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November 6, 2019

Delivered by Email, RESS & Courier

Ms. Christine Long, Registrar and Board Secretary
Ontario Energy Board
P.O. Box 2319, 27th Floor
2300 Yonge Street
Toronto, Ontario
M4P 1E4

Dear Ms. Long:

Re: Application for Review of an Amendment to the Independent Electricity System Operator Market Rules
Board File No. EB-2019-0242
Kingston CoGen Limited Partnership's Brief of Authorities

Pursuant to the Procedural Order No. 3 dated October 22, 2019, please find enclosed Kingston CoGen Limited Partnership's Brief of Authorities to accompany its written submissions for motion for stay in the above-captioned matter, submitted November 1, 2019. We have only included the cases that have not already been included in the Briefs of Authorities that were filed by the other parties and interveners on this motion.

Should you have any questions or require further information in this regard, please do not hesitate to contact me.

Yours very truly,

BORDEN LADNER GERVAIS LLP

Per:

Originally signed by John A.D. Vellone

John Vellone

JV/ld

EB-2019-0242

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sched. B, as amended;

AND IN THE MATTER OF an Application by the Association of Major Power Consumers in Ontario, pursuant to section 33 of the *Electricity Act, 1998, S*.O. 1998, c. 15, Sched. A and Rule 17 of the Ontario Energy Board *Rules of Practice and Procedure* for review of amendments to the Independent Electricity System Operator market rules related to the implementation of a Transitional Capacity Auction (MR- 00439-R00-R05).

AND IN THE MATTER OF a notice of motion by the Association of Major Power Consumers in Ontario, pursuant to section 33 of the *Electricity Act, 1998, S*.O. 1998, c. 15, Sched. A and Rule 17 of the Ontario Energy Board *Rules of Practice and Procedure* to stay the operation of amendments to the Independent Electricity System Operator market rules pending determination of the Application.

KINGSTON COGEN LIMITED PARTNERSHIP'S

BRIEF OF AUTHORITIES TO SUBMISSIONS FOR MOTION FOR STAY

INDEX

TAB A

Para. 9

2000 SCC 57
Supreme Court of Canada

Harper v. Canada (Attorney General)

2000 CarswellAlta 1158, 2000 CarswellAlta 1159, 2000 SCC 57, [2000] 2 S.C.R. 764, [2000] S.C.J. No. 58, [2001] 9 W.W.R. 201, [2001] A.W.L.D. 147, 193 D.L.R. (4th) 38, 234 W.A.C. 201, 271 A.R. 201, 92 Alta. L.R. (3d) 1, J.E. 2000-2262, REJB 2000-20913

Attorney General of Canada v. Stephen Joseph Harper

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

Judgment: November 10, 2000 *
Docket: 28210

Counsel: Written submissions by *Graham Garton, Q.C.*, and *Thomas W. Wakeling*, for Applicant. Written submissions by *Alan D. Hunter, Q.C.*, and *Eric Groody*, for Respondent.

***McLachlin C.J.C, L'Heureux-Dubé, Gonthier, Iacobucci, Bastarache, Binnie, Arbour, LeBel JJ.*:**

1 On May 31, 2000, Parliament passed the *Canada Elections Act*, S.C. 2000, c. 9 ("the Act"), imposing limits on third-party spending on advertising in the course of a federal election campaign. The law came into force on September 1, 2000. Our reasons in this application relate solely to the issue of whether an injunction which suspended the enforcement of certain provisions pertaining to third-party spending limits should be stayed. They do not deal with the granting of leave to appeal the injunction order nor any ensuing appeal. They also do not deal with the question of whether the Act is unconstitutional.

2 The respondent Stephen Joseph Harper commenced an action on June 7, 2000 before the Alberta Court of Queen's Bench, seeking a declaration that the spending limits are unconstitutional because they unjustifiably limit the right of free expression guaranteed by s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*. The trial commenced on October 2 and adjourned on October 13, after nine days of evidence.

3 On October 22, an election writ was issued, with a polling date of November 27, 2000. Mr. Harper applied to the same trial judge (Cairns J.), who heard the action seeking a declaration that the spending limits are unconstitutional, for an interlocutory injunction restraining the Chief Electoral Officer of Canada and the Commissioner of Canada Elections from enforcing the third-

party spending limits, pending the decision in the action. The trial judge granted the injunction ((October 23, 2000), Doc. 0001-09477 (Alta. Q.B.)), and the Alberta Court of Appeal upheld it (2000 ABCA 288 (Alta. C.A.)). The Attorney General of Canada now applies to this Court, seeking leave to appeal from the interlocutory injunction and, in the interim, a stay of the injunction. The application for leave to appeal is granted, by separate order, released concurrently. This leaves the question of whether the injunction restraining the enforcement of the law imposing spending limits should be stayed.

4 In considering whether an injunction should be granted, and by extension whether an injunction should be stayed pending appeal, the Court considers: (i) whether there is a serious issue to be tried; (ii) whether absent an injunction there will be irreparable harm to the individual seeking the injunction; and (iii) the balance of (in)convenience. Without prejudging the appeal, we are satisfied there is a serious issue to be tried. The issue is no less than the constitutionality of provisions of the electoral law passed by the Parliament of Canada which no court has held to be invalid. This is a serious issue not only because the constitutionality of the provisions is challenged, but because it is common ground that the determination of the constitutionality will turn on the application of s. 1 of the *Charter*, which is always a complex factual and legal analysis. We also assume that the provisions in issue may occasion "irreparable harm" to the capacity of third parties to participate as they wish in the election campaign to the extent of the spending limits on advertising imposed on them. This leaves the third ground, the balance of convenience.

5 Applications for interlocutory injunctions against enforcement of still-valid legislation under constitutional attack raise special considerations when it comes to determining the balance of convenience. On the one hand stands the benefit flowing from the law. On the other stand the rights that the law is alleged to infringe. An interlocutory injunction may have the effect of depriving the public of the benefit of a statute which has been duly enacted and which may in the end be held valid, and of granting effective victory to the applicant before the case has been judicially decided. Conversely, denying or staying the injunction may deprive plaintiffs of constitutional rights simply because the courts cannot move quickly enough: R. J. Sharpe, *Injunctions and Specific Performance* (loose leaf ed.), at para. 3.1220.

6 The trial judge found that the freedom of speech interest raised by the applicant Harper to be of great importance. On the other side of the balance, he found that the Attorney General of Canada had called no evidence on the harm that would result from suspending the operation of the law. In the absence of evidence, he characterized this harm as "notional and unproven unfairness" (para. 35). Accordingly, he found that the balance of convenience favoured the grant of an injunction.

7 We cannot, with respect, agree. This application is governed by the principles set forth in previous cases. On appeal the applicant Harper may seek alteration of these principles, but for the moment they govern. Applying these principles, the balance of convenience in this case favours granting the stay of the injunction. One of these principles is the rule against granting

the equivalent of final relief in interlocutory challenges to electoral statutes, even in the course of elections governed by those statutes: *Gould v. Canada (Attorney General)*, [1984] 2 S.C.R. 124 (S.C.C.); see also *Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832*, [1987] 1 S.C.R. 110 (S.C.C.), *per* Beetz J. at p. 144; *Haig v. R.*, [1993] 2 S.C.R. 995 (S.C.C.). In this case, allowing the injunction to stay in place will in effect give Mr. Harper the ultimate relief he seeks in his action, at least with respect to the current election. The trial judge, however, did not address this factor, nor the case law which addresses it.

8 It may also be noted that, in *Thomson Newspapers Co. v. Canada (Attorney General)*, S.C.C., No. 25593, May 7, 1997 (published in the *Bulletin of Proceedings of the Supreme Court of Canada*, 1997, at p. 882), this Court refused to grant a stay suspending the enforcement of the provisions mandating publication bans on opinion polls set forth in the *Canada Elections Act*, R.S.C. 1985, c. E-2, s. 322.1. In so doing, the Court relied on its previous decision in *Gould*, *supra*. The Court refused the stay even though the ultimate decision found the poll prohibition to be unconstitutional.

9 Another principle set out in the cases is that in considering the grant of an interlocutory injunction suspending the operation of a validly enacted but challenged law, it is wrong to insist on proof that the law will produce a public good. Rather, at this stage of the proceeding, this is presumed. As Sopinka and Cory JJ. stated in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.), at pp. 348-49:

> When the nature and declared purpose of legislation is to promote the public interest, a motions court should not be concerned whether the legislation actually has such an effect. It must be assumed to do so. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit.

It follows that in assessing the balance of convenience, the motions judge must proceed on the assumption that the law — in this case the spending limits imposed by s. 350 of the Act — is directed to the public good and serves a valid public purpose. This applies to violations of the s. 2(*b*) right of freedom of expression; indeed, the violation at issue in *RJR-MacDonald Inc.* was of s. 2(*b*). The assumption of the public interest in enforcing the law weighs heavily in the balance. Courts will not lightly order that laws that Parliament or a legislature has duly enacted for the public good are inoperable in advance of complete constitutional review, which is always a complex and difficult matter. It follows that only in clear cases will interlocutory injunctions against the enforcement of a law on grounds of alleged unconstitutionality succeed.

10 Again, the trial judge appears not to have applied this principle in weighing the benefits of the law against its impact on free expression. Instead of assuming that the legislation has the effect of promoting the public interest as *RJR-MacDonald Inc.* directs, the trial judge based his

conclusion on the fact that the Government " has not adduced any evidence to illustrate unfairness in any of these elections in Canada caused by third-party spending limits" (para. 33). He went on to repeat that the "Government simply asserts that third-party spending limits, if not controlled, may (and that is notional only) impact adversely on the fairness of elections" (para. 34), and moved directly from this to the conclusion that leaving the spending limits in place " would clearly cause more harm in the public interest than the notional unproven unfairness suggested by the Government" (para. 35). Moreover, the trial judge made no mention of the fact that the law may be seen not only as limiting free expression but as regulating it in order to permit all voices during an election to be heard fairly.

11 Applying the principles enunciated in previous decisions of this Court, and without prejudging the outcome of any appeal from the injunction, we are satisfied that the public interest in maintaining in place the duly enacted legislation on spending limits pending complete constitutional review outweighs the detriment to freedom of expression caused by those limits. To leave the injunction in place is to grant substantial success to the applicant Harper even though the trial has not been completed. Moreover, applying *RJR-MacDonald Inc.*, we must take as given at this stage that the legislation imposing spending limits on third parties will serve a valid public purpose. Weighing these factors against the partial limitation on freedom of expression imposed by the restrictions, we conclude that the balance of convenience favours staying the injunction granted by the trial judge.

Conclusion

12 We therefore conclude that a stay of the order enjoining the enforcement of s. 350(1), (2), (3) and (4) of the *Canada Elections Act* should be granted.

***Major J.* (dissenting):**

13 The facts that accompany this application by the Attorney General of Canada for a stay of the injunction obtained in Alberta are not in dispute. The chambers judge, relying on the pleadings and the evidence at the trial, faced the concession that the plaintiff Mr. Harper's freedom of expression was restricted by the legislation. Weighed against this was the inability of the Attorney General to demonstrate that the injunction would cause any inconvenience (see (October 23, 2000), Doc. 0001-09477 (Alta. Q.B.), at paras. 34-35 *per* Cairns J.):

> The Government simply asserts that third-party spending limits, if not controlled, may (and this is notional only) impact adversely on the fairness of elections. Yet, it can point to no evidence to illustrate unfairness in the Canadian elections caused by third-party spending.
>
> In my judgment, the spending limits having the deleterious effect of fettering the core freedom of expression and speech as enshrined in the Charter, as they do and as admitted by the

Attorney General of Canada, would clearly cause more harm in the public interest than the notional unproven unfairness suggested by the Government.

14 As described in the reasons of the majority, an injunction should be granted where: (1) there is a serious question to be tried, (2) there is irreparable harm to the person seeking the injunction if no injunction is issued, and (3) the balance of convenience favours an injunction.

15 It is on the determination of the balance of convenience that I disagree with the majority. The chambers judge, who was also the trial judge in the recently concluded trial, was in a unique position to weigh the balance of convenience.

16 The trial judge did not, nor do I, intend the interim injunction to reflect on the validity of the new elections legislation. The question of whether the limits on election spending are constitutional will only be decided once there is a determination on the merits.

17 It is inescapable to me that the balance of convenience tips sharply in favour of the plaintiff. The proposition advanced to counter the obvious inconvenience to Mr. Harper is that legislation generally identified as serving a public interest carries a *prima facie* assumption of validity. But that presumption should not be conclusive where, as here, it competes against the acknowledged impediment to the plaintiff's free speech unless there is some evidence demonstrating an impediment of a public interest. Here there is none.

18 The chambers judge was careful to note that the interim injunction was just that. He stated that his ultimate disposition may be that the legislation is constitutional. But he could not ignore the evidence produced during the two-week trial to the extent it bore on granting an interim injunction.

19 The interim injunction would safeguard important constitutional rights guaranteed by the *Canadian Charter of Rights and Freedoms* and protect the freedom of political speech during a federal election. The law is clear that — in the absence of an error in principle — the trial judge has the discretion, and is entitled to appellate deference.

20 In this application, we are dealing with one of the most valuable forms of speech: political speech. Canadians cherish the unimpeded diffusion of political ideas and opinions, and this Court has long recognized that freedom of expression is "essential to the working of a parliamentary democracy such as ours" (*Switzman v. Elbling*, [1957] S.C.R. 285 (S.C.C.), *per* Abbott J., at p. 326). Hence we must tread carefully in limiting political speech. It is speech that we recognize as invaluable, given its significance in our democratic process. We should be loathe to interfere with it, especially in the midst of a federal election.

21 I am of the view that the trial judge did not err in applying the three-part test for an injunction in a constitutional context, as set out in *Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832*, [1987] 1 S.C.R. 110 (S.C.C.), and *RJR-MacDonald Inc.*

v. Canada (Attorney General), [1994] 1 S.C.R. 311 (S.C.C.), both cases that the trial judge referred to and relied upon. As stated, I agree with the majority that the first two requirements are met.

22 The third requirement is that the balance of convenience favours granting the injunction. This requirement subsumes the question of what irreparable harm the *defendant* faces. After nine days of trial, there was no evidence before the Alberta Court of Queen's Bench that the injunction would cause any " inconvenience" or "irreparable harm". Nor has the Attorney General in this application referred this Court to any evidence showing what harm would result from the injunction. Instead, the Attorney General states as a conclusion that suspending the spending limits would result in unfairness, and so the legislation must be applied "in the interests of fairness for all".

23 The Attorney General admitted that there was a violation of s. 2(*b*), and offered not a scintilla of evidence showing that the injunction would cause some harm. In this light, the trial judge concluded that the balance of convenience favoured injunctive relief. Given the restriction upon a cherished constitutional freedom and the absence of anything tilting the other way, Cairns J. was entitled to reach this conclusion.

24 I acknowledge that in the majority of cases, it may be acceptable to assume that there is irreparable harm to the public interest when an injunction stops an authority from protecting the public good: *RJR-MacDonald Inc.*, *supra*, at p. 346. But that is an assumption only (as Sopinka and Cory JJ. suggest at p. 349), and it can be overcome when an applicant demonstrates that the injunction itself serves the public interest. In this case, the injunction furthers the *Charter*'s guarantee of freedom of expression, and Mr. Harper has displaced the assumption that the government suffers a greater harm than he does.

25 I find that the suggestion of "irreparable harm" to the government or the public interest is strained and unpersuasive. To date, Canadian federal elections have not been governed by limits on third-party spending. It is difficult to see how the consequences of undergoing one more election without these limits would somehow cause "irreparable harm" to our democratic institutions, particularly since no such harm occurred in past elections. In my view, the public interest favours granting, rather than refusing, the injunction. Dean Cassels is right to suggest that the "public interest" does not belong exclusively to the Attorney General, and I agree with his rejection of the "assumption that only one party speaks for the public interest" (J. Cassels, "An Inconvenient Balance: The Injunction as Charter Remedy", in J. Berryman, ed., *Remedies: Issues and Perspectives* (1991), at pp. 303-5). The question is: will the injunction serve the public good by protecting constitutional rights? Given the need to protect free speech, particularly during an election, it seems reasonable to require the Attorney General to provide something more than a *pro forma* statement about unfairness. In the absence of anything beyond speculation, and in the face of a serious denial of *Charter*-protected freedoms, the balance of convenience clearly favours the injunction. I would add that while the Attorney General argues that the public interest is served by seeing the legislation enforced, that argument is countered by the compelling public interest

in seeing fundamental *Charter-protected freedoms* upheld: J. Berryman, *The Law of Equitable Remedies* (2000), at p. 51.

26 "Because the granting of an interlocutory injunction is a discretionary matter appellate courts have limited the role of review": Berryman, *The Law of Equitable Remedies, supra*, at p. 37. This Court endorsed the deferential approach in *Metropolitan Stores (MTS) Ltd.*, *supra*, at pp. 154-56. The standard is high; the reviewing court "must not interfere with [the trial judge's exercise of discretion] merely on the ground that the members of the appellate court would have exercised the discretion differently": *Hadmor Productions Ltd. v. Hamilton*, [1982] 1 All E.R. 1042 (U.K. H.L.), *per* Lord Diplock, at p. 1046. To interfere, there must be a clear mistake on the law or the evidence, or some other glaring error. There is no such mistake here.

27 Cairns J. is entitled to appellate deference. He was, in fact, unusually well-placed to grant the injunction. The typical judge faced with this sort of injunction would not have the benefit of having presided over the trial on the merits of the constitutional challenge.

28 It is true, as the majority suggests, that in all but exceptional cases, the effect of democratically enacted legislation should not be suspended before a finding of unconstitutionality or invalidity. *Gould v. Canada (Attorney General)*, [1984] 1 F.C. 1133 (Fed. C.A.), aff'd [1984] 2 S.C.R. 124 (S.C.C.). But this case falls in the narrow category of exceptions. I reach that conclusion for three reasons.

29 First, there is the timing of the challenge. The new *Canada Elections Act*, S.C. 2000, c. 9, was given royal assent on May 31, 2000. The plaintiff's statement of claim was issued within seven days. The legislation would ordinarily have come into force after the November 27 general election, but it was activated, so to speak, by publication of notice in the *Canada Gazette* on September 1, 2000. The Attorney General of Canada introduced this legislation in a manner that virtually sealed it from meaningful constitutional scrutiny before the election. These circumstances demand scrutiny. The prospect arises that governments could pass unconstitutional laws immediately prior to an election and leave affected citizens with no remedy. The state could effectively place its election legislation beyond constitutional scrutiny by virtue of *when* that legislation is enacted. I note that the situation here is unlike that in *Gould*, *supra*, where the impugned provision had been in force for years but was challenged only on the eve of an election.

30 Another compelling factor is that the judge who handled the application for an interlocutory injunction knew the case; he had recently presided over a two-week trial in which the constitutionality of the legislation was debated in great detail. That fact distinguishes this case from *Gould*, *supra*, where the judge who granted the injunction had not heard arguments on the constitutionality of the provisions governing prisoners' voting rights. The fact that the same judge heard both the trial and the application for an injunction here argues in favour of considerable deference to his decision.

31 Finally, there is the nature of the constitutional challenge at issue. The speech that is limited here is political expression. It is the epitome of speech that furthers the aspirations of a democratic society. That expression would be limited at its most important moment, during an election, while the Attorney General offers no evidence that the injunction would cause harm.

32 The majority, at para. 7, accepts the Attorney General's submission that an injunction "effectively grants [Mr. Harper] the final relief that he seeks in the trial still under way." I do not, because the "final" question is the constitutionality of the legislation, and that question cannot be answered in these interlocutory proceedings. In any event, it could equally be said that staying the injunction gives the *government* the final relief it is most concerned about. That argument cuts both ways and does not get us far.

33 This Court, as Professor Roach points out in *Constitutional Remedies in Canada* (loose-leaf ed.), at p. 7 7, has "clearly rejected reliance on a presumption that legislation is constitutional in deciding interlocutory applications". In *Metropolitan Stores (MTS) Ltd.*, *supra*, at p. 124, Beetz J. held that "the presumption of constitutional validity ... is not compatible with the innovative and evolutive character of [the *Charter*]". It could be said that the majority improperly veers toward an automatic presumption of constitutionality.

34 In *RJR-MacDonald Inc.*, at pp. 333-34, Sopinka and Cory JJ. considered the factors that must govern the balancing process:

> On one hand, courts must be sensitive to and cautious of making rulings which deprive legislation enacted by elected officials of its effect.
>
> On the other hand, the *Charter* charges the courts with the responsibility of safeguarding fundamental rights. For the courts to insist rigidly that all legislation be enforced to the letter until the moment that it is struck down as unconstitutional might in some instances be to condone the most blatant violation of *Charter* rights. Such a practice would undermine the spirit and purpose of the *Charter* and might encourage a government to prolong unduly final resolution of the dispute.

I find those words apt. I would deny the application for a stay.

Application granted.

Requête accordée.

Footnotes

* Changes in a corrigendum issued by the court on November 11, 2000 have been incorporated herein.

TAB B

Para.137

Ontario (Energy Board) (Re), 2006 LNONOEB 23

Ontario Energy Board Decisions

Ontario Energy Board

Panel: Gordon Kaiser, Presiding Member and Vice Chair; Cynthia Chaplin, Member; Bill Rupert, Member

Decision: November 7, 2006.

No. EB-2005-0551

2006 LNONOEB 23

IN THE MATTER OF a proceeding initiated by the Ontario Energy Board to determine whether it should order new rates for the provision of natural gas, transmission, distribution and storage services to gas-fired generators (and other qualified customers) and whether the Board should refrain from regulating the rates for storage of gas.

(401 paras.)

Case Summary

Tribunal Summary:

INTRODUCTION

This proceeding was initiated by the Ontario Energy Board in late 2005 in response to issues first raised in the Board's *Natural Gas Forum Report* and more fully explored in the OEB staff report, *Natural Gas Electricity Interface Review*. The key issues addressed in this proceeding were:

* Rates and services for gas-fired generators
* Storage regulation.

The hearing participants, which included gas-fired generators and consumer groups, reached settlements with Union Gas Limited (Union) and Enbridge Gas Distribution Inc. (Enbridge) on most of the issues related to services for gas-fired generators, and the Board has approved those settlements. The oral hearing and this Decision addressed the issues which were not settled and the issue of storage regulation.

SERVICES FOR GAS-FIRED GENERATORS

The need to examine new services for gas-fired generators arises because of the increasing number of so-called "dispatchable" gas-fired power generation plants that are planned or in operation. These plants operate in response to five-minute dispatch instructions from the Independent Electricity System Operator (IESO), and, as a result, their gas consumption profiles are more volatile and difficult to forecast than the relatively stable profiles of residential, commercial and industrial gas consumers. Flexible and responsive gas services, including high-deliverability gas storage, can ensure the reliable operation of these plants and allow the plant operators to manage the financial risk of the business.

Based on the settlements, the Board has approved a number of new services aimed at the needs of the gas-fired generators, including:

* new distribution rate structures for high-volume gas consumers
* more frequent nomination windows for the distribution, storage and transportation of gas
* the inter-franchise movement of gas
* redirection of gas to different delivery points on short notice
* simpler processes for title transfers of gas in storage
* high-deliverability storage services.

There was no agreement on the price at which high-deliverability storage services should be offered. The generators argued for a regulated framework, while the utilities argued for a competitive framework. The key consideration is to ensure that new innovative services are developed. The Board concludes that the public interest is best met by refraining from regulating these services. This will stimulate the development of these services, by utilities and other providers. The Board will accordingly refrain from regulating the rates for high-deliverability storage services.

The Board has a duty to protect the interests of consumers using these services with respect to price and reliability and quality of service. The crucial factor is the availability of the service itself -- namely its reliability and quality. The Board expects Enbridge and Union to fulfill their commitments respecting the offering of these services. Pricing considerations are relevant, but competitive options will provide appropriate price protection. The Board will also be developing a reporting mechanism and complaint process to deal with any issues which arise.

NATURAL GAS STORAGE REGULATION

Union and Enbridge operate large underground gas storage facilities in southwestern Ontario. Those facilities, which are connected to multiple gas transmission pipelines, are part of what is known as the Dawn Hub, one of the more important natural gas market centres in North America.

The issue in this hearing was whether the Board should refrain from regulating the prices charged for storage services. Section 29 (1) of the *Ontario Energy Board Act, 1998* states:

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

Competition in Storage

The Board has concluded that Ontario storage operators compete in a geographic market that includes Michigan and parts of Illinois, Indiana, New York and Pennsylvania. The Board finds that the market is competitive and that neither Union nor Enbridge have market power.

Price Regulation

The Board will cease regulating the prices charged for the following storage services:

* all storage services offered by Union and Enbridge to customers outside their franchise areas;
* new storage services offered by Union and Enbridge to their in-franchise customers; and,
* all storage services offered by other storage operators, including storage operators affiliated with Union and Enbridge.

Rates for storage services provided to Union's and Enbridge's distribution customers will continue to be regulated by the

Board on a cost-of-service basis.

Union's existing storage capacity is well in excess of the current needs of its in-franchise customers and has been for many years. The Board has decided that Union will reserve approximately two-thirds of its existing capacity for in-franchise needs. At current rates of growth, that amount limit will satisfy in-franchise needs for several decades. Enbridge currently purchases storage from Union for a portion of its requirements. The Board has decided that Union will continue to provide these services at cost through a transition period ending in 2010.

Sharing the Premium on Ex-Franchise Sales

The sale of storage services by Union and Enbridge at market-based rates to ex-franchise customers has generated revenues well in excess of the cost of providing those services. Until now, the Board has required that most of the profits be used to reduce distribution rates. The Board has concluded that this sharing should continue for short-term storage deals. These are storage transactions that use storage space that is temporarily surplus to in-franchise needs. All of the profits on these transactions, less small incentive payments to the utilities, will be for the benefit of ratepayers.

The Board finds, however, that Union will not be required to share the profits on long-term storage transactions that use storage space not needed to serve in-franchise needs because that capacity now constitutes a "non-utility" asset for which the shareholders appropriately bear the risk. The sharing of these profits will remain unchanged for 2007 and then be phased out over the period to 2011.

Impact on Consumers

The Board's decisions are expected to have virtually no effect on consumers' bills in 2007. The impact after that cannot be precisely quantified because it will depend on future storage prices, the profit on ex-franchise storage sales, and the amount of gas consumed. While a precise forecast is not possible, bills are likely to increase by a small amount -- perhaps around 1% for the typical residential consumer.

DECISION WITH REASONS

TABLE OF CONTENTS

Appendices

1. THE PROCEEDING AND THE ISSUES

1.1 BACKGROUND

1 In the fall of 2003, the Ontario Energy Board began a comprehensive sector review -- the Natural Gas Forum -- to examine ways to further improve the efficiency and effectiveness of natural gas regulation in Ontario. The impetus for this review was recognition by the Board of the evolving natural gas market. In particular, the Board recognized that conventional gas supply sources are expected to experience flat to declining production. The anticipated increased reliance on non-conventional supply sources raised questions regarding the need for infrastructure within Ontario to meet changing natural gas flow patterns and about the adequacy of the current regulatory treatment of natural gas. On the demand-side, the anticipated expansion of gas-fired power generation was expected to affect the extent and type of investment required in gas infrastructure in Ontario and to drive the convergence of gas and electricity markets.

2 The outcome of the review was a Board report, released on March 30, 2005, entitled *Natural Gas Regulation in Ontario: A Renewed Policy Framework*[1] (the Natural Gas Forum Report). In this report the Board set as an "important and immediate priority" the need to ensure that Ontario's natural gas infrastructure could meet the demands created by new gas-fired generators. As a result, the Board initiated the Natural Gas Electricity Interface Review (NGEIR), to examine the regulatory treatment of natural gas infrastructure and services.[2]

3 NGEIR involved several months of research and meetings with stakeholders, which were led by Board Staff. The Board Staff NGEIR report was released for stakeholder comment on November 21, 2005. The report's key recommendations were that the Board should initiate a generic hearing to review whether the Board should:

* require gas utilities to provide firm higher deliverability service from storage and greater nomination entitlements;
* require greater operational flexibility in the provision of distribution services;
* forbear from regulating rates for gas storage services.

4 After reviewing the stakeholder comments, the Board initiated this generic hearing, known as the Natural Gas Electricity Interface Review Proceeding (the NGEIR Proceeding), to determine whether it should order new rates for the provision of natural gas transmission, distribution and storage services to gas-fired generators (and other eligible customers). The Board indicated that it would also determine in the NGEIR Proceeding whether to refrain, in whole or part, from exercising its power to regulate the rates charged for the storage of gas in Ontario by considering whether, as a question of fact, the storage of gas in Ontario is subject to competition sufficient to protect the public interest.

5 In addition, the Board determined that the generic hearing would examine Union's Transmission Bidding Open Season process as it relates to the rates and contractual terms for allocating transportation capacity. In particular, the issues concerning the M12 rate premiums identified in the Board's decision regarding the Dawn-Trafalgar Pipeline Transmission Expansion (EB-2005-0201) were included.

1.2 THE PROCEEDING

6 The NGEIR Proceeding was commenced pursuant to sections 19, 29 and 36 of the *Ontario Energy Board Act, 1998*. On December 29, 2005, the Board issued a Notice of Proceeding on its own motion to determine:

* whether it should order new rates for the provision of natural gas transmission, distribution and storage services to gas-fired generators (and other qualified customers); and
* whether to refrain, in whole or part, from exercising its power to regulate the rates charged for the storage of gas in Ontario by considering whether, as a question of fact, the storage of gas in Ontario is subject to competition sufficient to protect the public interest.

7 The Notice of Proceeding directed Enbridge Gas Distribution Inc. (Enbridge) and Union Gas Limited (Union) to file evidence on potential rates for gas-fired generators.

8 Procedural Order No. 2, issued on February 28, 2006, set out the issues to be addressed in the proceeding. These are set out in full in Appendix A, but can be summarized as follows:

I. Rates for gas-fired generators (and other qualified customers), including more frequent nomination windows, firm high deliverability service, unbundled services, inter-franchise movement of gas, redirection of gas to a different delivery point on short notice, and title transfer of gas in storage

I

I. Storage regulation and whether the Board should refrain, in whole or part, from exercising its power to regulate the rates charged for the storage of gas in Ontario, including:

* Is the market competitive?
* Who should receive cost-based pricing?
* Who should receive market-based pricing?
  * How should the amount of storage be allocated between the classes of customers?
* Who should receive the premium?

III. Transportation capacity bidding process and allocation

IV. Enbridge rates for large volume customers (Rate 300 Series)

9 The Board also moved four issues from Union's 2007 rates proceeding (EB-2005-0520) to the NGEIR Proceeding. These issues, as set out in Procedural Order No. 3, were related to storage pricing and storage and transmission deferral accounts.

10 Further details of the process can be found in Appendix A. Lists of witnesses and participants are in Appendix B.

1.3 SETTLEMENT PROPOSALS

11 A settlement conference was held for Issues I (rates for gas-fired generators and other qualified customers), III (transportation capacity bidding process and allocation) and IV (Enbridge's Rate 300 series rates). The Board indicated that it would not receive a settlement proposal on Issue II (storage regulation), so a settlement conference was not held in relation to this issue.

12 Two separate Settlement Proposals were filed with the Board on June 13, 2006. Enbridge submitted a Settlement Proposal for Issues I and IV (the Enbridge Proposal) and Union submitted a Settlement

Proposal for Issues I and III (the Union Proposal). A presentation of the Settlement Proposals was made to the Board on June 19, 2006. Details relating to the settlement process and the Board's treatment of the Settlement Proposals, including decisions on issues related to the Settlements and the Settlement Proposals themselves are provided at Appendix C and Appendix D for Enbridge and Appendix E and Appendix F for Union. The matters under Issues I, III and IV that were not resolved by way of settlement are discussed in Chapter 8.

1.4 MHP CANADA DECISION ON CORE POINTS

13 Market Hub Partners Canada (MHP Canada) is an affiliate of Union which proposes to develop third party storage in Ontario. As part of its evidence and submission to the Board in the context of the NGEIR Proceeding, MHP Canada made a request for an expedited decision on certain "core points", specifically that:

* MHP Canada cannot exercise market power;
  * MHP Canada, similar to independent storage developers, will be granted authority to charge market-based rates for its services; and
  * MHP Canada will be allowed flexibility to contract for services without requiring approval of individual contracts, provided that MHP Canada operates within a base set of service terms and conditions approved by the Board.

14 On September 7, 2006, the Board issued its oral decision on MHP Canada's request for an expedited decision on the core points. In its decision, the Board authorized MHP Canada to charge market-based rates and relieved MHP Canada of the requirement to have storage contracts approved by the Board. The transcript of the decision can be found in Appendix G.

1.5 ORGANIZATION OF THIS DECISION

15 This decision focuses principally on the second issue listed in the Board's Procedural Order No.2, that is, whether there is sufficient competition in natural gas storage for the Board to refrain in whole, or in part, from regulating rates.

16 **Chapter 2** is a an overview of gas storage in Ontario today - the existing storage facilities, the use of storage by Union's and Enbridge's "in-franchise" customers, the "ex-franchise" market for storage, and the prices charged for storage services. This chapter does not contain any Board decisions. It provides background and context for the Board's decisions on the competition question and the implementation issues covered in later chapters.

17 **Chapter 3** deals with the issue of competition in storage and whether Union and Enbridge have market power. The chapter addresses the framework for assessing market power, the definition of the product market, the scope of the geographical market, and quantification of market shares and concentration.

18 Section 29 of the *Ontario Energy Board Act, 1998* (the *OEB Act*) requires the Board to consider whether there is "competition sufficient to protect the public interest" before making a decision to refrain from regulation. **Chapter 4** sets out the Board's views on public interest issues relevant to gas storage.

19 **Chapter 5** deals with the decision to refrain, or forbear, from regulating storage rates and approving storage contracts. It sets out the Board's basis for deciding to refrain in part from regulating rates, as well as the Board's decision that in-franchise customers will continue to receive regulated storage services at cost-based rates.

20 Having decided to retain regulated cost-based storage rates for in-franchise customers, it is necessary to determine how much of Union's existing storage space should be reserved for those customers. **Chapter 6** covers that issue together with the Board's decisions on how much cost-based space Union and Enbridge should allocate to individual unbundled and semi-unbundled in-franchise customers.

21 **Chapter 7** sets out the Board's decisions on whether, and to what extent, Union's and Enbridge's in-franchise customers should continue to share in the margins over cost that the utilities earn on sales of storage services at market rates.

22 Issues I, III, and IV from Procedural Order No.2 were largely settled by the parties. **Chapter 8** covers the Board's decisions on a small number of Enbridge rate issues that were not settled.

