubé, Cory, Iacobucci JJ. and Lamer C.J.C. concurring):

1 At issue in this appeal is whether the Province of Ontario acted within its legislative authority in imposing an *ad valorem* levy for grants of letters probate.

I. Facts

2 The appellant is the executor of her late husband's estate. The total value of the estate was $414,000 which, pursuant to s. 2(1) of O. Reg. 293/92, subsequently amended by O. Reg. 802/94, required payment of $5,710 in probate fees in order to obtain letters probate. The regulation was purported to be under the authority of the *Administration of Justice Act*, R.S.O. 1990, c. A.6.

3 The appellant applied to the Ontario Court (General Division) for an order that she be issued letters probate without payment of the probate fee and for a declaration that the regulation which required that payment was unlawful. The application and subsequent appeal to the Ontario Court of Appeal were both dismissed.

II. Judicial History

A. Ontario Court (General Division) (1994), 20 O.R. (3d) 385 (Ont. Gen. Div.)

4 Morrison J., in assessing the probate charge, held that the difference between a fee and a tax is that a tax is compulsory, while a fee is only required to be paid where one seeks the services for which it is imposed. In concluding that the charge for probate is a fee and not a tax, he held that probate fees lack the universal application characteristic of a tax. In certain circumstances, executors can administer and distribute the bequest of a deceased without applying for a grant of probate. Also, living persons can arrange their affairs so that there is no necessity for probate. Morisson J. also held that "sliding scale" fees can be supported as ancillary or adhesive to a valid provincial regulatory scheme.

5 In rejecting the appellant's submission that the *Administration of Justice Act* does not authorize escalating fees as prescribed by the Regulations, Morisson J. held that the language used in s. 5(c) of the Act, together with the long history of similarly worded statutes providing for escalating probate fees, demonstrated the intention of the legislature to authorize volumetric fees. He therefore dismissed the application.

B. Ontario Court of Appeal (1997), 31 O.R. (3d) 777 (Ont. C.A.)

6 Morden A.C.J.O. held that, in light of the legislative evolution of the probate fee system in Ontario, the *ad valorem* fee structure imposed by the Regulations is properly authorized by s. 5(c) of the *Administration of Justice Act* and is not a revenue-generating device enacted for a purpose not authorized by the *Act*.

7 He also held that the charge for probate is a fee and not a tax. A tax is a levy which is enforceable by law, imposed under the authority of the legislature by a public body, and made for a public purpose: *Lawson v. Interior Fruit Committee* (1930), [1931] S.C.R. 357 (S.C.C.) at p. 363. Although the fee is compulsory and therefore enforceable by law, Morden A.C.J.O. found that it is legislation in relation to s. 92(14) of the *Constitution Act, 1867* and is not aimed at raising a revenue under s. 92(2). Thus, the charge for probate did not meet all the requirements of a tax.

8 Morden A.C.J.O. held that the question of whether the taxing power could be delegated to the Lieutenant Governor in Council pursuant to ss. 53 and 54 of the *Constitution Act, 1867* did not arise because the fees in question are not taxes. He concluded that even if the fees were considered to be taxes, they were ingredients of a regulatory scheme not covered by ss. 53 and 54. The appeal was dismissed.

III. Issues

9 On November 27, 1997, the Chief Justice stated the following constitutional questions:

> 1. Is the probate fee, which was imposed by Ontario Regulation 293/92, which was made under s. 5 of the *Administration of Justice Act*, R.S.O. 1990, c. A.6, invalid on the ground that it is an indirect tax that is outside the legislative authority of the province of Ontario under s. 92(2) of the *Constitution Act, 1867*?
>
> 2. Is the probate fee, which was imposed by Ontario Regulation 293/92, which was made under s. 5 of the *Administration of Justice Act*, R.S.O. 1990, c. A.6, invalid on the ground that it was imposed by a body other than the Legislature of Ontario in contravention of s. 90 (incorporating by reference ss. 53 and 54) of the *Constitution Act, 1867*?

IV. Relevant Constitutional, Statutory and Regulatory Provisions

A. Constitutional Provisions

10

> **Constitution Act, 1867**
>
> **53.** Bills for appropriating any Part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons.

54. It shall not be lawful for the House of Commons to adopt or pass any Vote, Resolution, Address, or Bill for the Appropriation of any Part of the Public Revenue, or of any Tax or Impost, to any Purpose that has not been first recommended to that House by Message of the Governor General in the Session in which such Vote, Resolution, Address, or Bill is proposed.

90. The following Provisions of this Act respecting the Parliament of Canada, namely, - the Provisions relating to Appropriation and Tax Bills, the Recommendation of Money Votes, the Assent to Bills, the Disallowance of Acts, and the Signification of Pleasure on Bills reserved, - shall extend and apply to the Legislatures of the several Provinces as if those Provisions were here re-enacted and made applicable in Terms to the respective Provinces and the Legislatures thereof, with the Substitution of the Lieutenant Governor of the Province for the Governor General, of the Governor General for the Queen and for a Secretary of State, of One Year for Two Years, and of the Province for Canada.

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next here-inafter enumerated; that is to say, -

2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.

14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

Constitution Act, 1982

45. Subject to section 41, the legislature of each province may exclusively make laws amending the constitution of the province.

B. Statutory Provisions

11

Administration of Justice Act, R.S.O. 1990, c. A.6

5. The Lieutenant Governor in Council may make regulations,

(a) requiring the payment of fees for any thing required or authorized under any Act to be done by any person in the administration of justice and prescribing the amounts thereof;

(b) providing for the payment of fees and allowances by Ontario in connection with services under any Act for the administration of justice and prescribing the amounts thereof;

(c) requiring the payment of fees in respect of proceedings in any court and prescribing the amounts thereof.

C. Regulations

12 Ontario Regulation 293/92 (pursuant to the *Administration of Justice Act*, R.S.O. 1990, c. A.6, s. 5)

2.-(1) The following fees are payable in estate matters:

1. For a grant of probate, administration or guardianship, not being a double probate, cessate grant or administration *de bonis non administratis*.

I.	on the first $50,000 of the value of the estate being administered, per thousand dollars or part thereof	$ 5.00

ii.	on the portion of the value of the estate being administered that exceeds $50,000, per thousand dollars or part thereof	$ 15.00

The above section was re-enacted by O. Reg. 802/94, s. 1, which reads as follows:

2.-(1) The following fees are payable in estate matters:

1. For a certificate of appointment of estate trustee, other than a certificate of succeeding estate trustee or a certificate of estate trustee during litigation,

I.	on the first $50,000 of the value of the estate being administered, per thousand dollars or part thereof	$ 5.00
ii.	on the portion of the value of the estate being administered that exceeds $50,000, per thousand dollars or part thereof	$ 15.00

V. Analysis

13 In Ontario, letters probate (now referred to as "certificate of appointment of estate trustee with a will") are issued by the Ontario Court (General Division). The purpose of probate is to certify that a will and codicils have been duly proved and registered in the court and that administration of the property of the deceased has been committed by the court to the persons named in the will as executors. Ontario Regulation 293/92 (subsequently re-enacted as O. Reg. 802/94) sets out a schedule of *ad valorem* charges which must be paid in order to obtain a grant of probate. The appellant challenges the legality of those charges.

A. Is the probate levy a fee or a tax?

14 The appellant contends that the probate levy prescribed by s. 2(1) of O. Reg 293/92 is a tax rather than a fee. This distinction is important because a tax may be either direct or indirect, and pursuant to s. 92(2) of the *Constitution Act, 1867*, a province only has jurisdiction to impose a direct tax. Conversely, a province may charge a fee, regardless of whether it is an indirect tax, provided that it is validly enacted under a provincial head of power other than the taxing power: see *Allard Contractors Ltd. v. Coquitlam (District)*, [1993] 4 S.C.R. 371 (S.C.C.) at p. 412, and *Ontario Home Builders' Assn. v. York (Region) Board of Education*, [1996] 2 S.C.R. 929 (S.C.C.) at p. 988.

15 Whether a levy is a tax or a fee was considered in *Lawson*, *supra*. Duff J. for the majority concluded that the levy in question was a tax because it was: (1) enforceable by law; (2) imposed under the authority of the legislature; (3) levied by a public body; and (4) intended for a public purpose.

16 The first, third and fourth criteria pertain to the nature of the levy, while the second criterion involves a consideration of the manner in which the levy was imposed. In this appeal the first concern is identifying the nature of the probate levy. The manner in which the levy was imposed will be considered later.

17 The Court of Appeal held that with respect to the first *Lawson* criterion the probate fee *is* compulsory and therefore enforceable by law. I agree. A practical compulsion usually exists for the executor to obtain probate in order to comply with his or her legal obligations. Although probate is not the foundation of the executor's title but only the authentic evidence of it, that authentication is nonetheless a practical and legal necessity in most cases, as illustrated by R. Hull and I. M. Hull in *Macdonell, Sheard and Hull on Probate Practice* (4th ed. 1996), at p. 188:

> Any debtor of the testator is justified in refusing to pay his debt to the executor until probate is produced. All proceedings in an action by the executor to enforce such payment will be stayed until the plaintiff obtains probate. Similarly an action to recover possession of the testator's goods, or for damages for their wrongful

> conversion, brought by the executor, must fail unless the executor has proved the will. In the absence of special statutory provisions to the contrary, the executor will fail whenever it is necessary to establish title as the personal representative of the deceased.

See also *The Solicitor's Guide to Estate Practice in Ontario*, by M. E. Rintoul (2nd ed. 1990), at pp. 35-36, wherein protection for the executor and administrative efficiency are identified as practical and legal reasons that frequently compel an executor to obtain probate. The fact that in some instances probate may be avoided does not lessen the fact that in Ontario letters probate are the rule in virtually all estate affairs.

18 The criterion that the fee must be levied by a public body is also satisfied here as probate fees in Ontario are levied by the Ontario Court (General Division).

19 The probate levy also meets the fourth *Lawson* criterion for a tax as the proceeds were intended for a public purpose. The Ontario Law Reform Commission concluded in 1991 that it is difficult to discern a principled justification for *ad valorem* probate fees, and that "[t]he only rationale for the graduated fee schedule appears to be that it has been regarded as a suitable vehicle for raising revenue" (*Report on Administration of Estates of Deceased Persons*, at p. 286).

20 Those conclusions are supported by the evidence before this Court which showed that probate fees do not "incidentally" provide a surplus for general revenue, but rather are intended for that very purpose. The revenue obtained from probate fees is used for the public purpose of defraying the costs of court administration in general, and not simply to offset the costs of granting probate.

21 Another factor that generally distinguishes a fee from a tax is that a nexus must exist between the quantum charged and the cost of the service provided in order for a levy to be considered constitutionally valid: see G. V. La Forest, *The Allocation of Taxing Power Under the Canadian Constitution* (2nd ed. 1981), at p. 72. This nexus was also considered a relevant to determining the nature of a municipal charge in *Allard Contractors, supra.* In that case the Court engaged the question of whether an indirect tax levied by a province was validly enacted as incidental to a matter of provincial jurisdiction. Addressing the relationship between a charge and the cost of the underlying service, Iacobucci J. wrote (at p. 411):

> A surplus itself is not a problem so long as the municipalities made reasonable attempts to match the fee revenues with the administrative costs of the regulatory scheme...

22 In determining whether that nexus exists, courts will not insist that fees correspond precisely to the cost of the relevant service. As long as a reasonable connection is shown between the cost of the service provided and the amount charged, that will suffice. The evidence in this appeal fails to disclose any correlation between the amount charged for grants of letters probate and the cost of providing that service. The Agreed Statement of Facts clearly shows that the procedures involved in granting letters probate do not vary with the value of the estate. Although the cost of granting letters probate bears no relation to the value of an estate, the probate levy varies directly with the value of the estate. The result is the absence of a nexus between the levy and the cost of the service, which indicates that the levy is a tax and not a fee.

23 Having determined that the probate levy is enforceable by law, is levied by a public body, is intended for public purposes, and that no nexus exists between the amount of the levy and the cost of the service for granting letters probate, the compelling conclusion is that the probate levy as presently enforced is a tax.

B. Is the probate levy a direct or indirect tax?

24 Section 92(2) of the *Constitution Act, 1867* confers upon the provinces the power to raise revenue for provincial purposes only by means of direct taxation: see *Allard Contractors, supra*, at p. 394, *per* Iacobucci J. It therefore has to be determined whether the probate levy is a direct or indirect tax.

25 In *Principles of Political Economy*, Book V, ch. 2, John Stuart Mill defined the distinction between direct and indirect taxes. That oft repeated definition has not been much improved upon and is frequently referred to by courts in determining whether a levy is direct or indirect:

> A direct tax is one which is demanded from the very persons who, it is intended or desired, should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another ....

26 Applying Mill's definition, the tax would be indirect if the executor was personally liable for payment of probate fees, as the intention would clearly be that the executor would recover payment from the beneficiaries of the estate. However, the legislation does not make the executor personally liable for the fees. Payment is made by the executor only in his or her representative capacity. As a result, this case is readily distinguishable from *Cotton v. R.*, [1914] A.C. 176 (Canada P.C.), where the succession duty was intended to be paid by one person and recouped from another. Here, as the amount is paid out of the estate by the executor in his or her representative capacity with the intention that the estate should bear the burden of the tax, the probate fees fall within Mill's definition of direct tax. The probate levy does not fall within the more expansive definition of an "indirect tax" in *Allard Contractors per* Iacobucci J. at p. 396.

27 Thus, although the probate levy is properly characterized as a tax and not a fee, it is a direct tax and therefore *intra vires* the province pursuant to s. 92(2) of the *Constitution Act, 1867*. As a result there is no need to consider whether it would survive as an indirect tax on the basis that it was ancillary to a valid regulatory scheme. Such a result in any event is doubtful on the facts.

C. Did the implementation of the probate tax violate ss. 53 or 54 of the Constitution Act, 1867?

28 While the Ontario legislature has the authority to implement a direct tax, it must do so in accordance with the requirements set out in the Constitution. Section 53 of the *Constitution Act, 1867* mandates that bills for imposing any tax shall originate in the House of Commons. By virtue of s. 90 of the *Constitution Act, 1867*, s. 53 is rendered applicable to the provinces. Thus, all provincial bills for the imposition of any tax must originate in the legislature.

29 To date, s. 53 has been the subject of only limited academic and jurisprudential discussion. It has been suggested that the purpose of s. 53 is to prevent the introduction of taxation legislation in the Senate, and that with the abolition of bicameral legislatures in the provinces it has become redundant: see, e.g., W. H. McConnell in *Commentary on the British North America Act* (1977), at p. 132.

30 In my view, the rationale underlying s. 53 is somewhat broader. The provision codifies the principle of no taxation without representation, by requiring any bill that imposes a tax to originate with the legislature. My interpretation of s. 53 does not prohibit Parliament or the legislatures from vesting any control over the details and mechanism of taxation in statutory delegates such as the Lieutenant Governor in Council. Rather, it prohibits not only the Senate, but also any other body other than the directly elected legislature, from imposing a tax on its own accord.

31 In our system of responsible government, the Lieutenant Governor in Council cannot impose a new tax *ab initio* without the authorization of the legislature. As Audette J. succinctly stated in *R. v. National Fish Co.*, [1931] Ex. C.R. 75 (Can. Ex. Ct.) at p. 83, "[t]he Governor in Council has no power, *proprio vigore*, to impose taxes unless under authority specifically delegated to it by Statute. The power of taxation is exclusively in Parliament."

32 The basic purpose of s. 53 is to constitutionalize the principle that taxation powers cannot arise incidentally in delegated legislation. In so doing, it ensures parliamentary control over, and accountability for, taxation. As E. A. Driedger stated in "Money Bills and the Senate" (1968), 3 *Ottawa L. Rev.* 25, at p. 41:

> Through the centuries, the principle was maintained that taxation required representation and consent. The only body in Canada that meets this test is the Commons. The elected representatives of the people sit in the Commons,

and not in the Senate, and, consistently with history and tradition, they may well insist that they alone have the right to decide to the last cent what money is to be granted and what taxes are to be imposed.

33 The conclusion that s. 53 continues to be binding upon the provinces is supported by the fact that the applicability of s. 53 to the provinces was not removed when the Constitution was amended in 1982, even though bicameral legislatures had ceased to exist at the provincial level by that time.

34 Section 53 is a constitutional imperative that is enforceable by the courts. A contrary opinion was expressed in *Reference re Agricultural Products Marketing Act (Canada)*, [1978] 2 S.C.R. 1198 (S.C.C.), where Pigeon J. for the majority commented in *obiter* that ss. 53 and 54 are not entrenched in the Constitution and can be indirectly amended through inconsistent legislation. Those comments, however, were made before the passage of the 1982 amendments to the Constitution.

35 By virtue of s. 45 of the *Constitution Act, 1982*, the legislature of each province retains the discretion to exclusively make laws amending the constitution of the province. That power must be read in association with s. 52(1) of the *Constitution Act, 1982*, which stipulates that any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect. Subsection 52(1) effectively requires any provincial legislation that seeks to amend the constitution of the province to do so *expressly*: see J. Small in "Money Bills and the Use of the Royal Recommendation in Canada: Practice versus Principle?" (1995), 27 *Ottawa L. Rev.* 33, at p. 50. Otherwise, the legislation is liable to being struck down on the basis that it is inconsistent with the Constitution.

36 Nothing in the *Administration of Justice Act* purports to amend the constitutional requirement for imposing tax legislation set out in s. 53. The Ontario legislature did not delegate to the Lieutenant Governor in Council the authority to impose a tax. Therefore whether it could constitutionally do so does not need to be addressed. The only power conferred by s. 5 of the Act was to make regulations regarding the payment of fees, not the imposition of taxes. Yet the probate fees in this instance are in substance a tax imposed by the Lieutenant Governor in Council without having originated in the legislature. While the legislature of Ontario may well be competent to establish probate taxes under the terms of the *Administration of Justice Act*, s. 53 requires that they do so explicitly. Since s. 53 was not expressly amended, the province was obliged to abide by its terms. Its failure to do so renders the probate tax imposed under O. Reg. 802/94 (previously O. Reg. 293/92) unconstitutional. The unconstitutionality of the impugned legislation is an important reminder of the fact that the imposition of a tax has both political and legal dimensions which require the legislature to act carefully if the tax is to be successfully implemented.

37 The appellant also challenges the validity of the probate tax on the ground that it violates s. 54 of the *Constitution Act, 1867*. However, since s. 54 concerns the appropriation of taxes, and not the imposition of taxes (see Small, *supra*, at p. 40), it is not relevant to this appeal.

D. Is the probate levy authorized by s. 5 of the Administration of Justice Act?

38 Regardless of whether s. 53 was complied with, or even if s. 53 is considered redundant at the provincial level, the probate levy is not enforceable as it was not authorized by s. 5 of the *Administration of Justice Act*. Section 5 reads:

> **5**. The Lieutenant Governor in Council may make regulations,
>
> (a) requiring the payment of fees for any thing required or authorized under any Act to be done by any person in the administration of justice and prescribing the amounts thereof;
>
> (b) providing for the payment of fees and allowances by Ontario in connection with services under any Act for the administration of justice and prescribing the amounts thereof;
>
> (c) requiring the payment of fees in respect of proceedings in any court and prescribing the amounts thereof.

39 While these provisions authorize the Lieutenant Governor in Council to impose fees, they do not constitute an express delegation of *taxing* authority. Whether the province may delegate its taxing authority was not fully argued before this Court, is *obiter* in the result, and should be considered only when the issue has been raised in the courts below. Of relevance to this appeal is that the Act clearly does not authorize the imposition of a tax, albeit direct.

40 The constitutional requirement for a clear and unambiguous authorization of taxation within the enabling statute also provides the reply to Bastarache J.'s concerns. Once it has been determined that the probate fees levied by the impugned regulation are a direct tax, the question is whether the *Administration of Justice Act*, and the action of the Lieutenant Governor in Council in enacting O. Reg. 293/92, fulfil the legal and constitutional requirements for the imposition of a tax. Section 53 constitutionally mandates the court to strictly construct enabling legislation, such as s. 5 of the *Administration of Justice Act*, when determining whether it properly creates a taxation power. This simply strengthens the general principle of interpretation that "[i]f Parliament wants to give the Executive or some administrative agency the power to raise a tax by regulation, it must do so in a specific and unequivocal provision" (R. Dussault and L. Borgeat, *Administrative Law: A Treatise* (2nd ed. 1985), vol. 1. at p. 445).