23 **Chapter 9** is a summary of the implementation and transition issues arising from the Board's decisions in Chapters 5, 6, 7 and 8.

2. ONTARIO GAS STORAGE - BACKGROUND

24 This chapter describes the development and current state of natural gas storage in Ontario, the pricing and allocation of storage, and the rate treatment for revenues earned from storage services sold at market-based rates.

2.1 ONTARIO GAS STORAGE FACILITIES

25 The existing and proposed underground natural gas storage facilities that were the subject of this hearing are all located in Southwestern Ontario, mostly in Lambton County. The storage pools now in operation are all depleted gas fields. With working gas capacity of over 240 Bcf, these Ontario facilities are among the largest gas storage pools in Canada.

26 The storage facilities are an integral part of what is commonly referred to as the Dawn Hub, which is widely recognized as one of the more important market centres in North America for the trading, transfer and storage of natural gas. In its Natural Gas Forum Report, the Board stated: "The large amount of nearby storage, combined with a convergence of pipelines linking the U.S. and Ontario gas markets, have made Dawn the most liquid trading location in Ontario."[3] The Federal Energy Regulatory Commission (the FERC), in its assessment of energy markets in the United States in 2004, made similar comments about the significance of Dawn:

> The Dawn Hub is an increasingly important link that integrates gas produced from multiple basins for delivery to customers in the Midwest and Northeast. ... Dawn has many of the attributes that customers seek as they structure gas transactions at the Chicago Hub: access to diverse sources of gas production; interconnection to multiple pipelines; proximity to market area storage; choice of seasonal and daily park and loan services; liquid trade markets; and opportunities to reduce long-haul pipeline capacity ownership by purchasing gas at downstream liquid hubs.[4]

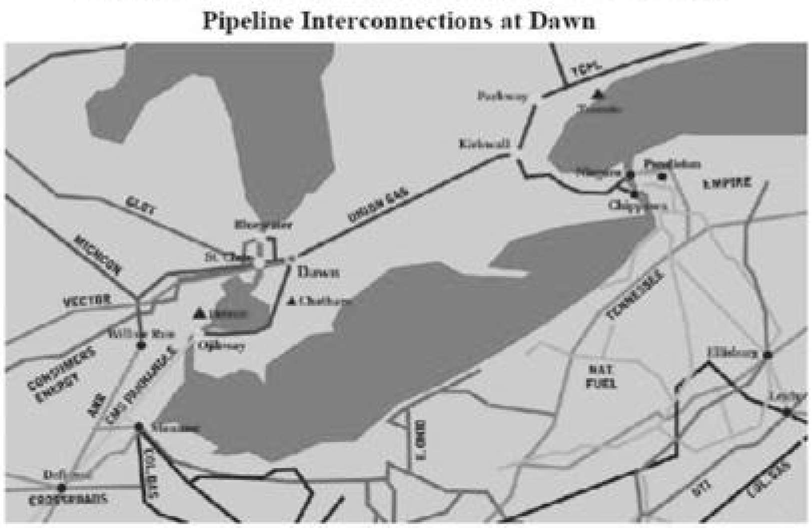
27 The storage facilities currently in operation in Ontario are owned and operated by two entities, Union, which also owns and operates the gas transmission line between Dawn and Parkway, and Enbridge. The storage operations of these companies are described in the next sections of this chapter, followed by information on new storage operations proposed or under development by other parties.

2.1.1 Union

28 Union is an indirect, wholly-owned subsidiary of Duke Energy Corporation, a U.S. company with large and diverse operations in North America's gas and electricity industries. Union owns and operates an integrated gas distribution, transmission and storage business in Ontario. On June 28, 2006, Duke Energy announced it would pursue a plan to create two separate publicly-traded companies by spinning off its natural gas businesses, including Union Gas, to shareholders.

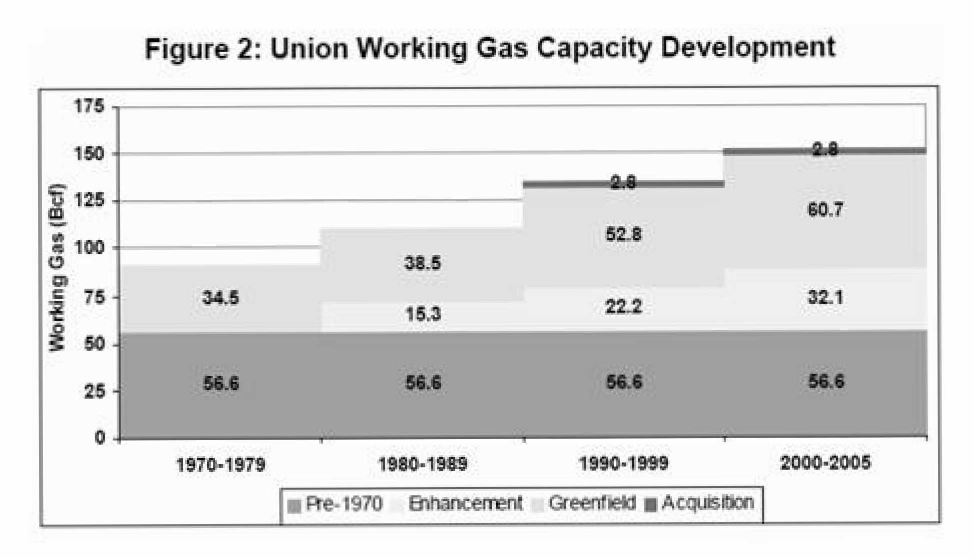
29 Union's storage operations include 20 depleted gas fields with working gas capacity of approximately 152 Bcf and peak deliverability of 2.3 Bcf per day. Union's storage pools connect with the Vector, Great Lakes, CMS Panhandle, Michcon, and Bluewater transmission pipelines from Michigan in the west, and (via Union's Dawn-Parkway pipeline) the TransCanada pipeline and Enbridge's gas distribution system in the east. Figure 1 shows these pipeline interconnections.

Figure 1: Pipeline Interconnections at Dawn



Source: Union Gas pre-filed evidence, Tab 2, page 10

30 Union has owned and operated storage facilities at Dawn since the 1940s. Since 1969, it has more than doubled the working gas capacity through enhancements, greenfield development, and acquisitions, as indicated in Figure 2.[5]



31 Union stated in the hearing that although there might be some potential to develop new storage capacity at its Dawn facilities, it has no current plans to do so.

32 For 2006, Union has allocated about 86 Bcf of its storage space to support the seasonal balancing needs of its in-franchise (distribution) customers. Gas for these customers is typically received from various connecting pipelines on a more or less constant basis during a year. Receipts in excess of demand during the spring, summer and early fall periods are stored and then withdrawn during the peak consumption period in the winter. The largest portion of storage space for in-franchise customers (approximately 61 Bcf) is allocated to customers that take bundled service (transmission, distribution, storage) and is managed by Union on an aggregate basis. Larger customers that take service under Rates T1 or T3 have one-year renewable contracts for fixed amounts of storage space. In aggregate, those contracts cover approximately 16 Bcf. Union also reserves 9 Bcf as "contingency" space related to its needs as system operator.[6]

33 Union earns revenue from selling long-term and short-term storage services to a variety of ex-franchise (non-distribution) customers.

* Long-term contracts - The working gas capacity of Union's pools far exceeds the amount required to support the seasonal balancing needs of Union's distribution customers. Union markets the excess space in multi-year contracts to "ex-franchise" customers, typically Canadian and U.S. gas distributors and marketers. Union's largest ex-franchise storage customer currently is Société en Commandite Gaz Métro (GMi), the largest gas distributor in Québec, which has four contracts covering over 22 Bcf of Union storage space.
* Short-term services - During the course of a year, the storage space required to meet the seasonal balancing requirements of distribution customers is frequently available to be used for short-term storage services for ex-franchise customers. These customers include the Canadian and U.S. marketers and retailers, the trading units of financial institutions, U.S. power generators, and some industrial gas users.

2.1.2 Enbridge

34 Enbridge is a wholly-owned subsidiary of Enbridge Inc., a Calgary-based energy company. Enbridge is the largest gas distributor in Ontario ranked by customers and revenue.

35 Enbridge's Tecumseh storage facilities, which have been in operation since the 1960s, have a working gas capacity of 98 Bcf and peak deliverability of 1.8 Bcf per day.[7] The Tecumseh storage pools are connected to Union's gas transmission pipeline at Dawn. To reach Enbridge's distribution franchise areas in central and eastern Ontario, gas stored at Tecumseh flows over the Union pipeline and then through the TCPL transmission system.

36 Enbridge is at the early stages of assessing the potential for expanding the deliverability of some of its Tecumseh pools.

37 Tecumseh storage is not sufficient to cover the seasonal load balancing requirements of Enbridge's in-franchise customers. To meet those requirements, Enbridge has supplemented its Tecumseh space with three multi-year contracts with Union for a total of 19.9 Bcf of storage at Dawn.

38 Unlike Union, Enbridge does not have the ability to sell long-term storage services from its storage pools because the storage requirements of its in-franchise customers exceed the capacity of Tecumseh. But, similar to Union, Enbridge can utilize its storage assets to offer various short-term storage services to ex-franchise customers. The principal customers for these services are Canadian and U.S. marketers, retailers, and financial institutions.

2.1.3 New Ontario Storage Proposed or Under Development

Tribute Resources Inc. and Tipperary Gas Corp. (Tribute)

39 Tribute, an independent storage company, received Board approval in 2005 to develop and operate a 3.2 Bcf gas storage pool located near Bayfield, Huron County (the Tipperary Storage Pool).[8] When operational, it will be connected to Union's transmission system.

40 The Tipperary Storage Pool has not yet been developed. The company is seeking additional approvals from the Board, including approval to drill a new horizontal and two lateral storage wells. Tribute plans to commence operation of this storage pool in June 2007. Tribute has received Board approval to charge market rates to its customers in accordance with Union's C1 range rate.

Market Hub Partners Canada L.P.

41 MHP Canada is a partnership that is wholly-owned by subsidiaries of Duke Energy and, as a result, is an affiliate of Union. MHP Canada plans to offer Dawn-based services to wholesale customers. It is currently developing its St. Clair Pool (1.1 Bcf) and, through a partnership, it intends to develop a further 5.3 Bcf at the Sarnia Airport Pool. Both projects are located in Lambton County and will be connected to Union's transmission system. MHP Canada has indicated it will seek development opportunities to increase its working gas capacity to 10 Bcf by 2010.

42 In a September 7, 2006 oral decision as part of this proceeding, the Board authorized MHP Canada to charge market-based rates for its storage services (in accordance with Union's C1 range rate) and allowed MHP Canada to enter into storage contracts without requiring Board approval of individual contracts.[9] MHP Canada expects its St. Clair Storage pool to be operational in June 2007.

Enbridge Inc.

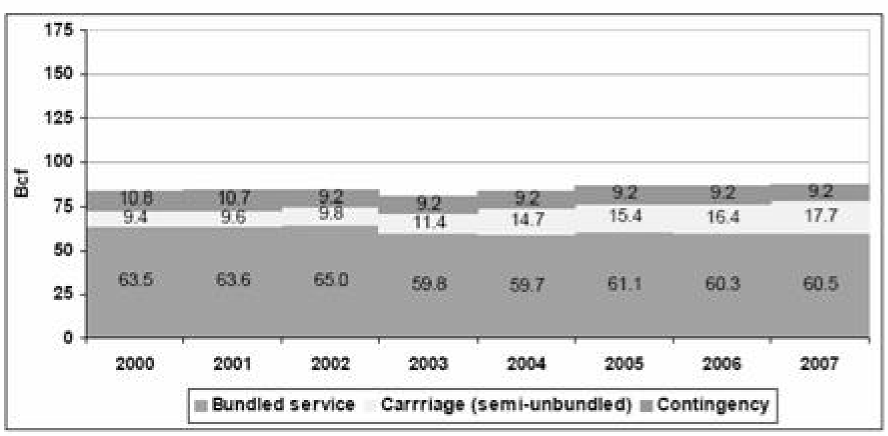
43 Enbridge Energy Distribution Inc. ("Enbridge Energy"), an unregulated subsidiary of Enbridge Inc, has carried out exploration and evaluation activities over the past several years to assess new storage potential in Ontario. The results indicate that undeveloped pinnacle reef storage in Ontario is smaller in size, of inferior quality, and located farther away from Dawn than the currently developed pools. Enbridge Inc. has concluded that the costs and risks associated with new storage development in Ontario are significantly higher than in the past.

2.2 PRICING AND ALLOCATION OF ONTARIO STORAGE

44 The prices currently charged by Union and Enbridge for storage services depend on whether the buyer of the services is considered to be an "in-franchise" or an "ex-franchise" customer. As a generalization, in-franchise customers pay cost-based rates for the storage services they use and ex-franchise customers pay market-based prices. Prices for both groups of customers are regulated by the Board. However, the prices for ex-franchise customers are subject to Board approved maximum rates (so-called range rates) that are high enough that they have not yet constrained the pricing of services to ex-franchise customers.

45 Figure 3 shows Union's analysis of the actual and estimated space requirements for in-franchise customers.[10]

Figure 3: Actual and Forecast Space Requirements Union In-franchise Customers (Bcf)



46 None of the participants in the hearing advocated that the Board refrain from regulating prices of storage services for in-franchise gas customers that require the traditional seasonal load balancing service. However, Union and Enbridge did propose changes to the allocation or pricing of storage services for in-franchise customers.

2.2.1 Definition of "In-Franchise Customer"

47 Although the term "in-franchise customer" was used repeatedly at the hearing and in most parties' evidence, there was no formal agreement on what the term means. In its evidence, Union provided the following definitions:

In-franchise -- Customers inside Union's franchise area. The in-franchise market consists predominantly of residential customers and has historically been considered to be the retail market.

Ex-franchise -- The ex-franchise market consists of storage services sold to those customers located outside Union's franchise area, including Ontario LDCs, marketers/ brokers and end use consumers located outside of Ontario, primarily in eastern Canada and the Northeast United States. This market is considered to be the wholesale market, since the majority of these customers are not end use customers but intermediaries.[11]

48 Union's definition of in-franchise customer is a largely, but not completely, accurate description of the customers that currently receive cost-based storage from both Union and Enbridge. For example, there are the following exceptions:

* Three embedded gas distributors - the City of Kitchener's gas distribution utility (Kitchener), Natural Resource Gas Ltd. (NRG) and Six Nations Natural Gas Company Limited (Six Nations) - pay cost-based rates to Union for storage services. These distributors are physically connected to Union's distribution system but serve gas consumers outside Union's franchise area.
* Gazifère Inc., the gas distributor in the Outaouais region of Québec and a subsidiary of Enbridge Inc., is charged cost-based rates for storage services provided by Enbridge. Gazifère's system is connected to Enbridge's distribution system in Eastern Ontario but serves gas consumers outside Enbridge's franchise area.
* Greenfield Energy Centre Limited Partnership (GEC), owner of a gas-fired generation plant under construction in Union's franchise area in the Sarnia region, has received permission from the Board to construct a gas pipeline that will not connect to Union's system. If GEC were to purchase storage services from Union in the future, it would presumably be considered an ex-franchise customer, and would not be eligible for cost-based in-franchise rates.

49 Given these exceptions, it is probably more accurate to state that cost-based storage services are currently provided to the "distribution customers" of Union and Enbridge. When the term "in-franchise customers" is used in this decision, it is intended to refer to distribution customers of the utilities.

2.2.2 Allocation of Storage to In-Franchise "Bundled" Customers

50 Most of Union's and Enbridge's distribution customers receive a bundled service (distribution, transmission, and storage). The utilities are responsible for determining how much storage is required in total for this customer group and for managing the aggregate allocation.

51 Even though individual bundled customers do not purchase or manage storage, the allocation of storage space is important to them for two reasons.

* It determines how much they are charged for storage. Union and Enbridge apply their cost-based storage rates to the storage allocations to determine the monthly charge to bundled customers. (Union's bills show storage charges as a separate line item. Enbridge includes its storage charges for bundled customers in distribution charges.).
* The allocation determines the amount of cost-based storage that commercial and industrial customers will be entitled to if they choose to take unbundled or semi-unbundled services

from their utility. It also fixes the amount of storage that a natural gas retailer will receive at cost-based rates should the retailer choose to manage storage requirements for its customers rather than rely on the utility service.

52 Union currently uses the "aggregate excess" methodology to allocate storage to bundled customers in its Southern operations area. The aggregate excess is the difference between (a) the amount of gas a customer is expected to use in the 151-day winter period and (b) the amount that would be consumed in that period based on the customer's average daily consumption over the entire year.

53 Union totals the amounts calculated under the aggregate excess method and then reduces that total by 2.4%. This reduction is meant to reflect that less storage is needed to manage the balancing requirements of a large portfolio of customers with diverse consumption patterns.

54 The total amount of storage space allocated to Union's bundled customers has not been capped. As new bundled customers are added, the aggregate excess amount has grown.

55 Enbridge also uses a similar method to allocate storage to its bundled customers.

2.2.3 Allocation of Storage to In-Franchise "Unbundled" and "Semi-Unbundled" Customers

56 Union's and Enbridge's in-franchise customers can choose an unbundled delivery service under which they separately contract for storage service. Only one Enbridge customer has opted for that service to date, although the Board is reviewing redesigned unbundled Enbridge rates as part of this proceeding so there may be further migration. None of Union's customers have chosen unbundled service.

57 Union refers to its T1 and T3 services as "semi-unbundled" services. The commercial and industrial customers taking T1 service and Kitchener which takes service under the T3 rate have entered into renewable one-year contracts for storage space at cost-based rates. Three T1 customers are gas-fired generators that have multi-year storage contracts. If these T1 and T3 customers require storage space greater than their contracted amounts, they are required to purchase the extra space at market-based rates.

58 The allocation of space to most of these customers was determined in 2001 as part of RP-1999-0017, which dealt with Union's unbundling proposals.[12] Union proposed that the aggregate excess method be used to allocate cost-based storage to customers taking unbundled service, and that the same approach be used for the storage allocation to T-service customers. As part of a settlement agreement, Union agreed to grandfather the storage allocations to T-service customers.[13] This grandfathering has resulted in over 40 T1 customers having different (generally higher) storage space under contract than would be the case if the aggregate excess method were used. The three gas-fired generators taking T1 service also have storage space under contract that is well above the amount determined under the aggregate excess method.

2.2.4 Storage Prices for In-Franchise and Ex-Franchise Customers

59 As noted earlier, Enbridge has contracted with Union for additional space to supplement its Tecumseh storage. Thus, the current storage <u>costs</u> underpinning Enbridge's bundled customers are a blend of cost-based rates for Tecumseh and market-based prices under the Union contract. The Union contract has prices that are substantially higher than Union's cost of storage. Enbridge started to pay these higher prices on April 1, 2006 but has not yet received Board approval to include the full contract prices in its rates.

Cost-based rates

60 The current cost-based rates for in-franchise storage users are approximately $.30 per GJ for Union and $0.40 per GJ for Enbridge. These rates are derived from the net book value of the storage facilities (including base pressure gas at historical cost), variable operating and maintenance expenses, financing costs and a return on equity at the Board's approved rate. In Union's case, the rates reflect an allocation of the cost of its storage facilities between in-franchise and ex-franchise users.

Market-based rates

61 Union began selling short-term storage services (less than 2 years) at market-based rates to ex-franchise customers in 1989. In 1997, the Board approved long-term storage contracts (one five-year and three ten-year contracts) that Union had entered into at market-based rates pursuant to an open season process. Based on the Board's RP- 1999-0017 Decision, Union began to transition all long-term ex-franchise customers to market-based rates.

62 Enbridge's Transactional Services function was established in 1997 to enable Enbridge to sell storage and transportation capacity that it considers surplus to what is needed to serve its in-franchise customers. All of Enbridge's Transactional Services are considered to be short-term (less than 2 years).

63 Sales of short-term and long-term storage services to ex-franchise customers are subject to maximum rates approved by the Board (so-called range rates). The actual prices realized by Union and Enbridge for sales of storage services to ex-franchise customers are determined by negotiation. Union's C1 rate schedule, which sets a maximum price of $3.00 per GJ, sets out the following factors that can affect the price of an individual transaction:

* The amount of storage service sought by the customer,
* Type of service (firm or interruptible; peak or off-peak),
* Utilization of facilities,
* Competition, and
* Term.

64 Market prices for storage used for seasonal load balancing tend to reflect seasonal differences in natural gas prices. Storage prices change constantly as the seasonal spread in gas prices changes. Over the past few years, the difference between the forward gas prices for the five-month winter withdrawal season (November through March), and the prices in injection periods has increased significantly. That has put upward pressure on market prices for storage.

65 Market prices for storage in recent years have been many times higher than the cost-based rates charged by Union and Enbridge. For example, the prices realized by Union in the January and February 2006 open seasons for winter 2006/2007 storage are presented below in Table 1.

Table 1: Union Storage Prices
Open Seasons for Winter 2006/2007

	Volume	High Price	Low Price	Weighted Average
US$/MMBtu	7,800,000	US$2.90	US$1.55	US$2.09
CDN$/GJ	8,229,437	$3.43	$1.84	$2.48

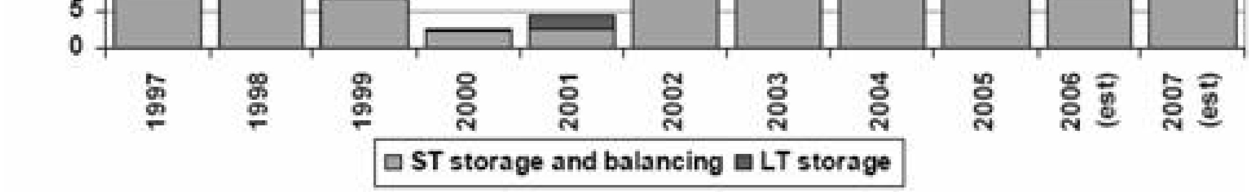
2.3 RATE TREATMENT OF MARGINS ON STORAGE SERVICES

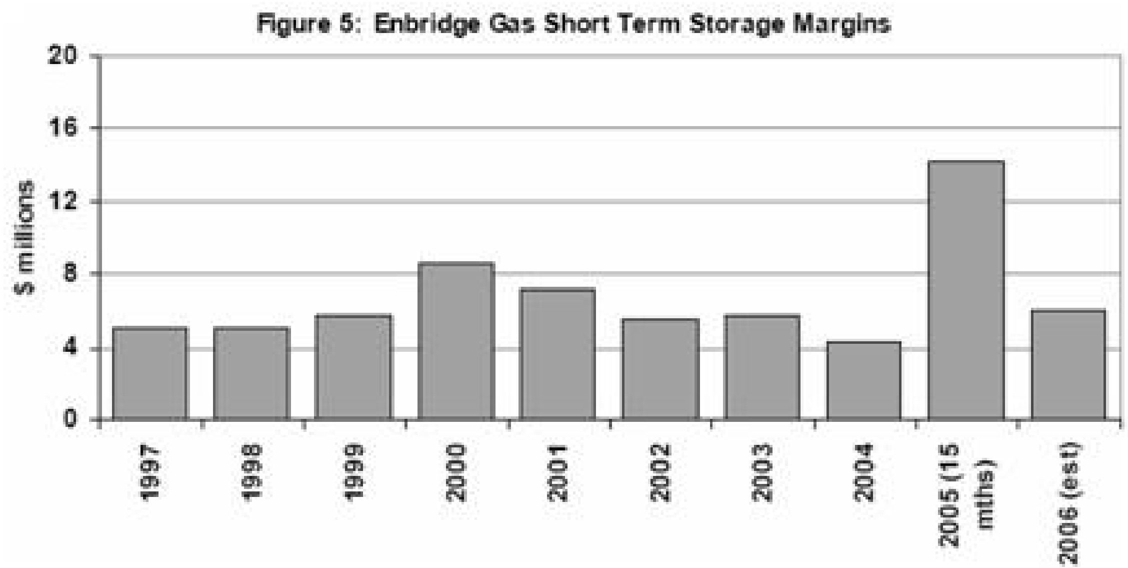
66 The market-based prices that are realized on sales of storage services to ex-franchise customers generally have been higher (sometimes, much higher) than the cost-based rates charged to in-franchise customers. In setting distribution rates for Union and Enbridge, the Board has directed that most of this premium over cost be credited against distribution rates.

67 This section reviews the amount of the margins realized by Union and Enbridge and the manner in which the margins are currently shared by distribution customers and the utilities.

2.3.1 Gross Margins

68 Figure 4 shows the actual margins on Union's ex-franchise storage sales for 1997-2005, estimates for 2006 and 2007.[14] The estimate for 2007 is included in the settlement agreement approved by the Board in its decision on Union's 2007 distribution rates.[15] The amounts are net of an allocation of some of Union's costs of its storage assets. Figure 5 shows the actual margins on Enbridge's Transactional Storage Services for 1997-2005 and the estimate for 2006.[16] The amounts for Enbridge do not reflect any costs of its Tecumseh storage operations because all such costs are currently included in Enbridge's distribution rates.





69 The growth in Union's margins on long-term storage business (long-term means co of two years or longer) in recent years appears to have been caused primarily by two fac in 2001, long-term contracts with ex-franchise customers that previously were at cos been renegotiated at higher market-based rates as they come up for renewal. Second, th storage for seasonal balancing -- which is largely a function of the difference between for the injection and withdrawal seasons -- has been increasing.

2.3.2 Sharing Mechanisms

70 The bulk of storage margins for Union and Enbridge have not accrued to those ut Board has required that most of the margins be credited against distribution rates. The those margins are shared between in-franchise ratepayers and the utilities has varied to past. The current approaches to sharing the margins are described below.

Union

71 Union forecasts the amount of short- and long-term storage margins for the rate y part of the rates case. Of the Board approved forecast amount, 90% is included a distribution rates for the year. To the extent that actual margins vary from the foreca Union books the difference in deferral accounts (account 179-70 for short-term transac

179-72 for long-term transactions). When cleared, these deferral account balances are shared 75:25 in favour of distribution ratepayers.

Enbridge

72 In its decision on Enbridge's 2006 distribution rates, the Board determined that a forecast margin of $10.7 million for 2006 Transactional Services (storage and transmission) was appropriate.[17] The first $8 million of that amount, less $800,000 to cover Enbridge's incremental costs of providing Transactional Services, is for the account of ratepayers and is included as a reduction in 2006 distribution rates. To the extent that Enbridge is able to realize more than $10.7 million in margin in 2006, the excess will be booked to a deferral account and ultimately shared 75:25 in favour of distribution ratepayers.

3. THE ASSESSMENT OF STORAGE COMPETITION

73 This chapter outlines the statutory test under section 29 of the *OEB Act*, establishes the analytical framework to be used in assessing competition in the storage market, and applies the framework.

3.1 THE LEGAL TEST

74 This proceeding is brought pursuant to Section 29 (1) of the *OEB Act* which reads:

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

75 Section 29 was introduced in 1998 as part of the *Energy Competition Act*[18] and followed a similar provision that was introduced in the Federal telecommunications statute five years earlier.[19]

76 The concept of forbearance and light-handed regulation first surfaced in the late 1970s and early 1980s. In 1979, the Economic Council of Canada issued its interim report entitled *Responsible Regulation*[20] and a final report two years later, entitled *Reforming Regulation*[21] with specific recommendations. The McDonald Commission in 1985 concluded that it would be appropriate to adopt "selective deregulation" in Canada.[22]

77 Regulators in Canada and the United States offered two related grounds for forbearance. The first was that markets were being redefined by new technology and, therefore, competition rather than regulation could produce better outcomes in terms of the quantity and prices of goods and services, all of which would maximize social welfare. Much of the early work was done in the telecommunications industry. Not surprisingly, the absence of market power was held by both the U.S. Federal Communications Commission and the Canadian Radio-television and Telecommunications Commission (CRTC) to be sufficient grounds for the exercise of regulatory forbearance.[23]

78 The *Telecommunications Act*[24], which came into effect October 25, 1993, created the first statutory provision relating to forbearance in this country. Section 34 reads:

> Where the Commission finds as a question of fact that a telecommunications service or class of services provided by a Canadian carrier is or will be subject to competition sufficient to protect the interests of users, the Commission shall make a determination to refrain, to the extent that it considers appropriate, conditionally or unconditionally, from the exercise of any power or the

performance of any duty under sections 24, 25, 27, 29, and 31 in relation to the service or class of services.

79 The CRTC between 1994 to 2007, pursuant to that section 34 decided to forbear from regulating telecommunications terminal equipment, cellular telephone and paging service, satellite services, data and private line services, internet services and ultimately long distance services.[25]

80 It is important to remember that the public policy rationale for forbearance is not limited to the belief that competition provided adequate safeguards in workably competitive markets. The second ground for forbearance is based on concerns related to regulatory costs. Those costs are not limited to the financial burden on utilities and ultimately consumers. As the Federal Communications Commission noted, the costs include reducing the firm's ability to react rapidly to the changing market conditions, dampening incentives to innovate and wasting resources through the regulation of firms that have no market power.[26]

81 There are degrees of competition in any market. They range from a monopoly, where there is a sole seller, to perfect competition, where there are many sellers and no one seller can influence price and quantity in the market. It is not necessary to find that there is perfect competition in a market to meet the statutory test of "competition sufficient to protect the public interest"; what economists refer to as a "workably competitive" market may well be sufficient.

82 It is also important to remember that competition is a dynamic concept. Accordingly, in section 29 the test is whether a class of products "is or will be" subject to sufficient competition. In this respect parties often rely on qualitative evidence to estimate the direction in which the market is moving.

3.2 ONUS

83 One of the issues raised was who has the onus in the NGEIR Proceeding. Generally, the onus is on the applicant. Most intervenors argued that the onus was on Union and Enbridge. The utilities and their affiliates disagreed. MHP, for example, countered that the onus was on any party seeking to change the status quo. In its view, Union has been selling storage at market-based rates for many years and that represents the status quo.

84 Some have argued that the ex-franchise prices are not competitive and that the framework should be revisited. Union itself is proposing to freeze the allocation of cost-based storage to in-franchise customers, and to acquire incremental volumes at market- based prices. As pointed out by the Consumers Council of Canada (Consumers Council), that is certainly not the status quo.

85 In any event, there is no applicant in this proceeding, and the matter has been brought about on the Board's own motion. The Board therefore finds that it is not appropriate to assign onus to any particular party.

3.3 THE ANALYTICAL FRAMEWORK AND THE ASSESSMENT OF MARKET POWER

86 The Board must determine the appropriate analytical framework for assessing whether the market is competitive. In this section and in the balance of this chapter, we address the issues associated with the appropriate analytical framework and its application. Through this analysis, the Board can determine whether Union or Enbridge have market power and whether there is a workably competitive market for storage. The evidence and submissions identified three frameworks in which to consider the market power question: the Canadian Competition Bureau's Merger Enforcement Guidelines (MEGs), the CRTC approach to forbearance, and the U.S. Federal Energy Regulatory Commission (FERC) approach to addressing requests for market-based rate authority. The approaches followed by these three authorities are summarized below.

FERC

87 The FERC has applied a straightforward structural approach, derived from the U.S. Merger Enforcement Guidelines, to considering the market power implications of applications for new storage at market-based rates. Prior to FERC Order 678 (which has modified the FERC approach and which is described below), the product market was taken to be physical storage. The geographic market is based on an assessment of the extent of competition provided by neighbouring storage facilities. Once these markets have been identified, a Herfindahl-Hirschmann Index (HHI)[27] calculation is performed to assess the potential for market power. The potential for entry is also assessed. An HHI threshold of 1800 is generally used as a screen: if the concentration in the market is below this value, the market is deemed to be competitive and a new storage supplier will be allowed to charge market-based rates. In several cases, even prior to Order 678, the FERC has allowed storage applications where the HHI was significantly above 1800, particularly if the new entrant had a small market share, because even if some incumbent firms possess market power, licensing a new entrant at market-based rates is unlikely to add to that market power and may well diminish it.

88 In 2005, the FERC initiated a Notice of Proposed Rulemaking culminating in Order 678, which relaxed this framework somewhat. Order 678 makes two significant changes to the framework for approving new storage applications. First, the product market has been broadened to potentially include pipeline capacity, local production and LNG peaking gas facilities. Second, even where the applicant cannot show that it does not have market power, it may be permitted to charge market-based rates, if such an outcome is determined to be in the public interest.

CRTC

89 The CRTC, relying on section 34 of the *Telecommunications Act*, is willing to forbear from regulation when "a service or class of services provided by a Canadian carrier is or will be subject to competition sufficient to protect the interests of users". The CRTC test thus resembles closely the language in section 29 of the *OEB Act.* Through application of these criteria, the CRTC has forborne from regulating the supply of long distance services, telephone equipment, customer inside wiring, business and residential local telephone services, high-speed Internet services, wireless telephone services and data services.

90 Because of the original status of these industries as natural monopolies, the CRTC approach emphasizes the need to ensure that a dominant incumbent firm is not able to exercise substantial market power. Indeed, much of the CRTC's concern over forbearance has been a concern over prices that might be too low, rather than too high -- in other words a concern about predatory behaviour exercised by the incumbent firms. In its 2006 decision[28] which establishes a framework for forbearance over competition in local telephone service, the CRTC required that the dominant firm's market share must have fallen below 75% before forbearance would proceed.

91 The CRTC follows a set of steps that mirror the methodology found in the Competition Bureau's Merger Enforcement Guidelines.

Competition Bureau's Merger Enforcement Guidelines

92 In their approaches to identifying market power both the FERC and CRTC follow a methodology derived from their respective national Merger Enforcement Guidelines or MEGs.[29] Although the methodology is intended for use in identifying the market power implications of mergers, it can be helpful when assessing whether the forbearance of regulation is likely to lead existing firms to exercise market power.

93 The MEGs approach is to identify the relevant market in terms both of products that are significant substitutes and the geographic area from which supplies of these products engage in competitive rivalry. Once this has been done, the degree of concentration in this market can be quantified by calculation of market shares to assess the degree of market power that is likely to be possessed by suppliers. In addition, an assessment is made of the conditions of entry because market power is unlikely to be possible in even a highly concentrated industry if price increases would encourage the swift entry of new and competitive suppliers.

94 Whereas the FERC focuses on the HHI, the Competition Bureau looks at market share to assess the potential for unilateral exercise of market power and generally will not challenge a merger if this indicator is below 35%. For assessing coordinated exercise of market power, the Bureau looks at the four-firm concentration ratio (the post-merger combined market share of the four largest firms) and generally will not challenge a merger when this indicator is below 65%.