41 Bastarache J. states that the authorization extended to the Lieutenant Governor in Council in the *Administration of Justice Act* to prescribe fees "includes the power to implement a direct tax..."(para 11). With respect, this conclusion cannot be sustained. The distinction between these two forms of charges cannot be erased by simply interpreting the word "fees" to include taxes. This distinction is both legally and constitutionally significant to determining the validity of the enactment. As s. 53 of the *Constitution Act, 1867*, Standing Order 54 of the Ontario legislature, and the general law on construction of taxing statutes all demonstrate, the imposition of taxes is an act of unique political significance, subject to special rules and requirements, none of which the impugned scheme meets. Ontario Reg. 293/92 is both unconstitutional and *ultra vires* as it seeks to impose a tax without clear and unambiguous authorization from the legislature to do so.

42 The appellant also argued that s. 5 does not authorize the imposition of *ad valorem* probate fees. Given my conclusion that the probate levy is a tax and not a fee, it is not necessary to address this issue. I would add, though, that the wording of the Act does not appear to restrict the type of fee that may be imposed provided that it possesses the characteristics of a fee, including *inter alia* the existence of a nexus between the amount charged and the cost of the service provided.

E. Disposition and Remedy

43 Section 52(1) of the *Constitution Act, 1982* provides that the Constitution is the supreme law of Canada and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect. The probate fee levied by O. Reg. 293/92 is in substance a direct tax which has not been imposed in accordance with the requirements of s. 53 of the *Constitution Act, 1867*. Thus the regulation is invalid and of no force or effect.

44 An immediate declaration of invalidity would deprive the province of the revenue derived from probate fees, with no opportunity to remedy the legislation or find alternative sources of funding. Probate fees have a lengthy history in Ontario, and the revenue derived therefrom is substantial. For example, the evidence presented to this Court indicated that in 1993 and 1994, probate fees collected in Ontario totalled $51.8 million and $52.6 million, respectively. This revenue is used to defray the costs of court administration in the province. An immediate deprivation of this source of revenue would likely have harmful consequences for the administration of justice in the province. The declaration of invalidity is therefore suspended for a period of six months to enable the province to address the issue.

45 The final issue is whether the appellant is entitled to a refund of the probate fees of $5,710 paid by her as executor for her late husband's estate.

46 In *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161 (S.C.C.), La Forest J. for three of the six members of the Court held that there is a general rule against recovery of taxes paid under unconstitutional statutes, with exceptions

where the relationship between the state and a particular taxpayer resulting in the collection of the tax is unjust or oppressive in the circumstances.

47 Even if this Court were to adopt the rule articulated by La Forest J., it would not prevent recovery by the appellant in this case. An exception has been recognized where taxes are paid under compulsion or protest: *Air Canada*, *supra*, at pp. 1209-10. Here, the appellant has challenged the validity of the regulation imposing the probate fee from the outset. She paid the fee in order to fulfil her legal obligations as executor of the estate only after the Ontario Court (General Division) held that the regulation was legally valid. Had the proper decision been rendered at first instance, the appellant would not have paid the fee. It would therefore be inequitable to deny recovery at this stage.

48 The appeal is accordingly allowed with costs and the appellant refunded the $5,710 paid by her.

49 For the reasons given, I would answer the constitutional questions as follows:

> 1. Is the probate fee, which was imposed by Ontario Regulation 293/92, which was made under s. 5 of the *Administration of Justice Act*, R.S.O. 1990, c. A.6, invalid on the ground that it is an indirect tax that is outside the legislative authority of the province of Ontario under s. 92(2) of the *Constitution Act, 1867*?

Answer: No

> 2. Is the probate fee, which was imposed by Ontario Regulation 293/92, which was made under s. 5 of the *Administration of Justice Act*, R.S.O. 1990, c. A.6, invalid on the ground that it was imposed by a body other than the Legislature of Ontario in contravention of s. 90 (incorporating by reference ss. 53 and 54) of the *Constitution Act, 1867*?

Answer: Yes

***Bastarache J.* (dissenting) (Gonthier J. concurring):**

50 This appeal concerns the validity of the fees set for probate by the Legislature of Ontario through Regulation 293/92, which was enacted pursuant to s. 5 of the *Administration of Justice Act*, R.S.O. 1990, c. A.6. The facts and the issues have been set out in the reasons of Major J. and I will not repeat them.

51 I have read the reasons of my colleagues Major and Binnie JJ. and in a number of aspects, I cannot, with respect, agree with their approaches. I accept Major J.'s characterization of the probate fee as a tax and I accept that it is a direct tax within the legislative authority of the province. I do not, however, agree that the probate fee is invalid on the ground that it was imposed by a body other than the Legislature of Ontario in contravention of s. 90 (incorporating by reference ss. 53 and 54 of the *Constitution Act, 1867*). Moreover, I do not accept Major and Binnie JJ.'s conclusion that the probate fees are not authorized under s. 5 of the *Administration of Justice Act*.

Sections 53 and 54 of the Constitution Act, 1867

52 Sections 53 and 54 of the *Constitution Act, 1867*, which are made applicable to the provincial legislature by virtue of s. 90 of the Act, provide as follows:

> **53.** Bills for appropriating any Part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons.
>
> **54.** It shall not be lawful for the House of Commons to adopt or pass any Vote, Resolution, Address, or Bill for the Appropriation of any Part of the Public Revenue, or of any Tax or Impost, to any Purpose that has not been first recommended to that House by Message of the Governor General in the Session in which such Vote, Resolution, Address, or Bill is proposed.

53 The appellant argued that s. 53 of the *Constitution Act, 1867* requires that any bill that appropriates public revenue or imposes any tax must originate in the Legislative Assembly. With respect to s. 54, the appellant argued that it prohibits the Legislative Assembly from adopting or passing such a bill unless it has been recommended to the Legislative Assembly by message of the Lieutenant Governor.

54 Major J., in his reasons, states that the rationale underlying s. 53 of the *Constitution Act, 1867* is to prohibit any body other than the legislature from imposing a tax on its own accord. The purpose of s. 53 of the *Constitution Act, 1867*, in my view, is to provide that bills concerning taxation originate in the House of Commons rather than the Senate. The section was enacted because of a concern in English history about taxation bills being introduced in the House of Lords rather than in the Commons. With the abolition of bicameral legislatures in the provinces, s. 53 no longer has significance at the provincial level (W. H. McConnell, *Commentary on the British North America Act* (1977), at pp. 105-6 and 131-32; W. R. Anson, *The Law and Custom of the Constitution* (3rd ed. 1897), Part 1, at pp. 265-68).

55 Even if s. 53 of the *Constitution Act, 1867* continues to apply to the provinces, the fact that the legislature has authorized the executive to prescribe fees in the form of a tax does not violate s. 53 of the *Constitution Act, 1867*. The tax in the form of probate fees is imposed by s. 5 of the *Administration of Justice Act*. This Act was introduced in the Legislative Assembly of Ontario and therefore cannot violate s. 53 of the *Constitution Act, 1867*. All that the Legislature has done is delegate to the Lieutenant Governor in Council the authority to provide for the details of the tax through regulation. The provincial legislature is entitled to delegate taxing powers to its subordinate bodies, including the Lieutenant Governor in Council (*Hodge v. R.* (1883), 9 App. Cas. 117 (Ontario P.C.) at pp. 131-33; *Shannon v. British Columbia (Lower Mainland Dairy Products Board)*, [1938] A.C. 708 (British Columbia P.C.) at p. 722; *Irving Oil Ltd. v. New Brunswick (Provincial Secretary)*, [1980] 1 S.C.R. 787 (S.C.C.)).

56 I agree with Major J. that s. 54 of the *Constitution Act, 1867* is not relevant to this appeal. Section 54 requires that bills relating to the appropriation of taxes (supply bills) be accompanied by a royal recommendation. The only bills that are guaranteed to the executive under s. 54 of the *Constitution Act, 1867* are true appropriation bills.

Section 5 of the Administration of Justice Act

57 Section 5 of the *Administration of Justice Act* provides as follows:

> **5.** The Lieutenant Governor may make regulations,
>
> (a) requiring the payment of fees for any thing required or authorized under any Act to be done by any person in the administration of justice and prescribing the amounts thereof;
>
> (b) providing for the payment of fees and allowances by Ontario in connection with services under any Act for the administration of justice and prescribing the amounts thereof;
>
> (c) requiring the payment of fees in respect of proceedings in any court and prescribing the amounts thereof.

58 Having found that the probate fee enacted pursuant to s. 5 of the *Administration of Justice Act* is in reality a direct tax imposed by the province through its delegate, the Lieutenant Governor in Council, the issue to be decided at this stage is whether s. 5 of the *Administration of Justice Act* authorizes the imposition of the fee structure found in Regulation 293/92. In finding that the probate fee is a direct tax, it has been determined that the probate fee is (1) enforceable by law; (2) levied by a public body; and (3) intended for a public purpose (reasons of Major J., at paras. 17-20).

59 In determining whether or not the probate fee, as a direct tax, is authorized under the *Administration of Justice Act*, it is not necessary to conduct an analysis of whether a nexus exists between the quantum charged and the cost of the service. It is only because variable fees are indirect in their general tendency that the nexus argument is normally raised (see *Allard Contractors Ltd. v. Coquitlam (District)*, [1993] 4 S.C.R. 371 (S.C.C.) at pp. 398 b and 402e; see also *Ontario Home Builders' Assn. v. York (Region) Board of Education*, [1996] 2 S.C.R. 929 (S.C.C.) at para. 53). In *Allard* and *Home*

Builders', the nexus between the fee and the value of the service provided arose in the context of indirect taxes, which would only be valid if ancillary to a valid regulatory scheme. It is noted in *Home Builders'*, at para. 53, that "[a]ny power of indirect taxation extending beyond regulatory costs would indeed render s. 92(2) [Direct Taxation] meaningless". It has long been accepted that there is no constitutional prohibition against a direct tax that is variable and designed to defray the costs of a regulation (see *Shannon v. British Columbia (Lower Mainland Dairy Products Board)*, *supra*, at p. 721). As Professor La Forest (as he then was) stated in *The Allocation of Taxing Power Under the Canadian Constitution* (2nd ed. 1981), quoted in *Home Builders'*, *supra*, at para. 52: "there is no doubt that direct taxation may be raised under section 92(2) even though it is framed in the form of a licence". The sole issue here is whether s. 5 of the *Administration of Justice Act* is broad enough to authorize this direct tax, not whether there is a nexus between the tax and the probate service, as would be required if the tax was indirect.

60 In my view, according to the ordinary rules of interpretation, including the legislative history of the impugned provision as thoroughly described by Morden A.C.J.O. in the Court of Appeal, s. 5(c) of the *Administration of Justice Act* is broad enough to authorize the Lieutenant Governor in Council to impose a direct tax on persons applying for probate. It authorizes the Lieutenant Governor in Council to prescribe fees in respect of proceedings in any court. This includes the power to implement a direct tax on applications for probate. The language of the section does not require that the fees be in proportion to services rendered. There is no exclusion of an "*ad valorem*" fee structure (*Canada (Attorney General) v. Cie de publication La Presse* (1966), [1967] S.C.R. 60 (S.C.C.)).

61 The powers of a provincial legislature cannot be limited except by the Constitution. The province of Ontario authorized the Lieutenant Governor in Council, through s. 5 of the *Administration of Justice Act*, to implement a direct tax in respect of court proceedings. The Lieutenant Governor in Council validly prescribed the amount for this tax and the method of payment through the taxing of applications for letters probate pursuant to Regulation 293/92. Accordingly, I would dismiss the appeal with costs.

***Binnie J.* (McLachlin J. concurring):**

62 I agree with Justice Major's conclusion that Ontario's probate "fee" is in reality a tax, albeit a direct tax within the legislative authority of the province. I also agree with his proposed disposition of the appeal. I differ, however, from his conclusion that the probate tax imposed under O. Reg. 293/92 (now 802/94) is unconstitutional by virtue of non-compliance with s. 53 of the *Constitution Act, 1867*. I prefer to rest my conclusion on his alternative ground that O. Reg. 293/92 is *ultra vires* s. 5 of the *Administration of Justice Act*, R.S.O. 1990, c. A.6.

63 The legislative power of the province is sovereign except as limited by the Constitution itself, including limitations flowing from the federal-provincial division of powers, and the *Canadian Charter of Rights and Freedoms*. In the absence of a constitutional prohibition, the legislature has power to authorize a tax structure of its own choosing, and for which it will be politically accountable, including a tax to be prescribed by the Lieutenant Governor in Council. I do not construe s. 53 of the *Constitution Act, 1867* as constituting such a prohibition.

64 Major J. rightly observes at para. 31 that:

> In our system of responsible government, the Lieutenant Governor in Council cannot impose a new tax *ab initio* without the authorization of the legislature.

It seems to me this leads to a straightforward question of whether the regulation is *ultra vires* s. 5 of the *Administration of Justice Act*. There is no need to look to the constitutional subtleties of s. 53, which provides:

> **53**. Bills for appropriating any Part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons.

Section 53 appears under the heading "Money Votes; Royal Assent" in a series of five sections dealing with various aspects of the relationships among the House of Commons, the Senate and the Crown. These provisions are made applicable

to the provinces by s. 90. Section 53 requires that money bills originate in the House of Commons. Regulation 293/92 is not, and never was, a "bill". It is a regulation that was prescribed by the Lieutenant Governor in Council. Bills arise only as part of the legislative process in the House of Commons or the Senate.

65 My colleague advances the proposition in para. 32 that:

> The basic purpose of s. 53 is to constitutionalize the principle that taxation powers cannot arise incidentally in delegated legislation. [Emphasis added.]

66 Again, in para. 40, he argues that s. 53 "constitutionally mandates the court to strictly construct enabling legislation". In my view, respectfully, this analysis reads the word "bills" out of the section, and takes the section out of the context of the series of sections of which it forms a part. Section 53 addresses a state of affairs prior to any "legislation" coming into existence. It is explicitly related to legislative procedure and there is nothing that I can see in its text to justify concluding that its "basic purpose" is the constitutional entrenchment of a principle of "strict construction" of legislation, delegated or otherwise. Regardless of the attraction of my colleague's broad rationale of promoting "parliamentary control over, and accountability for, taxation" (para. 32), I do not think the Court can facilitate achievement of the objective by rewriting s. 53. As the Court recently affirmed in *Reference re Secession of Quebec* (1998), 161 D.L.R. (4th) 385 (S.C.C.), implicit principles can and should be used to expound the Constitution, but they cannot alter the thrust of its explicit text.

67 I do, however, agree with Major J. that O. Reg. 293/92 is *ultra vires* s. 5 of the *Administration of Justice Act*, and would like to add a comment about the respondents' use of legislative history to support the government position. The respondents emphasized the historical evolution of probate fees in Ontario from 1793 until the present, and related the present fee structure to provisions in the *Estates Act*, R.S.O. 1990, c. E-21, having a bearing on probate fees. It is argued that it would be reasonable to infer from this historical context that the Legislature of Ontario intended by s. 5 to continue the authority of the Lieutenant Governor in Council to impose escalating *ad valorem* probate fees. Leaving aside the taxation issue, the difficulty with relying on legislative history in this case is that the context has changed. The statutory authority no longer exists in an Act dealing with a court exercising a specialized estates jurisdiction. Section 5 of the *Administration of Justice Act*, unlike sections of the *Act to establish a Court of Probate in this Province, and also a Surrogate Court in every District thereof*, S.U.C. 1793, 33 Geo 3, c. 8, and subsequent versions of the *Surrogate Courts Acts*, does not have a narrow focus. Section 5(a) authorizes fees "for any thing required or authorized under *any* Act to be done by any person in the administration of justice" (emphasis added), s. 5(b) allows fees to be prescribed "*in connection with* services under *any* Act for the administration of justice" (emphasis added), and s. 5(c) allows fees to be prescribed "*in respect of* proceedings in *any* court" (emphasis added). The words "for", "in connection with" and "in respect of" are words of very broad signification, and the obligation to pay the prescribed fee can be in relation to an enormous variety of "things", "services", and "proceedings". If s. 5(c), for example, validly authorizes escalating *ad valorem* fees for probate, it must equally authorize escalating *ad valorem* type fees "in respect of" other court proceedings. The 200-year legislative history of probate fees does not, therefore, justify an interpretation of the new and more generalized power to prescribe fees in s. 5 of the *Administration of Justice Act* beyond the sort of "fees" that the text of s. 5 would otherwise support.

68 It is implicit in the notion of "fee for service" that there is, somewhere, a cost base that is somehow connected to the provision of the relevant service and is to be allocated amongst users. The *New Shorter Oxford English Dictionary*, vol. 1, at p. 928, includes in its definition of "fee" a "sum payable to a public officer in return for the execution of relevant duties". The Court of Appeal accepted as appropriate in this regard the costs of operating the entire Ontario Court (General Division). The respondents seem to suggest that all users of the Ontario Court (General Division) are being subsidized by the government treasury and that some users cannot complain if they are subsidized less than other users. The record is singularly bare of any accounting data in this regard. In any event, as a matter of ordinary statutory interpretation, s. 5 cannot reasonably be construed as authorizing a fee for "things", "services" or "proceedings" based on the size of the bank account of the person seeking them rather than the cost of their delivery — however broadly the cost of such things, services or proceedings may be defined.

69 In short, the Ontario Legislature may delegate the power to prescribe an escalating *ad valorem* probate tax to the Lieutenant Governor in Council but it must do so in clear and unambiguous language. The present section authorizes the Lieutenant Governor in Council to prescribe fees, and unless and until the section is amended the charge to users for the relevant service must have some reasonable relationship to the cost of the provision of that service.

Appeal allowed.

Pourvoi accueilli.

TAB 3

2008 CarswellOnt 2830
Ontario Superior Court of Justice (Divisional Court)

Advocacy Centre for Tenants-Ontario v. Ontario (Energy Board)

2008 CarswellOnt 2830, [2008] O.J. No. 1970, 166 A.C.W.S. (3d) 384, 238 O.A.C. 343, 293 D.L.R. (4th) 684

Advocacy Centre for Tenants-Ontario and Income Security Advocacy Centre on behalf of Low-Income Energy Network (Appellant) and Ontario Energy Board (Respondent)

Cumming J., Kiteley J., and Swinton J.

Heard: February 25, 2008
Judgment: May 16, 2008
Docket: Toronto 273/07

Counsel: Paul Manning, Mary Truemner for Appellant
Michael Miller for Ontario Energy Board
Fred Cass, David Stevens for Enbridge Gas Distribution Inc.
Robert Warren for Consumers Council of Canada

Subject: Public; Constitutional

APPEAL by intervenor from provincial energy board's decision that it lacked jurisdiction to implement certain energy rate proposal.

Per Curiam:

The Appeal

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

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

3 Enbridge Gas Distribution Inc. ("EGD") sought approval by the Board of EGD's 2007 gas distribution rates based simply upon the Board's traditional, standard "cost of service" ratemaking principles. The Appellant Low Income Energy Network ("LIEN") had intervened in the application before the Board. LIEN argues that without a rate affordability program, the interests of low-income consumers are not protected. LIEN proposed that the Board accept as an issue in the EGD proceeding the following matter:

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

4 LIEN seeks from the Board the introduction of a rate affordability assistance program to make natural gas distribution rates affordable to poor people. The underlying premise of the proposal of LIEN is that low income

consumers (estimated to be about 18% of households in Ontario) should pay less for gas distribution services than other consumers. LIEN emphasizes that the supply of natural gas (or other source of energy) serves to meet basic human needs such as warmth from heating and the generation of power. Those who cannot afford to use natural gas as a source of energy may be placed at a significant disadvantage. LIEN submits that the Board can consider ability to pay in setting rates if it is necessary to meet broad public policy concerns. Access to an essential service is arguably such a concern. The supply of natural gas can be considered a necessity that is available from a single source with prices set by the Board in the public interest.

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

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

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

The Standard of Review

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

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

Analysis of the Board's Jurisdiction

A. Applicable Principles

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

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

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

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

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

14 The Court must apply a "pragmatic or functional" analysis in determining the issue of jurisdiction, by considering the wording of the *Act* conferring jurisdiction upon the Board, the purpose of the *Act* creating the Board, the reason for the Board's existence, the area of expertise of its members and the nature of the problem before the Board. *Syndicat national des employés de la commission scolaire régionale de l'Outaouais v. U.E.S., local 298*, [1988] 2 S.C.R. 1048 (S.C.C.) at 1088.