Board Findings

95 The question before us in this proceeding is unlike that addressed by the Competition Bureau in a merger application or by the FERC in an individual application for market-based rates. The Board has entered into this broad-based inquiry to determine whether it will refrain from regulating storage rates in Ontario. However, the Board finds that there is much to be gained from considering the approaches of others in determining questions of market power - both the analytical tests used and the actual application in specific cases.

96 Enbridge argued that the Board can use the CRTC's approach to forbearance as a model for an appropriate analytical framework. Enbridge further argued that FERC's Order 678 amounts to a recognition by FERC that its assessment of market power should be less restrictive in order to encourage the development of storage and in order that customers get the benefits of reduced price volatility and greater assurance that peak demands will be met. Enbridge reasoned that the Board should not take guidance from FERC decisions which took a narrow approach to the assessment of market power because the FERC itself has moved away from this approach.

97 The Board notes that while the experts and intervenors differed as to how the test should be applied, there was little disagreement as to the key components of the analysis, namely those followed in the MEGs:

* Identification of the product market;
* Identification of the geographic market;
    * Calculation of market share and market concentration measures;
    * An assessment of the conditions for entry for new suppliers, together with any dynamic efficiency considerations (such as the climate for innovation and the likelihood of attracting new investment).

98 The Board finds that this approach is the appropriate means by which to determine whether Union or Enbridge have market power and whether the storage market is competitive. This approach encompasses the key components of the approaches used by the FERC and the Competition Bureau. Having determined the appropriate analytical framework, we turn now to the application of the framework to Ontario.

99 We will address each of the four components; we will also address the price impact issue raised by Mr. Stauft, an expert witness sponsored by a number of consumer intervenors. His analysis asserted that a comparison of the market price and the regulated price can be used to assess market power.

3.4 IDENTIFICATION OF THE PRODUCT MARKET

100 The product market identifies a set of products that are reasonably good substitutes for each other. In other words, where buyers will respond to a price increase by switching, in significant numbers, to a substitute product, the two products should be considered as belonging to the same product market. It should be noted that since storage has several distinct functions, including seasonal balancing and meeting short-term demand peaks, it is arguable that more than one product market may be identified for the different functions of storage.

101 Concentric Energy Advisors (CEA) provided expert evidence on behalf of MHP Canada. CEA suggested that the relevant product market would include physical storage, local production from the regions in the relevant geographic market, pipeline capacity in the relevant geographic market contracted by marketers either directly or as agents for industrial customers, and utility peakshaving facilities. CEA's rationale for including marketer-contracted pipeline capacity is that this capacity could be reasonably expected to be active in the secondary market for transportation services, and thus provide readily available deliverability in direct competition to storage services. Local production and peakshaving would also provide deliverability in competition with storage.

102 Union offered expert evidence prepared by Energy and Environmental Analysis Inc and Professor Schwindt of Simon Fraser University (EEA/Schwindt report). The EEA/Schwindt report identified several products that can substitute for at least some storage uses. However, in the report, the boundaries of the geographic market were derived based on physical storage only, an approach the authors considered to be very conservative.

103 Mr. Stauft, the expert witness for a group of consumer intervenors[30], held that the relevant product market should be limited to storage only. While in Mr. Stauft's view LNG and uncontracted pipeline capacity could be substitutes for storage, in Ontario neither of these potential substitutes exist. Mr. Stauft did not agree that contracted pipeline capacity -- even if held by active participants in the secondary market for pipeline services -- could be correctly considered to be a close substitute for physical storage.

104 The Board Hearing Team[31] presented an expert witness, Ms. McConihe, and her evidence paralleled the evidence provided by Mr. Stauft, and she concluded that the relevant product market was storage only.

105 Enbridge argued that the evidence shows that there are real substitutes for storage, including commodity sales, swaps, exchanges, displacement, delivery/redelivery and financial instruments.

106 The Association of Power Producers of Ontario (APPrO) argued that the product it is most interested in -- high deliverability storage -- is not currently available in Ontario. APPrO argued that competition cannot exist for a product that is not yet introduced and pointed out that when it is introduced it will be available only from Ontario utilities as ex-Ontario suppliers will be constrained by the nomination windows specified by the North American Energy Standards Board (NAESB).

Board Findings

107 The Board finds that the evidence supports the conclusion that there are non-storage products and services which provide reasonable substitutes for storage. These substitutes include commodity sales, swaps, exchanges, displacement, and delivery/redelivery services. The difficulty comes in trying to incorporate these into the quantitative analysis. The Board was not presented with data on these products which are comparable to the data available on physical storage. It should also be noted that these services (swaps, exchanges, displacement, etc.) do not increase the total availability of the underlying storage or commodity, but enhance the functioning of the market by increasing liquidity. Pipeline capacity contracted to marketers may well provide a proxy for the quantity of these services available; however, the Board finds that the evidence is not substantial enough to include this category in the analysis.

108 For these reasons, while the product market is broader than just physical storage, for purposes of the quantitative analysis we include physical storage only. The Board notes that this approach has the benefit of providing a conservative assessment of the level of competition. The real level of competition is undoubtedly higher than that shown by a quantitative analysis based only on physical storage.

109 With respect to APPrO's position, the Board is not convinced that high deliverability storage service is a different product. High deliverability storage may be a new service, but it is a particular way of using physical storage, which still depends upon the physical parameters of working capacity and deliverability. The Board provides a more detailed consideration of the pricing of high deliverability storage service later in this decision.

3.5 IDENTIFICATION OF THE GEOGRAPHIC MARKET

110 The geographic market is the area from which suppliers compete effectively for the business of a given group of customers. In the case of gas storage, this amounts to examining whether the market is restricted to Ontario or whether it should be more broadly drawn.

111 The utilities, their affiliates and Nexen argued for a larger geographic market, one which includes storage in Michigan and parts of Illinois, Indiana, New York and Pennsylvania. The consumer intervenors argued for a geographic market limited to Ontario. The issue centred on whether transportation constraints close off access to storage outside Ontario and included discussion of the secondary market.

112 Both Ms. McConihe and Mr. Stauft concluded that the storage market was limited to Ontario because there is limited firm uncontracted pipeline capacity joining Ontario to other markets and that, therefore, storage in other areas (such as Michigan) is not a substitute and not part of the same market.

113 EEA/Schwindt presented a seasonal price analysis and a price correlation analysis in support of a geographic market that includes Ontario, Michigan, northern Illinois, northern Indiana, and the Natural Fuel Gas territory in western New York and Pennsylvania. Energy Probe supported this analysis.

114 For the price correlation analysis, EEA/Schwindt presented correlation coefficients of daily gas commodity prices at nine North American trading hubs with the daily commodity price at Dawn. Results were presented for several different time periods, and the full sample covers the period 1999 through August 2005. With two exceptions, the correlation coefficients are above 0.99.

115 For the seasonal price analysis, EEA/Schwindt examined differentials in the marginal value of storage approximated by the differential between the peak (winter) and off-peak (summer) prices. If storage providers at a particular market hub are exercising market power this differential should be greater than at other pricing hubs, but if there are no transportation constraints, then geographic arbitrage will make it impossible to exercise market power in this way. The EEA/Schwindt evidence on these seasonal differentials revealed little or no systematic variation between different pricing locations and in their view supported a conclusion of a broader geographic market.

116 The consumer intervenors acknowledged that the commodity market is highly integrated but argued that does not lead to the conclusion that the storage market is integrated. The Vulnerable Energy Consumers Coalition (VECC) and Canadian Manufacturers and Exporters (CME) argued that the price correlation analysis has never been accepted by the FERC. Union responded that the FERC rejected the use of the price correlation analysis as a means of demonstrating a lack of market power but that in this case it is being used as a means of defining the scope of the market.

117 Enbridge pointed out that it is clear that Dawn is physically connected to storage in Michigan and elsewhere through extensive pipeline interconnections. In the utilities' view, the secondary market provides adequate access to substitute storage facilities. They pointed to the evidence of GMi and BP Canada (BP) as being actual market participants who consider, and at times use, these alternative means.

118 The Board Hearing Team argued a similar position. In its view, the evidence -- in particular that of GMi and BP -- supports the conclusion that there are adequate substitutes for Ontario storage in the primary and secondary market. The Board Hearing Team pointed to the MEGs standard and its reference to buyer behaviour and cited the evidence that marketers and utilities do purchase alternative services in Michigan and New York - and that these alternatives are not necessarily more expensive.

Board Findings

119 Ms. McConihe's conclusion that the market is restricted to Ontario was based on a survey of available firm primary pipeline capacity. This survey concluded that most of the pipeline capacity was under contract. Union and others argued that this is not surprising since pipelines are generally not built or expanded unless there are firm contracts to support the development. They argued that Ms. McConihe failed to understand the secondary market. As Mr. Reed on behalf MHP Canada stated, the existence of pipeline capacity is what is important in terms of integrating markets - not the availability of unsubscribed firm capacity.

120 There is no significant amount of uncontracted firm capacity to access other storage areas. However, there is strong evidence that the market does view Michigan and other areas as viable alternatives to storage provided by Union.

121 Ms. McConihe acknowledged the existence and likely significance of the secondary market, but expressed concern that it could not be quantified. While there may not be sufficient transaction level data about total secondary market activity, we certainly have evidence which supports the conclusion that the secondary market is relatively deep and liquid and that the market extends beyond just Ontario. Enbridge referred to this anecdotal evidence as "real-world examples of competitive alternatives". That evidence includes:

* GMi's evidence regarding its assessment of alternatives and the growth of the secondary market;
* the purchases of storage in Michigan and New York by Ontario utilities and marketers;
* the depth and liquidity of the Dawn Hub (as evidenced by the fact that traded volumes far surpass physical volumes);

* BP's evidence regarding its use of storage in Ontario, Michigan and the upper Midwest to offer services in Ontario and its evidence that at least one Union storage customer had switched to BP as a supplier for part of its storage needs;
* BP's evidence regarding its provision of services including swaps, exchanges, park and loans, delivery and re-delivery;
* Enbridge's RFP results included at least response from outside Ontario
* the evidence as to the significant holdings of storage and pipeline capacity by marketers generally;
* open seasons for new capacity on pipelines and for storage.

122 The Board concludes that the geographic market extends beyond Ontario, even though there is a lack of uncontracted firm pipeline capacity. The Board is satisfied that there are reasonable alternative means for storage customers in Ontario to access a broad market area. This can be done through the secondary markets or through participating in open seasons for new firm capacity. The Board is also satisfied that there is access to suitable substitutes for Ontario storage available in the broader market because there is direct evidence that the alternatives are considered and are being used.

123 The Board finds that the price correlation analysis, while not in and of itself determinative of this issue, supports this conclusion. The very high level of these correlations, combined with the other evidence about the advanced state of inter-hub trading and the absence of occurrences of "basis blow-outs"[32] at individual hubs, supports the conclusion that the market is highly integrated. The Board also finds that the seasonal price analysis supports the conclusion that storage facilities outside Ontario are part of the same market.

124 For these reasons, the Board agrees with EEA/Schwindt and concludes that the geographic market includes Ontario, Michigan, northern Illinois, northern Indiana, and the National Fuel Gas territory in western New York and Pennsylvania.

3.6 CALCULATION OF MARKET CONCENTRATION AND MARKET SHARE

125 The identification of geographic market and product market boundaries allows the calculation of measures of market concentration, both corresponding to individual firms (market share) and measures of concentration for the market as a whole, such as the HHI index. The former gives an indication of the potential for a single firm to exercise market power, whereas the latter is an overall indicator of how competitive the market is likely to be.

Board Findings

126 Before any calculations are made, an appropriate volumetric measure must first be selected to quantify the capacity of a storage facility. Subject to the availability of data, any of the following measures can be used: working gas capacity, injection capacity, deliverability, or capacity available to third parties. The last of these measures, capacity available to third parties, captures storage that is directly available to the competitive marketplace. However, there is clear evidence of market-based transactions taking place from what is otherwise considered dedicated storage capacity. Therefore, the Board concludes that it is reasonable to use the measures of working gas capacity and maximum daily deliverability. Market share data using these measures were provided by EEA/Schwindt.

127 The Board has found that the geographic market includes Ontario, Michigan, northern Illinois, northern Indiana, and National Fuel Gas in western New York and Pennsylvania. The Board accepts the market share data provided by EEA/Schwindt which is summarized in Table 2.

Table 2: Market Shares and Market Concentration

	Working Gas Capacity	Max. Daily Deliverability
Union market share	13.1%	9.1%
Enbridge market share	7.9%	7.1%
4 Firm Concentration	61.7%	56.9%
HHI	1,270	1,220

128 The Board finds that these results support the conclusion that neither Union nor Enbridge have market power in the storage market. The Board finds that the storage market is workably competitive.

3.7 THE PRICE IMPACT ISSUE

129 Mr. Stauft testified that the regulated cost-based price for storage was a reasonable proxy for the competitive price of storage and that this approach was used by FERC. In his view, because the price for storage in the ex-franchise market is substantially higher than the cost-based rate, Union is exercising market power.

Board Findings

130 Most of the consumer intervenors, including the Industrial Gas Users Association (IGUA), the Association of Major Power Consumers of Ontario (AMPCO), Schools Energy Coalition (Schools), VECC, and the Consumers Council, supported Mr. Stauft's position. They took the position that the assessment of market power rests on a comparison of the price prevailing in the market with the current regulated price and that, as a result, Union exercises market power. Union, Enbridge and their affiliates disagreed with the price analysis. Union argued that the price of cost-based storage was not a proxy for the competitive price of storage. In its view, market values for storage reflect seasonal commodity price differentials, which are unrelated to the cost of providing storage service.

131 The Board finds that the current cost-based regulated price is not a reasonable proxy for the competitive price. There is strong evidence that new storage is substantially more expensive due to higher costs for base pressure gas, reduced economies of scale, and smaller more remote pools. Enbridge Inc.'s oral testimony lays out these cost factors quite clearly, and the Low Income Energy Network (LIEN) has rightly observed that inflation is exerting upward pressure on these costs. Union pointed out that the FERC generally sets regulated storage rates on the basis of incremental costs.

132 Given the high cost of new storage and the high value for storage in terms of the commodity market, the Board does not agree that the market price being above historical cost-based rates is evidence of market power. In a competitive market, the costs of new capacity influence prices, and in the case of storage these costs are substantially higher than the historical cost-based rates.

133 The Board notes that the differential between current cost-based rates and the market value of storage, while not evidence of market power, would be a concern on distributional grounds if the Board were considering re-pricing cost-based storage to market-based levels. However, no party proposed such re-pricing. All parties, in one way or another, acknowledged that the in-franchise distribution customers do not have effective access to alternative storage providers, because they purchase a storage service which is bundled with distribution and transmission, and that therefore, these retail customers should remain subject to cost-based regulation. This distinction between in-franchise and ex-franchise customers is discussed further in Chapter 5.

3.8 BARRIERS TO ENTRY

134 Market power analysis typically includes an assessment of the conditions for entry for new suppliers, together with any dynamic efficiency considerations (such as the climate for innovation and the likelihood of attracting new investment). This analysis is particularly important in a market that is concentrated, or where the incumbent has a high market share, because if there is ease of entry then that market share can be quickly eroded if there is an attempt to raise prices. We do not have that concern here. The Board has found that neither Union nor Enbridge have market power in the storage market.

135 We did hear evidence regarding the high costs and high risks associated with developing new storage assets. In the view of most intervenors, there will be incentives for new investment if the Board refrains from regulating rates for third-party storage developments. This issue is discussed further in Chapter 4 and Chapter 5.

4. COMPETITION AND THE PUBLIC INTEREST

136 Although the Board has determined that the storage market in Ontario is subject to workable competition, the Board must also determine whether the level of competition is or will be "sufficient to protect the public interest". This is a key element of section 29. There has been considerable debate in this proceeding regarding the meaning of "public interest" in section 29. The public interest is multi-faceted and dynamic, but it is important to clearly identify how the Board will assess whether the public interest will be protected by competition if the Board refrains from regulating storage rates.

Board Findings

137 The public interest can incorporate many aspects including customers, investors, utilities, the market, and the environment. Union and Enbridge argued for a narrow definition of the public interest. In their view, competition itself protects the public interest, and once the Board has satisfied itself that the market is competitive, the public interest is protected by definition. The Board finds this to be an inappropriate narrowing of the concept. Competition is better characterized as a continuum, not a simple "yes" or "no". The Board would not be fulfilling its responsibilities if it limited the review in the way suggested without considering the full range of impacts and the potential need for transition mechanisms and other means by which to ensure forbearance proceeds smoothly.

138 Some of the intervenors took the position that the public interest review should be focussed on the financial impacts. For example, Schools argued that the Board should look at the benefits and costs of forbearance, and in its view, the costs include a possible transfer of between $50 million and $174 million from ratepayers to shareholders (arising from the proposed end to the margin-sharing mechanisms and the potential re-pricing of cost-based storage to market prices). The Board agrees that the financial impacts are a relevant consideration, but does not agree that an assessment of the public interest should be limited to an assessment of the immediate rate impacts. The scope of appropriate considerations is broader and includes factors related to market signals, incentives and efficiency. These are discussed further below.

139 Some parties, including the Board Hearing Team and APPrO, argued that the Board's legislative objectives provide the best set of public interest considerations to apply in this case. Others took a similar approach, although expressed somewhat differently. For example:

* VECC submitted that the test is whether the market created by forbearance "will operate in a fashion that ensures that market discipline will be at least as effective as regulation in effecting fair and reasonable conditions in the customer relationship."
* Energy Probe argued that the Board should be guided by three public interest considerations: encouraging economically efficient pricing of gas storage services; protecting consumers of monopoly transmission and distribution services; and promoting the development of cost-effective storage opportunities in Ontario.

140 The Board finds that these broader approaches set out above represent a balanced and comprehensive approach to assessing the public interest. It is appropriate to consider the Board's legislative objectives in this case, because they are a clear expression of the factors the Board is to take into account. The Board's objectives which are most directly relevant in this case are as follows:

* to facilitate competition in the sale of gas to users;
* to protect the interests of consumers with respect to prices and the reliability and quality of gas service.
* to facilitate rational development and safe operation of gas storage

141 The Board notes that these may well be conflicting objectives. Put differently, there are public interest trade-offs. This is particularly relevant in light of another argument raised by the parties. Enbridge and MHP Canada argued that the forbearance contemplated in section 29, as a matter of statutory interpretation, is mandatory because of the use of the word "shall" in the statute. They argued that once the Board makes a factual finding that there is sufficient competition to protect the public interest, the *OEB Act* requires that the Board then refrain from setting prices through a cost of service regime.

142 The Board does not agree with Enbridge and MHP Canada's conclusion. Section 29 says that the Board shall make a determination to refrain "in whole or part" which the Board believes allows considerable flexibility in this regard. In addition, the Board concludes that it is required by the statute to address the public interest trade-offs, for example, between price impacts and the development of storage and the Ontario market generally.

143 We will now review each objective and discuss some of the public interest factors which the Board considers relevant to the assessment of whether the level of storage competition is sufficient to protect the public interest if the Board refrains from rate regulation and contract approval.

4.1 TO FACILITATE COMPETITION IN THE SALE OF GAS TO USERS

144 The Board has worked over time to ensure that Ontario consumers reap the benefits of commodity competition. The Board must continue to pursue this objective and can do so by facilitating the evolution of a robust market in Ontario. The development of the Dawn Hub has brought substantial benefits to consumers in Ontario and to other market participants.

145 The Board concludes that it is in the public interest to maintain and enhance the depth and liquidity of the market at the Dawn Hub as a means of facilitating competition. One way to do this is to encourage the development of innovative services and to ensure access to those services. Choice is the bedrock of competition. The evolution of the transactional services market is an example where innovative and flexible services have evolved within a market-based pricing structure.

146 Enbridge argued that forbearance will foster innovation by facilitating the provision of storage services in the competitive market. The Board agrees that regulating storage rates does place constraints on the development of flexible and innovative services; forbearance, within a framework of non-discriminatory access, can remove these constraints.

147 In the current industry structure, the gas utilities both acquire storage for their own customers and operate storage for their own needs and for other customers. The utilities also operate integrated storage and transportation systems. The Board considers later in this decision whether forbearance requires that there be greater separation between these operations or whether other procedures should be developed to ensure non-discriminatory access to storage and transportation.

4.2 TO PROTECT THE INTERESTS OF CONSUMERS WITH RESPECT TO PRICES AND THE RELIABILITY AND QUALITY OF GAS SERVICE

148 The interests of consumers were a primary focus for many intervenors. The submissions addressed issues related to the direct and indirect impacts of forbearance and competition. Interestingly, no ex-franchise customer opposed paying market-based rates; nor was there any evidence of a price impact on this market segment in the event of forbearance. This is consistent with the Board's finding that these customers have alternatives and that competition will provide adequate protection for these customers.

149 With respect to in-franchise customers, two rate impacts were discussed: the direct impact on storage rates and the indirect impact on the sharing of the storage premium. With respect to the direct impact, the utilities proposed to freeze the allocation of in-franchise storage and to acquire incremental storage at market-based prices. This would have the effect of increasing in-franchise storage rates (under current market conditions), albeit only marginally given the relatively slow growth of in-franchise storage demand. The utilities were of the view that this afforded in-franchise customers a significant level of protection. The other direct storage rate impact arises from the proposal that Enbridge be treated as an ex-franchise customer in respect of its contracts with Union. This would have the effect of raising Enbridge's storage rates.

150 However, attention of the parties was primarily focussed on the indirect impact arising from the premium which exists between the price of market-based storage and the underlying costs. Currently, that premium is shared between utility ratepayers and utility shareholders. Under the utilities' proposals for forbearance, the premium would be retained by the shareholders. This would result in significant transfer of funds in the case of Union (2007 estimate is $44.5 million); less so in the case of Enbridge (2007 estimate is $5 million to $6 million). The intervenors in general rejected these proposals and, as a result, opposed forbearance.

151 IGUA/AMPCO argued that there should be no forbearance if there will be any adverse impact on ratepayers. Similarly, they argued that the level of return under forbearance should be no greater than the regulated return; otherwise the level of competition is not sufficient, because the regulated return is a proxy for a competitive result. The Consumers Council argued that there should be no forbearance if a material increase in price is not offset by the prospect of decreasing prices.

152 Union argued that on IGUA/AMPCO's and the Consumers Council approach, the Board would never forbear, no matter how competitive the market. It argued that the financial impact is not a factor as to whether forbearance is warranted. Union argued that the Board should consider that new storage development would attract additional volumes to Ontario, increasing market liquidity and enhancing security of supply for Ontario consumers.

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

154 Apart from the premium issue, the direct expected storage rate impacts under a forbearance scenario are modest for Union's in-franchise customers, under the utility proposal of fixing the in-franchise storage allocation. The impact for Enbridge customers is more pronounced given its lower level of storage assets. The Board must consider whether the allocation to Union's in-franchise customers should be fixed and whether Enbridge (and possibly other ex-franchise customers) should be entitled to cost-based storage from Union.

155 A key consideration with respect to this issue is the question of which consumers the Board is responsible for protecting. Some parties, such as Kitchener, have argued that our duty is to end-use consumers in Ontario -- either to them directly or to them indirectly through their local distributor. These parties advocate cost-based storage pricing for Ontario end-users and market-based pricing for those outside Ontario.

156 While the Board concurs that a key objective (and therefore a key public interest consideration) is the protection of consumers in Ontario, the Board concludes that this approach of separate treatment depending upon location is problematic. This is discussed further later in Chapter 5.

157 The Board concludes that long-term consumer protection in terms of price, reliability and quality of service is best achieved through thriving competition for the competitive elements of the storage market and effective regulation of the non-competitive elements of the market. The Board is of the view that refraining from rate regulation and contract approval in the ex-franchise market has the potential to foster more competition in the storage market, to the benefit of all customers, provided there are clear rules and non-discriminatory access by all market participants. In a competitive market, customers have choices, resources are distributed efficiently, and there are incentives to innovate and respond to customer needs.

4.3 TO FACILITATE RATIONAL DEVELOPMENT AND SAFE OPERATION OF GAS STORAGE

158 Discussion in this area focussed on the impact of forbearance on the development of new storage in Ontario, through the utilities directly, through their affiliates, or through independent storage developers. The estimates of new storage potential ranged from 50 Bcf to around 120 Bcf.

159 The Board has as an explicit objective to facilitate the rational development of gas storage. The Board therefore must look for means by which to achieve this objective. A number of authorities have identified the need to develop additional storage. For example, FERC has acknowledged that additional storage development will mitigate commodity price volatility and improve winter peak availability. The utilities and their affiliates took the position that this should be a key consideration for the Board and argued that new storage development will not take place in Ontario under the current regulatory regime. In their view, forbearance from setting rates and approving contracts would encourage storage development and the development of storage services. Nexen agreed with the utilities that forbearance will allow needed new services to develop.

160 Energy Probe also agreed and argued that there has been limited recent storage development despite the appearance of significant opportunities and that this can be contrasted with the level of development elsewhere. In Energy Probe's view, Ontario storage development has been artificially constrained due to unfavourable regulatory conditions. Energy Probe argued that forbearance will drive enhancements to meet the needs of gas-fired generators and that the public interest will benefit from having storage developers manage the risks and rewards of development.

161 Others, primarily consumer groups, took the view that new storage, to the extent that it is needed, can be stimulated by allowing market-based rates for new storage developers only. The position of these groups, including the London Property Management Association (LPMA), the Wholesale Gas Service Purchasers Group (WGSPG), VECC, and Consumers Council, can be summarized as follows:

* The existing facilities are more than sufficient to meet Ontario's needs.
* The utilities could further develop existing facilities under the current regulatory framework if additional capacity is needed. There is evidence that they have done so in the past.
* Forbearing from setting storage rates and transferring the rents to the shareholders will not provide an incentive to non-utility developers, and continued regulation of the utilities will not provide a disincentive to third-party storage development. The way to stimulate new storage development by third parties is by forbearing or regulating at market rates, which is consistent with FERC Order 678.
* There is no evidence that forbearing from regulating the utilities will cause them to increase capacity. The Enbridge evidence is that even with forbearance it might not invest in storage enhancements.

162 The evidence suggests that there is no need for significant new storage within Ontario to serve the traditional requirements of Ontario consumers. However, there is a demonstrated desire for more specialized services to meet the load characteristics of power generators. The Board also agrees that further development of storage in Ontario would be of benefit to Ontario consumers in terms of reduced price volatility, enhanced security of supply and an overall enhanced competitive market at Dawn. There is also evidence that new services, once they are generally available, can enhance the service offerings of other parties, such as marketers, thereby increasing the liquidity of the market.

163 The Board concludes that it is appropriate to facilitate the development of storage to offer these services without undue risk for ratepayers. The issue is how this objective is best achieved. At a minimum, for third-party storage development, whether independent or affiliated, the Board agrees that it should refrain from setting storage rates and approving storage contracts. There was no significant opposition to this approach.

164 The more contentious issue concerns the utilities and whether forbearance on price setting is necessary to stimulate their investment in storage. The utilities claimed they would only develop storage under a forbearance scenario but would not commit to doing so. On the other hand, the evidence shows the utilities have been willing to invest in the past under regulation, and indeed, the Board has the authority to order the utilities to provide storage services. The Board concludes that while there is no guarantee that the utilities will develop storage under forbearance, it is apparent they will not develop it under a regulatory framework unless ordered to do so. The Board does not believe that the best way to stimulate development of storage assets and services is to order utilities to develop these resources. The Board's preferred approach is to use market mechanisms where possible, and under forbearance, the Board concludes, the utilities will have an incentive to develop assets and services.

165 A related question is whether it continues to be appropriate for storage to be developed as part of the regulated utility business or whether it should in the future be developed separately. The Board accepts the evidence of Enbridge Inc. that storage development is more akin to exploration and development and is riskier than other distribution activities. Some parties disagreed that enhancements to existing storage facilities were as risky as new storage development. However, the Board is convinced by the evidence that storage investments are generally riskier than other regulated activities, such as distribution or transmission expansions, given the difficulty, for example, in accurately predicting the achievable operating parameters related to storage projects. This evidence was not significantly challenged. The Board therefore agrees with Energy Probe's view, namely that the risks associated with new storage development are best borne by storage developers. This approach is consistent with a rational development of storage in the Board's view. Under forbearance, the utility shareholders would be expected to bear the risk of any storage development for the competitive market.

5. FORBEARANCE

166 The Board has determined that the storage market is workably competitive. We have also considered some of the key elements of the public interest. The issue we address in this chapter is whether the Board should refrain from setting storage prices and approving storage contracts. The Board has the discretion under section 29 to refrain from regulating "in whole or part". The Board interprets this to mean that it has substantial flexibility to establish a framework which recognizes the circumstances of various segments of the market.

167 At its simplest, the issue is who is entitled to cost-based rates and who will pay market-based rates. The Board will consider this issue in the context of the public interest factors described in Chapter 4. First, the Board will address the issue of third-party storage, and then the Board will address utility storage. The chapter concludes with a consideration of reporting requirements.

5.1 THIRD-PARTY STORAGE

168 Third-party storage is not yet available in Ontario. Currently, Union and Enbridge own and operate all of the storage facilities. The Board has heard an application by Tribute, and approvals required to develop the Tipperary Storage Pool have been issued. However, the development of the project has been delayed and some of the Board approvals granted in 2005 have expired; Tribute is in the process of seeking renewals. Until renewals are granted, the Tipperary Storage Pool cannot be developed and made operational. The current development schedule proposes that operation of the pool will begin by June 2007.

169 MHP Canada has recently filed a series of applications in relation to its proposed St. Clair storage facility and has indicated that it intends to pursue its Sarnia Airport Pool project at some time in the future. The Board also heard testimony from Enbridge Inc. regarding its work in this area.

170 In its Natural Gas Forum Report, the Board indicated that it did not intend to regulate the rates of new independent storage operators. In our earlier partial decision on MHP Canada's core points, the Board determined that MHP Canada would be authorized to charge market-based rates within the Board approved range.[33] The issue before the Board now is whether it should refrain from setting the rates of all third-party storage (both independent and affiliated) and refrain from approving storage contracts entered into by these companies.

171 MHP Canada and Enbridge Inc. argued that the Board should refrain from regulating the rates of third-party storage. MHP argued that cost-based rates do not compensate for the risk of developing storage. It also took the position that the *Affiliate Relationships Code for Gas Utilities* (ARC) is sufficient to govern the relationship between Union and MHP Canada, but it sought confirmation on two points:

* that under a market-based rate framework the Board would not require disclosure of MHP Canada's costs and revenues where the services to Union arise from a fair and open competitive bidding process, and
* that section 2.3.10 of the ARC (which relates to services provided in a market which is not competitive) would not apply because the Board has found the market to be competitive.

172 Tribute was also of the view that the ARC requirements are sufficient to protect the competitive interests of affiliate and unaffiliated market players without placing undue additional conditions on utilities and their affiliates.

173 There was no substantial opposition to the proposal that the Board should refrain from setting the rates and approving the contracts of new storage operators. Most intervenors recognized that doing so would stimulate storage investment in Ontario. For example, LPMA/WGSPG argued that without market-based pricing, little or no additional capacity or deliverability would likely be developed in Ontario and it therefore supported full market-based rates for third-party developers or utility affiliates (provided there is compliance with ARC). IGUA/AMPCO also agreed that market-based pricing for new storage developers would stimulate development of new storage although they argued that the Board should not refrain from regulating these rates.

Board Findings

174 The Board will refrain from setting the rates and approving the contracts related to third-party storage, both utility-affiliated storage and independent storage. These storage developers will be operating in the competitive storage market, and the Board agrees that they should have the ability to offset the substantial risks of these developments with the flexibility to price storage in a way which captures the market value of those storage services.

175 The ability to charge market prices in the absence of price regulation will provide a positive investment incentive and, to the extent new third-party storage is developed, this will enhance competition in storage -- as well as competition in the market generally. This is in the public interest. If the new storage is used by Ontario consumers they may well face higher prices for this storage than they would for cost-based utility storage. However, these storage providers will have no captive customers, and Ontario consumers will not bear the risks associated with these new developments. The Board also finds this to be in the public interest. In conclusion, the Board finds that these storage operators will be subject to competition sufficient to protect the public interest.

176 MHP Canada requested that the Board confirm MHP Canada's interpretation of two aspect of the ARC. The ARC provides that if an open and fair tender is held, the prices in that tender will establish the market price for the service. Under those circumstances, the ARC would not require that a contracting party disclose its cost and revenue data.

5.2 UTILITY STORAGE

177 The Board must address a number of issues with respect to storage services offered by Union and Enbridge:

* Which storage services should the Board continue to regulate at cost-based rates?
* Should the Board set cost-based rates for the storage services Union provides to other Ontario LDCs?
* Should the rates for new storage services, such as high deliverability storage, be regulated at cost-based rates?
* Having determined which services will continue to be regulated at cost-based rates, should the Board refrain from regulating the prices of other services?
* Should the Board require separation of the competitive storage operations from other parts of the business, or is a cost allocation study sufficient to distinguish between regulated and unregulated storage?

178 The Board will address these issues in the following sections, 5.2.1 through 5.2.5.

5.2.1 Regulated Storage Services

179 In the current framework, the demarcation between cost-based and market-based rates is commonly expressed in terms of "in-franchise" and "ex-franchise": "in-franchise" customers pay cost-based rates and "ex-franchise" customers pay market-based rates. However, as pointed out in Chapter 2, this nomenclature is not entirely accurate. Kitchener, for example, is not in Union's franchise territory but does receive cost-based storage; similarly Gazifère is outside Enbridge's franchise territory (and outside the Province) but also receives cost-based storage. Until recently, Enbridge's contract with Union was at cost-based rates, and Enbridge's rates continue to include Union storage costs at cost-based rates even though the contracts entered into as of April 1, 2006 are at market-based rates. However, the term "in-franchise" is commonly used to refer to all customers that take bundled, unbundled or semi-unbundled distribution, storage and contract carriage transportation services, and the term "ex-franchise" is commonly used to refer to customers that take cross-franchise storage and transportation services.

180 Virtually all parties agreed that the Board should continue to regulate storage rates for "in-franchise" customers and that these customers should pay cost-based storage rates. One exception was MHP Canada, which argued that conditions exist for the Board to forbear in relation to the market as a whole. While MHP advocated full forbearance, it recognized that the elimination of the bifurcated market may require a transition. MHP Canada proposed that the Board adopt a policy direction to move to full forbearance in the storage services market.

Board Findings

181 In terms of a section 29 analysis, the goal would be to continue to regulate (and set cost-based rates) for those customers who do not have competitive storage alternatives and to refrain from regulating (allow market-based prices) for those who do have competitive alternatives. The Board concludes that it should continue to regulate and set cost-based rates for existing storage services provided to in-franchise customers up to their allocated amounts. This approach was supported by all the intervenors, except by MHP Canada, as noted above.

182 The parties recognized that bundled customers, in particular, do not acquire storage services separately from distribution services, do not control their use of storage, and do not have effective access to alternatives in either the primary or secondary markets. Competition has not extended to the retail end of the market, and therefore is not sufficient to protect the public interest. However, the Board finds that customers taking unbundled or semi-unbundled service should have equivalent access to regulated cost-based storage for their reasonable needs. The Board finds that it would not further the development of the competitive market, or facilitate the development of unbundled and semi-unbundled services, if these unbundled and semi-unbundled services were to include current storage services at unregulated rates. The Board also agrees with the parties that noted that re-pricing existing storage will not provide an incentive for investment in new storage and therefore cannot be said to provide that public interest benefit.

183 However, customers taking unbundled and semi-unbundled services do have greater control over their acquisition and use of storage than do bundled customers. It is also the Board's expectation that these customers will have access to and use services from the secondary market. Therefore, the Board concludes it is particularly important to ensure that the allocation of cost-based regulated storage to these customers is appropriate. This issue is addressed in Chapter 6.

184 MHP Canada has suggested that the Board adopt full forbearance in storage pricing as a policy direction. Similarly, Union has characterized its allocation proposal and Enbridge has characterized its "exemption" approach for in-franchise customers as being "transitions" to full competition. The Board has found that the current level of competition is not sufficient to refrain from regulating all storage prices; nor do we see evidence that it would be appropriate to refrain from regulating all storage prices in the future. The current structure (for example, the full integration of Union's storage and transportation businesses and the full integration of Union as a provider of storage services and as a user of storage services) is not conducive to full forbearance from storage rate setting. In addition, there would be significant direct and indirect rate impacts associated with full forbearance from rate setting, and there is little evidence of significant attendant public interest benefits. The current situation is that these customers are not subject to competition sufficient to protect the public interest; nor is there a reasonable prospect that they will be at some future time.

185 Although there was general support for the continued regulation of storage rates for the bundled, unbundled and semi-unbundled customers, three aspects of its application were disputed:

* The amount of storage which should be allocated to these customers, both in aggregate and individually;
* Whether Ontario utilities should receive access to cost-based storage from Union;
* Whether the rates for new storage services from utilities should be regulated.

186 The first issue, the allocation of storage to customers both individually and in total, is addressed in Chapter 6. We address the other two issues next.

5.2.2 Union's Storage Services for Other Utilities

187 Union currently provides storage service to a number of other utilities. It provides storage at cost-based rates to Kitchener, NRG and Six Nations. These customers, while not in Union's franchise territory, take "in-franchise" services. As such, the Board's finding regarding the continuation of regulated cost-based rates applies to these utilities as well.

188 Union also provides storage services to Kingston, Enbridge and GMi. These are cross-franchise storage and transportation services, and while they were originally provided at cost-based rates, Union received authority to charge market-based rates (within the C1 range) to these customers in the Board's RP-1999-0017 Decision. Due to differences in the terms of the contracts, Kingston and GMi have been paying market-based rates for some time, but Enbridge has only recently entered into a series of market-based contracts with Union.

189 Enbridge is one of Union's largest storage customers. Enbridge and Union entered into a long-term market-based contract for the period April 1, 2004 through March 31, 2014. Enbridge proposed to have its 2005 rates reflect the new storage costs. In the RP- 2003-0203 decision, the Board did not approve the flow through of market-based storage costs into Enbridge's rates on the basis that the claimed long-term benefits were speculative and that a reversion to cost-based rates until March 31, 2006 (which under the contract would be triggered by the Board's rejection of Enbridge's original proposal) would result in substantial cost savings. The Board did not question the Board's RP-1999-0017 decision to allow existing contracts to be renewed at market-based rates.

190 Upon the expiry of that cost-based arrangement on March 31, 2006, Union and Enbridge entered into three contracts with market-based prices with the following expiry dates and volumes:

2008	9.4 Bcf
2009	5.6 Bcf
2010	4.9 Bcf

191 Although these contracts began April 1, 2006, the costs associated with these services are not reflected in Enbridge's current distribution rates. At the time of Enbridge's 2006 rates case, it had not negotiated any agreement with Union, and therefore its rates proposal was based on the assumption that storage costs for Union services would continue at the same level.

192 Enbridge currently provides cost-based storage services to Gazifère, its affiliated Quebec distributor, under a bundled distribution service. Enbridge proposed to charge Gazifère market-based rates on the basis that it is an ex-franchise customer.

193 A number of parties argued that Union should provide regulated cost-based storage to all Ontario utilities. (No party argued that GMi should receive storage services at cost-based rates.) The Board Hearing Team grounded its argument on the basis of price discrimination; other parties relied on the notion that storage is a Provincial asset (as articulated in the 1962 Langford Report[34]) as the basis for their argument.

194 The Board Hearing Team noted that the decision allowing Union to renew its cost-based storage contracts at market-based rates has resulted in the situation where customers in Union's franchise area pay cost-based rates, while customers in the Kingston area pay market-based rates. The Board Hearing Team noted that the Board in its Natural Gas Forum Report raised the issue of whether this pricing structure was inappropriately discriminatory.

195 In order to remedy this, the Board Hearing Team recommended that customers be split into two groups: "core" and "non-core". Under this proposal, the core customer category would include all Ontario end-use customers that take bundled and unbundled regulated services from the gas utilities. Core customers would receive regulated cost-based storage services from the total inventory of Union and Enbridge's storage assets. Retailers would also have access to cost-based storage. Non-core customers would include customers who have opted out of regulated rate protection and assume the total risk of their portfolio management, including storage. Non-core customers would also include marketers (excluding retailers serving the core market) and out-of-province utilities. These customers would pay market prices for storage.

196 The Board Hearing Team argued that this separation would ensure a consistent treatment of customers across all gas utility franchises in Ontario. Under this approach the current contracts between Union and Enbridge, and between Union and Kingston, would be revised to reflect cost-based rates. The Consumers Council suggested a similar approach. It argued that the definition ex-franchise should be refined and that it is more reasonable to distinguish between services which are provided using the integrated storage systems that have been developed by the utilities for the purpose of providing a "core" or "utility related" delivery service, and discretionary services that are available because the utility storage infrastructure is not needed from time to time to perform the utility function.

197 Other parties took the view that storage is a Provincial asset and noted that the Langford Report recommended that distribution companies should have first call on Ontario gas storage. Those parties argued that Union's storage should be provided at cost-based rates to consumers throughout Ontario, and specifically at cost-based rates to Enbridge and Kingston.

Board Findings

198 The Board finds that the core/non-core approach may be appropriate in some situations. It could serve, for example, as a means of determining which segment of the in-franchise customers should continue to have its storage rates regulated. However, the Board concludes, for reasons outlined below, that it is not necessary for Union to continue to provide cost-based storage to Enbridge, or to revert to cost-based storage for Kingston, in order to ensure that there is no undue price discrimination in the Province.

199 The Board agrees that effective competitive storage options do not exist for the in-franchise customers of Union and Enbridge. The Board has already determined that these customers will continue to receive regulated cost-based storage rates. However, Enbridge and Kingston, which are buying storage services on behalf of their customers because they do not have sufficient storage resources of their own, do have access to alternatives. This is as true for Enbridge as it is for GMi. Therefore, the question is whether Enbridge (for its storage needs beyond the capacity of Tecumseh) and Kingston (for all of its storage needs) should be entitled to cost-based storage rates from Union.

200 The Board Hearing Team cited the principle that customer rates for storage should not vary on the basis of where they are located in Ontario but should be based on the customer load profile and the costs to provide service. The Board notes that distribution rates for similar customers do vary across the Province, and even within Union's territory, to reflect the different underlying costs of serving customers.

Union has developed sufficient storage to serve the needs of its distribution customers, while Enbridge has not. As Enbridge's storage requirements have increased, it has had to decide whether to contract for its requirements or develop additional assets itself. It is not surprising that Enbridge has continued to acquire services from Union, when it had access to cost-based rates, given that the costs of developing new storage have undoubtedly grown. This does not mean that if Union charges market-based rates the result is price discrimination. The Board Hearing Team appeared to recognize this when it stated that price differentiation should also be driven by the specific costs of a utility.

201 Other parties advocating regulated cost-based storage for all Ontario utility customers drew upon the Langford Report for support for their position, arguing that Ontario has historically recognized gas storage as a Provincial asset for the benefit of all Ontarians. The Board disagrees with this application of Langford's conclusions for two primary reasons. First, the Langford Report was prepared within a very different market context. The North American natural gas market was in its infancy. In the intervening period there has been extensive infrastructure development from wellhead to burner tip, market integration across North America, and the deregulation of the commodity. Utilities are no longer the only suppliers of gas to customers. We must determine the appropriate regulatory tools for Ontario storage within the current market context -- one which is very different from the time of the Langford Report.

202 The Langford Report is relevant, however, in that it articulates the historic perspective on storage and its appropriate development, without being prescriptive on financial matters. The Langford Report, for example, does not express any explicit view in respect of pricing, and this relates to the Board's second reason for disagreeing with those relying on the Langford Report as a reason for requiring Union to provide storage at cost-based rates to all Ontario customers. Advocates of cost-based pricing assume an automatic link between the concept of a Provincial asset and cost-based prices, but the Board finds that this approach is flawed. The public interest in Ontario is best served if Ontario storage assets are used efficiently. The Langford Report in fact recognizes this, when it states at page 56: "The role of the Provincial Government with respect to storage should be that of controlling and regulating it *only so far as is necessary to ensure efficient and economical development of the industry*" (emphasis added). It is in the Ontario public interest for storage and storage services to be further developed, and it is in the public interest for those customers who have access to alternatives to pay prices set in the competitive market.

203 There are also two other drawbacks to continuing to regulate cost-based rates for Union's service to Kingston and Enbridge. First, an "Ontario-utilities first" policy would send a negative market signal about what is otherwise a deep liquid trading point within the integrated North American market. Second, this approach could tip the playing field in favour of utilities over marketers, who may well serve Ontario customers but which under the various proposals would pay market-based rates. Neither of these market signals is consistent with the Board's objective of ensuring the continued strength and development of the Dawn Hub.

204 The issue is whether Enbridge and Kingston, as purchasers of storage for bundled customers, should receive regulated cost-based storage services from Union. The Board concludes that they should not, because the storage services they acquire are subject to competition sufficient to protect the public interest, but that in the case of Enbridge, a transition framework is required. The Board must also consider the application of its conclusions to the case of Gazifère. We will now address each of these utilities in turn.

Kingston

205 Kingston, which is connected to the TCPL system, not the Union system, has been operating at market-based rates for its cross-franchise service for some time and took no active part in the NGEIR

Proceeding. The Board therefore concludes that Kingston is not opposed to paying market-based rates. The Board notes that because it does not set rates for Kingston's customers, the Board has no authority or control over how Kingston charges its own customers for storage. The Board is satisfied that Kingston has effective access to competitive alternatives and therefore does not require the protection of regulation for its acquisition of storage from Union. Because Kingston already receives market-based storage services, no transition framework is necessary.

Enbridge

206 The Board finds that a transition framework is warranted in the case of Enbridge. Enbridge does have access to storage alternatives and does operate within the competitive storage market. However, the quantity of storage it acquires from Union is a substantial portion of its total requirement, and, given the uncertainty around storage price regulation at the time Enbridge entered into its current contracts, it may have had limited effective access to alternatives at that time.

207 Given the current substantial difference between cost-based and market-based storage prices, if the prices of the new contracts were included in Enbridge's rates, there would be an increase in Enbridge's total storage costs (although the majority of Enbridge's storage costs would still be based on the costs of Tecumseh). The Board must be concerned about the impact on consumers from refraining from rate regulation and balance that consideration with the objectives of facilitating storage development and the competitive market. With respect to storage development, in section 5.2.1 we concluded that re-pricing existing storage does not provide an incentive to develop new storage; the Board is similarly satisfied that retaining cost-based rates for existing storage for a transition period will not create an adverse impact on new storage development.

208 With respect to protecting consumers, the Board finds that it is in the public interest to provide Enbridge and its customers with a transition to market-based pricing for its storage needs (in excess of its Tecumseh capacity), rather than requiring it to access the competitive market for its full requirement all at one time. This will have the effect of phasing-in the rate impact on Enbridge's customers, and facilitating the development of competitive alternatives -- to the benefit of Enbridge's customers and competitive storage providers. The Board finds that this transition should begin in 2008 and be completed in 2010. This timing will allow Enbridge to tender for services during 2007. Enbridge's rates in 2007 will continue to reflect cost-based storage rates for the services it acquires from Union.

209 The way to achieve this transition is for Union and Enbridge to amend the current contracts (which under section 4.04 would expire as of March 31, 2007 as a result of the Board's NGEIR decision) to maintain the current volumes and expiration dates but to replace the market-based rates with cost-based rates. The result of this approach would be that in 2008 Enbridge would need to acquire 9.4 Bcf (less than 10% of its storage requirement) from the competitive market. Smaller incremental amounts would be sourced from the competitive market in 2009 and 2010. The Board concludes that the phased approach, and the relatively small amounts of competitively sourced storage added each year, will result in a small net impact on Enbridge customer rates. In this way, the interests of consumers will be sufficiently protected.

210 The Board's decision to refrain from regulating the prices of Union's ex-franchise storage services will be conditional on the amendment of the Union/Enbridge contracts as described above in order that these services will be subject to competition sufficient to protect the public interest.

Gazifère

211 The Board must also consider the application of its findings to Gazifère. Gazifère is a small Quebec distributor, serving 30,000 customers, which is connected to the Enbridge system and is an affiliate of Enbridge. Enbridge proposed to charge market based rates to Gazifère on the basis that it is an ex-franchise customer. Others argued that all customers outside Ontario should pay market-based rates.

212 As outlined earlier in this section, the Board has found that a decision to refrain from regulating storage rates should not be based on an in-Ontario, ex-Ontario approach, but rather on the competitive position of the customer. The appropriate consideration is whether Gazifère has access to alternatives. The evidence is that it does not; it is connected to the Enbridge system and takes a bundled distribution service. In all respects, Gazifère is similarly situated to the distributors attached to Union's system (namely, Kitchener, NRG, and Six Nations) which each take bundled or semi-unbundled service. The Board finds that it is appropriate for Gazifère to receive regulated cost-based service, just as Kitchener, NRG and Six Nations do, because the service they receive is not subject to competition sufficient to protect the public interest.

5.2.3 New Storage Services, including High Deliverability Storage

213 This issue concerns a set of new storage services and, in particular, high deliverability storage services. The services include Enbridge's proposed Rate 316 and services related to the Tecumseh storage enhancement project and Union's proposed high deliverability storage services and three ex-franchise services: F24-S, Upstream Pipeline Balancing Service (UPBS) and Downstream Pipeline Balancing Service (DPBS). These services are of particular interest to dispatchable gas-fired power generators, and indeed were developed in response to generator requests, because they provide the means by which these customers can conduct intra-day balancing.

214 The storage requirements for dispatchable gas-fired power generators are very different from existing customers. Whereas existing customers use storage for seasonal or daily balancing, dispatchable generators want to use storage for intra-day balancing. And whereas existing customers can meet their needs with the standard deliverability service (daily delivery of 1.2% of storage space allocation), dispatchable generators want daily deliverability as high as 10% of their storage space allocation.

215 Many of the issues which existed between Union and Enbridge and their generator customers were resolved in the Settlement Proposals which were filed and accepted by the Board. These settlements, which can be found at Appendices D and F, set out the parameters for multiple nomination windows, the inter-franchise movement of gas, the redirection of gas, title transfers for gas in storage, and the allocation methodology for 1.2% deliverability storage. What remained unresolved was the pricing for the new high deliverability storage services.

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

217 APPrO argued that the utilities have an obligation to provide these services and, because allocations of 1.2% standard deliverability space have been agreed, power generators have no options (other than through the utilities) for acquiring the necessary deliverability services to make use of these storage allocations. In APPrO's view, storage in other geographic areas is not an option because all other transmission systems are limited to the four NAESB nomination windows. APPrO submitted that the utilities may have options as to how to meet the requirements -- in particular storage enhancements and/or additional transportation capacity. Sithe Global Power Goreway ULC, Sithe Global Power Southdown

ULC, TransCanada Energy Ltd., Portlands Energy Centre (collectively, the GTA Generators) agreed with APPrO's position.

218 The consumer representatives also generally agreed that services for power generators should be considered part of the in-franchise market and regulated accordingly.

219 Union argued that it would not develop assets to provide these services unless the rates are deregulated. If the rates remain regulated, then Union would plan to acquire the services in the market. Enbridge explained that if the Board refrains from regulating the prices for new storage developments, it will plan to offer capacity related to the Tecumseh storage enhancement project through an open season. This project might or might not proceed depending upon the economics at the time. Regardless of whether the Board refrains from regulating in this area, Enbridge will acquire services to underpin its unbundled high deliverability storage service (Rate 316) through an open tender, and it proposed to pass through those market-based costs to customers taking the service.

220 Enbridge maintained that the evidence supported a conclusion that the generators themselves acknowledge that they expect to have access to competitive alternatives. Union pointed out that the generators could acquire additional space in order to achieve a higher deliverability and if the additional space is not required, it could be resold in the market.

221 The marketers expressed some concern with the possibility that these services would be provided at cost exclusively to generators. Nexen argued that there should be no discrimination in favour of power generators and that on the Union system the playing field should be level between marketers and other ex-franchise customers such as Enbridge and generators outside Union's franchise area. BP cautioned that the Board should not confer a competitive advantage to some players to the detriment of others as a result of forbearance or through the development of new services and identified its objective as being a level playing field with equal treatment or access.

222 The issue of automatic renewal rights was also raised. Enbridge indicated that it is not considering automatic renewal rights for storage contracts under its Rate 316 proposal, since that service will be acquired by Enbridge through a tender. APPrO maintained that Rate 316 is a companion service to Rate 125 and that if a customer renews its Rate 125 service, that customer should have the right to renew its Rate 316 service as well.

Board Findings

223 There was no disagreement that these services are needed and should be developed. The generators have convincingly expressed the importance of these types of service to the effective functioning of their operations -- both physically and financially. The issue for the Board, within a section 29 context, is how best to achieve this objective. APPrO and the GTA Generators (supported by the consumer intervenors) advocated a regulated framework; the utilities argued for a competitive framework.

224 These services are not currently offered, indeed they need to be developed, and investments must be made in order to offer them. Union has been conducting open seasons for its new offerings and is committed to providing these services if the Board refrains from regulating them. The Board concludes that these services are substantially different from the bundled, unbundled and semi-unbundled distribution services offered by Enbridge and Union. There is demand for these services from marketers (for example, BP and Nexen) and likely others. In addition, when the capacity generators hold is excess to their needs, they expect to be able to offer this excess into the competitive market. It follows that they expect to be able to acquire these services through the competitive market as well as sell them.

225 The Board could order the utilities to provide these services on a regulated basis. However, the Board concludes that this would not be the best approach to ensuring the development of these services. The key consideration is to ensure that new innovative services are developed and offered into the market. The Board concludes that the best way to ensure this public interest is met is to refrain from regulating these services. This will stimulate the development of these services, by the utilities and by other providers. The Board finds that competition in these services will be sufficient to protect the public interest.

226 The Board does have a duty to protect the interests of consumers using these services with respect to price and reliability and quality of service. In this context we find that the crucial factor is the availability of the service itself -- namely its reliability and quality. The Board notes that Enbridge committed to offer Rate 316, whether or not the Tecumseh enhancement project goes ahead, and to price it on a cost pass-through basis. The Board expects Enbridge to fulfill this commitment. Union has proceeded with its open season, and the Board expects Union to offer these services on an open season basis, without withholding capacity. These commitments will ensure a level of consumer protection.

227 Pricing considerations are relevant, but the Board finds that the development of competitive options will provide appropriate price protection for these consumers. The Board will also be developing a reporting mechanism and complaint process, discussed at the end of this chapter, and we expect that parties will bring any issues of market failure to the Board's attention.

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

229 Although this issue was discussed in the context of high deliverability services, the Board finds that its conclusions have general application, namely that any new storage which is developed by the utilities will be included as part of the competitive market. The utilities will bear the risk of these investments, not ratepayers. Similarly, the Board will not regulate the rates, nor approve the contracts, arising from these investments. If the utilities provide storage to their regulated business through these investments, the ratemaking implications of that approach will be considered in the context of a rates proceeding.

5.2.4 Forbearance in the Ex-Franchise Market

230 Most parties argued that ex-franchise customers should pay market-based rates. Some parties took the position that the Board could refrain from regulating the prices in this market (if the Board determined the market was competitive), and others were of the view that the Board should continue to approve market-based range rates.

231 For example, the Consumers Council argued that the Board should not refrain from regulating storage but that it is appropriate for the utilities to charge market rates for Transactional Services and long-term storage services to maximize revenue from the assets for the benefit of ratepayers.

Board Findings

232 The evidence shows that other than for in-franchise customers, the storage market is competitive. With the exception of Enbridge, the customers in this competitive part of the market (commonly referred to as ex-franchise) have been acquiring storage at market-based rates for some time. The Board sees no benefit from continuing to regulate the prices of these services; on the contrary, competition in this area is sufficient to protect the public interest. The Board will therefore refrain from regulating rates or approving contracts for Union's short- or long-term ex-franchise storage services and will refrain from regulated the rates or approving the contracts for Enbridge's Transactional Storage Services.

5.2.5 Separation of Unregulated Storage Costs and Revenues

233 Both Union and Enbridge proposed to separate the unregulated costs and revenues from the regulated costs and revenues using a cost allocation study. The issue is whether a cost allocation approach is sufficient, or if a greater degree of separation is required. Further, if a cost allocation approach is sufficient, there is an issue as to whether Union's current cost allocation study is adequate.

234 During the oral hearing, Union's witnesses indicated that Union would be preparing a new cost allocation study as the basis for revising the allocation of the costs of its storage assets between in-franchise (regulated) and ex-franchise (unregulated). In its final argument, however, Union submitted that the cost allocation necessary to split the costs of its storage assets between in-franchise and ex-franchise has already been completed in its 2007 rates case. According to Union, that allocation would result in the total storage rate base being split as follows ($ million):

Included in regulated rate base	$380.703	(79%)
Allocated to ex-franchise activities	$102.916	(21%)
Total	$483.619	(100%)

235 Enbridge proposed to separate the costs and revenues associated with its Transactional Storage Services at the next rates proceeding. It was Enbridge's position that no adjustment to rate base would be required if the Board were to forbear from price regulation.

236 Some parties argued that a greater degree of separation was required; others argued that Union's cost allocation study was inadequate.

237 Energy Probe argued that accounting separation is not sufficient because the historic cost allocation work could not have anticipated the dramatic change of storage forbearance. It took the position that the Board should encourage full structural separation at least, and that ratepayers should be held harmless for any associated costs.

238 The Board Hearing Team also recommended that Union's transmission and storage operations should be functionally separated, and that both Union and Enbridge's regulated and non-regulated storage should be functionally separated. The Board Hearing Team was of the view that this separation is necessary to ensure the development of the competitive storage market and to encourage new entrants. However, if no separation were required, the Board Hearing Team suggested that there should be a generic cost allocation review to examine the cost allocation thoroughly and to ensure no cross-subsidization.

239 LIEN argued that it would be difficult to separate costs for Union's integrated storage business. In LIEN's view, the current cost allocation study may be adequate to set rates, but it is not sufficient to separate price-regulated storage from non-price-regulated storage. LIEN proposed that an alternative would be to transfer assets which are surplus to distribution needs to a separate entity at fair market value which, in LIEN's view, would put Union on an equal footing with other storage providers.

240 Similarly, LPMA/WPSPG argued that Union's current cost allocation is not necessarily appropriate;

there may be fundamental methodology issues to be addressed and there are storage-related costs that are included in distribution costs that should be considered for allocation to Union.

Board Findings

241 The Board finds that functional separation is not necessary. The evidence before the Board is that it would be costly and difficult to establish a functional separation of utility and non-utility storage, and there was no evidence to suggest that there would be significant benefits from such a separation. To the extent there may be concerns regarding the integrated operations, these will be addressed through the reporting requirements set out in section 5.4.

242 We also conclude that Union's current cost allocation study is adequate for the purposes of separating the regulated and unregulated costs and revenues for ratemaking purposes. The Board agrees with the Board Hearing Team that it is important to ensure that there is no cross-subsidization between regulated and unregulated storage. However, the Board is content that with its findings on the treatment of the premium on short-term storage services (Chapter 7) Union will have little incentive to use the cost allocation for purposes of cross-subsidy.

243 The issue of Enbridge's cost allocation is addressed in Chapter 7.

5.3 CONCLUSIONS ON FORBEARANCE

244 In the previous sections, the Board has found that it will refrain, in part, from regulating storage rates under section 36 (as that section relates to storage) of the *OEB Act* and refrain from approving certain storage contracts under section 39(2) of the *OEB Act.* Specifically:

* The Board will refrain from regulating the storage rates or approving the contracts of new storage providers.
* The Board will continue to regulate storage rates for bundled, unbundled and semi-unbundled customers of Union and Enbridge (up to the allocated amount).
* The Board will refrain from regulating the storage rates or approving the contracts of cross-franchise, or ex-franchise, storage customers of Union and Enbridge.
* The Board will refrain from regulating the rates or approving the contracts for new storage services offered by Union and Enbridge.

5.4 REPORTING

245 A number of parties made recommendations regarding ongoing reporting by utilities and other storage operators. The utilities and their affiliates generally agreed to provide the type of reporting required by FERC for interstate pipelines (FERC Regulations, s.284.13) although to some extent they challenged whether it was necessary. FERC Regulation s.284.13 contains requirements for regular reporting on customer and system information.

246 Kitchener suggested that the Board develop a Storage and Transportation Access Rule or "STAR" to ensure non-discriminatory access to storage and transportation services, following on from the Gas Distribution Access Rule.

247 The Board Hearing Team identified four principles in this area:

* Create a level playing field for market participants,
* Adopt rules and practices to govern affiliate behaviour that protect the public interest,
* Support open and non-discriminatory access to transmission, and
* Establish a transparent storage/transmission market so market participants can make informed decisions.

248 The Board Hearing Team supported the development of a STAR. It also proposed that the ARC be amended to control the interaction between the utilities and their storage affiliates and that reporting requirements be put in place for all storage providers in order to enhance transparency in the market.

Board Findings

249 The Board agrees with the Board Hearing Team's principles and shares the concerns related to forbearance raised by a number of parties. Specifically, in refraining from regulating storage rates or approving storage contracts, the Board must:

* Ensure consumer protection within the competitive market for storage in Ontario.
* Ensure access to Union's transportation system on a non-discriminatory basis to new and existing storage operators.

250 The Board concludes that it is necessary to develop appropriate operating and reporting procedures to ensure these objectives are addressed. The Board finds that Kitchener's proposal for the development of a STAR (Storage and Transportation Access Rule) has merit.

251 The Board will initiate a process to develop rules of conduct and reporting related to storage. The Board will ensure that the process addresses the following:

* Requirements to ensure that Union cannot discriminate in favour of its own storage operations or those of its affiliates and cannot discriminate to the detriment of third-party storage providers;
* Reporting requirements for all storage providers, although the requirements may vary as between utility and non-utility storage providers, and which may include: terms and conditions, system operating data, and customer information;
* A complaint mechanism for customers (or other market participants).

6. ALLOCATION OF STORAGE AVAILABLE AT COST-BASED RATES

252 Having decided that Union and Enbridge should retain regulated, cost-based rates for storage used by in-franchise customers, the question becomes how much of the existing storage space should be reserved for those customers. There are two issues arising from this allocation matter.

253 First, should the amount of storage available to Union's in-franchise customers at cost-based rates be fixed at an amount less than the total working gas capacity of Union's storage pools, currently 152 Bcf?

Union proposed to fix the amount of existing storage allocated to in-franchise customers at the amount Union estimates those customers will use in 2007.

254 Second, what method should Union and Enbridge use to allocate the amount of storage available at cost-based rates to individual unbundled and semi-unbundled customers? The evidence shows that, for various reasons, many of Union's T-service (semi-unbundled) customers have been allocated amounts of storage that are inconsistent with amounts determined under Union's standard "aggregate excess" method. In addition, Kitchener argued that as a gas distributor embedded in Union's distribution system, it requires more storage space at cost-based rates than the amount calculated under the aggregate excess method.

6.1 UNION'S TOTAL COST-BASED STORAGE ALLOCATION

255 Union proposed to freeze, on January 1, 2007, the amount of its storage capacity available to in-franchise customers at cost-based rates. The frozen amount would be 92.1 PJ (approximately 87 Bcf), Union's estimate of in-franchise requirements for 2007. Incremental in-franchise storage requirements due to load growth would be met by Union purchasing the required additional amounts in the market and passing through the contract costs to its in-franchise customers.

256 Union noted that the in-franchise storage requirement has been very stable over the past seven years, increasing from 88.2 PJ in 2000 to 90.6 PJ in 2006, an annual growth rate of just 0.45%.

257 In its evidence, Union explained the rationale for its proposal as follows:

> Under the current regulatory framework, any future increase to in-franchise storage requirements would be provided through a reallocation of the portfolio of storage capacity owned and managed by Union.
>
> This current practice is not appropriate as it does not reflect the fact that the storage market is competitive, nor does it encourage or support the development of new storage capacity. Specifically, Union would not be incented to assume the risk and commit the capital and resources to develop new storage capacity with economics premised on competitive market pricing, when there is a risk of this storage being reallocated in the future to meet in-franchise requirements at a cost of service rate.[35]

258 In argument, Union summarized the reasons for its proposal as follows:

* "Claw-back" of assets etc. allocated to ex-franchise sales would undermine development of new storage capacity premised on market pricing.
* "Claw-back" would also make cost allocation issues more complex.
* Meeting incremental demand with services sourced from competitive markets is consistent with a transition to competition and a step toward sending better "price signals" to in-franchise customers.
* This proposal will not result in "rate shock" of any kind.[36]

259 Kitchener, LPMA/WGSPG, Consumers Council, VECC, and IGUA/AMPCO argued that there should be no freeze on the amount of Union's storage available at cost-based rates to in-franchise customers. GMi and the Board Hearing Team supported Union's proposal.

Board Findings

260 Under the existing regulatory framework, Union's in-franchise customers have had first call, at cost-based rates, on Union's storage capacity. Said differently, Union has sold storage services to ex-franchise customers only when it can demonstrate that the storage being sold is surplus to in-franchise needs.

261 From an operational perspective, it is not necessary (nor would it appear to be feasible) for Union to physically split its storage facilities between "in-franchise" and "ex-franchise" uses. And until now, Union has been able to offer storage services in the ex-franchise market without capping or freezing the amount of capacity that is available for in-franchise uses.

262 Giving in-franchise customers a priority call at cost-based rates on all of Union's storage may be supportable if one takes the view that every Bcf of Union's storage capacity is a "utility asset" and is required to provide "utility services." But that view needs to be re-examined in light of the evidence presented at this hearing about the development and use of Union storage in recent years, and the Board's determination that the storage market is competitive.

Amount of Union's "surplus" capacity

263 There is no doubt that Union's existing storage capacity far exceeds the current requirements of its in-franchise customers. Some 40% of the current capacity has been sold in the ex-franchise market. And the requirements of in-franchise customers have grown slowly (less than 0.5% per year over the past six years according to Union's evidence). The excess is so large that it would take several decades for all of the current capacity of 152 Bcf to be required for in-franchise customer needs if those needs grow at 1% per annum, and more than 100 years at the current rate of growth.

264 In past decisions on storage, the Board has required Union to file forecasts of storage capacity and in-franchise needs to demonstrate that space being sold to ex-franchise customers is surplus to in-franchise needs. For example, in the EBRO 494-03 decision, the Board approved four long-term ex-franchise storage contracts based on Union's 10-year forecast of capacity and in-franchise needs. The Board considered, but did not require, Union to insert a clause into the contracts that would allow Union the right of recall because the Board "found...that the Company's forecast of its in-franchise storage needs is reasonable."[37]

Union's storage development

265 During the hearing, a common argument from many parties on several different issues (particularly on the issue of sharing the premium on ex-franchise sales) was that in-franchise customers have "paid for" or "substantiated" the storage assets of the utilities. If true, is this a basis for continuing to grant in-franchise customers a perpetual call on all of Union's storage capacity at cost-based rates?

266 This argument breaks down on two fronts. First, Union's rate base excludes capital costs of storage that underpins long-term ex-franchise sales. Second, the sheer magnitude of the current surplus makes it unlikely that Union's expansion of its storage facilities in the recent past has been driven primarily, or perhaps even to any significant extent, by the anticipated needs of in-franchise customters. For example, since 1999 Union has added almost 18 Bcf of capacity through greenfield developments and enhancements to existing pools, capacity that was not necessary to cover in-franchise needs. This additional capacity has been directed to, and taken up by, the "ex-franchise" market, not distribution customers of Union.

267 Ex-franchise customers have contracted for Union's long-term surplus space and have paid market-based rates, rates that have been much higher than cost-based rates. Rather than bearing the costs of surplus Union storage space that is offered long-term to the ex-franchise market, Union's in-franchise customers have in fact benefited through receiving most of the premium on long-term sales.

Union's rationale

268 Union claims that development of new storage capacity would be undermined unless the amount of storage allocated to in-franchise customers is capped. This claim appears to have little merit. First, no party to this proceeding has opposed market rates for new storage capacity by third parties. Second, a freeze on space for in-franchise customers would have a neutral effect on the development of the competitive market. This was illustrated by LPMA/WGSPG, which put forward the following scenario in its argument: Assume the incremental storage requirement for the in-franchise customers is, say, 2 Bcf in a particular year. Under Union's proposal, Union would purchase that 2 Bcf from third-party providers. Under the existing framework, that 2 Bcf would be supplied by Union, leaving it with 2 Bcf less for ex-franchise sales. That 2 Bcf shortfall could be provided by third-party providers. The net impact on third-party providers is 2 Bcf of additional storage in either case.

269 Union also claims that meeting incremental in-franchise demand at market prices is consistent with a "transition to competition" and would send "better price signals to in-franchise consumers." No one in this proceeding, however, has advocated that any in-franchise customers, except for some of the largest gas customers, should be obligated to take a service that might require them to participate directly in the competitive storage market.