B. The Wording of the Act

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

> 36.(1) No gas transmitter, gas distributor or storage company shall sell gas or charge for the transmission, distribution or storage of gas except in accordance with an order of the Board, which is not bound by the terms of any contract.
>
> . . . . .
>
> (2) The Board may make orders approving or fixing just and reasonable rates for the sale of gas by gas transmitters, gas distributors and storage companies, and for the transmission, distribution and storage of gas.
>
> (3) In approving or fixing just and reasonable rates, the Board may adopt any method or technique that it considers appropriate.

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

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

18 The majority opinion in the Board Decision is of the view that the words "any method or technique" cannot reasonably be interpreted to mean "a fundamental replacement of the rate making process based on cost causality with one based on income level as a rate grouping determinant." (p.9)

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

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

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

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

21 The present s.36 (3) replaced s.19 of the old *Ontario Energy Board Act*, R.S.O. 1980, c. 332, which required a traditional cost of service analysis in very prescriptive terms:

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

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

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

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

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

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

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

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

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

30 Section 79 of the *Act* explicitly authorizes the Board to provide rate protection for rural or remote consumers of an electricity distributor. The majority decision argues that it is a reasonable inference that the Legislature, by virtue of the explicit singling out of a single category of consumers in s. 79, did not intend this benefit to apply to other categories of consumers. The Board argues that if s. 36 (2) and (3) are intended to allow for differential rate setting for subsets of residential consumers, then s. 79 is unnecessary. The majority decision considers the existence of s. 79 as indicating that the Legislature has been explicit on issues that it considers warrant special treatment through a subsidy. The majority decision argues that the existence of s. 79 implicitly excludes any intent to confer jurisdiction to depart from simply the cost of service approach employed to implement the mandate given to the Board by s. 36.

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

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

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

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

> (2) The Board, in carrying out its responsibilities under this or any other Act in relation to gas, shall be guided by the following objectives:
>
> 1. To facilitate competition in the sale of gas to users.
>
> 2. To protect the interests of consumers with respect to prices and the reliability and quality of gas service.
>
> 3. To facilitate rational expansion of transmission and distribution systems.
>
> 4. To facilitate rational development and safe operation of gas storage.

5. To promote energy conservation and energy efficiency in a manner consistent with the policies of the Government of Ontario.

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

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

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

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

> ...[T]he legislation involves economic regulation of energy resources, including setting prices for energy which are fair and reasonable to the distributors and the suppliers, while at the same time are a reasonable cost for the consumer to pay. This will frequently engage the balancing of competing interests, as well as consideration of broad public policy.

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

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

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

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

39 The Board's regulatory power is designed to act as a proxy in the public interest for competition in view of a natural gas utility's geographical natural monopoly. Absent the intervention of the Board as a regulator in rate-setting, gas utilities (for the benefit of their shareholders) would be in a position to extract monopolistic rents from consumers, in particular, given a relatively inelastic demand curve for their commodity. Clearly, a prime purpose of the *Act* and the Board is to balance the interests of consumers of natural gas with those of the natural gas suppliers. The Board's mandate through economic regulation is directed primarily at avoiding the potential problem of excessive prices resulting because of a monopoly distributor of an essential service.

40 In performing this regulatory function, it is consistent for the Board to seek to protect the interests of *all* consumers vis-a-vis the reality of a monopoly. The Board must balance the respective interests of the utility and the collective interest of all consumers in rate setting. *Union Gas Ltd. v. Ontario (Energy Board)* (1983), 1 D.L.R. (4th) 698, 43 O.R. (2d) 489 (Ont. Div. Ct.) at 501 . The Board's regulatory power is primarily a proxy for competition rather than an instrument of

social policy. *Dalhousie Legal Aid Service v. Nova Scotia Power Inc.* (2006), 268 D.L.R. (4th) 408 (N.S. C.A.) at para. 33 [*Dalhousie*].

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

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

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

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

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

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

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

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

48 Indeed, the provincial income tax legislation previously provided for public tax expenditures to assist low income consumers with rising electricity costs. This was done through an "Ontario home electricity payment" by reference to

income levels. *Income Tax Act*, R.S.O. 1990, c.1.2, s. 8.6.1, as rep. by *Income Tax Amendment Act (Ontario Home Electricity Relief), 2006*, S.O. 2006, c. 18, s. 1. As well, Parliament has provided a one-time relief for energy costs to low income families and seniors in Canada through the *Energy Costs Assistance Measures Act*, S.C. 2005, c. 49.

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

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

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

Conclusions on the Board's Jurisdiction

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

53 However, the Board is authorized to employ "any method or technique that it considers appropriate" to fix "just and reasonable rates." Although "cost of service" is necessarily an underlying fundamental factor and starting point to determining rates, the Board must determine what are "just and reasonable rates" within the context of the objectives set forth in s. 2 of the *Act*. Objective #2 therein speaks to protecting "the interests of consumers with respect to prices."

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

55 However, in our view, the Board need not stop there. Rather, the Board in the consideration of its statutory objectives might consider it appropriate to use a specific "method or technique" in the implementation of its basic "cost of service" calculation to arrive at a final fixing of rates that are considered "just and reasonable rates." This could mean, for example, to further the objective of "energy conservation", the use of incentive rates or differential pricing dependent upon the quantity of energy consumed. As well, to further the objective of protecting "the interests of consumers" this could mean taking into account income levels in pricing to achieve the delivery of affordable energy to low income consumers on the basis that this meets the objective of protecting "the interests of consumers with respect to prices."

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

57 This is not, of course, to imply any preferred course of action in rate setting by the Board. The Board in its discretion may determine that "just and reasonable rates" are those that follow from the approach of "cost causality" once the "cost of service" amount is determined. That is, the principle of equality of rates for consumers within a given class (e.g., residential consumers) may be viewed as the most just and reasonable approach. A determination by the Board that all

residential gas consumers (with relatively minor deviations through such programs as the "Winter Warmth Program") pay the same distribution rates is not in itself discriminatory on a prohibited ground. Indeed, it can be seen as a non-discriminatory policy in terms of prices paid.

58 Nor is it to suggest that as a matter of public policy, objectives of distributive justice or conservation in respect of energy consumption are best achieved by rate setting as compared to, for instance, tax expenditures or social assistance devised and implemented by the Legislature through mechanisms independent of the operation of the *Act*. It is noted that the Minister is given the authority in s. 27 of the *Act* to issue policy statements as to matters that the Board must pursue; however, the Minister has not issued any policy statement directing the board to base rates on considerations of the ability to pay. Moreover, the power granted to a regulatory authority "must be exercised reasonably and according to the law, and cannot be exercised for a collateral object or an extraneous and irrelevant purpose, however commendable." *Multi-Malls Inc. v. Ontario (Minister of Transportation & Communications)* (1976), 14 O.R. (2d) 49 (Ont. C.A.) at 55 . As we have said, cost of service is the starting point building block in rate setting, to meet the fundamental concern of balancing the interests of all consumers with the interests of the natural monopoly utility.

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

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

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

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

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

The issue of the Canadian Charter of Rights and Freedoms

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

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

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

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

Disposition

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

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

***Swinton J.*:**

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

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

The Board's Practice in Setting Rates

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

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

The Proper Approach to Statutory Interpretation

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

> There is only one rule in modern interpretation, namely, courts are obliged to determine the meaning of legislation in its total context, having regard to the purpose of the legislation, the consequences of proposed interpretations, the presumptions of special rules of interpretation, as well as admissible external aids. In other words, the courts must consider and take into account all relevant and admissible indicators of legislative meaning. After taking these

into account, the court must then adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of

> (a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is, its promotion of the legislative purpose; and (c) its acceptability, that is, the outcome is reasonable and just. (at p. 131)

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

The Words of the Provision in Issue

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

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

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

> It gives the Board the flexibility to employ other methods of ratemaking in fixing just and reasonable rates, such as incentive ratemaking, rather than the traditional costs of service regulation specified in section 19 of the old Act. The change in the legislation was coincident with the addition of the regulation of the electricity sector to the Board's mandate. The granting of the authority to use methods other than cost of service to set rates for the gas sector was an alignment with the non-prescriptive authority to set rates for the electricity sector. The Board is of the view that if the intent of the legislature by the new language was to include ratemaking considering income level as a rate class determinant, the new Act would have made this provision explicit given the opportunity at the time of the update of the Act and the resultant departure from the Board's past practice.

The Regulatory Context

79 According to longstanding principles governing public utilities developed under the common law, a public utility like the respondent Enbridge Gas Distribution Inc. ("Enbridge") must treat all its customers equally with respect to the rates they pay for a particular service (*Canada (Attorney General) v. Toronto (City)* (1893), 23 S.C.R. 514 (S.C.C.) at 519 -20; *St. Lawrence Rendering Co. v. Cornwall (City)*, [1951] O.R. 669 (Ont. H.C.) at 683; *Chastain v. British Columbia Hydro & Power Authority* (1972), 32 D.L.R. (3d) 443 (B.C. S.C.) at 454).

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

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

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

See, as well, *Edmonton (City) v. Northwestern Utilities Ltd.*, [1929] S.C.R. 186 (S.C.C.) at 192.

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

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

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

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

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

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

Other Provisions of the Act

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

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

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

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

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

> The Board, in approving just and reasonable rates for a distributor who delivers electricity to rural or remote consumers, shall provide rate protection for those consumers or prescribed classes of those consumers by reducing the rates that would otherwise apply in accordance with the prescribed rules.

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

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

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

The Significance of Ordering Rate Affordability Programs

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

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

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

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

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

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

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

97 Where the issue of rate affordability programs has arisen in other jurisdictions, courts and boards have ruled that a public utilities board does not have jurisdiction to set rates based on ability to pay (see, for example, *Washington Gas Light Co. v. Public Service Commission of the District of Columbia*, 450 A.2d 1187 (U.S. D.C. Ct. App. 1982) at para. 38; *Dalhousie Legal Aid Service v. Nova Scotia Power Inc.* (2006), 268 D.L.R. (4th) 408 (N.S. C.A.) at 419 ; Alberta Energy and Utilities Board Decision 2004-066 [*ENMAX Power Corp., Re*, 2004 CarswellAlta 2078 (Alta. E.U.B.)], Section 9.2.6 at 161, as well as the Oregon case, *supra*).

98 The appellants distinguish the *Dalhousie* case because the Nova Scotia legislation is different from Ontario's. Specifically, s. 67(1) of the *Public Utilities Act*, R.S.N.S. 1989, c. 380 provides that "[a]ll tolls, rates and charges shall always, under substantially similar circumstances and conditions in respect of service of the same description, be charged equally to all persons and at the same rate".