270 GMi, currently Union's largest ex-franchise customer, and Nexen expressed concerns about "claw-back" that the Board finds more compelling than Union's argument. GMi opposed any storage allocation rules that could result in "clawing back storage capacity held by ex-franchise customers for the benefit of in-franchise consumers." It said it would view any such measure as unfair discrimination. Nexen submitted that "claw-back" of storage services from ex-franchise customers would be "discriminatory and detrimental to not only GMi but to the very existence of the secondary market that Ontario currently supports and benefits from."

Conclusion

271 The Board finds that there should be a cap on the amount of Union's existing storage space that is reserved for in-franchise customers at cost-based rates. In the Board's view, Union's existing storage assets are, in substance, a combination of "utility assets" required to serve Union's in-franchise distribution customers and "non-utility assets" that are not required for regulated utility operations and that are sold in the competitive storage market. This distinction is supported by the significant excess of total capacity over in-franchise needs for the foreseeable future and by the fact that development in recent years has been driven by the ex-franchise market, not in-franchise needs. The Board does not accept IGUA/AMPCO's submissions that the entire amount of Union's storage is a "utility asset" and that ex-franchise customers (such as gas marketers and utilities in the U.S. Northeast) are buying "utility services" when they purchase storage from Union. The Board has determined that the ex-franchise market is competitive and that it will refrain from rate regulation or contract approval; these will no longer be "utility" services.

272 The Board concludes that its determination that the storage market is competitive requires it to clearly delineate the portion of Union's storage business that will be exempt from rate regulation.

Retaining a perpetual call on all of Union's current capacity for future in-franchise needs is not consistent with forbearance. As evidenced by the arguments from GMi and Nexen, two major participants in the ex-franchise market, retaining such a call is likely to create uncertainty in the ex-franchise market that is not conducive to the continued growth and development of Dawn as a major market centre.

273 The Board concludes that it would be inappropriate, however, to freeze the in-franchise allocation at the level proposed by Union. Union's proposal implies that a distributor with an obligation to serve would be prepared to own, or to have under contract, only the amount of storage needed to serve in-franchise customers for just the next year. In the Board's view, it is appropriate to allow for some additional growth in in-franchise needs when determining the "utility asset" portion of Union's current capacity.

274 The Board acknowledges that there is no single, completely objective way to decide how much should be reserved for future in-franchise needs. The Board has determined that Union should be required to reserve 100 PJ (approximately 95 Bcf) of space at cost-based rates for in-franchise customers. This compares with Union's estimate of 2007 in-franchise needs of 92 PJ (87 Bcf). At an annual growth rate of 0.5% each year, which Union claims is the growth rate since 2000, in-franchise needs would not reach 100 PJ until 2024. The limit would be reached in 2016 if the annual growth is 1%; at a very annual high growth rate of 2% per annum, the 100 PJ limit would be reached in 2012.

275 The 100 PJ (95 Bcf) amount is the capacity that Union must ensure is available to in-franchise customers if they need it. Union should continue to charge in-franchise customers based on the amount of space required in any year. If Union's in-franchise customers require less than 95 Bcf in any year, as measured by Union's standard allocation methodology, the cost-based rates should be based on that amount, not on the full 95 Bcf reserved for their future use. Union will have the flexibility to market the difference between the total amount needed and the 95 Bcf reserve amount.

6.2 ALLOCATION OF COST-BASED STORAGE: METHODOLOGY AND APPLICATION

276 Union and Enbridge have developed methods of allocating cost-based storage space to their in-franchise customers -- both bundled customers as a group, and individual unbundled and semi-unbundled (T1 and T3) customers. The amount allocated currently has two implications for customers:

* It is the basis for determining how much a customer will be charged at cost-based rates.
* For unbundled or semi-unbundled customers, the amount is the maximum amount of cost-based storage to which they are entitled. Any storage they demand above the allocated amount must be procured at market-based rates.

277 In Union's case, the allocation methodology will take on greater significance in the future because it will also be used to determine when in-franchise needs exceed the 100 PJ of Union storage reserved for in-franchise customers.

278 The issues addressed in this section are:

* Should Union and Enbridge continue to use their current methods to determine the amount of cost-based storage allocated in total to customers taking bundled service?
* What method should be used to allocate cost-based storage to unbundled and semi-unbundled customers? Should a single method be used consistently by both Union and Enbridge or should the Board permit variations or exceptions?

6.2.1 Aggregate Excess Method -- Bundled Service

279 Union has used the "aggregate excess method" since 2000. This method, which was approved by the Board in RP-1999-0017, calculates a standard amount of storage space to meet seasonal load balancing needs. It involves a comparison of forecast gas consumption in the winter (the five months November through March) with gas consumption for an entire year. Total winter consumption is forecast assuming normal weather conditions. The formula can be expressed:

Aggregate excess = Total winter consumption -- [(151/365)* (Total annual consumption)]

280 To simplify the computation of overall storage needs for bundled customers, Union has developed standard aggregate excess volumes for residential customers in each of its operations areas. The calculation of the space required to serve bundled commercial and industrial M2 customers is also simplified by applying a standard percentage to those customers' forecast annual consumption.

281 Union reduces the total aggregate excess amount for bundled customers by 2.4% to recognize that not all of the bundled customers have the load profiles assumed by the aggregate excess method. Some bundled customers consume more gas in the summer than the winter, which reduces the amount of storage space Union needs to manage seasonal load balancing for its portfolio of bundled customers.

282 Kitchener raised concerns with respect to the aggregate access method, particularly in respect of its own storage allocation, and VECC echoed Kitchener's concerns. This issue is dealt with separately later in this chapter. No other party objected to Union continuing to use its "aggregate excess method" to determine total storage requirements for bundled customers.

283 Enbridge indicated it uses the same methodology as Union except that it uses 121 days for "rate-making purposes." At the Technical Conference, Enbridge indicated that it is "open to using the actual withdrawal cycle period, which is 151 days."

Board Findings

284 The Board accepts the continued use of the aggregate excess method by Union to determine the total storage space it requires to manage the seasonal load balancing needs of bundled customers.

285 Based on the evidence in this proceeding, it not clear that there is a single "official" aggregate excess method policy document in which Union outlines the calculation, the source of the inputs, how the method is to be applied in each of its operations areas, and how Union validates the appropriateness of its 2.4% reduction factor. Given the Board's decision to "freeze" total in-franchise cost-based storage, it will be increasingly important that all stakeholders have a common understanding of exactly how the method works in all circumstances. The Board directs Union to file such a policy document within 90 days of this decision. The policy should also cover the issues addressed in the next section of this decision, namely the application of the allocation method to individual customers.

286 Enbridge appears to use a generally similar method although there was no detailed evidence filed on Enbridge's calculation at this hearing. The Board therefore also directs Enbridge to file an aggregate excess policy document with the Board within 90 days of this decision. Enbridge should also address the application of the allocation method to individual customers.

287 In order to ensure consistency where it is warranted, the Board will consider whether to pursue these matters on a generic basis.

6.2.2 Storage Allocation -- Unbundled and Semi-unbundled Customers

288 There was considerable debate in this proceeding about using the aggregate excess method for allocating cost-based storage to individual unbundled and semi-unbundled (Union T1 and T3) customers. We first address the issue generally. We then address the specific issues which arise for gas-fired generators and Kitchener. While this issue has immediate application for Union, because it has customers taking semi-unbundled service, it will also be relevant for Enbridge because the Board is approving new unbundled rates as part of this proceeding, and Enbridge expects that there will be migration to these new rates.

289 Union has not consistently applied a single method to allocate cost-based storage to in-franchise customers taking semi-unbundled and unbundled service. The official position seems to be that Union uses the aggregate excess method. It became clear during the hearing, however, that many T1 and T3 customers have been allocated amounts of storage that are considerably different than amounts derived from an aggregate excess calculation.

290 Union produced a document showing that 44 T1 customers, over half of Union's T1 customers, and one T3 customer (Kitchener) have been permitted to contract for volumes of cost-based storage that differ from the amounts that would be allocated under the aggregate excess method. Nine of the 44 T1 customers listed have contracts for quantities less than the aggregate excess amount. The other 35 T1 customers and Kitchener have more (and in many cases, significantly more) cost-based storage space under contract than would be permitted if the aggregate excess method were followed. For example, one T1 customer has a storage contract for 1,434,120 GJ but its aggregate excess amount is only 139,902 GJ. Another has a contract for 1,100,000 GJ but an aggregate excess amount of zero.

291 Union indicated there are three reasons for the differences:

* The cost-based storage allocations of 21 customers that were on T1 service before June 7, 2000 were "grandfathered" by the settlement agreement approved by the Board in RP-1999-0017. The contract quantities were not required to be adjusted to the customer's aggregate excess amount.
* The amount of the cost-based storage under contract generally does not get changed at the time of the annual contract renewal even when the customer's updated consumption profile results in a higher or lower aggregate excess amount. The reason for this is that the only "trigger" for a revision to a storage quantity at the annual renewal date is a five percent increase or decrease in Contract Demand (maximum daily gas demand as agreed between the customer and Union). A change in consumption profile, by itself, has no effect on the amount of storage under contract. Union pointed out that using the change in Contract Demand as the trigger to amend storage contract quantities was agreed to in the RP-1999-0017 settlement agreement.
* At least three of the T1 customers that have contract quantities above aggregate excess amounts are gas-fired generators that have multi-year storage contracts with firm space and deliverability amounts.

292 Union proposed no changes to the way in which storage is currently allocated to in-franchise customers at cost-based rates.

293 IGUA/AMPCO submitted that the guiding principle should be to allocate to customers a sufficient amount to meet "reasonable load balancing requirements." For large volume customers, they argued that the allocation methodology should be as flexible as it has been in the past and that the grandfathering under the RP-1999-0017 settlement agreement should be preserved on the grounds of estoppel. IGUA/AMPCO said no changes in allocations should be made without customer consent.

294 The Board Hearing Team supported using the aggregate excess method for allocating cost-based storage to individual unbundled and semi-unbundled customers. The Board Hearing Team advocated adjusting the contract quantities of all existing T-1 contracts to the aggregate excess amount at the next contract renewal date. It also proposed, however, that a T1 customer that requires more storage than calculated by the aggregate excess method should make a case to its utility. Under that approach, any departure from aggregate excess would have to be submitted to the Board for approval.

Board Findings

295 The Board concludes it is essential that there be clear, standardized, and consistently applied rules for allocating cost-based storage to unbundled and semi-unbundled in-franchise customers. These types of rules clearly are not in effect today. The current allocations to a large proportion of Union's T1 and T3 customers bear no resemblance to aggregate excess volumes due to: the "grandfathering" process endorsed in RP- 1999-0017; the lack of an effective mechanism to adjust contract volumes for changed customer circumstances; and, some "non-grandfathered" T1 storage contracts with volumes that may have been at odds with the aggregate excess method even at the time the contracts were first negotiated.

296 The Board supports the continued use of the aggregate excess method as the default method for allocating cost-based space. That method is clearly designed for customers with the traditional seasonal load balancing need and fits well with the storage needs of many unbundled or semi-unbundled customers. But it appears that the storage requirements of at least some of the larger industrial and commercial customers may have little or nothing to do with seasonal load balancing. Allocating cost-based storage using a method that is based on assumptions that are materially at odds with a customer's circumstances, in the Board's view, would be unfair and unsupportable. Therefore, the Board concludes it is necessary to consider whether one or more additional allocation methodologies should be developed for cases where the aggregate excess method is clearly inappropriate.

297 Board does not, however, support a unique allocation approach for each customer. In the Board's view, the objective of allocation of cost-based storage space is to assign an amount that is reasonably in line with what a customer is likely to require. The objective is not to allocate precisely the amount a particular customer claims it might need. That would require in-depth knowledge of each customer's expected consumption, its gas supply portfolio, and the non-storage options (such as spot gas purchases) the customer might use to manage its needs. That would be impractical for the utilities to implement, both administratively and because it would never be possible to determine that one, and only one, allocation of storage is the "right" amount for any particular customer. Unbundled or semi-unbundled in-franchise customers that desire more storage than allocated to them by the utilities under the standard method(s) have the ability, as they do today, to purchase additional storage services at market-based rates or alternative services in the market.

298 The Board is not ordering any change in the contract quantities of T1 customers at this time for the following reasons:

* First, although it appears likely that one (or more) additional allocation methods may be necessary, the Board does not have enough information to reach a firm conclusion. Further evidence is required.
* Second, the Board is conscious that many of the existing contracts with volumes above the aggregate excess amounts have been in effect for several years. The Board does not accept the estoppel argument advance by IGUA/AMPCO, but even if one or more appropriate additional allocation methodologies were already developed, any changes to contracts should be done in a controlled and deliberate manner.

299 The Board does want to have better allocation rules developed in the near future. To further that objective, the Board orders Union (a) to review the use of storage by existing T1 customers to determine the extent to which their storage needs are not driven by traditional seasonal load balancing, (b) to develop one or more storage allocation methods that would result in better estimates of certain customers' needs than the aggregate excess method, and (c) submit within 90 days a proposed storage allocation policy for Board review that details the aggregate excess method and the proposed new method(s), including the circumstances in which each allocation model would be applicable.

300 Enbridge currently has only one customer taking unbundled service but it is likely that more customers will opt for unbundled service in the future. The Board therefore directs Enbridge to file, within 90 days, the methodology or methodologies it proposes to use to allocate cost-based storage to unbundled customers.

301 In order to ensure consistency where it is warranted, the Board will consider whether to pursue these matters on a generic basis.

6.2.3 Storage Allocation -- Gas-Fired Generators

302 All parties in this proceeding recognized that the operators of dispatchable gas-fired power plants have very different needs for gas storage than the typical gas user that has seasonal load balancing needs. Several aspects of enhanced services for gas-fired generators were settled by the parties before the oral hearing started. Rate issues related to high deliverability storage services were not settled; however, there was a settlement on how much 1.2% deliverability storage should be made available at cost-based rates.

303 The Enbridge and Union Settlement Proposals take different approaches to the allocation of standard storage space to gas-fired generators. The portions of the Settlement Proposals that describe the agreed allocations are set out below.

> **Enbridge Settlement Proposal**
>
> Currently, the Company's customers only receive an allocation of cost-based storage at standard deliverability that meets 57% of the gap between system peak demand and the amount of gas delivered through pipeline supplies. The remainder of this gap is met through other balancing means such as peaking supplies and curtailment. In order to achieve consistency, the Company will limit the storage allocation available to gas fired generators to the same level, such that the allocation of storage at standard deliverability to gas fired generators will be scaled to 57% of the amount of storage at standard deliverability required to meet the gap between demand and pipeline supply. (Page 23)

The allocation for gas fired generators for cost-based storage at 1.2% deliverability is as follows:

(g) A gas fired generator is assumed to provide gas supply equal to 17 times the maximum hourly demand of the facility. In the event that the plant is not dispatched, up to 17 hours of supply may need to be injected into storage, assuming that storage is the only means of balancing available.

(h) Assuming that high deliverability storage at 10% is available to meet the gas fired generator's needs, this would result in a space demand of 17 times the maximum hourly demand, divided by 10%.

(i) The space demand is then multiplied by .57 to determine the amount of cost-based standard storage at 1.2% deliverability available to the gas fired generator. (Page 24)

Union Settlement Proposal

The parties agree that new T1 and U7 customers with non-obligated supply shall be entitled to contract for T1 and U7 storage service with firm storage deliverability up to 24 times the customer's peak hourly consumption and storage space up to 24 times the customer's peak hourly consumption multiplied by 4 days. Should a customer elect to contract for firm storage deliverability that is less than the maximum entitlement, the maximum storage space that a customer is entitled to at cost shall be ten times the firm storage deliverability contracted for. In no event, shall the storage space exceed the maximum storage space entitlement previously described. Storage space with 1.2 % deliverability will be available at cost-based rates. Storage deliverability above the base firm deliverability of 1.2% up to the customer's firm CD shall be made available by Union to in-franchise customers in a manner to be determined by the Board as part of Issue No.2 [to Procedural Order No.2] (Pages 14 and 15)

Board Findings

304 The Board approved the Settlement Proposals with the cost-based storage allocations described above. The Union and Enbridge approaches to this issue are obviously somewhat different. The Board considered whether to carry out a detailed comparison of the proposed allocation methods to determine if greater consistency between the Enbridge and Union methodologies could be achieved. The Board has decided that step is not necessary. The developers of all the proposed Ontario dispatchable gas-fired facilities participated in the settlement process and were parties to the Settlement Proposals (directly or through their trade association). The Board also recognizes that the allocation of 1.2% deliverability space at cost-based rates is tied to some extent to the individual proposals of each utility for high deliverability storage.

305 The Union approach to allocation of cost-based space is available only to <u>new</u> T1 and U7 customers with non-obligated supply. During the hearing, the Board became aware that three operating gas-fired generators in Union's territory have multi-year T1 contracts for amounts of cost-based storage significantly greater than the amounts calculated by the aggregate excess method. The evidence in this hearing indicated that those contracts were not among the pre-June 7, 2000 contracts that were "grandfathered" by RP-1999-0017. The Board does not know the basis on which the storage allocations for these three customers were determined. We also do not know the extent to which the contracted storage amounts exceed the amounts that would be available were the generators to be subject to the new allocation rules contained in the Union Settlement Proposal.

306 The Board concludes that in the future, allocations of cost-based storage should be made using clear, standardized rules that are consistently applied. If there are to be non-standard allocations, it is important that the Board understand the circumstances and be satisfied that any such exceptions are justified. As indicated in section 6.2.2, the Board has ordered Union to analyze the use of storage by existing T1 customers to determine if one or more allocation methodologies should be developed to deal with cases where the aggregate excess method is clearly inappropriate. As part of that work, the Board directs Union to file with the Board, on a confidential basis if necessary, the terms and conditions of these three contracts, the basis for the storage allocations, and the terms and conditions of any other multi-year T1 storage contracts.

6.2.4 City of Kitchener

307 Kitchener intervened in these proceedings to question the appropriateness of the aggregate excess methodology as it applies to embedded utilities in general and Kitchener in particular.

308 Kitchener owns and operates a gas distribution utility connected to Union's system. The rates Kitchener charges its approximately 60,000 customers are not subject to regulation by the Board.

309 Until 1999, Kitchener was a Rate M9 system gas customer. In 1999, it switched from Rate M9 to Rate T3 and negotiated a cost-based storage allocation of 89.3 million m^3 (3.37 million GJ). That initial T3 storage contract expired in 2005. Since then, Kitchener has received two Board-approved one-year extensions at the same contract volume.

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

311 In this proceeding, Kitchener claimed that the aggregate excess method does not provide sufficient cost-based storage space for a gas distributor like Kitchener. It argued for an allocation of cost-based storage space that:

* Provides Kitchener with full deliverability from storage on March 1, recognizing the contractual requirement of Kitchener to maintain a minimum storage balance of 20% for maximum firm deliverability, and
* Provides Kitchener with a reserve on March 31 to enable it to manage temperature risk for the first two weeks of April.[38]

312 In the alternative, Kitchener argued that if the Board continues to approve the grandfathering of storage volumes in certain T1 contracts, it should extend the grandfathering to the amount of storage space in Kitchener's current T3 contract.

313 Kitchener made a number of arguments about why it believes the aggregate excess method is the wrong way to calculate its allocation of cost-based storage space. Kitchener's main objection seems to be that the aggregate excess method assumes "normal" weather. Kitchener says the allocation of cost-based space for an embedded distributor must provide for the possibility of a colder than normal winter and provide protection for a cold snap after March 31.[39] Kitchener also asserted that the aggregate excess method understates the amount of storage required by Union itself to serve its bundled customers and that Union rectifies that problem by purchasing winter gas. Kitchener charged that such a strategy results in significant additional costs for Union's system gas customers.

314 Union supported the continued use of the aggregate excess method and argued against Kitchener's proposals. Union stated that Kitchener is confusing the issue of managing gas supply inventory during the winter months to meet a design day with the issue of allocation of physical storage space based on a seasonal requirement for storage.

315 Union pointed out that Kitchener acknowledges there has been only one occasion in the past five years when Kitchener's storage allocation was insufficient. On that occasion, Kitchener avoided any overrun charges by purchasing incremental gas. Union also observed that Kitchener has the option to contract to have Union provide the March 1 deliverability inventory if it so chooses. If it chose this option, Kitchener would no longer have to maintain 20% inventory on March 1.

Board Findings

316 In section 6.2.2, the Board expressed its view that the objective of the allocation of cost-based storage to unbundled and semi-unbundled customers is to assign an amount that is reasonably in line with what a customer is likely to require; the objective is not to allocate precisely the amount that a particular customer claims it might need. The Board also acknowledged that the seasonal balancing assumption that underlies the aggregate excess method might be materially at odds with the way that some customers use storage. The Board has directed Union to develop one (or possibly more) allocation methods that can be used to allocate storage to those customers.

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

318 Kitchener acknowledges that it requires storage for seasonal load balancing, which is consistent with the assumptions of the aggregate excess method. Kitchener's circumstances are vastly different from those of dispatchable gas-fired generators, for example, a class of customer that everyone acknowledges does not use storage for seasonal load balancing.

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

320 The Board does not see the relevance of Union's gas supply plan to an allocation formula used to assign cost-based space to unbundled or semi-unbundled customers. Kitchener argued that Union "makes no attempt to produce a least cost [gas] supply plan which optimizes the level of cost based storage for in-franchise customers." The argument seems to be that if Kitchener's "least cost supply plan" advice were followed, Union would allocate more cost-based space to its bundled in-franchise customers, which would then cause Union to realize that all in-franchise customers should also get more cost-based storage. In the Board's view, the method of allocating cost-based storage should not be linked to any specific gas supply plan. The aggregate excess method is based on the simple -- and for most customers, realistic -- assumption that natural gas is delivered from the supply regions in equal amounts each day of the year. The cost-based storage allocation is then derived from a particular customer's usual winter consumption.

321 The Board is not going to order that the amount of storage under contract to T1 customers be revised until the Board receives and considers information from Union on its development of one or more additional allocation methodologies, as described in section 6.2.2. That is unlikely to be completed by April 1, 2007, the date Kitchener's current contract expires. The Board will direct Union to renew Kitchener's storage contract for an additional year at current volumes to ensure that Kitchener receives equitable treatment with the other T1 customers which may have their storage allocations adjusted. This extension should not be interpreted as an indication that the Board intends to revisit the storage allocation method for Kitchener.

7. TREATMENT OF THE PREMIUM ON MARKET-BASED STORAGE TRANSACTIONS

322 Union and Enbridge ratepayers have received a significant portion of the premium over cost-based rates that results from the sale of storage services to ex-franchise customers at market-based rates. Chapter 2 provided information on the magnitude of the margins in recent years and the basis on which these margins are shared between the utilities and ratepayers. Union's ratepayers have received 90% of the forecast margins related to both long-term ex-franchise sales (contract terms of two years or more) and short-term transactions (contract terms of less than two years). Ratepayers also receive 75% of any margins that are greater than forecast amounts. Enbridge ratepayers have received approximately 75% of Enbridge's Transactional Services margins.

323 Union proposed to end the sharing of long-term and short-term margins with ratepayers. Specifically, Union proposed that the Board adjust distribution rates effective January 1, 2007, to exclude all storage costs and revenues associated with ex-franchise sales from 2007 rates and to eliminate five existing storage and transportation deferral accounts that currently capture market-based margins in excess of amounts incorporated into rates. Union has forecast 2007 margins at $29.9 million (long-term) and $14.6 million (short-term).

324 Enbridge also proposed to end margin sharing with ratepayers. It is seeking approval to exclude revenues and expenses associated with Transactional Storage Services from its distribution rates commencing in 2007. All Transactional Storage Service revenues, forecast to be $5 to $6 million in 2007, would accrue to Enbridge. The costs to be excluded from distribution rates in 2007 would be some portion of the approximately $800,000 of O&M costs of Enbridge's Transactional Services business. Enbridge proposed to continue to include the entire net book value of its storage facilities in rate base.

325 The Board Hearing Team and Energy Probe supported the Union and Enbridge proposals. LPMA/WPSPG, Consumers Council, LIEN, VECC, IGUA/AMPCO, and Schools generally objected to any change in how margins are shared.

7.1 MARGINS ON SHORT-TERM STORAGE TRANSACTIONS

326 During the hearing, most parties presented views on the rationale for requiring the utilities to credit most of their storage margins to ratepayers. Several parties opposing the Union and Enbridge proposal to cease margin sharing referred to earlier Board decisions that they believed supported margin sharing.

327 The Board first dealt with margin sharing in the context of Union's short-term storage services, which Union started to sell at market-based rates in 1989. In 1996, the Board considered essentially the same issue when Enbridge proposed to start marketing its Transactional Services more aggressively and retain some of the margin. The Board has expressed a consistent view that Union's short-term storage transactions and Enbridge's Transactional Services involve sales at market-based rates of services derived from utility assets that are temporarily surplus.

328 In its decision in EBRO 492, dated September 10, 1996, the Board stated:

> The Company [Enbridge] stated that the objective of offering transactional services is to make additional use in off-peak periods of the Company's physical and contractual storage and transportation assets acquired in the first place to serve the in-franchise customers. [Paragraph 3.3.2, emphasis added]
>
> The Board does not agree that an incentive to provide these services should be necessary, and notes that the Company has offered both peak and off-peak services, along with assignments and exchanges in prior years without the need for an incentive. However, the Board acknowledges that the Company does incur some risk associated with its participation in these activities, and finds that a 10 percent incentive will be adequate to address these modest risks. [Paragraph 3.3.30]

329 In 1997, the Board for the first time approved Union entering long-term storage contracts at market-based rates with ex-franchise customers. In its decision in EBRO 494-03 dated September 26, 1997, the Board described the basis for allowing Union's short-term transactions as follows:

> Short-term storage for ex-franchise customers has been marketed on the basis that it is space required to provide in-franchise service. Due to weather and other variables part of the space is temporarily surplus to in-franchise needs. Customers already pay the costs of this storage in rates. Any revenue from short-term sales of storage services that is beyond the direct marginal cost to provide the service is a benefit to in-franchise consumers. [Paragraph 2.3.19, emphasis added]

Board Findings

330 The Board concludes that its decision to refrain in part from regulating rates for storage services does not invalidate the basis for sharing margins with ratepayers on short-term deals. Union's short-term storage transactions and Enbridge's Transactional Services storage sales are sales of services derived from utility assets that are temporarily surplus to in-franchise needs. The Board concurs with VECC's final argument on this point:

> In Union's case, the assets underpinning the short-term storage and balancing services sold in the ex-franchise market are presently included in rate base. In the case of Enbridge, all of the assets underpinning their transactional services sold in the ex-franchise market are included in rate base. As stated earlier, VECC views it as highly inappropriate for the utilities to seek the entire margin associated with these assets given that they have been "substantiated" by captive ratepayers who have paid in rates for the full opportunity cost of the associated capital investment (including a fair return on equity) along with overhead costs and direct operational costs associated with providing the services. In VECC's view, the utilities should be required to provide a rationale for receiving any of the associated margins given their earlier mentioned obligation to optimize the use of utility assets. [Page 16]

331 Requiring the utilities to share these margins with ratepayers is not in any way inconsistent with a finding that the storage market is competitive. The basis for sharing these margins is the nature of the assets that underpin the transactions, not the prices at which the transactions occur.

332 The Board finds that the entire margin on storage transactions that are underpinned by "utility asset" storage space, less an appropriate incentive payment to the utilities, should accrue to ratepayers. Ratepayers bear the cost of that space through the regulated storage rates and should benefit from transactions that utilize temporarily surplus space. The Board finds that shareholders will retain all of the margin on short-term transactions arising from the "non-utility" storage space.

Short-term margins derived from "utility assets"

333 The decision to require Union to notionally divide its existing storage into two pieces -- a "utility asset" (maximum of 100 PJ) and a "non-utility asset" (the balance of Union's capacity) is set out in Chapter 6. Union's storage facilities will not be physically split into two pieces and Union is likely to continue operating its storage assets in much the same way as it does today. Union presumably will determine its ability to execute short-term deals based on the amount of temporarily surplus space in the entire storage facility. As long as the utility and non-utility storage is operated as an integrated asset, it will not be possible to determine that any particular short-term transaction physically utilizes space from either the "utility asset" or the "non-utility asset."

334 Given the impossibility of physically linking a short-term transaction to a specific slice of storage space, the Board considered other methods of determining the amount of storage margins that should accrue to Union's ratepayers. The Board has decided that the calculation should be based on how the costs of the storage facilities are split between the utility and non-utility businesses. Specifically, Union's revenues in any year from short-term storage transactions, less any incremental costs incurred by Union to earn those revenues, should be shared by Union and ratepayers in proportion to Union's allocation of rate base between utility and non-utility assets.

335 As indicated in Chapter 5, the allocation is currently 79/21 utility/non-utility. Union's existing policy on what constitutes a short-term storage transaction will continue to apply. As and when Union requires more capacity for in-franchise needs (up to the 100 PJ cap) or adds storage capacity or enhances deliverability of its storage facilities, the cost allocation will presumably change. Once a revised cost allocation has been approved in a Union rates case, the basis on which margins on short-term storage transactions are shared will also change.

336 All of Enbridge's current storage assets (storage facilities and contracts) are required to serve its in-franchise customers. Thus, all of Enbridge's storage-related transactional services revenues today are derived from "utility assets." If and when Enbridge increases the capacity of its Tecumseh storage facilities, it will be necessary for the company to adopt a method of allocating storage-related Transactional Services revenues between utility and non-utility assets.

Incentive payments to utilities for short-term transactions

337 The Board has considered whether to continue allocating a portion of the margins from short-term transactions to the utilities as an incentive to optimize the use of the "utility assets" of each company.

338 The Board has decided that Enbridge should continue to share in margins on Transactional Services storage deals. Eliminating any sharing would leave Enbridge with no financial incentive to market temporarily surplus storage space. An incentive mechanism aligns Enbridge's interest with the interest of ratepayers. The size of the incentive is a matter of judgement and that issue has been debated in several past rates cases. The Board finds that the current 25% incentive is excessive given that ratepayers bear all of the costs of the existing storage assets. The Board believes a 10% incentive is sufficient. In the future, 10% of the storage component of Enbridge's Transactional Services revenue, less any incremental costs incurred by Enbridge to earn those revenues, will be for the account of Enbridge. The remainder will be for the benefit of ratepayers. As a result, Enbridge will not be required to separate its revenues and costs for Transactional Storage Services.

339 With respect to Union, an argument might be made that an incentive is not necessary. Union will receive margins from short-term storage deals that are deemed to arise from the "non-utility" portion of its storage facilities. Thus, Union will already be motivated to maximize the revenues on all short-term transactions. The Board has decided, however, that it would be appropriate for Union and Enbridge to be treated consistently and to each receive 10% of the net revenues deemed to arise from the "utility asset" portion of storage.

340 The Board is currently undertaking a process to determine a multi-year incentive ratemaking framework for Union and Enbridge. That process will address how best to implement the Board's findings on the sharing of short-term storage transaction margins within an incentive ratemaking framework. Enbridge's 2007 rates case is in progress; the Board's finding with respect to short-term margin sharing will be implemented through that proceeding.

7.2 MARGINS ON UNION'S LONG-TERM TRANSACTIONS

341 Margins on both Union's short-term storage transactions and its long-term deals historically have been shared with ratepayers in essentially the same way. Although the Board has devoted considerable time to long-term contracting issues in past Union cases, it has not determined that margins on the two types of transactions should be shared on fundamentally different bases. In its decision on Union's 2000 rates (RP-1999-0017), the Board described the rationale for sharing the margins on all of Union's storage sales:

> The Board recognizes that the assets necessary to provide both transactional services and long-term storage services have been paid for by Union's customers. Providing that the Company has a financial incentive to maximize revenues for these services should increase the benefits to both the customer and the shareholder. Consequently the Board authorizes a sharing of net revenues for transactional services and market premium for a long-term storage services in the ratio of 75:25 between ratepayer and shareholder as an incentive to maximize the revenue associated with both these services. [Paragraph 2.505]

342 Union's rationale for the sharing of storage margins has changed over time. In 1996, when it was unsuccessful in obtaining Board approval for long-term storage sales at market-based rates, Union had submitted that all of the margins would be credited to ratepayers "since in-franchise customers had paid for the development of the storage." In Union's 2000 rates case (RP-1999-0017), the Board noted that "Union's position was that ratepayers have paid for the services from the assets, not for the assets themselves." This is the position that Union advanced in this proceeding.

343 IGUA/APMCO claimed Union is estopped from changing its position on margin sharing. The argument is that the Board was persuaded to allow market-based rates on the condition that the bulk of the proceeds would go to the ratepayer. Accordingly, IGUA/AMPCO argued that it is now improper for Union to change its mind and to argue that these proceeds now need to go to the shareholder in order to promote the development of new storage.

Board Findings

344 The Board has determined that storage space in excess of the amount made available at cost-based rates (which is to be capped at 100 PJ -- see Chapter 6) can be considered a "non-utility" asset. This is the space that will support Union's long-term storage sales. The Board finds that profits from new long-term transactions should accrue entirely to Union, not to ratepayers.

345 In comparing this decision with the past Board decisions on the sharing of margins on long-term storage sales, it is important to remember the context in which the Board made its earlier decisions. Until this proceeding, the Board had never reviewed the state of competition in storage and had not considered whether to refrain, in whole or in part, from regulating storage prices. Thus, there was little basis for the Board to treat the margins on short-term and long-term sales differently. Further, the Board's decision in RP-1999-0017 to allow all then existing cost-based contracts with ex-franchise customers to be renewed at market rates has resulted in a substantial growth in long-term margins, margins that have been largely for the benefit of ratepayers. It is certainly not possible today to assert that ratepayers have "paid for" the space that underpins Union's long-term storage contracts.

346 The Board does not accept IGUA/AMPCO's estoppel argument. Estoppel as a principle of contract law is sometimes called "detrimental reliance". IGUA/AMPCO's theory seems to be that when the Board made its decision on the sharing of long-term margins it relied upon an undertaking by Union to continue the sharing. Perhaps that might have been part of the Board's rationale at the time but the Board itself has now questioned the continuing need for the practice and whether the rationale developed at that time continues to exist.

347 This after all, is the purpose of section 29. Section 29 requires the Board to re-examine the need for regulation or the degree of regulation where market structures have changed. This Board in the Natural Gas Forum Report recognized that market conditions in energy markets have in fact changed. When such changes occur, regulators, particularly those such as the Board and the CRTC with statutory forbearance mandates in their governing legislation, must re-examine the regulatory construct in light of the current market conditions. That is what this proceeding seeks to accomplish. The concept of estoppel has no meaning in such a framework.

7.3 TRANSITION RELATED TO LONG-TERM MARGINS

348 IGUA/AMPCO and LPMA/WGSPG argued that in the event the Board decides to eliminate the sharing of any margins with ratepayers there should be some mitigation. As a precedent, LPMA/WGSPG referred to the 2003 decision by the Board on the phase-out of the Delivery Commitment Credit (DCC). There the Board recommended a five-year period based on a cost increase of 11.3 cents per GJ on a specific class of customers. LPMA/WGSPG argued that the phase-in period in the current case should be eight years, because the cost impact is a greater impact of 17.5 cents per GJ across all customer classes.

Board Findings

349 The Board recognizes that, particularly in recent years, Union's ratepayers have had a significant benefit due to sharing the bulk of the margins on long-term deals. The Board would prefer to have a smooth transition away from the status quo rather than an abrupt change in rates.

350 The Board finds, however, that there is no basis for retaining a requirement that Union share the margins on new long-term storage transactions, that is, long-term deals executed after the Board's forbearance decision. To continue sharing those margins with ratepayers would conflict with the Board's decisions (a) to recognize that part of Union's storage capacity constitutes a non-utility asset, and (b) to forbear from regulating the prices of ex-franchise transactions. Union should reap the benefits and bear the risks of those new transactions.

351 The margins that will be recorded in future years in respect of existing long-term deals are different. Those margins flow from long-term contracts that were negotiated and priced prior to the Board's forbearance decision and prior to the Board's decision that there is a non-utility part of Union's storage facilities. When those contracts were signed, Union had no reason to expect that it would receive anything more than 10% of the margin. The Board has concluded that ratepayers should continue to receive some of the margin on those existing contracts.

352 The Board considered whether to require Union to record the margins on existing long-term contracts separately from the margins on new long-term contracts. Under this approach, ratepayers would be credited with 90% of the margins on existing contracts for the remaining terms of those contracts. This approach conceptually has appeal but could give rise to ongoing implementation questions. For example, the Board might have to consider how contract re-negotiations or defaults by customers are to be treated. This level of complexity and potential ongoing review is unwarranted.

353 The Board has concluded that it should adopt a simpler phase-out mechanism that is a rough sort of "proxy" for the conceptual approach described above. The phase-out of the sharing of margins on Union's long-term storage transactions will take place over four years. The share accruing to Union will increase over that period to recognize that contracts will mature and a larger part of Union's total long-term margins will be generated by new transactions. For 2007, forecast margins (on long-term and short-term transactions) now included in the determination of Union's rates will remain unchanged. After 2007, Union's share of long-term margins will be as follows: 2008 -- 25%, 2009 -- 50%, 2010 -- 75%, 2011 and thereafter -- 100%.

354 The Board is currently undertaking a process to determine a multi-year incentive ratemaking framework for Union and Enbridge. That process will address how best to implement the Board's findings on the transition for long-term storage transaction margins within an incentive ratemaking framework.

7.4 ATCO DECISION

355 During the oral hearing and in final argument, several parties referred to the recent Supreme Court of Canada decision on the proceeds of an asset sale by ATCO Gas and Pipelines Ltd. Some parties claimed the case supported a cessation of margin sharing by the utilities, while other parties questioned whether the facts of that case were relevant to the Ontario storage market.

356 ATCO, a public utility in Alberta, applied to the Alberta Energy and Utilities Board (AEUB) as required by the Alberta *Gas Utilities Act*[40], for the approval of the sale of buildings and land located in the City of Calgary. The utility argued that the property was no longer useful and the sale caused no harm to ratepayers. The AEUB agreed that the customers would not be harmed and approved the sale.

357 In a second decision, the AEUB determined that it would allocate the net profits from the proceeds of the sale between the utility and ratepayers. The AEUB held that it had jurisdiction to order this allocation because it had authority to attach conditions to the order approving the sale to protect the public interest.

358 The Alberta Court of Appeal set aside the AEUB's decision[41] referring the matter back to the AEUB to allocate the entire proceeds from the sale to ATCO. The City of Calgary, representing the customers' interest, appealed to the Supreme Court of Canada, which upheld the Court of Appeal finding that the AEUB did not have the requisite jurisdiction. On February 9, 2006 the Supreme Court of Canada released its decision in the ATCO case.[42]

Board Findings

359 The Supreme Court of Canada found as follows:

> The customers pay an amount for the regulated service that equals the cost of the service and the necessary resources...The payment does not incorporate acquiring ownership or control of the utility's assets.[43]

360 There are differences between the ATCO case and the present case. The ATCO case involved the sale of a capital asset (land), while this case involves providing a service (storage).

361 The Alberta case related to section 26 of the *Gas Utilities Act* in Alberta, which required ATCO to apply to the AEUB for approval to sell any asset. The sharing of the premium from the sale of storage services to ex-franchise customers at market-based rates has been decided in the context of rates cases.

362 The findings of fact in this case indicate that there are certain storage assets in rate base that are used to provide storage service to in-franchise ratepayers. This decision also finds that those services should be provided at cost-based rates as they have been in the past.

363 The utility also uses these assets to generate profits from sales to ex-franchise customers. The bulk of the revenues have historically flowed to ratepayers and a small share has gone to the utility. That share represents a "fee" that provides an incentive to the utility to generate these sales and profits from what at certain times of the year is excess capacity. This does not give rise to any claim by the utility under the ATCO principles. The ratepayers are receiving service relating to assets in rate base. No sale of assets is involved. The utility is being compensated for certain services.

364 At the same time, this decision finds that there are certain storage assets that are not part of the utility rate base and finds that the return from those assets, in terms of profit on sales to ex-franchise customers, should accrue entirely to the utility and its shareholders. Again, no claim arises under the ATCO principles. There is no appropriation to the benefit of the ratepayer of any utility assets or for that matter any proceeds from that asset. Accordingly, the Board finds that ATCO decision has no application to this decision.

7.5 STORAGE AND TRANSPORTATION SERVICE DEFERRAL ACCOUNTS

365 The deferral accounts at issue in this proceeding are the following:

* Short-Term Storage and Other Balancing Services Account (179-70)
* Long-Term Peak Storage Services Account (179-72)
* Transportation Exchange Services Account (179-69)
* Other S&T Services Account (179-73)
* Other Direct Purchase Services Account (174-74)

366 On March 15, 2006, the Board notified Union and the intervenors that Union's proposal to eliminate the five deferral accounts, made as part of the rate application EB-2005-0520, had been moved to this proceeding. The relevant evidence from EB-2005-0520 was re-filed in this proceeding.

367 Union explained that of the five accounts in question, the storage accounts (179-70 and 179-72) are directly related to the storage forbearance issue, while the remaining three transmission accounts (179-69, 179-73 and 174-74) are not directly related to the storage forbearance issue.

368 Union proposed to eliminate the Short-Term Storage and Other Balancing Services Account (179-70) and Long-Term Peak Storage Services Account (179-72) on the basis that these accounts would no longer be necessary if the Board decides to forbear from regulating ex-franchise storage service sales.

369 Union also proposed to eliminate the other three transmission-related deferral accounts (179-69, 179-73 and 179-74). Union advanced two reasons for this proposal. First, Union stated that the forecast of S&T revenue should not be treated any differently than the forecast of any other source of revenue. Second, Union submitted that its proposal is consistent with the Board's policy direction, as outlined in its Natural Gas Forum Report, that in an incentive regulation framework there should be no earnings sharing and transactional services revenues should not receive special treatment. Union also expressed concern that there may not be another opportunity or forum to deal with this issue prior to the beginning of the proposed incentive regulation framework.

370 Most intervenors took the position that the storage related accounts (179-70 and 179-72) should continue if the Board determines that it will not refrain from regulating the prices of ex-franchise storage sales services. However, intervenors also acknowledged that if the Board were to forbear from regulating the prices of ex-franchise storage services, then these accounts would no longer be needed and under those specific circumstances should be eliminated. For example, the Board Hearing Team argued that under forbearance, gas utilities' shareholders will be bearing the risk associated with storage transactions in the ex-franchise market and any premium or shortfalls should accrue to the shareholder.

371 With respect to the transmission-related deferral accounts (179-69, 179-73 and 179-74), most intervenors were of the view that these accounts should not be eliminated because transmission will remain a regulated service. LPMA/WGSPG supported the objective of reducing the number of variance and deferral accounts but took the position that a comprehensive review of all such accounts should be undertaken as part of the incentive regulation mechanism that is still to be determined. Many intervenors adopted the LPMA/WGSPG position.

372 The Board Hearing Team supported Union's proposal. It argued that because transactional transportation services are part of the gas utility's monopoly service, these revenues should be treated no differently than any other regulated revenue.

Board Findings

373 With respect to the storage related accounts (179-70 and 179-72), most intervenors were of the view that the resolution of this issue depends on whether the Board refrains from regulating ex-franchise storage. The Board has determined that it will refrain from regulating rates in this area. However, we have also concluded that there should continue to be a sharing of the premium arising from short-term storage transactions, for both Union and Enbridge, and that there should be a phase-out of the sharing of the premium arising from Union's long-term storage transactions. Accordingly, the Board concludes that the accounts should be maintained for now. As outlined in sections 7.1 and 7.3, we have determined that the gas incentive ratemaking process is the best place in which to determine the precise implementation of these findings.

374 With respect to the transmission-related accounts, there was general acknowledgement that the issue related to the structure of the incentive regulation framework and not the issue of storage regulation. Union was concerned that this proceeding would be the only opportunity to deal with its proposal before the introduction of incentive regulation. The Board does not agree. On September 11, 2006, the Board issued a letter indicating its intent to establish a consultation process to use in relation to the development of the gas incentive regulation framework. This process is specifically designed to address issues about the framework prior to the commencement of incentive regulation for natural gas utilities. The Board finds that the proposed elimination of these three transmission-related accounts should be considered as part of a comprehensive review that includes all deferral accounts under an incentive regulation mechanism.

375 The Board therefore concludes that all of the accounts will be maintained and will be reviewed as part of the process for setting the incentive regulation mechanism for natural gas utilities.

8. OUTSTANDING ENBRIDGE RATES ISSUES (RATES 125 AND 300)

376 The unresolved issues arising from the Enbridge Settlement Proposal relate specifically to the allocation of implementation costs and migration revenue deficiencies attributable to changes in Rates 125 and 300, and the Rate 125 eligibility criteria.

377 Early in the proceedings, there were two threshold issues. The first issue was whether the allocation of implementation costs and migration revenue deficiencies should be addressed in this proceeding or Enbridge's next rates proceeding. The Board determined that the issue should be addressed in this proceeding, and that decision was rendered orally on June 27, 2006. The second issue was whether residential customers should be allocated any of the implementation costs or migration revenue deficiencies. The Board rendered its decision orally on July 14, 2006, in which it stated that both the implementation costs and the migration related revenue deficiencies should be recovered from large volume customers as they are the main beneficiaries of these services. (The transcript of the Board's oral decisions on these issues is included at Appendix C.)

378 The remaining issues before the Board are the following:

* Smoothing of Migration-Related Impacts:
* Rate 125 Eligibility Criteria

8.1 SMOOTHING OF RATE MIGRATION IMPACTS

379 Enbridge stated that the offering of new services, such as Rate 125 and Rate 300, typically leads to the migration of customers from the existing rates to the new rates, if there is an economic advantage or a reduction in rates, for these customers. This migration typically leads to an increase in the existing rate because the customers who are less costly to serve are often the ones which migrate. Enbridge's initial estimate of the impact of migration related deficiencies was based on the assumption that customers with the largest benefit would migrate away from Rate 115. This would result in a 60% increase in the Rate 115 distribution charges, or a 14% bill impact excluding commodity charges and a 2% bill impact including commodity charges. Enbridge subsequently proposed an approach that aims to mimic the Settlement Proposal, which restricts the initial migration to Rate 300 to 20 customers. The impact of this proposal would be an increase in Rate 115 distribution charge of 38%, which results in a bill impact of 7% excluding commodity charges or 1% including commodity charges.

380 In order to further limit the impact on Rate 115 customers, Enbridge presented the Board with a rate smoothing proposal that limits the distribution rate impact on Rate 115 customers to 15%. This proposal reflects the migration of the largest customer (TransAlta) and some additional load from Rate 115. As a result of this smoothing, the distribution rate impact on Rates 100, 110 and 115 would be 3%, 2% and 15% respectively. The corresponding bill impacts, excluding commodity costs, are 1%, 0.5% and 2.7%.

381 IGUA supported Enbridge's rate smoothing proposal. Enbridge stated that it does not have a preference for whether smoothing is used or not, but noted that it is important for the Board to indicate if smoothing should be used, to enable customers to make a well informed decision about whether they want to move to unbundled rates.

Board Findings

382 The evidence indicates that the migration of customers from an existing rate to a new rate will have rate consequences for the remaining customers in the rate class from which the customer migrates. The Board agrees that from a cost allocation perspective it is appropriate that the remaining customers in the rate class pay the higher average cost resulting from the migration of customers which are less costly serve. However, from a pricing perspective, the Board is mindful of the rate impacts on the remaining customers. The Board concludes that a smoothing of the distribution-related impacts, as proposed by Enbridge, is appropriate. While the precise details of the resulting rates will be determined in the fiscal 2007 rates case, the Board concludes it is appropriate to signal now to all parties that this smoothing will be incorporated.

383 The Board therefore approves Enbridge's rate smoothing proposal which would limit the distribution rate increase to 15% for Rate 115 and spread the remainder of the migration related deficiencies over Rate 100 and Rate 110 resulting in distribution rate increases for these rates of 3% and 2% respectively.

8.2 RATE 125 ELIGIBILITY CRITERIA

384 There is agreement amongst all parties that the dedicated service (or "contract demand billing") portion of Rate 125 is to be limited to new customers only, and this is reflected in the Settlement Proposal. This aspect of the service is designed to make utility service competitive against the bypass option for new customers. The parties disagreed on whether the non-dedicated provision of service under Rate 125 is to be limited to new customers.

385 Enbridge maintained that when the Board first approved Rate 125 there was no distinction between new and existing customers and it was always known that there was a large customer which was eligible to migrate to Rate 125. This customer was subsequently identified in this hearing as TransAlta.

386 IGUA's position, supported by AMPCO and CME, is that the re-design of Rate 125 should not be treated as an existing rate with a bypass clause. IGUA argued that since there are no existing customers taking service under Rate 125 the Board should treat this as a new rate. APPrO argued that throughout the re-design of Rate 125, the Board has been aware of the likelihood of TransAlta migrating to Rate 125 and the resultant impacts of that migration.

Board Findings

387 The Board notes that from the time Rate 125 was first developed, TransAlta has been eligible to migrate to this rate. The primary change in the rate in this proceeding was the introduction of a bypass competitive component. TransAlta is not eligible for this aspect of the rate; nor has it sought access to this aspect. The Board concludes that it would be unfair to now deny TransAlta access to Rate 125 service unless there were compelling reasons to do so.

388 IGUA seeks to limit access to Rate 125 to new customers only. It appears to the Board that this position is driven mostly by a concern for the rate impact on remaining customers resulting from TransAlta's migration. The Board notes that this potential impact has always existed, and we believe that this concern is adequately mitigated by Enbridge's proposed smoothing mechanism which the Board has approved.

389 Accordingly, the only aspect of Rate 125 that will be restricted to new customers is the billing contract demand feature.

9. CUSTOMER IMPACTS AND IMPLEMENTATION OF BOARD DECISIONS

9.1 CUSTOMER IMPACTS

390 The Board's decisions in this proceeding will affect the future gas bills of all distribution customers of Union and Enbridge in some fashion over the next few years.

9.1.1 Enbridge

Union storage contracts

391 Amending the existing storage contracts with Union to include cost-based pricing will have no effect on customers' bills. Enbridge has not yet started to pass through the current higher contract prices to customers so the Board's decision preserves the status quo. When those contracts mature over the period 2008 to 2010, Enbridge will likely procure the needed storage, which is about 18% of what Enbridge currently requires to serve its customers, at market prices. Those prices will depend on market conditions at the time and cannot be predicted. It is likely, however, they will be higher than the cost-based rates Enbridge charges for storage services from its own storage facilities.

Reducing Enbridge's share of the storage-related margins from its Transactional Services business

392 This reduction, from 25% to 10%, will reduce consumers' bills in the future compared to the status quo. The impact will depend on the amount of margins Enbridge is able to earn, which will depend on future market prices. Based on the level of margins earned by Enbridge in recent years, the impact of this change on a customer's bill is likely to be modest.

9.1.2 Union

Enbridge storage contracts

393 Amending these contracts to include cost-based pricing will reduce the amount of long-term storage margins Union will earn over the period until the contracts mature (2008 to 2010) and will therefore reduce the share of the margin flowing to ratepayers.

Changing the sharing of short-term storage revenues

394 The Board has decided that Union should be credited with the portion of short-term storage margins that are deemed to use the "non-utility" space at Union's storage facilities. Union's share of the margin will also include an incentive related to the utility portion of Union's storage assets. Based on the current level of short-term storage margins, this change will result in a small reduction in the margins that are for the benefit of ratepayers.

Phase-out of sharing long-term storage margins

395 This is the most significant change for Union ratepayers, who currently are credited with 90% of Union's long-term margins. Starting in 2008, the ratepayer share of these margins will decline each year and reach zero by 2011.

9.1.3 Overall Impact

396 The Board's decisions on the sharing of premiums on storage transactions will have virtually no effect on consumers' bills in 2007. The impact after that cannot be precisely quantified because it will depend on future market prices of storage and the level of margins earned by the utilities on ex-franchise storage sales. The impact on any individual consumer will also depend on the amount of gas they consume in the future.

397 The total annual gas bill for a typical residential consumer in Enbridge's territory (Rate 1) and in Union's Southwestern Ontario operations area (Rate M2) is in the range of $1,000 to $1,500 depending on the price of natural gas during the year. Assuming (a) that Union and Enbridge are able to earn the same amount on ex-franchise storage sales in the period 2008 through 2010 that they are forecast to earn in 2007, and (b) that gas prices and other delivery charges remain the same, the Board's decisions in this proceeding are likely to increase rates by a small amount -- perhaps around 1% on the typical residential consumer's bill by 2011.

9.2 COMPLETION OF THE PROCEEDINGS AND COST AWARDS

398 As part of this proceeding, new unbundled rates have been approved for Enbridge and they are to be implemented as soon as possible. The Board therefore directs Enbridge to file a draft Rate Order within 15 days of this decision. The draft Rate Order should reflect the findings in this decision.

399 The Board also directs Union to file a Draft Rate Order reflecting the findings in this decision within 90 days. This should be done in conjunction with Union's filing of amended contracts with Enbridge.

400 The Board will issue a cost awards decision separately.

9.3 IMPLEMENTATION

401 The following table summarizes the Board's decisions in this proceeding and outlines next steps. Each item is cross-referenced to the relevant section of this decision.

	Implementation Issue	Regulatory Process	Timing
1.	Continued cost-based rate regulation for most in-franchise storage service (section 5.2.1)	No additional process required	
2.	Amendments to Enbridge's storage contracts with Union (19.9 Bcf) to incorporate cost-based rates (section 5.2.2)	Union to file amended contracts for Board approval	Within 90 days of this decision
3.	Refrain from rate regulation for Union and Enbridge ex-franchise storage services (section 5.2.4) and new storage services (section 5.2.3)	Union and Enbridge to file Draft Rate Orders	Enbridge to file within 15 days. Union to file within 90 days.
4.	Refrain from rate regulation and contract approval for third-party storage operators (section 5.1)	The Board will rescind MHP Canada's and Tribute's Rate Orders	
5.	Refrain from requiring Board approval of storage contracts (section 5.1, 5.2.4)	The Board to rescind Blanket Storage Orders	
6.	Union and Enbridge policies on aggregate excess method and its application (section 6.2.1)	Union and Enbridge to file policies; Board will consider possible generic process.	Within 90 days of this decision
7.	Development of storage allocation methodology (or methodologies) for use in cases where aggregate excess method is inappropriate (section 6.2.2)	Union and Enbridge to file proposals; Union to file long-term T1 contracts; Board will consider possible generic process.	Within 90 days of this decision

	Implementation Issue	Regulatory Process	Timing
8.	Extension to City of Kitcheners' contract with Union (section 6.2.4)	Union to amend contract and file with the Board	Within 90 days of this decision
9.	Share of margin on short-term storage transactions for Union to be based on non-utility assets (21%) and incentive related to utility assets (7.9%, that is 10% of 79%) (section 7.1)	Implementation to be determined through gas incentive ratemaking process	Beginning 2008 Rates
10.	Share of margin on short-term storage transactions for Enbridge to based on incentive (10%) (section 7.1)	Implementation through 2007 rates, with follow on implementation through the gas incentive ratemaking process	2007 rates
11.	Phase-out of ratepayer share of margins on Union's long-term storage transactions (section 7.3)	Implementation to be determined through gas incentive ratemaking process	2008 through 2011
12.	Smoothing of rate impacts from migration to Enbridge Rate 125 and Rate 300 (Chapter 8)	Implementation through Enbridge's 2007 rates proceeding	2007 rates
13.	Implementation of Enbridge unbundled rates (section 5.2.3 and Chapter 8)	Enbridge to submit draft Rate Order	Within 15 days of this decision
14.	Development of rules of conduct and reporting related to storage (section 5.4)	Board to initiate process.	

DATED at Toronto November 7, 2006

ORIGINAL SIGNED BY

Gordon Kaiser
Presiding Member and Vice Chair

ORIGINAL SIGNED BY

Cynthia Chaplin
Member

ORIGINAL SIGNED BY

Bill Rupert

Member

* * * * *

APPENDIX A

Details of the Proceeding

The Issues

The Board, in Procedural Order No. 2, set out the following issues for the NGEIR Proceeding:

I. Rates for gas-fired generators (and other qualified customers):

Should the Board order new rates for the provision of natural gas, transmission, distribution and storage services to gas-fired generators (and other qualified customers)? If the Board does order new rates, should that order contain the following requirements:

1. More frequent nomination windows for distribution, storage and transportation that correspond with the nominations of upstream pipelines that connect to the Ontario gas system.
2. Firm high deliverability service from storage with customer options for 1.2%, 5% and 10% deliverability.
3. Gas storage and distribution offered as discrete services.
4. Inter-franchise movement of gas (i.e., the ability to access services across Ontario, whether to a customer's own account or as a sale to a third-party).
5. Redirection of gas to a different delivery point on short notice (i.e., the ability to redirect or acquire gas on short notice to a different delivery point).
6. The ability to transfer the title of gas in storage (i.e., the title transfer in gas storage is treated as an administrative matter instead of a physical withdrawal or injection of gas).

II. Storage regulation:

Should the Board refrain, in whole or part, from exercising its power to regulate the rates charged for the storage of gas in Ontario? In making this determination, the Board will have regard to a number of considerations, including:

1. Do gas utilities (and/or their affiliates) either collectively or individually have market power in the provision of storage services for all or some categories of customers in Ontario?
2. If gas utilities (and/or their affiliates) do have market power in storage, is it appropriate for them to charge "market rates" for transactional and long-term storage services?
3. If gas utilities (and/or their affiliates) do not have market power, is it in the public interest that all or some customers continue to pay storage rates at cost as opposed to market rates? How should the extra revenue from storage services at market rates be allocated?
4. If the Board determines, based on considerations of market power and the public interest more generally, that some customers should pay for storage services at cost and others should pay for storage services at market prices, how should the line be drawn between the two types of customers and, specifically, should there be a constraining allocation of physical storage facilities to some types of customers based on measures such as aggregate

excess or whether customers are considered "in-franchise" or "ex-franchise"? How should the extra revenue from storage services at market rates be allocated?

III. Transportation capacity bidding process and allocation:

Should the Board allow a gas transmitter to charge a premium above costs for gas transmission services and, if so, how should that premium be allocated?

IV. Enbridge rates for large volume customers (Rate 300 Series):

Should the Board consider any other terms and conditions in addition to those outlined in Appendix B [to Procedural Order No. 2 -- "Mandatory Evidence to be filed by Enbridge with respect to Rate 300 Series Rates"]?

What should be the maximum waiting period for customers to make the transition to the new Rate 300 series rates?

The Board also moved four issues from Union's 2007 rates proceeding (EB-2005-0520) to the NGEIR Proceeding. These issues, as set out in Procedural Order No. 3, were:

1. Matters relating to market pricing of storage services;
2. Union's proposal to eliminate storage and transmission deferral accounts;
3. Union's proposal to change the blanket storage order; and
4. Power services -- M12 service upgrades for power producers.

Technical Conferences

On April 5 and 6, 2006, the Board held a technical conference on the mandatory evidence filed by Enbridge and Union with respect to potential rates for gas-fired generators and other qualified customers (Issue I of this proceeding). At the April 6, 2006 technical conference, Enbridge presented revisions to Rate 125 -- Extra Large Firm Transportation Service and proposed a new High Deliverability Storage Service (Rate 316). The proposed rates were presented on a conceptual basis only, and Enbridge took the position that the setting of rates associated with Rate 125 and Rate 316 should only be done in the context of Enbridge's 2007 rate hearing. The Board did not agree and directed Enbridge to file supplemental evidence to complete the mandatory evidence on the potential rates for gas-fired generators and other qualified customers (Issue I) and added a one-day technical conference on April 27, 2006 on Issues I and IV.

A further technical conference was held on May 16-19, 2006 to provide participants with the opportunity to present their evidence relating to Issues II, III and IV and to allow other participants to obtain further clarification of the evidence.

Settlement Conference

A settlement conference was held for Issues I (rates for gas-fired generators and other qualified customers), III (transportation capacity bidding process and allocation) and IV (Enbridge's Rate 300 series rates). The Board indicated that it would not receive a settlement proposal on Issue II (storage regulation), so a settlement conference was not held in relation to this issue.

Two separate Settlement Proposals were filed with the Board on June 13, 2006. Enbridge submitted a Settlement Proposal for Issues I and IV (the "Enbridge Proposal") and Union submitted a Settlement

Proposal for Issues I and III (the "Union Proposal"). A presentation of the Settlement Proposals was made to the Board on June 19, 2006. On July 14, 2006, the Board approved the Enbridge Proposal.[44] On June 27, 2006,[45] the Board approved the Union Proposal.

Proceeding

The oral hearing commenced on June 19, 2006 and concluded on July 20, 2006. Arguments were delivered orally and in writing during August and final reply arguments were heard on September 7, 2006.

* * * * *

APPENDIX B

Participants and Witnesses

List of Participants

Board Hearing Team	Donna Campbell Pascale Duguay Laurie Klein
Board Support Team	Kristi Sebalj David Brown Zora Crnojacki Ronald Man Rudra Mukherji
Union Gas Limited	Glenn Leslie Michael Packer Connie Burns
Enbridge Gas Distribution	Fred Cass David Stevens
Aegent Energy Advisors	Valerie Young
Association of Major Power Consumers of Ontario	Mark Rodger Adam White
Association of Power Producers of Ontario	Patrick Moran Richard King David Butters
BP Canada	David Brett Cheryl Worthy
Canadian Association of Petroleum Producers	Nick Schultz
Canadian Manufacturers & Exporters	Brian Dingwall
City of Kitchener	Alick Ryder James Gruenbauer
Competition Bureau	Mark Ronayne

Consumers Council of Canada	Robert Warren Julie Girvan
Coral Energy Canada Inc.	Paul Kerr
Direct Energy Marketing Inc.	Dave Matthews
Enbridge Inc.	Robert J. Howe Bob Craig
Energy Probe Research Foundation	David S. MacIntosh Thomas Adams
EPCOR Utilities Inc.	Elisabeth (Lisa) De Marco Leigh-Anne Palter
Greenfield Energy Centre LP	Patrick Moran John Rosenkranz
Hydro One Networks Inc.	Glen MacDonald
IESO	John M. Rattray George Katsuras
Inco Limited	John LeMay John Butler
Industrial Gas Users Association	Peter Thompson Peter Fournier
London Property Management Association	Randy Aiken
Low Income Energy Network	Malcolm Jackson
Natural Gas Consultant	Jason Stacey
Nexen Marketing Inc.	Debbie White Shannon Young
Market Hub Partners Canada	Laurie Smith Karen Illsey Toby Bishop Jim Redford

Ontario Energy Savings L.P.	Nola L. Ruzycki
Ontario Power Authority	Miriam Heinz Gia DeJulio
Ontario Power Generation Inc.	Barry Green Greg Olsen
Portlands Energy Centre	David Brown Nicolle Butcher John Wolnik
Pristine Power Inc.	Michael Peterson Kevin Gilchrist
School Energy Coalition	John DeVellis Jay Shepherd Brian Cain
Sithe Global Power Goreway ULC Sithe Global Power Southdown ULC	David Brown Duane E. Cramer
Société en Commandite Gaz Métro	Louis-André Leclerc Louis-Charles Ratelle Frederic Morel
TransAlta Cogeneration L.P. and TransAlta Energy Corp.	Sandy O'Connor
TransCanada Energy Ltd.	David Brown Margaret Duzy Jennifer Nichols John Wolnik
TransCanada PipeLines Limited	Bernard Pelletier Patrick Keys Murray Ross
Tribute Resources Inc.	Peter Budd Robert Lockhart
Vulnerable Energy Consumers Coalition	Michael Janigan Roger Higgin James Wightman
Wholesale Gas Service Purchasers Group	William Blake Nick Petruzzella Randy Aiken

Expert Witnesses

The Board Hearing Team presented the following expert witness:

Bruce McConihe	LECG, LLC

Union Gas Limited presented the following expert witnesses:

Bruce Henning	Energy and Environmental Analysis
Michael Sloan	Energy and Environmental Analysis
Richard Schwindt	Simon Fraser University

Enbridge Gas Distribution presented the following expert witnesses:

David McKeon	View Communications Inc.
Richard Smead	Navigant Consulting Ltd.

Market Hub Partners Canada L.P. presented the following expert witness:

John Reed	Concentric Energy Advisors

The Industrial Gas Users Association, Association of Major Power Consumers of Ontario, Consumers Council of Canada, Vulnerable Energy Consumers Coalition, School Energy Coalition, City of Kitchener, Canadian Manufacturers & Exporters, Inc. jointly sponsored the following expert witness:

Mark Stauft	Consultant

The Association of Power Producers of Ontario presented the following expert witnesses:

Robert Cary	Rob Cary & Associates
Michael Nolan	Ontario Power Generation
John Rosenkranz	Consultant
John Wolnik	Elenchus Research Associates

Witnesses by Party

Enbridge Gas Distribution	Jody Sarnovsky Malini Giridhar David Charleson James Grant Anton Kacicnik
Union Gas Limited	Mark Isherwood Mark Kitchen Chris Shorts Steven Poredos Steven Baker Mike Sloan Drew Quigley Mike Broeders
Market Hub Partners Canada	Jim Redford
Board Hearing Team	Ajit Ratra
Société en Commandite Gaz Métro	Jean-Pierre Bélisle Sophie Brochu Frédéric Morel
Association of Power Producers of Ontario	Duane Cramer Brian Kelly
Enbridge Inc.	Robert Craig
City of Kitchener	Dwayne Quinn James Gruenbauer
BP Canada	Cheryl Worthy Stephen Acker
Industrial Gas Users Association Association of Major Power Consumers of Ontario	Peter Fournier Adam White Darren MacDonald John Butler

* * * * *

[Editor's note: Appendix C, Decision on Enbridge Settlement Proposal, could not be reproduced online. Please contact Quicklaw Customer Service at 1-800-387-0899 or service@lexisnexis.ca and request the following document: 06oebd023.PDF]

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[Editor's note: Appendix D, Enbridge Settlement Proposal, could not be reproduced online. Please contact Quicklaw Customer Service at 1-800-387-0899 or service@lexisnexis.ca and request the following document: 06oebd023.PDF]

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[Editor's note: Appendix E, Decision on Union Settlement Proposal, could not be reproduced online. Please contact Quicklaw Customer Service at 1-800-387-0899 or service@lexisnexis.ca and request the following document: 06oebd023.PDF]

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[Editor's note: Appendix F, Union Settlement Proposal, could not be reproduced online. Please contact Quicklaw Customer Service at 1-800-387-0899 or service@lexisnexis.ca and request the following document: 06oebd023.PDF]

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[Editor's note: Appendix G, Decision on MHP CanadaAEs Core Points, could not be reproduced online. Please contact Quicklaw Customer Service at 1-800-387-0899 or service@lexisnexis.ca and request the following document: 06oebd023.PDF]

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1 Board File No. RP-2004-0213, 2005 LNONOEB 61

2 Board File No. EB-2005-0306, 2005 LNONOEB 59

3 *Natural Gas Regulation in Ontario: A Renewed Policy Framework*, Report on the Ontario Energy Board Natural Gas Forum, March 30, 2005 at page 84.

4 Federal Energy Regulatory Commission, *2004 State of the Markets Report*, June 2005, page 161.

5 Derived from information in Union Gas Undertaking K3.1, which was expressed in PJs. Table 1 was prepared using a conversion factor of 1Bcf = 1.055 PJ.

6 Space Allocation derived from Exhibit J5.02, converted to Bcf using a factor of 1Bcf=1.055 PJ.

7 Union Gas has long-term contracts covering 6.7 Bcf of Tecumseh storage facilities, which reduce the space available to Enbridge to around 92 Bcf.

8 RP-2003-0253, 2005 LNONOEB 43 *Decision with Reasons to Follow*, June 17, 2005

9 The Board's decision on MHP Canada's core points is reproduced in Appendix G.

10 Derived from Union Exhibit J5.02. Figure 3 was prepared using a conversion factor of 1 Bcf = 1.055 PJ.

11 Union Gas prefiled evidence Exhibit A, Tab 1, footnotes 1 and 2.

12 *RP-1999-0017, 2001 LNONOEB 3 Decision with Reasons*, July 21, 2001

13 Page 25 of the Settlement Agreement in RP-1999-0017 stated: "In order to facilitate the transition to the new allocation methodology [aggregate excess], Union agrees to grandfather existing T-service customers currently operating within there current deliverability level, whether those customers remain as t-service or select the new unbundled service."

14 Union information extracted from Exhibit K2.3, and the settlement agreement for Union's 2007 distribution rates.

15 RP-2005-0520 dated June 29, 2006

16 Enbridge information extracted from Exhibit K6.1 and, for the 2006 estimate, Transcript Day 7, page 20.

17 *EB-2005-0001/EB-2005-0437, 2006 LNONOEB 25, Decision with Reasons*, February 9, 2006

18 S.O. 1998, c.15

19 Telecommunications Act S.C. 1993 c.38

20 Economic Council of Canada, *Responsible Regulation -- An Interim Report of the Economic Council of Canada (Ottawa, Supply and Services, 1979)*

21 Economic Council of Canada, *Reforming Regulation* (Ottawa, Supply and Services, 1982)

22 Royal Commission on the economic and development prospects for Canada, Volume 2, at 254 (1985)

23 Further Notice of Proposed Rulemaking, 84 F.C.C. 2d 445, at 472-74, 478 (1981). See, Enhanced services, Telecom Decision CRTC 84-18, at 6-17, 118 CAN GAZETTE PT I, 6117, at 6123-25 (12-July, 1984).