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

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

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

102 Section 7 of that Act, unlike s. 2 of the *Ontario Energy Board Act*, expressly includes the power "to respond to the economic and social requirements of users of telecommunications services" (s. 7(h)), as well as to enrich and strengthen

the social and economic fabric of Canada and its regions (s. 7(a)). Moreover, while s. 27(2)(b) of that Act forbids unjust discrimination in rates charged, s. 27(6) explicitly permits reduced rates, with the approval of the Commission, for any charitable organization or disadvantaged person.

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

104 The appellants have also pointed out that the Board has in the past authorized programs that transfer benefits to lower income customers. The Winter Warmth program is one in which individuals can apply for emergency financial relief with heating bills. It is triggered by an application from a particular customer, and the program is funded by all customers. The fact that the Board has approved this charitable program does not lead to the conclusion that it has jurisdiction to set rates on the basis of income level.

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

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

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

Jurisdiction by Necessary Implication

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

The Role of the Charter

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

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

110 In any event, the appellants' argument is, in fact, that the failure of the Board to order a rate affordability program is discriminatory on the basis of sex, race, age, disability and social assistance, because of the adverse impact on these groups (Factum, para. 43, as well as para. 47). Such an argument can not be made without a full evidentiary record, and the inclusion of statistical material in the Appeal Book is not a sufficient basis on which to address this equality argument.

Conclusion

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

Appeal allowed.

TAB 4

2005 FC 1217, 2005 CF 1217
Federal Court

Canadian Assn. of Broadcasters v. R.

2005 CarswellNat 2725, 2005 CarswellNat 5206, 2005 FC 1217,
2005 CF 1217, 142 A.C.W.S. (3d) 420, 50 Admin. L.R. (4th) 26

Canadian Association of Broadcasters (The Plaintiff Association), Groupe TVA Inc., CTV Television Inc., The Sports Network Inc., 2953285 Canada Inc. (o.b.a. Discovery Channel Canada), Le Réseau des Sports (RDS) Inc., The Comedy Network Inc., 1163031 Ontario Inc. (o.b.a. Outdoor Life Network), Global Communications Limited, Global Television Network Quebec Limited Partnership, Prime TV, General Partnership, CHUM Limited, CHUM Ottawa Inc., CHUM Television Vancouver Inc. and Pulse24 General Partnership (The Corporate Plaintiffs) (Plaintiffs) and Her Majesty The Queen (Defendant)

Vidéotron Ltée, Vidéotron (Régional) Ltée and CF Cable TV Inc. (Plaintiffs) and Her Majesty The Queen (Defendant)

Hugessen J.

Heard: September 1, 2005
Judgment: September 9, 2005 *
Docket: T-2277-03, T-276-04

Proceedings: affirmed *Canadian Assn. of Broadcasters v. R.* (2006), 2006 FCA 208, 2006 CarswellNat 1526 (F.C.A.)

Counsel: Barbara A. McIsaac, Q.C., Howard Fohr for Plaintiffs
Daniel Urbas, Carl J. Souquet for Plaintiffs, Vidéotron Ltée et al, in T-276-04
F.B. (Rick) Woyiwada, R. Jeff Anderson for Defendant in T-2277-03
Francisco Couto for Defendant in T-276-04

Subject: Public; Constitutional; Tax — Miscellaneous

MOTION for determination of questions of law.

Hugessen J.:

1 This is a motion for a determination of two questions of law. The questions, as set out in the Order of the Court dated May 6, 2005, are as follows:

> (a) Is Part II of the *Broadcasting Licence Fee Regulations*, 1997, SOR/97-144 *ultra vires* s. 11 of the *Broadcasting Act*, S.C. 1991, c. 11, as amended, if the fees imposed thereunder are considered to be a tax?
>
> (b) Does s. 11 of the *Broadcasting Act*, S.C. 1991, c. 11 as amended, constitute an ineffective delegation of Parliament's taxation authority if the fees imposed thereunder are considered to be a tax?

2 Section 11 of the *Broadcasting Act* is as follows:

> 11. (1) The Commission may make regulations

(a) with the approval of the Treasury Board, establishing schedules of fees to be paid by licensees of any class;

(b) providing for the establishment of classes of licensees for the purposes of paragraph (a);

(c) providing for the payment of any fees payable by a licensee, including the time and manner of payment;

(d) respecting the interest payable by a licensee in respect of any overdue fee; and

(e) respecting such other matters as it deems necessary for the purposes of this section.

(2) Regulations made under paragraph (1)(a) may provide for fees to be calculated by reference to any criteria that the Commission deems appropriate, including by reference to

(a) the revenues of the licensees;

(b) the performance of the licensees in relation to objectives established by the Commission, including objectives for the broadcasting of Canadian programs; and

(c) the market served by the licensees.

3 Section 11 of the *Regulations*, which defines a Part II fee, reads as follows:

11. A Part II licence fee shall consist of an annual licence fee, based on the fee revenue of a licensee for the return year that terminated in the current calendar year or during that portion of that return year in which the licensee held the licence to operate the undertaking, the amount of which shall be calculated as follows:

(a) for a distribution or a television undertaking, 1.365 per cent of the amount by which the fee revenue exceeds the applicable exemption level; and

(b) for a radio undertaking,

(i) subject to subparagraph (ii), 1.365 per cent of the amount by which the fee revenue exceeds the applicable exemption level, and

(ii) in the case of a joint radio undertaking, 1.365 per cent of the amount by which the combined fee revenue exceeds the applicable exemption level.

4 The plaintiffs by their present action contest the validity of these charges. Their contention, put at its simplest, is that they are not "fees" at all because they bear no necessary relationship to the cost or value of what the licensee obtains from the privilege of having a licence. Rather, they are in reality a "tax" whose only or principal purpose is the raising of revenue. The Crown defends primarily on the ground that the charges are indeed fees not taxes, but also on the basis that, even assuming them to be taxes, they are authorized by the statute and that the latter does not constitute an improper delegation of Parliament's taxing power. Thus, although the two questions stated in the Court's Order above are conditional in their form, ("if the fees imposed thereunder are considered to be a tax") they are by no means hypothetical and deal with a very real issue as defined in the pleadings. They assume the charges to be a tax and, if answered in the negative would leave little or nothing of the plaintiffs' claim. Conversely, an affirmative answer would negate a significant part of the Crown's defence in law.

5 The difference between a tax and a fee is not merely semantic or theoretical in the law of Canada. It was discussed, in the context of a decision relating to the validity of provincially imposed probate fees, in *Eurig Estate, Re*, [1998] 2 S.C.R. 565 (S.C.C.) at paras 15, 21-22:

> 15. Whether a levy is a tax or a fee was considered in *Lawson, supra.* Duff J. for the majority concluded that the levy in question was a tax because it was: (1) enforceable by law; (2) imposed under the authority of the legislature; (3) levied by a public body; and (4) intended for a public purpose.
>
> . . .
>
> 21. Another factor that generally distinguishes a fee from a tax is that a nexus must exist between the quantum charged and the cost of the service provided in order for a levy to be considered constitutionally valid: see G. V. La Forest, *The Allocation of Taxing Power Under the Canadian Constitution* (2nd ed. 1981), at p. 72. This nexus was also considered relevant to determining the nature of a municipal charge in *Allard Contractors, supra.* In that case the Court engaged the question of whether an indirect tax levied by a province was validly enacted as incidental to a matter of provincial jurisdiction. Addressing the relationship between a charge and the cost of the underlying service, Iacobucci J. wrote (at p. 411):
>
> > A surplus itself is not a problem so long as the municipalities made reasonable attempts to match the fee revenues with the administrative costs of the regulatory scheme....
>
> 22. In determining whether that nexus exists, courts will not insist that fees correspond precisely to the cost of the relevant service. As long as a reasonable connection is shown between the cost of the service provided and the amount charged, that will suffice. The evidence in this appeal fails to disclose any correlation between the amount charged for grants of letters probate and the cost of providing that service. The Agreed Statement of Facts clearly shows that the procedures involved in granting letters probate do not vary with the value of the estate. Although the cost of granting letters probate bears no relation to the value of an estate, the probate levy varies directly with the value of the estate. The result is the absence of a nexus between the levy and the cost of the service, which indicates that the levy is a tax and not a fee.

6 I accept, of course, that the governing principal for statutory interpretation is the "words in total context" approach (Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Toronto: Butterworths, 2002)):

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

7 The ordinary and grammatical reading of the statutory and regulatory sections in question here discloses a power to charge and an actual levy of "fees". It is by no means obvious that this, even when read in its total context, is in reality a power to impose and the levying of a tax on licensees. Nor does the specific grant of authority to relate such fees to the licensee's revenue connote any intention that they are to be charged for the purpose of raising general government revenues as opposed to defraying the cost of services or of the regulatory scheme as a whole. Indeed, in the light of the provisions of s. 11(2)(b) of the statute *supra* it would be unusual, although admittedly not impossible, to find a taxation scheme where the rate would be calculated by reference to the taxpayer's performance in meeting the objectives established by a regulatory scheme.

8 The jurisprudence has made it clear see *Eurig Estate, Re*, *supra* that the concepts of "fee" and "tax" are logically and juridically distinct: a fee cannot be a tax, and a tax cannot be a fee. In the case of *Westbank First Nation v. British Columbia Hydro & Power Authority*, [1999] 3 S.C.R. 134 (S.C.C.) the Court defined both terms. A tax as a levy to raise revenue for general purposes, while a fee is a levy to charge for services directly rendered. The Court also suggested that there was a third category of levy, a regulatory charge, which it defined as a levy to finance or constitute a regulatory scheme, or to be ancillary or adhesive to a regulatory scheme.

9 In the instant matter, I am of the opinion that both questions must be answered in the affirmative. If the "fees" are assumed to be taxes, as they must be for the purposes of the questions, they cannot be fees or regulatory charges. I do

not have to decide whether they fit into one or the other of those categories and, if so, which one. Nor is it necessary for me to find whether fees and regulatory charges are themselves mutually exclusive of one another (although I am inclined to think that they are not.) It is enough to hold, as I do, that the concept of taxes is exclusive of both of them.

10 For the first question, if the fees under Part II of the Regulations are considered to be a tax, then Part II "fees", as taxes, are *ultra vires* s. 11 of the *Broadcasting Act*. The Act expressly provides for the charging of fees, and not of taxes and thus, insofar as Part II "fees" are taxes, the "fees" are *ultra vires* s. 11 of the Act.