24 Telecommunications Act S.C. 1993 c.38

25 Exhibit E, Tab 2, Schedule 1, Attachment 2

26 Further Notice of proposed Rulemaking, 84 FCC 2nd 445 at 472-74,478, (1981)

27 The HHI is a measure of the competitive structure of an industry. It is equal to the sum of the squares of the market shares of all the companies in the industry (multiplied by 10,000). Thus an industry with ten equally sized firms would have an HHI of 1,000. An industry with five equally sized firms would have an HHI of 2,000.

28 Telecommunications Decision CRTC 2006-15

29 The Canadian and U.S. MEGs, while distinct, follow exactly the same methodology for the purposes of identifying market power.

30 Mr. Stauft's evidence was sponsored by IGUA, AMPCO, Consumers Council, Schools, Kitchener, and CME.

31 In this proceeding there were two Board Staff teams. The Board Support Team took the traditional role of completing the public record and providing assistance to the Panel. The Board Hearing Team acted as a public interest intervenor, presented evidence, and made submissions.

32 "Basis blowout" was described by Mr. Henning as "a description of the market conditions whereby the value, market value, of the pipeline services exceeds the maximum regulated costs". (Tr. 4, p. 27)

33 The Board's decision regarding MHP Canada's core points appears at Appendix G.

34 *Report of Committee on Oil and Gas Resources*, *Part II Underground Storage of Natural Gas*, June 1962 (commonly referred to as the "Langford Report")

35 Union Pre-filed evidence, Exhibit C, Tab 1, page 15.

36 Exhibit Y2.1, outline of Union reply argument, page 4.

37 EBRO 494-03 Decision with Reasons, September 26, 1997, paragraph 2.2.29.

38 In its pre-filed evidence and during the oral hearing, Kitchener also put forward the idea that it should receive a proportionate share of Union's system integrity space. In its final argument, however, Kitchener withdrew that proposal.

39 Kitchener also made submissions on some problems with the way cost-based storage has been allocated to Union's T1 customers, including the deviations from aggregate excess that were grandfathered by the Board. Some of Kitchener's general concerns about the aggregate excess methods are addressed in section 6.2.2 of this decision.

40 R.S.A. 2000, c. G-5, s.26

41 ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board), [2004] 24 Alta. L.R. (4th) 205 (C.A.)

42 ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board), [2006] S.C.J. No. 4, 2006 SSC 4.

43 Ibid, par. 68

44 Board File No. RP-2004-0213

45 Board File No. EB-2005-0306

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Ontario (Energy Board) (Re), 2006 LNONOEB 23

Ontario Energy Board Decisions

Ontario Energy Board

Panel: Gordon Kaiser, Presiding Member and Vice Chair; Cynthia Chaplin, Member; Bill Rupert, Member

Decision: November 7, 2006.

No. EB-2005-0551

2006 LNONOEB 23

IN THE MATTER OF a proceeding initiated by the Ontario Energy Board to determine whether it should order new rates for the provision of natural gas, transmission, distribution and storage services to gas-fired generators (and other qualified customers) and whether the Board should refrain from regulating the rates for storage of gas.

(401 paras.)

Case Summary

Tribunal Summary:

INTRODUCTION

This proceeding was initiated by the Ontario Energy Board in late 2005 in response to issues first raised in the Board's *Natural Gas Forum Report* and more fully explored in the OEB staff report, *Natural Gas Electricity Interface Review*. The key issues addressed in this proceeding were:

* Rates and services for gas-fired generators
* Storage regulation.

The hearing participants, which included gas-fired generators and consumer groups, reached settlements with Union Gas Limited (Union) and Enbridge Gas Distribution Inc. (Enbridge) on most of the issues related to services for gas-fired generators, and the Board has approved those settlements. The oral hearing and this Decision addressed the issues which were not settled and the issue of storage regulation.

SERVICES FOR GAS-FIRED GENERATORS

The need to examine new services for gas-fired generators arises because of the increasing number of so-called "dispatchable" gas-fired power generation plants that are planned or in operation. These plants operate in response to five-minute dispatch instructions from the Independent Electricity System Operator (IESO), and, as a result, their gas consumption profiles are more volatile and difficult to forecast than the relatively stable profiles of residential, commercial and industrial gas consumers. Flexible and responsive gas services, including high-deliverability gas storage, can ensure the reliable operation of these plants and allow the plant operators to manage the financial risk of the business.

Based on the settlements, the Board has approved a number of new services aimed at the needs of the gas-fired generators, including:

* new distribution rate structures for high-volume gas consumers
* more frequent nomination windows for the distribution, storage and transportation of gas
* the inter-franchise movement of gas
* redirection of gas to different delivery points on short notice
* simpler processes for title transfers of gas in storage
* high-deliverability storage services.

There was no agreement on the price at which high-deliverability storage services should be offered. The generators argued for a regulated framework, while the utilities argued for a competitive framework. The key consideration is to ensure that new innovative services are developed. The Board concludes that the public interest is best met by refraining from regulating these services. This will stimulate the development of these services, by utilities and other providers. The Board will accordingly refrain from regulating the rates for high-deliverability storage services.

The Board has a duty to protect the interests of consumers using these services with respect to price and reliability and quality of service. The crucial factor is the availability of the service itself -- namely its reliability and quality. The Board expects Enbridge and Union to fulfill their commitments respecting the offering of these services. Pricing considerations are relevant, but competitive options will provide appropriate price protection. The Board will also be developing a reporting mechanism and complaint process to deal with any issues which arise.

NATURAL GAS STORAGE REGULATION

Union and Enbridge operate large underground gas storage facilities in southwestern Ontario. Those facilities, which are connected to multiple gas transmission pipelines, are part of what is known as the Dawn Hub, one of the more important natural gas market centres in North America.

The issue in this hearing was whether the Board should refrain from regulating the prices charged for storage services. Section 29 (1) of the *Ontario Energy Board Act, 1998* states:

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

Competition in Storage

The Board has concluded that Ontario storage operators compete in a geographic market that includes Michigan and parts of Illinois, Indiana, New York and Pennsylvania. The Board finds that the market is competitive and that neither Union nor Enbridge have market power.

Price Regulation

The Board will cease regulating the prices charged for the following storage services:

* all storage services offered by Union and Enbridge to customers outside their franchise areas;
* new storage services offered by Union and Enbridge to their in-franchise customers; and,
* all storage services offered by other storage operators, including storage operators affiliated with Union and Enbridge.

Rates for storage services provided to Union's and Enbridge's distribution customers will continue to be regulated by the

Board on a cost-of-service basis.

Union's existing storage capacity is well in excess of the current needs of its in-franchise customers and has been for many years. The Board has decided that Union will reserve approximately two-thirds of its existing capacity for in-franchise needs. At current rates of growth, that amount limit will satisfy in-franchise needs for several decades. Enbridge currently purchases storage from Union for a portion of its requirements. The Board has decided that Union will continue to provide these services at cost through a transition period ending in 2010.

Sharing the Premium on Ex-Franchise Sales

The sale of storage services by Union and Enbridge at market-based rates to ex-franchise customers has generated revenues well in excess of the cost of providing those services. Until now, the Board has required that most of the profits be used to reduce distribution rates. The Board has concluded that this sharing should continue for short-term storage deals. These are storage transactions that use storage space that is temporarily surplus to in-franchise needs. All of the profits on these transactions, less small incentive payments to the utilities, will be for the benefit of ratepayers.

The Board finds, however, that Union will not be required to share the profits on long-term storage transactions that use storage space not needed to serve in-franchise needs because that capacity now constitutes a "non-utility" asset for which the shareholders appropriately bear the risk. The sharing of these profits will remain unchanged for 2007 and then be phased out over the period to 2011.

Impact on Consumers

The Board's decisions are expected to have virtually no effect on consumers' bills in 2007. The impact after that cannot be precisely quantified because it will depend on future storage prices, the profit on ex-franchise storage sales, and the amount of gas consumed. While a precise forecast is not possible, bills are likely to increase by a small amount -- perhaps around 1% for the typical residential consumer.

DECISION WITH REASONS

TABLE OF CONTENTS

Appendices

1. THE PROCEEDING AND THE ISSUES

1.1 BACKGROUND

1 In the fall of 2003, the Ontario Energy Board began a comprehensive sector review -- the Natural Gas Forum -- to examine ways to further improve the efficiency and effectiveness of natural gas regulation in Ontario. The impetus for this review was recognition by the Board of the evolving natural gas market. In particular, the Board recognized that conventional gas supply sources are expected to experience flat to declining production. The anticipated increased reliance on non-conventional supply sources raised questions regarding the need for infrastructure within Ontario to meet changing natural gas flow patterns and about the adequacy of the current regulatory treatment of natural gas. On the demand-side, the anticipated expansion of gas-fired power generation was expected to affect the extent and type of investment required in gas infrastructure in Ontario and to drive the convergence of gas and electricity markets.

2 The outcome of the review was a Board report, released on March 30, 2005, entitled *Natural Gas Regulation in Ontario: A Renewed Policy Framework*[1] (the Natural Gas Forum Report). In this report the Board set as an "important and immediate priority" the need to ensure that Ontario's natural gas infrastructure could meet the demands created by new gas-fired generators. As a result, the Board initiated the Natural Gas Electricity Interface Review (NGEIR), to examine the regulatory treatment of natural gas infrastructure and services.[2]

3 NGEIR involved several months of research and meetings with stakeholders, which were led by Board Staff. The Board Staff NGEIR report was released for stakeholder comment on November 21, 2005. The report's key recommendations were that the Board should initiate a generic hearing to review whether the Board should:

* require gas utilities to provide firm higher deliverability service from storage and greater nomination entitlements;
* require greater operational flexibility in the provision of distribution services;
* forbear from regulating rates for gas storage services.

4 After reviewing the stakeholder comments, the Board initiated this generic hearing, known as the Natural Gas Electricity Interface Review Proceeding (the NGEIR Proceeding), to determine whether it should order new rates for the provision of natural gas transmission, distribution and storage services to gas-fired generators (and other eligible customers). The Board indicated that it would also determine in the NGEIR Proceeding whether to refrain, in whole or part, from exercising its power to regulate the rates charged for the storage of gas in Ontario by considering whether, as a question of fact, the storage of gas in Ontario is subject to competition sufficient to protect the public interest.

5 In addition, the Board determined that the generic hearing would examine Union's Transmission Bidding Open Season process as it relates to the rates and contractual terms for allocating transportation capacity. In particular, the issues concerning the M12 rate premiums identified in the Board's decision regarding the Dawn-Trafalgar Pipeline Transmission Expansion (EB-2005-0201) were included.

1.2 THE PROCEEDING

6 The NGEIR Proceeding was commenced pursuant to sections 19, 29 and 36 of the *Ontario Energy Board Act, 1998.* On December 29, 2005, the Board issued a Notice of Proceeding on its own motion to determine:

* whether it should order new rates for the provision of natural gas transmission, distribution and storage services to gas-fired generators (and other qualified customers); and
* whether to refrain, in whole or part, from exercising its power to regulate the rates charged for the storage of gas in Ontario by considering whether, as a question of fact, the storage of gas in Ontario is subject to competition sufficient to protect the public interest.

7 The Notice of Proceeding directed Enbridge Gas Distribution Inc. (Enbridge) and Union Gas Limited (Union) to file evidence on potential rates for gas-fired generators.

8 Procedural Order No. 2, issued on February 28, 2006, set out the issues to be addressed in the proceeding. These are set out in full in Appendix A, but can be summarized as follows:

I. Rates for gas-fired generators (and other qualified customers), including more frequent nomination windows, firm high deliverability service, unbundled services, inter-franchise movement of gas, redirection of gas to a different delivery point on short notice, and title transfer of gas in storage

I

I. Storage regulation and whether the Board should refrain, in whole or part, from exercising its power to regulate the rates charged for the storage of gas in Ontario, including:

* Is the market competitive?
* Who should receive cost-based pricing?
* Who should receive market-based pricing?
    * How should the amount of storage be allocated between the classes of customers?
* Who should receive the premium?

III. Transportation capacity bidding process and allocation

IV. Enbridge rates for large volume customers (Rate 300 Series)

9 The Board also moved four issues from Union's 2007 rates proceeding (EB-2005-0520) to the NGEIR Proceeding. These issues, as set out in Procedural Order No. 3, were related to storage pricing and storage and transmission deferral accounts.

10 Further details of the process can be found in Appendix A. Lists of witnesses and participants are in Appendix B.

1.3 SETTLEMENT PROPOSALS

11 A settlement conference was held for Issues I (rates for gas-fired generators and other qualified customers), III (transportation capacity bidding process and allocation) and IV (Enbridge's Rate 300 series rates). The Board indicated that it would not receive a settlement proposal on Issue II (storage regulation), so a settlement conference was not held in relation to this issue.

12 Two separate Settlement Proposals were filed with the Board on June 13, 2006. Enbridge submitted a Settlement Proposal for Issues I and IV (the Enbridge Proposal) and Union submitted a Settlement

Proposal for Issues I and III (the Union Proposal). A presentation of the Settlement Proposals was made to the Board on June 19, 2006. Details relating to the settlement process and the Board's treatment of the Settlement Proposals, including decisions on issues related to the Settlements and the Settlement Proposals themselves are provided at Appendix C and Appendix D for Enbridge and Appendix E and Appendix F for Union. The matters under Issues I, III and IV that were not resolved by way of settlement are discussed in Chapter 8.

1.4 MHP CANADA DECISION ON CORE POINTS

13 Market Hub Partners Canada (MHP Canada) is an affiliate of Union which proposes to develop third party storage in Ontario. As part of its evidence and submission to the Board in the context of the NGEIR Proceeding, MHP Canada made a request for an expedited decision on certain "core points", specifically that:

* MHP Canada cannot exercise market power;
* MHP Canada, similar to independent storage developers, will be granted authority to charge market-based rates for its services; and
* MHP Canada will be allowed flexibility to contract for services without requiring approval of individual contracts, provided that MHP Canada operates within a base set of service terms and conditions approved by the Board.

14 On September 7, 2006, the Board issued its oral decision on MHP Canada's request for an expedited decision on the core points. In its decision, the Board authorized MHP Canada to charge market-based rates and relieved MHP Canada of the requirement to have storage contracts approved by the Board. The transcript of the decision can be found in Appendix G.

1.5 ORGANIZATION OF THIS DECISION

15 This decision focuses principally on the second issue listed in the Board's Procedural Order No.2, that is, whether there is sufficient competition in natural gas storage for the Board to refrain in whole, or in part, from regulating rates.

16 **Chapter 2** is a an overview of gas storage in Ontario today - the existing storage facilities, the use of storage by Union's and Enbridge's "in-franchise" customers, the "ex-franchise" market for storage, and the prices charged for storage services. This chapter does not contain any Board decisions. It provides background and context for the Board's decisions on the competition question and the implementation issues covered in later chapters.

17 **Chapter 3** deals with the issue of competition in storage and whether Union and Enbridge have market power. The chapter addresses the framework for assessing market power, the definition of the product market, the scope of the geographical market, and quantification of market shares and concentration.

18 Section 29 of the *Ontario Energy Board Act, 1998* (the *OEB Act*) requires the Board to consider whether there is "competition sufficient to protect the public interest" before making a decision to refrain from regulation. **Chapter 4** sets out the Board's views on public interest issues relevant to gas storage.

19 **Chapter 5** deals with the decision to refrain, or forbear, from regulating storage rates and approving storage contracts. It sets out the Board's basis for deciding to refrain in part from regulating rates, as well as the Board's decision that in-franchise customers will continue to receive regulated storage services at cost-based rates.

20 Having decided to retain regulated cost-based storage rates for in-franchise customers, it is necessary to determine how much of Union's existing storage space should be reserved for those customers. **Chapter 6** covers that issue together with the Board's decisions on how much cost-based space Union and Enbridge should allocate to individual unbundled and semi-unbundled in-franchise customers.

21 **Chapter 7** sets out the Board's decisions on whether, and to what extent, Union's and Enbridge's in-franchise customers should continue to share in the margins over cost that the utilities earn on sales of storage services at market rates.

22 Issues I, III, and IV from Procedural Order No.2 were largely settled by the parties. **Chapter 8** covers the Board's decisions on a small number of Enbridge rate issues that were not settled.

23 **Chapter 9** is a summary of the implementation and transition issues arising from the Board's decisions in Chapters 5, 6, 7 and 8.

2. ONTARIO GAS STORAGE - BACKGROUND

24 This chapter describes the development and current state of natural gas storage in Ontario, the pricing and allocation of storage, and the rate treatment for revenues earned from storage services sold at market-based rates.

2.1 ONTARIO GAS STORAGE FACILITIES

25 The existing and proposed underground natural gas storage facilities that were the subject of this hearing are all located in Southwestern Ontario, mostly in Lambton County. The storage pools now in operation are all depleted gas fields. With working gas capacity of over 240 Bcf, these Ontario facilities are among the largest gas storage pools in Canada.

26 The storage facilities are an integral part of what is commonly referred to as the Dawn Hub, which is widely recognized as one of the more important market centres in North America for the trading, transfer and storage of natural gas. In its Natural Gas Forum Report, the Board stated: "The large amount of nearby storage, combined with a convergence of pipelines linking the U.S. and Ontario gas markets, have made Dawn the most liquid trading location in Ontario."[3] The Federal Energy Regulatory Commission (the FERC), in its assessment of energy markets in the United States in 2004, made similar comments about the significance of Dawn:

> The Dawn Hub is an increasingly important link that integrates gas produced from multiple basins for delivery to customers in the Midwest and Northeast. ... Dawn has many of the attributes that customers seek as they structure gas transactions at the Chicago Hub: access to diverse sources of gas production; interconnection to multiple pipelines; proximity to market area storage; choice of seasonal and daily park and loan services; liquid trade markets; and opportunities to reduce long-haul pipeline capacity ownership by purchasing gas at downstream liquid hubs.[4]

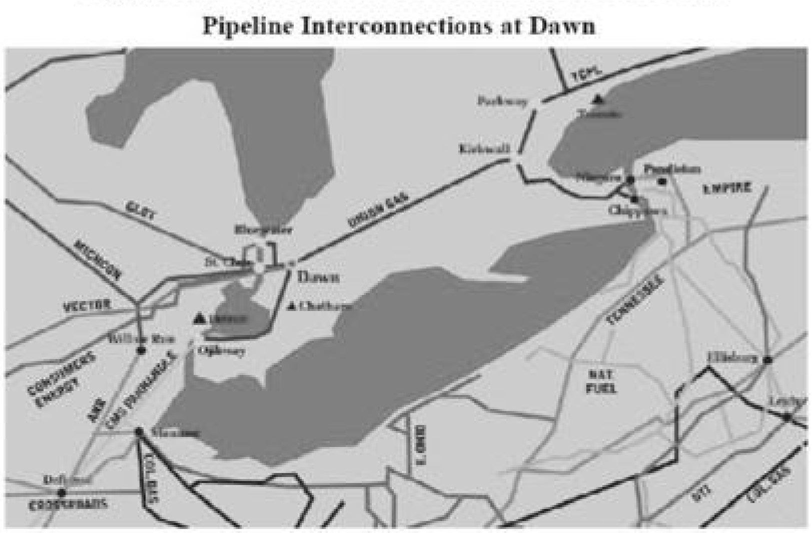
27 The storage facilities currently in operation in Ontario are owned and operated by two entities, Union, which also owns and operates the gas transmission line between Dawn and Parkway, and Enbridge. The storage operations of these companies are described in the next sections of this chapter, followed by information on new storage operations proposed or under development by other parties.

2.1.1 Union

28 Union is an indirect, wholly-owned subsidiary of Duke Energy Corporation, a U.S. company with large and diverse operations in North America's gas and electricity industries. Union owns and operates an integrated gas distribution, transmission and storage business in Ontario. On June 28, 2006, Duke Energy announced it would pursue a plan to create two separate publicly-traded companies by spinning off its natural gas businesses, including Union Gas, to shareholders.

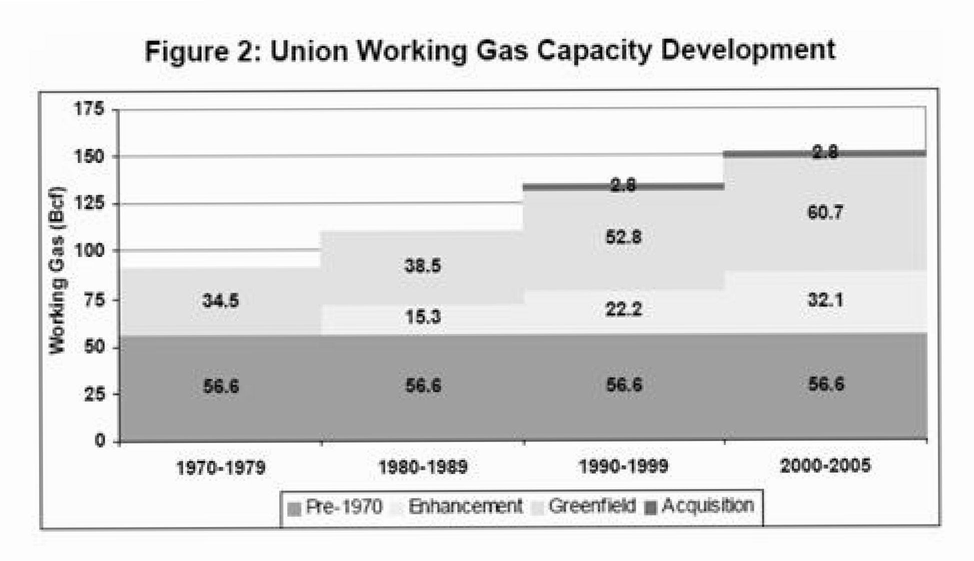
29 Union's storage operations include 20 depleted gas fields with working gas capacity of approximately 152 Bcf and peak deliverability of 2.3 Bcf per day. Union's storage pools connect with the Vector, Great Lakes, CMS Panhandle, Michcon, and Bluewater transmission pipelines from Michigan in the west, and (via Union's Dawn-Parkway pipeline) the TransCanada pipeline and Enbridge's gas distribution system in the east. Figure 1 shows these pipeline interconnections.

Figure 1: Pipeline Interconnections at Dawn



Source: Union Gas pre-filed evidence, Tab 2, page 10

30 Union has owned and operated storage facilities at Dawn since the 1940s. Since 1969, it has more than doubled the working gas capacity through enhancements, greenfield development, and acquisitions, as indicated in Figure 2.[5]



31 Union stated in the hearing that although there might be some potential to develop new storage capacity at its Dawn facilities, it has no current plans to do so.

32 For 2006, Union has allocated about 86 Bcf of its storage space to support the seasonal balancing needs of its in-franchise (distribution) customers. Gas for these customers is typically received from various connecting pipelines on a more or less constant basis during a year. Receipts in excess of demand during the spring, summer and early fall periods are stored and then withdrawn during the peak consumption period in the winter. The largest portion of storage space for in-franchise customers (approximately 61 Bcf) is allocated to customers that take bundled service (transmission, distribution, storage) and is managed by Union on an aggregate basis. Larger customers that take service under Rates T1 or T3 have one-year renewable contracts for fixed amounts of storage space. In aggregate, those contracts cover approximately 16 Bcf. Union also reserves 9 Bcf as "contingency" space related to its needs as system operator.[6]

33 Union earns revenue from selling long-term and short-term storage services to a variety of ex-franchise (non-distribution) customers.

* Long-term contracts - The working gas capacity of Union's pools far exceeds the amount required to support the seasonal balancing needs of Union's distribution customers. Union markets the excess space in multi-year contracts to "ex-franchise" customers, typically Canadian and U.S. gas distributors and marketers. Union's largest ex-franchise storage customer currently is Société en Commandite Gaz Métro (GMi), the largest gas distributor in Québec, which has four contracts covering over 22 Bcf of Union storage space.
* Short-term services - During the course of a year, the storage space required to meet the seasonal balancing requirements of distribution customers is frequently available to be used for short-term storage services for ex-franchise customers. These customers include the Canadian and U.S. marketers and retailers, the trading units of financial institutions, U.S. power generators, and some industrial gas users.

2.1.2 Enbridge

34 Enbridge is a wholly-owned subsidiary of Enbridge Inc., a Calgary-based energy company. Enbridge is the largest gas distributor in Ontario ranked by customers and revenue.

35 Enbridge's Tecumseh storage facilities, which have been in operation since the 1960s, have a working gas capacity of 98 Bcf and peak deliverability of 1.8 Bcf per day.[7] The Tecumseh storage pools are connected to Union's gas transmission pipeline at Dawn. To reach Enbridge's distribution franchise areas in central and eastern Ontario, gas stored at Tecumseh flows over the Union pipeline and then through the TCPL transmission system.

36 Enbridge is at the early stages of assessing the potential for expanding the deliverability of some of its Tecumseh pools.

37 Tecumseh storage is not sufficient to cover the seasonal load balancing requirements of Enbridge's in-franchise customers. To meet those requirements, Enbridge has supplemented its Tecumseh space with three multi-year contracts with Union for a total of 19.9 Bcf of storage at Dawn.

38 Unlike Union, Enbridge does not have the ability to sell long-term storage services from its storage pools because the storage requirements of its in-franchise customers exceed the capacity of Tecumseh. But, similar to Union, Enbridge can utilize its storage assets to offer various short-term storage services to ex-franchise customers. The principal customers for these services are Canadian and U.S. marketers, retailers, and financial institutions.

2.1.3 New Ontario Storage Proposed or Under Development

Tribute Resources Inc. and Tipperary Gas Corp. (Tribute)

39 Tribute, an independent storage company, received Board approval in 2005 to develop and operate a 3.2 Bcf gas storage pool located near Bayfield, Huron County (the Tipperary Storage Pool).[8] When operational, it will be connected to Union's transmission system.

40 The Tipperary Storage Pool has not yet been developed. The company is seeking additional approvals from the Board, including approval to drill a new horizontal and two lateral storage wells. Tribute plans to commence operation of this storage pool in June 2007. Tribute has received Board approval to charge market rates to its customers in accordance with Union's C1 range rate.

Market Hub Partners Canada L.P.

41 MHP Canada is a partnership that is wholly-owned by subsidiaries of Duke Energy and, as a result, is an affiliate of Union. MHP Canada plans to offer Dawn-based services to wholesale customers. It is currently developing its St. Clair Pool (1.1 Bcf) and, through a partnership, it intends to develop a further 5.3 Bcf at the Sarnia Airport Pool. Both projects are located in Lambton County and will be connected to Union's transmission system. MHP Canada has indicated it will seek development opportunities to increase its working gas capacity to 10 Bcf by 2010.

42 In a September 7, 2006 oral decision as part of this proceeding, the Board authorized MHP Canada to charge market-based rates for its storage services (in accordance with Union's C1 range rate) and allowed MHP Canada to enter into storage contracts without requiring Board approval of individual contracts.[9] MHP Canada expects its St. Clair Storage pool to be operational in June 2007.

Enbridge Inc.

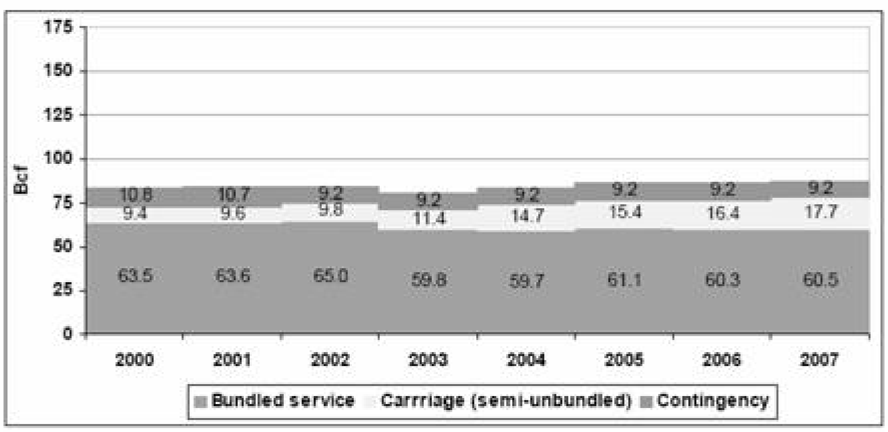
43 Enbridge Energy Distribution Inc. ("Enbridge Energy"), an unregulated subsidiary of Enbridge Inc, has carried out exploration and evaluation activities over the past several years to assess new storage potential in Ontario. The results indicate that undeveloped pinnacle reef storage in Ontario is smaller in size, of inferior quality, and located farther away from Dawn than the currently developed pools. Enbridge Inc. has concluded that the costs and risks associated with new storage development in Ontario are significantly higher than in the past.

2.2 PRICING AND ALLOCATION OF ONTARIO STORAGE

44 The prices currently charged by Union and Enbridge for storage services depend on whether the buyer of the services is considered to be an "in-franchise" or an "ex-franchise" customer. As a generalization, in-franchise customers pay cost-based rates for the storage services they use and ex-franchise customers pay market-based prices. Prices for both groups of customers are regulated by the Board. However, the prices for ex-franchise customers are subject to Board approved maximum rates (so-called range rates) that are high enough that they have not yet constrained the pricing of services to ex-franchise customers.

45 Figure 3 shows Union's analysis of the actual and estimated space requirements for in-franchise customers.[10]

Figure 3: Actual and Forecast Space Requirements Union In-franchise Customers (Bcf)



46 None of the participants in the hearing advocated that the Board refrain from regulating prices of storage services for in-franchise gas customers that require the traditional seasonal load balancing service. However, Union and Enbridge did propose changes to the allocation or pricing of storage services for in-franchise customers.

2.2.1 Definition of "In-Franchise Customer"

47 Although the term "in-franchise customer" was used repeatedly at the hearing and in most parties' evidence, there was no formal agreement on what the term means. In its evidence, Union provided the following definitions:

In-franchise -- Customers inside Union's franchise area. The in-franchise market consists predominantly of residential customers and has historically been considered to be the retail market.

Ex-franchise -- The ex-franchise market consists of storage services sold to those customers located outside Union's franchise area, including Ontario LDCs, marketers/ brokers and end use consumers located outside of Ontario, primarily in eastern Canada and the Northeast United States. This market is considered to be the wholesale market, since the majority of these customers are not end use customers but intermediaries.[11]

48 Union's definition of in-franchise customer is a largely, but not completely, accurate description of the customers that currently receive cost-based storage from both Union and Enbridge. For example, there are the following exceptions:

* Three embedded gas distributors - the City of Kitchener's gas distribution utility (Kitchener), Natural Resource Gas Ltd. (NRG) and Six Nations Natural Gas Company Limited (Six Nations) - pay cost-based rates to Union for storage services. These distributors are physically connected to Union's distribution system but serve gas consumers outside Union's franchise area.
* Gazifère Inc., the gas distributor in the Outaouais region of Québec and a subsidiary of Enbridge Inc., is charged cost-based rates for storage services provided by Enbridge. Gazifère's system is connected to Enbridge's distribution system in Eastern Ontario but serves gas consumers outside Enbridge's franchise area.
* Greenfield Energy Centre Limited Partnership (GEC), owner of a gas-fired generation plant under construction in Union's franchise area in the Sarnia region, has received permission from the Board to construct a gas pipeline that will not connect to Union's system. If GEC were to purchase storage services from Union in the future, it would presumably be considered an ex-franchise customer, and would not be eligible for cost-based in-franchise rates.

49 Given these exceptions, it is probably more accurate to state that cost-based storage services are currently provided to the "distribution customers" of Union and Enbridge. When the term "in-franchise customers" is used in this decision, it is intended to refer to distribution customers of the utilities.

2.2.2 Allocation of Storage to In-Franchise "Bundled" Customers

50 Most of Union's and Enbridge's distribution customers receive a bundled service (distribution, transmission, and storage). The utilities are responsible for determining how much storage is required in total for this customer group and for managing the aggregate allocation.

51 Even though individual bundled customers do not purchase or manage storage, the allocation of storage space is important to them for two reasons.

* It determines how much they are charged for storage. Union and Enbridge apply their cost-based storage rates to the storage allocations to determine the monthly charge to bundled customers. (Union's bills show storage charges as a separate line item. Enbridge includes its storage charges for bundled customers in distribution charges.).
* The allocation determines the amount of cost-based storage that commercial and industrial customers will be entitled to if they choose to take unbundled or semi-unbundled services

> from their utility. It also fixes the amount of storage that a natural gas retailer will receive at cost-based rates should the retailer choose to manage storage requirements for its customers rather than rely on the utility service.

52 Union currently uses the "aggregate excess" methodology to allocate storage to bundled customers in its Southern operations area. The aggregate excess is the difference between (a) the amount of gas a customer is expected to use in the 151-day winter period and (b) the amount that would be consumed in that period based on the customer's average daily consumption over the entire year.

53 Union totals the amounts calculated under the aggregate excess method and then reduces that total by 2.4%. This reduction is meant to reflect that less storage is needed to manage the balancing requirements of a large portfolio of customers with diverse consumption patterns.

54 The total amount of storage space allocated to Union's bundled customers has not been capped. As new bundled customers are added, the aggregate excess amount has grown.

55 Enbridge also uses a similar method to allocate storage to its bundled customers.

2.2.3 Allocation of Storage to In-Franchise "Unbundled" and "Semi-Unbundled" Customers

56 Union's and Enbridge's in-franchise customers can choose an unbundled delivery service under which they separately contract for storage service. Only one Enbridge customer has opted for that service to date, although the Board is reviewing redesigned unbundled Enbridge rates as part of this proceeding so there may be further migration. None of Union's customers have chosen unbundled service.

57 Union refers to its T1 and T3 services as "semi-unbundled" services. The commercial and industrial customers taking T1 service and Kitchener which takes service under the T3 rate have entered into renewable one-year contracts for storage space at cost-based rates. Three T1 customers are gas-fired generators that have multi-year storage contracts. If these T1 and T3 customers require storage space greater than their contracted amounts, they are required to purchase the extra space at market-based rates.

58 The allocation of space to most of these customers was determined in 2001 as part of RP-1999-0017, which dealt with Union's unbundling proposals.[12] Union proposed that the aggregate excess method be used to allocate cost-based storage to customers taking unbundled service, and that the same approach be used for the storage allocation to T-service customers. As part of a settlement agreement, Union agreed to grandfather the storage allocations to T-service customers.[13] This grandfathering has resulted in over 40 T1 customers having different (generally higher) storage space under contract than would be the case if the aggregate excess method were used. The three gas-fired generators taking T1 service also have storage space under contract that is well above the amount determined under the aggregate excess method.