11 In the light of this conclusion it is not strictly necessary to answer the second question for, if the delegated power does not include the power to tax, the requirements for a valid delegation of a taxing power are not relevant. However, as the point was fully argued I think it proper briefly to state my view.

12 The case law notably *Eurig Estate, Re, supra* and *O.E.C.T.A. v. Ontario (Attorney General)*, [2001] 1 S.C.R. 470 (S.C.C.) makes it clear that any delegation by the elected legislature of its taxing powers must be clear, specific and explicit. Even if, by a strained interpretation it was found that the regulation was *intra vires* the statute, it seems to me beyond doubt that the grant to the Commission is far from meeting those criteria.

13 Accordingly, both questions will be answered in the affirmative and those answers will be final and conclusive for the purposes of the action (Rule 220(3)).

14 The plaintiffs are each entitled to their costs on both stages of the motion. I have already granted costs to the Crown on the plaintiffs' unsuccessful appeals of the Order stating the questions.

Order

The questions stated in the Order of May 6, 2005, herein are both answered in the affirmative.

The plaintiffs shall each have their costs to be assessed.

Order accordingly.

Footnotes

* Affirmed reasons reported at *Canadian Assn. of Broadcasters v. R.* (2006), 2006 FCA 208, 2006 CarswellNat 1526, (sub nom. *Canadian Association of Broadcasters v. Canada)* 353 N.R. 12, 2006 CAF 208, 2006 CarswellNat 3496, 50 Admin. L.R. (4th) 3x (F.C.A.)

TAB 5

1977 CarswellOnt 328
Ontario Divisional Court

Dawn (Township) Restricted Area By-Laws 40 of 1973 & 52 of 1974, Re

1977 CarswellOnt 328, [1977] 1 A.C.W.S. 365, [1977] O.J. No. 2223, 15 O.R. (2d) 722, 2 M.P.L.R. 23, 76 D.L.R. (3d) 613, 7 O.M.B.R. 300 (note)

Union Gas Ltd. v. Corporation Of Township Of Dawn

Tecumseh Gas Storage Ltd. v. Township Of Dawn

Keith, Maloney and Donohue JJ.

Heard: January 24, 1977
Judgment: February 22, 1977

Proceedings: reversed *Dawn (Township) Restricted Area By-Laws 40 of 1973 & 52 of 1974, Re* (1975), 1975 CarswellOnt 1123, 4 O.M.B.R. 462 ((O.M.B.))

Counsel: *J.J. Robinette* , Q.C. and *L.G. O'Connor* , Q.C., for appellant Union Gas Ltd.
P.Y. Atkinson , for appellant Tecumseh Gas Storage Ltd.
W.B. Williston , Q.C., for respondent Township of Dawn.
T.H. Wickett , for Ontario Energy Board.

Subject: Public; Civil Practice and Procedure

Appeal from a decision of the Ontario Municipal Board approving a zoning by-law regulating the location of gas transmission pipelines.

The judgment of the Court was delivered by *Keith J.* :

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

(a) Is s. 4.2.3. of By-law 40 of the Township of Dawn as amended, ultra vires of the respondent municipality?

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

2 The Township of Dawn in the County of Lambton, a rural agricultural township in south western Ontario, passed its first comprehensive zoning by-law on 18th June 1973 (By-law No. 40) and amending By-law (No. 52) on 3rd September 1974.

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

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

1.1 Section 1 — Introduction

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

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

Title

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

Penalty

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

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

Section 4 — General Use and Zone Regulations

4.1 Uses Permitted.

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

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

(a) running northerly or southerly within 100 feet perpendicular distance from the centre line dividing the east and west halves of a concession lot;

(b) running easterly and westerly within 100 feet perpendicular distance from a concession lot line not being a township, county or provincial road or highway;

(c) across, but not along a township, county or provincial road or highway.

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

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

The township consists of flat agricultural land with soil rated in the Canada Land Survey as A2. The Board was advised by the representative of the Ministry of Agriculture and Food that the soil is of the Brookston clay type

which requires particular attention to drainage because the land is so flat and that this was the reason it was rated A2 rather than A1. The soil is very productive if properly drained and worked. As drainage is installed the soil responds to cash crops such as corn and soya beans. Drainage is accomplished generally by a grid system of tile drainage lines approximately 40 feet apart throughout the whole of the township. These feed into municipal drains which generally follow lot and concession lines and eventually drain to the south-west into the Sydenham River. An example of this method of drainage in the township is shown on Exhibit 9, filed. This also indicates the position of the Union Gas Company pipeline which runs in a diagonal direction across the tile drains referred to above. Because the pipeline runs across the drains, a header line is required to direct the flow of the water into the municipal drain.

The evidence indicates that in respect of the pipeline installation on a right-of-way that may be 60 feet wide or more, and the header line parallel to it, the farmer in using his equipment must gear down each time before crossing these installations rather than continuing in the usual sweep of the farmland. This time-consuming and inconvenient operation is necessary every time the farmer crosses the pipeline easement area. In addition, the evidence clearly indicated that upon excavation for the pipeline, the soil composition is disturbed and impacted so that growth is hampered for several years until the soil is returned to its normal state. The Company indicated in evidence that a new method for laying lines and conserving the topsoil for future development had been devised. This may alleviate the problems, but only time will tell.

The Union Gas Limited (hereinafter to be referred to as 'the Company') operates in the south-west part of the province and has important connections with Consumers' Gas Company of Toronto and other systems for whom it stores gas in the summer months for delivery in the winter. The relationship of the Union Gas Limited operation to other systems in the province are well illustrated on Exhibit 33, filed. The hub of their system is in Dawn Township from which all the distribution and transmission lines radiate. The importance of the Company to the municipality is illustrated by Exhibit 26 filed, which shows that for the years 1970 to 1974 inclusive, the Company paid taxes which formed a significant portion of the total township levy varying from 24.3 per cent to 30.6 per cent in those years.

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

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

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

Argument of counsel for the Tecumseh Gas Storage Limited was that the use of land for pipelines was not in fact a use of land as envisaged under Section 35(1)1 of The Planning Act. To bolster this argument counsel referred the Board to the case of *Pickering Township v. Godfrey* reported in 1958 Ontario Reports, page 429. The Board finds that the instant case can be distinguished from the quoted case which dealt specifically with the making of a quarry or gravel pit as a 'land use'. In addition, the Board finds that the use of land for installation of a pipeline fits the definition arrived at in the case above quoted as meaning 'the employment of the property for enjoyment, revenue or profit without in any way otherwise diminishing or impairing the property itself'. (p. 427, second paragraph).

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

> 57(1) In the event of conflict between this Act and any other general or special Act, this Act prevails.
>
> (2) This Act and the regulations prevail over any by-law passed by a municipality.

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

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

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

In the meantime, the municipality will by legislation inform all its ratepayers where the pipelines should be laid. The farmer will be able to proceed with the least amount of interference both during construction of pipelines on or near his lands and indeed in his everyday work. The pipeline companies will benefit from this as well. With less interference to the farmer there should be fewer difficulties experienced both in the installation of the pipelines and the servicing and maintenance of the pipelines and the tile drain systems.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

18 It is not necessary for my purpose to trace the history and origins of the present Ontario Energy Board Act, as amended. Reference to s. 58 of the present act will suffice to show that this industry has developed over many years under provincial legislation. Section 58 reads as follows:

> 58. Every order and decision made under,
>
> (*a*) *The Fuel Supply Act*, being chapter 152 of the Revised Statutes of Ontario, 1950;
>
> (*b*) *The Natural Gas Conservation Act*, being chapter 251 of the Revised Statutes of Ontario, 1950;

(*c*) *The Well Drillers Act*, being chapter 423 of the Revised Statutes of Ontario, 1950;

(*d*) *The Ontario Fuel Board Act, 1954;*

(*e*) *The Ontario Energy Board Act, 1960;*

(*f*) *The Ontario Energy Act*, being chapter 271 of the revised Statutes of Ontario, 1960; or

(*g*) *The Ontario Energy Board Act, 1964* . that were in force on the day the Revised Statutes of Ontario, 1970 is proclaimed in force shall be deemed to have been made by the Board under this Act.

19 Pursuant to s. 2 [am. 1973, c. 55, s. 1] of the Act, the Ontario Energy Board is composed of not less than five members appointed by the Lieutenant Governor in Council. It has an official seal, and its orders which must be judicially noticed are not subject to The Regulations Act, R.S.O. 1970, c. 410.

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

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

> 18. An order of the Board is a good and sufficient defence to any action or other proceeding brought or taken against any person in so far as the act or omission that is the subject of such action or other proceeding is in accordance with the order.

22 Section 19 [am. 1973, c. 55, s. 5(1), (2)] vests power in the Board to fix rates and other charges for the sale, transmission, distribution and storage of natural gas.

23 Under s. 23 [am. 1973, c. 55, s. 8] the Board is charged with responsibility to issue permits to drill gas wells.

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

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

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

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

(3) Where an interested person desires to make objection to the application, such objection shall be given in writing to the applicant and filed with the Board within fourteen days after the giving of notice of the application and shall set forth the grounds upon which such objection is based.

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

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

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

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

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

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

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

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

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

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

28 In my view this statute makes it crystal clear that all matters relating to or incidental to the production, distribution, transmission or storage of natural gas, including the setting of rates, location of lines and appurtenances, expropriation of necessary lands and easements are under the exclusive jurisdiction of the Ontario Energy Board and are not subject to legislative authority by municipal councils under The Planning Act.

29 These are all matters that are to be considered in the light of the general public interest and not local or parochial interests. The words "in the public interest" which appear, for example, in ss. 40(8), 41(3) and 43(3) which I have quoted, would seem to leave no room for doubt that it is the broad public interest that must be served. In this connection it will be recalled that s. 40(1) speaks of the requirement for filing a general location of proposed lines or stations showing "the municipalities, highways, railways, utility lines and navigable waters through, under, over, upon or across which the proposed line is to pass".

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

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

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

33 In the *Campbell-Bennett* case, the defendant Trans Mountain Pipe Line was incorporated by a special act of the Parliament of Canada to construct inter-provincial pipe lines. During the course of construction of a pipe line from Acheson, Alberta to Burnaby, British Columbia, some work was done in British Columbia by the plaintiff for which it claimed to be entitled to a mechanics' lien on the works in British Columbia, and to enforce that lien under the British Columbia Mechanics' Lien Act, R.S.B.C. 1960, c. 238 by seizing and selling a portion of the pipe line.

34 At p. 212 Kerwin J. (as he then was) on behalf of himself and Fauteux J. (as he then was) said "The result of an order for the sale of that part of Trans Mountain's oil pipe line in the County of Yale would be to break up and sell the pipe line piecemeal, and a provincial legislature may not legally authorize such a result."

35 Then at pp. 213 to 215, Rand J. on behalf of himself and the other three members of the Court said:

> The respondent, Trans Mountain Oil Pipe Line Company, was incorporated by Dominion statute, 15 Geo. VI, c. 93. It was invested with all the 'powers, privileges and immunities conferred by' and, except as to provisions contained in the statute which conflicted with them, was made subject to all the 'limitations, liabilities and provisions of any general legislation relating to pipe lines for the transportation of oil' enacted by Parliament. Within that framework, it was empowered to construct or otherwise acquire, operate and maintain interprovincial and international pipe lines with all their appurtenances and accessories for the transportation of oil.
>
> The *Pipe Lines Act* , R.S.C. 1952, c. 211, enacted originally in 1949, is general legislation regulating oil and gas pipe lines and is applicable to the company. By its provisions the company may take land or other property necessary for the construction, operation or maintenance of its pipe lines, may transport oil and may fix tolls therefor. The location of its lines must be approved by the Board of Transport Commissioners and its powers of expropriation are those provided by the *Railway Act* . By s. 38 the Board may declare a company to be a common carrier of oil and all matters relating to traffic, tolls or tariffs become subject to its regulation. S. 10 provides that a company shall not sell or otherwise dispose of any part of its company pipe line, that is, its line held subject to the authority of Parliament, nor purchase any pipe line for oil transportation purposes, nor enter into any agreement for amalgamation, nor abandon the operation of a company line, without leave of the Board; and generally the undertaking is placed under the Board's regulatory control.
>
> Is such a company pipe line so far amenable to provincial law as to subject it to statutory mechanics' liens? The line here extends from a point in Alberta to Burnaby in British Columbia. That it is a work and undertaking within the exclusive jurisdiction of Parliament is now past controversy: *Winner v. S.M.T. (Eastern) Limited* ([1951] S.C.R. 887), affirmed, with a modifi cation not material to this question, by the Judicial Committee but as yet unreported. The lien claimed is confined to that portion of the line within the County of Yale, British Columbia. What is proposed is that a lien attaches to that portion of the right of way on which the work is done, however small it may be, or wherever it may be situated, and that the land may be sold to realize the claim. In other words, an interprovincial or international work of this nature can be disposed of by piecemeal sale to different persons and its undertaking thus effectually dismembered.
>
> In the light of the statutory provisions creating and governing the company and its undertaking, it would seem to be sufficient to state such consequences to answer the proposition. The undertaking is one and entire and only with the approval of the Board can the whole or, I should say, a severable unit, be transferred or the operation abandoned. Apart from any question of Dominion or Provincial powers and in the absence of clear statutory authority, there

could be no such destruction by means of any mode of execution or its equivalent. From the earliest appearance of such questions it has been pointed out that the creation of a public service corporation commits a public franchise only to those named and that a sale under execution of property to which the franchise is annexed, since it cannot carry with it the franchise, is incompatible with the purposes of the statute and incompetent under the general law. Statutory provisions, such as s. 152 of the *Railway Act* , R.S.C. (1952), c. 234, have modified the application of the rule, but the sale contemplated by s. 10 of the *Pipe Lines Act* is a sale by the company, not one arising under the provisions of law and in a proceeding *in invitum* . The general principle was stated by Sir Hugh M. Cairns, L.J. in *Gardner v. London, Chatham and Dover Railway* ((1867), L.R. 2 Ch. 201 at 212):

> When Parliament, acting for the public interest, authorizes the construction and maintenance of a railway, both as a highway for the public, and as a road on which the company may themselves become carriers of passengers and goods, it confers powers and imposes duties and responsibilities of the largest and most important kind, and it confers and imposes them upon the company which Parliament has before it, and upon no other body of persons. These powers must be executed and these duties discharged by the company. They cannot be delegated or transferred.

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

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

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

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

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

> 17. — (1) The Lieutenant Governor in Council may make regulations,
>
> (*a*) for the conservation of oil or gas;
>
> (*b*) prescribing areas where drilling for oil or gas is prohibited;
>
> (*c*) prescribing the terms and conditions of oil and gas production leases and gas storage leases or any part thereof, excluding those relating to Crown lands, and providing for the making of statements or reports thereon;
>
> (*d*) regulating the location and spacing of wells;
>
> (*e*) providing for the establishment and designation of spacing units and regulating the location of wells in spacing units and requiring the joining of the various interests within a spacing unit or pool;
>
> (*f*) prescribing the methods, equipment and materials to be used in boring, drilling, completing, servicing, plugging or operating wells;
>
> (*g*) requiring operators to preserve and furnish to the Department drilling and production samples and cores;

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

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

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

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

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

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

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

41 The second of the additional submissions to which reference should be made is based on a cardinal rule for the interpretation of statutes and expressed in the maxim "*generalia specialibus non derogant* ". For a discussion of the effect of this rule I will only refer to the case of *Ottawa v. Eastview*, [1941] S.C.R. 448, [1941] 4 D.L.R. 65 commencing at p. 461, and to the Dictionary of English Law (Earl Jowitt) at p. 862.

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

43 The Planning Act, on the other hand, is of a general nature and the powers granted to municipalities to legislate with respect to land use under s. 35 [am. 1972, c. 118, s. 6(1)] of that Act must always be read as being subject to special legislation such as is contained, for example, in The Ontario Energy Board Act, The Energy Act and The Petroleum Resources Act.

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

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

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

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

Nothing in this by-law shall prevent the use of any land as a right-of-way, easement or corridor for any oil, gas, brine or other liquid product pipeline and appurtenances thereto.

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

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

Appeal allowed.

TAB 6

Ontario Statutes
Electricity Act, 1998
Part II.2 — Management of Electricity Supply, Capacity and Demand [Heading added 2004, c. 23, Sched. A, s. 33.]

S.O. 1998, c. 15, Sched. A, s. 25.33

s 25.33 Electricity pricing to reflect costs

Currency

25.33Electricity pricing to reflect costs

25.33(1)IESO to make adjustments

The IESO shall, through its billing and settlement systems, make adjustments in accordance with the regulations that ensure that, over time, payments by classes of market participants in Ontario that are prescribed by regulation reflect,

(a) amounts paid to generators, the Financial Corporation and distributors, whether the amounts are determined under the market rules or under section 78.1, 78.2 or 78.5 of the *Ontario Energy Board Act, 1998*; and

(b) amounts paid to entities with whom the IESO has a procurement contract, as determined under the procurement contract.

25.33(2)Distributors and retailers to make adjustments

Distributors and retailers shall, through their billing systems, make adjustments in accordance with the regulations that ensure that, over time, payments by classes of consumers in Ontario that are prescribed by regulation reflect,

(a) amounts paid to generators, the Financial Corporation and distributors, whether the amounts are determined under the market rules or under section 78.1, 78.2 or 78.5 of the *Ontario Energy Board Act, 1998*; and

(b) amounts paid to entities with whom the IESO has a procurement contract, as determined under the procurement contract.

25.33(3)Exception

Any adjustment that would otherwise be made under subsection (1) or (2) and that relates to electricity that is consumed by any of the following types of consumers shall instead be made in accordance with the regulations to one or more variance accounts established and maintained by the IESO:

1. [Repealed 2009, c. 12, Sched. B, s. 6(2).]

2. A consumer whose rates are determined by the Board under section 79.16 of the *Ontario Energy Board Act, 1998*.

3. A consumer who is a member of a class of consumers prescribed by the regulations.

25.33(4)Adjustments, payments, set-offs and credits

The IESO, distributors and retailers shall,

(a) make such adjustments in their accounts as may be required or permitted by the regulations to record adjustments described in subsections (1), (2) and (3); and

(b) make and receive such payments, set-offs and credits as may be required or permitted by the regulations with respect to consumers described in subsection (3).

25.33(5)Variance accounts
The IESO shall establish and maintain such variance accounts as may be necessary to record all amounts payable or receivable by it under this section.

25.33(6)Compliance
The Board shall ensure that adjustments, payments, set-offs and credits required or permitted under this section are made in accordance with the regulations.

25.33(7)Adjustment not assignable
An adjustment made under subsection (1) or (2) is not assignable by a consumer in a contract with a retailer, whether the contract is entered into before or after this section comes into force.

25.33(8)No cause of action
No cause of action against a consumer, a retailer or the Crown arises as the result of a contract or a term of a contract ceasing to have effect because of the operation of subsection (7).

Amendment History
2004, c. 23, Sched. A, s. 37; 2009, c. 12, Sched. B, s. 6; 2014, c. 7, Sched. 7, s. 8

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Ontario Statutes
Electricity Act, 1998
Part II.2 — Management of Electricity Supply, Capacity and Demand [Heading added 2004, c. 23, Sched. A, s. 33.]

S.O. 1998, c. 15, Sched. A, s. 25.35

s 25.35

Currency

25.35

25.35(1)Feed-in tariff program

The Minister may direct the IESO to develop a feed-in tariff program that is designed to procure energy from renewable energy sources under such circumstances and conditions, in consideration of such factors and within such period as the Minister may require.

25.35(2)Minister's directions

Where the Minister has issued a direction under subsection (1), the Minister may issue, and the IESO shall follow in preparing its feed-in tariff program, directions that set out the goals to be achieved during the period to be covered by the program, including goals relating to,

(a) the participation by aboriginal peoples in the development and establishment of renewable energy projects; and

(b) the involvement of members of the local community in the development and establishment of renewable energy projects.

25.35(3) [Repealed 2014, c. 7, Sched. 7, s. 10(3).]

25.35(4)Definition

In this section,

"feed-in tariff program" means a program for procurement, including a procurement process, providing standard program rules, standard contracts and standard pricing regarding classes of generation facilities differentiated by energy source or fuel type, generator capacity and the manner by which the generation facility is used, deployed, installed or located.

Amendment History

2009, c. 12, Sched. B, s. 7; 2014, c. 7, Sched. 7, s. 10

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