2.2.4 Storage Prices for In-Franchise and Ex-Franchise Customers

59 As noted earlier, Enbridge has contracted with Union for additional space to supplement its Tecumseh storage. Thus, the current storage <u>costs</u> underpinning Enbridge's bundled customers are a blend of cost-based rates for Tecumseh and market-based prices under the Union contract. The Union contract has prices that are substantially higher than Union's cost of storage. Enbridge started to pay these higher prices on April 1, 2006 but has not yet received Board approval to include the full contract prices in its rates.

Cost-based rates

60 The current cost-based rates for in-franchise storage users are approximately $.30 per GJ for Union and $0.40 per GJ for Enbridge. These rates are derived from the net book value of the storage facilities (including base pressure gas at historical cost), variable operating and maintenance expenses, financing costs and a return on equity at the Board's approved rate. In Union's case, the rates reflect an allocation of the cost of its storage facilities between in-franchise and ex-franchise users.

Market-based rates

61 Union began selling short-term storage services (less than 2 years) at market-based rates to ex-franchise customers in 1989. In 1997, the Board approved long-term storage contracts (one five-year and three ten-year contracts) that Union had entered into at market-based rates pursuant to an open season process. Based on the Board's RP- 1999-0017 Decision, Union began to transition all long-term ex-franchise customers to market-based rates.

62 Enbridge's Transactional Services function was established in 1997 to enable Enbridge to sell storage and transportation capacity that it considers surplus to what is needed to serve its in-franchise customers. All of Enbridge's Transactional Services are considered to be short-term (less than 2 years).

63 Sales of short-term and long-term storage services to ex-franchise customers are subject to maximum rates approved by the Board (so-called range rates). The actual prices realized by Union and Enbridge for sales of storage services to ex-franchise customers are determined by negotiation. Union's C1 rate schedule, which sets a maximum price of $3.00 per GJ, sets out the following factors that can affect the price of an individual transaction:

* The amount of storage service sought by the customer,
* Type of service (firm or interruptible; peak or off-peak),
* Utilization of facilities,
* Competition, and
* Term.

64 Market prices for storage used for seasonal load balancing tend to reflect seasonal differences in natural gas prices. Storage prices change constantly as the seasonal spread in gas prices changes. Over the past few years, the difference between the forward gas prices for the five-month winter withdrawal season (November through March), and the prices in injection periods has increased significantly. That has put upward pressure on market prices for storage.

65 Market prices for storage in recent years have been many times higher than the cost-based rates charged by Union and Enbridge. For example, the prices realized by Union in the January and February 2006 open seasons for winter 2006/2007 storage are presented below in Table 1.

Table 1: Union Storage Prices Open Seasons for Winter 2006/2007

	Volume	High Price	Low Price	Weighted Average
US$/MMBtu	7,800,000	US$2.90	US$1.55	US$2.09
CDN$/GJ	8,229,437	$3.43	$1.84	$2.48

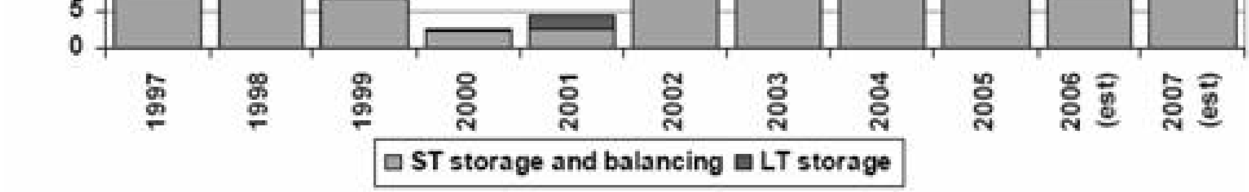
2.3 RATE TREATMENT OF MARGINS ON STORAGE SERVICES

66 The market-based prices that are realized on sales of storage services to ex-franchise customers generally have been higher (sometimes, much higher) than the cost-based rates charged to in-franchise customers. In setting distribution rates for Union and Enbridge, the Board has directed that most of this premium over cost be credited against distribution rates.

67 This section reviews the amount of the margins realized by Union and Enbridge and the manner in which the margins are currently shared by distribution customers and the utilities.

2.3.1 Gross Margins

68 Figure 4 shows the actual margins on Union's ex-franchise storage sales for 1997-2005, estimates for 2006 and 2007.[14] The estimate for 2007 is included in the settlement agreement approved by the Board in its decision on Union's 2007 distribution rates.[15] The amounts are net of an allocation of some of Union's costs of its storage assets. Figure 5 shows the actual margins on Enbridge's Transactional Storage Services for 1997-2005 and the estimate for 2006.[16] The amounts for Enbridge do not reflect any costs of its Tecumseh storage operations because all such costs are currently included in Enbridge's distribution rates.



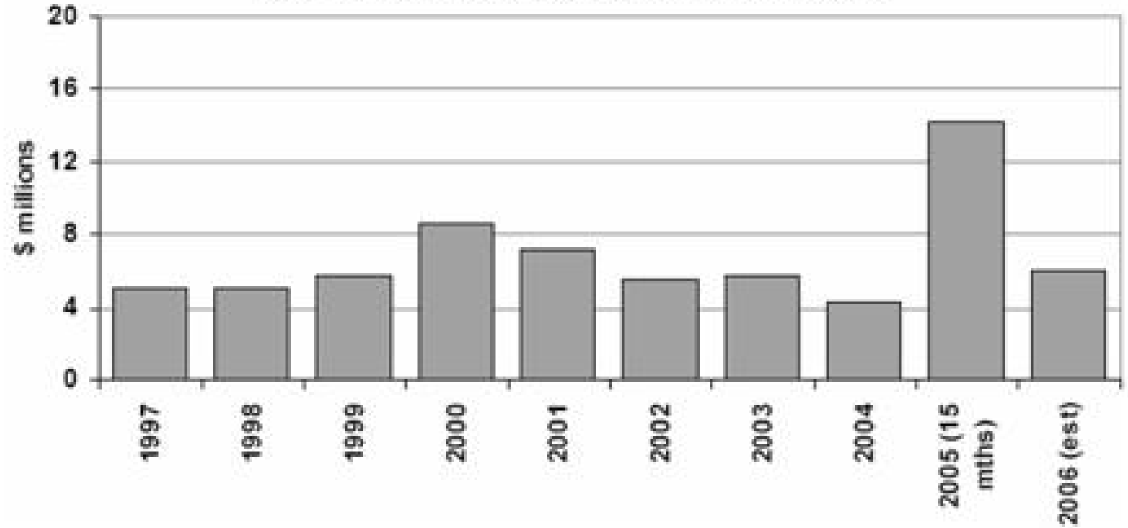


Figure 5: Enbridge Gas Short Term Storage Margins

69 The growth in Union's margins on long-term storage business (long-term means co
of two years or longer) in recent years appears to have been caused primarily by two fac
in 2001, long-term contracts with ex-franchise customers that previously were at cos
been renegotiated at higher market-based rates as they come up for renewal. Second, th
storage for seasonal balancing -- which is largely a function of the difference between
for the injection and withdrawal seasons -- has been increasing.

2.3.2 Sharing Mechanisms

70 The bulk of storage margins for Union and Enbridge have not accrued to those ut
Board has required that most of the margins be credited against distribution rates. The
those margins are shared between in-franchise ratepayers and the utilities has varied to
past. The current approaches to sharing the margins are described below.

Union

71 Union forecasts the amount of short- and long-term storage margins for the rate y
part of the rates case. Of the Board approved forecast amount, 90% is included a
distribution rates for the year. To the extent that actual margins vary from the foreca
Union books the difference in deferral accounts (account 179-70 for short-term transa

179-72 for long-term transactions). When cleared, these deferral account balances are shared 75:25 in favour of distribution ratepayers.

Enbridge

72 In its decision on Enbridge's 2006 distribution rates, the Board determined that a forecast margin of $10.7 million for 2006 Transactional Services (storage and transmission) was appropriate.[17] The first $8 million of that amount, less $800,000 to cover Enbridge's incremental costs of providing Transactional Services, is for the account of ratepayers and is included as a reduction in 2006 distribution rates. To the extent that Enbridge is able to realize more than $10.7 million in margin in 2006, the excess will be booked to a deferral account and ultimately shared 75:25 in favour of distribution ratepayers.

3. THE ASSESSMENT OF STORAGE COMPETITION

73 This chapter outlines the statutory test under section 29 of the *OEB Act*, establishes the analytical framework to be used in assessing competition in the storage market, and applies the framework.

3.1 THE LEGAL TEST

74 This proceeding is brought pursuant to Section 29 (1) of the *OEB Act* which reads:

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

75 Section 29 was introduced in 1998 as part of the *Energy Competition Act*[18] and followed a similar provision that was introduced in the Federal telecommunications statute five years earlier.[19]

76 The concept of forbearance and light-handed regulation first surfaced in the late 1970s and early 1980s. In 1979, the Economic Council of Canada issued its interim report entitled *Responsible Regulation*[20] and a final report two years later, entitled *Reforming Regulation*[21] with specific recommendations. The McDonald Commission in 1985 concluded that it would be appropriate to adopt "selective deregulation" in Canada.[22]

77 Regulators in Canada and the United States offered two related grounds for forbearance. The first was that markets were being redefined by new technology and, therefore, competition rather than regulation could produce better outcomes in terms of the quantity and prices of goods and services, all of which would maximize social welfare. Much of the early work was done in the telecommunications industry. Not surprisingly, the absence of market power was held by both the U.S. Federal Communications Commission and the Canadian Radio-television and Telecommunications Commission (CRTC) to be sufficient grounds for the exercise of regulatory forbearance.[23]

78 The *Telecommunications Act*[24], which came into effect October 25, 1993, created the first statutory provision relating to forbearance in this country. Section 34 reads:

> Where the Commission finds as a question of fact that a telecommunications service or class of services provided by a Canadian carrier is or will be subject to competition sufficient to protect the interests of users, the Commission shall make a determination to refrain, to the extent that it considers appropriate, conditionally or unconditionally, from the exercise of any power or the

performance of any duty under sections 24, 25, 27, 29, and 31 in relation to the service or class of services.

79 The CRTC between 1994 to 2007, pursuant to that section 34 decided to forbear from regulating telecommunications terminal equipment, cellular telephone and paging service, satellite services, data and private line services, internet services and ultimately long distance services.[25]

80 It is important to remember that the public policy rationale for forbearance is not limited to the belief that competition provided adequate safeguards in workably competitive markets. The second ground for forbearance is based on concerns related to regulatory costs. Those costs are not limited to the financial burden on utilities and ultimately consumers. As the Federal Communications Commission noted, the costs include reducing the firm's ability to react rapidly to the changing market conditions, dampening incentives to innovate and wasting resources through the regulation of firms that have no market power.[26]

81 There are degrees of competition in any market. They range from a monopoly, where there is a sole seller, to perfect competition, where there are many sellers and no one seller can influence price and quantity in the market. It is not necessary to find that there is perfect competition in a market to meet the statutory test of "competition sufficient to protect the public interest"; what economists refer to as a "workably competitive" market may well be sufficient.

82 It is also important to remember that competition is a dynamic concept. Accordingly, in section 29 the test is whether a class of products "is or will be" subject to sufficient competition. In this respect parties often rely on qualitative evidence to estimate the direction in which the market is moving.

3.2 ONUS

83 One of the issues raised was who has the onus in the NGEIR Proceeding. Generally, the onus is on the applicant. Most intervenors argued that the onus was on Union and Enbridge. The utilities and their affiliates disagreed. MHP, for example, countered that the onus was on any party seeking to change the status quo. In its view, Union has been selling storage at market-based rates for many years and that represents the status quo.

84 Some have argued that the ex-franchise prices are not competitive and that the framework should be revisited. Union itself is proposing to freeze the allocation of cost-based storage to in-franchise customers, and to acquire incremental volumes at market- based prices. As pointed out by the Consumers Council of Canada (Consumers Council), that is certainly not the status quo.

85 In any event, there is no applicant in this proceeding, and the matter has been brought about on the Board's own motion. The Board therefore finds that it is not appropriate to assign onus to any particular party.

3.3 THE ANALYTICAL FRAMEWORK AND THE ASSESSMENT OF MARKET POWER

86 The Board must determine the appropriate analytical framework for assessing whether the market is competitive. In this section and in the balance of this chapter, we address the issues associated with the appropriate analytical framework and its application. Through this analysis, the Board can determine whether Union or Enbridge have market power and whether there is a workably competitive market for storage. The evidence and submissions identified three frameworks in which to consider the market power question: the Canadian Competition Bureau's Merger Enforcement Guidelines (MEGs), the CRTC approach to forbearance, and the U.S. Federal Energy Regulatory Commission (FERC) approach to addressing requests for market-based rate authority. The approaches followed by these three authorities are summarized below.

FERC

87 The FERC has applied a straightforward structural approach, derived from the U.S. Merger Enforcement Guidelines, to considering the market power implications of applications for new storage at market-based rates. Prior to FERC Order 678 (which has modified the FERC approach and which is described below), the product market was taken to be physical storage. The geographic market is based on an assessment of the extent of competition provided by neighbouring storage facilities. Once these markets have been identified, a Herfindahl-Hirschmann Index (HHI)[27] calculation is performed to assess the potential for market power. The potential for entry is also assessed. An HHI threshold of 1800 is generally used as a screen: if the concentration in the market is below this value, the market is deemed to be competitive and a new storage supplier will be allowed to charge market-based rates. In several cases, even prior to Order 678, the FERC has allowed storage applications where the HHI was significantly above 1800, particularly if the new entrant had a small market share, because even if some incumbent firms possess market power, licensing a new entrant at market-based rates is unlikely to add to that market power and may well diminish it.

88 In 2005, the FERC initiated a Notice of Proposed Rulemaking culminating in Order 678, which relaxed this framework somewhat. Order 678 makes two significant changes to the framework for approving new storage applications. First, the product market has been broadened to potentially include pipeline capacity, local production and LNG peaking gas facilities. Second, even where the applicant cannot show that it does not have market power, it may be permitted to charge market-based rates, if such an outcome is determined to be in the public interest.

CRTC

89 The CRTC, relying on section 34 of the *Telecommunications Act*, is willing to forbear from regulation when "a service or class of services provided by a Canadian carrier is or will be subject to competition sufficient to protect the interests of users". The CRTC test thus resembles closely the language in section 29 of the *OEB Act.* Through application of these criteria, the CRTC has forborne from regulating the supply of long distance services, telephone equipment, customer inside wiring, business and residential local telephone services, high-speed Internet services, wireless telephone services and data services.

90 Because of the original status of these industries as natural monopolies, the CRTC approach emphasizes the need to ensure that a dominant incumbent firm is not able to exercise substantial market power. Indeed, much of the CRTC's concern over forbearance has been a concern over prices that might be too low, rather than too high -- in other words a concern about predatory behaviour exercised by the incumbent firms. In its 2006 decision[28] which establishes a framework for forbearance over competition in local telephone service, the CRTC required that the dominant firm's market share must have fallen below 75% before forbearance would proceed.

91 The CRTC follows a set of steps that mirror the methodology found in the Competition Bureau's Merger Enforcement Guidelines.

Competition Bureau's Merger Enforcement Guidelines

92 In their approaches to identifying market power both the FERC and CRTC follow a methodology derived from their respective national Merger Enforcement Guidelines or MEGs.[29] Although the methodology is intended for use in identifying the market power implications of mergers, it can be helpful when assessing whether the forbearance of regulation is likely to lead existing firms to exercise market power.

93 The MEGs approach is to identify the relevant market in terms both of products that are significant substitutes and the geographic area from which supplies of these products engage in competitive rivalry. Once this has been done, the degree of concentration in this market can be quantified by calculation of market shares to assess the degree of market power that is likely to be possessed by suppliers. In addition, an assessment is made of the conditions of entry because market power is unlikely to be possible in even a highly concentrated industry if price increases would encourage the swift entry of new and competitive suppliers.

94 Whereas the FERC focuses on the HHI, the Competition Bureau looks at market share to assess the potential for unilateral exercise of market power and generally will not challenge a merger if this indicator is below 35%. For assessing coordinated exercise of market power, the Bureau looks at the four-firm concentration ratio (the post-merger combined market share of the four largest firms) and generally will not challenge a merger when this indicator is below 65%.

Board Findings

95 The question before us in this proceeding is unlike that addressed by the Competition Bureau in a merger application or by the FERC in an individual application for market-based rates. The Board has entered into this broad-based inquiry to determine whether it will refrain from regulating storage rates in Ontario. However, the Board finds that there is much to be gained from considering the approaches of others in determining questions of market power - both the analytical tests used and the actual application in specific cases.

96 Enbridge argued that the Board can use the CRTC's approach to forbearance as a model for an appropriate analytical framework. Enbridge further argued that FERC's Order 678 amounts to a recognition by FERC that its assessment of market power should be less restrictive in order to encourage the development of storage and in order that customers get the benefits of reduced price volatility and greater assurance that peak demands will be met. Enbridge reasoned that the Board should not take guidance from FERC decisions which took a narrow approach to the assessment of market power because the FERC itself has moved away from this approach.

97 The Board notes that while the experts and intervenors differed as to how the test should be applied, there was little disagreement as to the key components of the analysis, namely those followed in the MEGs:

* Identification of the product market;
* Identification of the geographic market;
    * Calculation of market share and market concentration measures;
    * An assessment of the conditions for entry for new suppliers, together with any dynamic efficiency considerations (such as the climate for innovation and the likelihood of attracting new investment).

98 The Board finds that this approach is the appropriate means by which to determine whether Union or Enbridge have market power and whether the storage market is competitive. This approach encompasses the key components of the approaches used by the FERC and the Competition Bureau. Having determined the appropriate analytical framework, we turn now to the application of the framework to Ontario.

99 We will address each of the four components; we will also address the price impact issue raised by Mr. Stauft, an expert witness sponsored by a number of consumer intervenors. His analysis asserted that a comparison of the market price and the regulated price can be used to assess market power.

3.4 IDENTIFICATION OF THE PRODUCT MARKET

100 The product market identifies a set of products that are reasonably good substitutes for each other. In other words, where buyers will respond to a price increase by switching, in significant numbers, to a substitute product, the two products should be considered as belonging to the same product market. It should be noted that since storage has several distinct functions, including seasonal balancing and meeting short-term demand peaks, it is arguable that more than one product market may be identified for the different functions of storage.

101 Concentric Energy Advisors (CEA) provided expert evidence on behalf of MHP Canada. CEA suggested that the relevant product market would include physical storage, local production from the regions in the relevant geographic market, pipeline capacity in the relevant geographic market contracted by marketers either directly or as agents for industrial customers, and utility peakshaving facilities. CEA's rationale for including marketer-contracted pipeline capacity is that this capacity could be reasonably expected to be active in the secondary market for transportation services, and thus provide readily available deliverability in direct competition to storage services. Local production and peakshaving would also provide deliverability in competition with storage.

102 Union offered expert evidence prepared by Energy and Environmental Analysis Inc and Professor Schwindt of Simon Fraser University (EEA/Schwindt report). The EEA/Schwindt report identified several products that can substitute for at least some storage uses. However, in the report, the boundaries of the geographic market were derived based on physical storage only, an approach the authors considered to be very conservative.

103 Mr. Stauft, the expert witness for a group of consumer intervenors[30], held that the relevant product market should be limited to storage only. While in Mr. Stauft's view LNG and uncontracted pipeline capacity could be substitutes for storage, in Ontario neither of these potential substitutes exist. Mr. Stauft did not agree that contracted pipeline capacity -- even if held by active participants in the secondary market for pipeline services -- could be correctly considered to be a close substitute for physical storage.

104 The Board Hearing Team[31] presented an expert witness, Ms. McConihe, and her evidence paralleled the evidence provided by Mr. Stauft, and she concluded that the relevant product market was storage only.

105 Enbridge argued that the evidence shows that there are real substitutes for storage, including commodity sales, swaps, exchanges, displacement, delivery/redelivery and financial instruments.

106 The Association of Power Producers of Ontario (APPrO) argued that the product it is most interested in -- high deliverability storage -- is not currently available in Ontario. APPrO argued that competition cannot exist for a product that is not yet introduced and pointed out that when it is introduced it will be available only from Ontario utilities as ex-Ontario suppliers will be constrained by the nomination windows specified by the North American Energy Standards Board (NAESB).

Board Findings

107 The Board finds that the evidence supports the conclusion that there are non-storage products and services which provide reasonable substitutes for storage. These substitutes include commodity sales, swaps, exchanges, displacement, and delivery/redelivery services. The difficulty comes in trying to incorporate these into the quantitative analysis. The Board was not presented with data on these products which are comparable to the data available on physical storage. It should also be noted that these services (swaps, exchanges, displacement, etc.) do not increase the total availability of the underlying storage or commodity, but enhance the functioning of the market by increasing liquidity. Pipeline capacity contracted to marketers may well provide a proxy for the quantity of these services available; however, the Board finds that the evidence is not substantial enough to include this category in the analysis.

108 For these reasons, while the product market is broader than just physical storage, for purposes of the quantitative analysis we include physical storage only. The Board notes that this approach has the benefit of providing a conservative assessment of the level of competition. The real level of competition is undoubtedly higher than that shown by a quantitative analysis based only on physical storage.

109 With respect to APPrO's position, the Board is not convinced that high deliverability storage service is a different product. High deliverability storage may be a new service, but it is a particular way of using physical storage, which still depends upon the physical parameters of working capacity and deliverability. The Board provides a more detailed consideration of the pricing of high deliverability storage service later in this decision.

3.5 IDENTIFICATION OF THE GEOGRAPHIC MARKET

110 The geographic market is the area from which suppliers compete effectively for the business of a given group of customers. In the case of gas storage, this amounts to examining whether the market is restricted to Ontario or whether it should be more broadly drawn.

111 The utilities, their affiliates and Nexen argued for a larger geographic market, one which includes storage in Michigan and parts of Illinois, Indiana, New York and Pennsylvania. The consumer intervenors argued for a geographic market limited to Ontario. The issue centred on whether transportation constraints close off access to storage outside Ontario and included discussion of the secondary market.

112 Both Ms. McConihe and Mr. Stauft concluded that the storage market was limited to Ontario because there is limited firm uncontracted pipeline capacity joining Ontario to other markets and that, therefore, storage in other areas (such as Michigan) is not a substitute and not part of the same market.

113 EEA/Schwindt presented a seasonal price analysis and a price correlation analysis in support of a geographic market that includes Ontario, Michigan, northern Illinois, northern Indiana, and the Natural Fuel Gas territory in western New York and Pennsylvania. Energy Probe supported this analysis.

114 For the price correlation analysis, EEA/Schwindt presented correlation coefficients of daily gas commodity prices at nine North American trading hubs with the daily commodity price at Dawn. Results were presented for several different time periods, and the full sample covers the period 1999 through August 2005. With two exceptions, the correlation coefficients are above 0.99.

115 For the seasonal price analysis, EEA/Schwindt examined differentials in the marginal value of storage approximated by the differential between the peak (winter) and off-peak (summer) prices. If storage providers at a particular market hub are exercising market power this differential should be greater than at other pricing hubs, but if there are no transportation constraints, then geographic arbitrage will make it impossible to exercise market power in this way. The EEA/Schwindt evidence on these seasonal differentials revealed little or no systematic variation between different pricing locations and in their view supported a conclusion of a broader geographic market.

116 The consumer intervenors acknowledged that the commodity market is highly integrated but argued that does not lead to the conclusion that the storage market is integrated. The Vulnerable Energy Consumers Coalition (VECC) and Canadian Manufacturers and Exporters (CME) argued that the price correlation analysis has never been accepted by the FERC. Union responded that the FERC rejected the use of the price correlation analysis as a means of demonstrating a lack of market power but that in this case it is being used as a means of defining the scope of the market.

117 Enbridge pointed out that it is clear that Dawn is physically connected to storage in Michigan and elsewhere through extensive pipeline interconnections. In the utilities' view, the secondary market provides adequate access to substitute storage facilities. They pointed to the evidence of GMi and BP Canada (BP) as being actual market participants who consider, and at times use, these alternative means.

118 The Board Hearing Team argued a similar position. In its view, the evidence -- in particular that of GMi and BP -- supports the conclusion that there are adequate substitutes for Ontario storage in the primary and secondary market. The Board Hearing Team pointed to the MEGs standard and its reference to buyer behaviour and cited the evidence that marketers and utilities do purchase alternative services in Michigan and New York - and that these alternatives are not necessarily more expensive.

Board Findings

119 Ms. McConihe's conclusion that the market is restricted to Ontario was based on a survey of available firm primary pipeline capacity. This survey concluded that most of the pipeline capacity was under contract. Union and others argued that this is not surprising since pipelines are generally not built or expanded unless there are firm contracts to support the development. They argued that Ms. McConihe failed to understand the secondary market. As Mr. Reed on behalf MHP Canada stated, the existence of pipeline capacity is what is important in terms of integrating markets - not the availability of unsubscribed firm capacity.

120 There is no significant amount of uncontracted firm capacity to access other storage areas. However, there is strong evidence that the market does view Michigan and other areas as viable alternatives to storage provided by Union.

121 Ms. McConihe acknowledged the existence and likely significance of the secondary market, but expressed concern that it could not be quantified. While there may not be sufficient transaction level data about total secondary market activity, we certainly have evidence which supports the conclusion that the secondary market is relatively deep and liquid and that the market extends beyond just Ontario. Enbridge referred to this anecdotal evidence as "real-world examples of competitive alternatives". That evidence includes:

* GMi's evidence regarding its assessment of alternatives and the growth of the secondary market;
* the purchases of storage in Michigan and New York by Ontario utilities and marketers;
* the depth and liquidity of the Dawn Hub (as evidenced by the fact that traded volumes far surpass physical volumes);

* BP's evidence regarding its use of storage in Ontario, Michigan and the upper Midwest to offer services in Ontario and its evidence that at least one Union storage customer had switched to BP as a supplier for part of its storage needs;
* BP's evidence regarding its provision of services including swaps, exchanges, park and loans, delivery and re-delivery;
* Enbridge's RFP results included at least response from outside Ontario
* the evidence as to the significant holdings of storage and pipeline capacity by marketers generally;
* open seasons for new capacity on pipelines and for storage.

122 The Board concludes that the geographic market extends beyond Ontario, even though there is a lack of uncontracted firm pipeline capacity. The Board is satisfied that there are reasonable alternative means for storage customers in Ontario to access a broad market area. This can be done through the secondary markets or through participating in open seasons for new firm capacity. The Board is also satisfied that there is access to suitable substitutes for Ontario storage available in the broader market because there is direct evidence that the alternatives are considered and are being used.

123 The Board finds that the price correlation analysis, while not in and of itself determinative of this issue, supports this conclusion. The very high level of these correlations, combined with the other evidence about the advanced state of inter-hub trading and the absence of occurrences of "basis blow-outs"[32] at individual hubs, supports the conclusion that the market is highly integrated. The Board also finds that the seasonal price analysis supports the conclusion that storage facilities outside Ontario are part of the same market.

124 For these reasons, the Board agrees with EEA/Schwindt and concludes that the geographic market includes Ontario, Michigan, northern Illinois, northern Indiana, and the National Fuel Gas territory in western New York and Pennsylvania.

3.6 CALCULATION OF MARKET CONCENTRATION AND MARKET SHARE

125 The identification of geographic market and product market boundaries allows the calculation of measures of market concentration, both corresponding to individual firms (market share) and measures of concentration for the market as a whole, such as the HHI index. The former gives an indication of the potential for a single firm to exercise market power, whereas the latter is an overall indicator of how competitive the market is likely to be.

Board Findings

126 Before any calculations are made, an appropriate volumetric measure must first be selected to quantify the capacity of a storage facility. Subject to the availability of data, any of the following measures can be used: working gas capacity, injection capacity, deliverability, or capacity available to third parties. The last of these measures, capacity available to third parties, captures storage that is directly available to the competitive marketplace. However, there is clear evidence of market-based transactions taking place from what is otherwise considered dedicated storage capacity. Therefore, the Board concludes that it is reasonable to use the measures of working gas capacity and maximum daily deliverability. Market share data using these measures were provided by EEA/Schwindt.

127 The Board has found that the geographic market includes Ontario, Michigan, northern Illinois, northern Indiana, and National Fuel Gas in western New York and Pennsylvania. The Board accepts the market share data provided by EEA/Schwindt which is summarized in Table 2.

Table 2: Market Shares and Market Concentration

	Working Gas Capacity	Max. Daily Deliverability
Union market share	13.1%	9.1%
Enbridge market share	7.9%	7.1%
4 Firm Concentration	61.7%	56.9%
HHI	1,270	1,220

128 The Board finds that these results support the conclusion that neither Union nor Enbridge have market power in the storage market. The Board finds that the storage market is workably competitive.

3.7 THE PRICE IMPACT ISSUE

129 Mr. Stauft testified that the regulated cost-based price for storage was a reasonable proxy for the competitive price of storage and that this approach was used by FERC. In his view, because the price for storage in the ex-franchise market is substantially higher than the cost-based rate, Union is exercising market power.

Board Findings

130 Most of the consumer intervenors, including the Industrial Gas Users Association (IGUA), the Association of Major Power Consumers of Ontario (AMPCO), Schools Energy Coalition (Schools), VECC, and the Consumers Council, supported Mr. Stauft's position. They took the position that the assessment of market power rests on a comparison of the price prevailing in the market with the current regulated price and that, as a result, Union exercises market power. Union, Enbridge and their affiliates disagreed with the price analysis. Union argued that the price of cost-based storage was not a proxy for the competitive price of storage. In its view, market values for storage reflect seasonal commodity price differentials, which are unrelated to the cost of providing storage service.

131 The Board finds that the current cost-based regulated price is not a reasonable proxy for the competitive price. There is strong evidence that new storage is substantially more expensive due to higher costs for base pressure gas, reduced economies of scale, and smaller more remote pools. Enbridge Inc.'s oral testimony lays out these cost factors quite clearly, and the Low Income Energy Network (LIEN) has rightly observed that inflation is exerting upward pressure on these costs. Union pointed out that the FERC generally sets regulated storage rates on the basis of incremental costs.

132 Given the high cost of new storage and the high value for storage in terms of the commodity market, the Board does not agree that the market price being above historical cost-based rates is evidence of market power. In a competitive market, the costs of new capacity influence prices, and in the case of storage these costs are substantially higher than the historical cost-based rates.

133 The Board notes that the differential between current cost-based rates and the market value of storage, while not evidence of market power, would be a concern on distributional grounds if the Board were considering re-pricing cost-based storage to market-based levels. However, no party proposed such re-pricing. All parties, in one way or another, acknowledged that the in-franchise distribution customers do not have effective access to alternative storage providers, because they purchase a storage service which is bundled with distribution and transmission, and that therefore, these retail customers should remain subject to cost-based regulation. This distinction between in-franchise and ex-franchise customers is discussed further in Chapter 5.

3.8 BARRIERS TO ENTRY

134 Market power analysis typically includes an assessment of the conditions for entry for new suppliers, together with any dynamic efficiency considerations (such as the climate for innovation and the likelihood of attracting new investment). This analysis is particularly important in a market that is concentrated, or where the incumbent has a high market share, because if there is ease of entry then that market share can be quickly eroded if there is an attempt to raise prices. We do not have that concern here. The Board has found that neither Union nor Enbridge have market power in the storage market.

135 We did hear evidence regarding the high costs and high risks associated with developing new storage assets. In the view of most intervenors, there will be incentives for new investment if the Board refrains from regulating rates for third-party storage developments. This issue is discussed further in Chapter 4 and Chapter 5.

4. COMPETITION AND THE PUBLIC INTEREST

136 Although the Board has determined that the storage market in Ontario is subject to workable competition, the Board must also determine whether the level of competition is or will be "sufficient to protect the public interest". This is a key element of section 29. There has been considerable debate in this proceeding regarding the meaning of "public interest" in section 29. The public interest is multi-faceted and dynamic, but it is important to clearly identify how the Board will assess whether the public interest will be protected by competition if the Board refrains from regulating storage rates.

Board Findings

137 The public interest can incorporate many aspects including customers, investors, utilities, the market, and the environment. Union and Enbridge argued for a narrow definition of the public interest. In their view, competition itself protects the public interest, and once the Board has satisfied itself that the market is competitive, the public interest is protected by definition. The Board finds this to be an inappropriate narrowing of the concept. Competition is better characterized as a continuum, not a simple "yes" or "no". The Board would not be fulfilling its responsibilities if it limited the review in the way suggested without considering the full range of impacts and the potential need for transition mechanisms and other means by which to ensure forbearance proceeds smoothly.

138 Some of the intervenors took the position that the public interest review should be focussed on the financial impacts. For example, Schools argued that the Board should look at the benefits and costs of forbearance, and in its view, the costs include a possible transfer of between $50 million and $174 million from ratepayers to shareholders (arising from the proposed end to the margin-sharing mechanisms and the potential re-pricing of cost-based storage to market prices). The Board agrees that the financial impacts are a relevant consideration, but does not agree that an assessment of the public interest should be limited to an assessment of the immediate rate impacts. The scope of appropriate considerations is broader and includes factors related to market signals, incentives and efficiency. These are discussed further below.

139 Some parties, including the Board Hearing Team and APPrO, argued that the Board's legislative objectives provide the best set of public interest considerations to apply in this case. Others took a similar approach, although expressed somewhat differently. For example:

* VECC submitted that the test is whether the market created by forbearance "will operate in a fashion that ensures that market discipline will be at least as effective as regulation in effecting fair and reasonable conditions in the customer relationship."
* Energy Probe argued that the Board should be guided by three public interest considerations: encouraging economically efficient pricing of gas storage services; protecting consumers of monopoly transmission and distribution services; and promoting the development of cost-effective storage opportunities in Ontario.

140 The Board finds that these broader approaches set out above represent a balanced and comprehensive approach to assessing the public interest. It is appropriate to consider the Board's legislative objectives in this case, because they are a clear expression of the factors the Board is to take into account. The Board's objectives which are most directly relevant in this case are as follows:

* to facilitate competition in the sale of gas to users;
* to protect the interests of consumers with respect to prices and the reliability and quality of gas service.
* to facilitate rational development and safe operation of gas storage

141 The Board notes that these may well be conflicting objectives. Put differently, there are public interest trade-offs. This is particularly relevant in light of another argument raised by the parties. Enbridge and MHP Canada argued that the forbearance contemplated in section 29, as a matter of statutory interpretation, is mandatory because of the use of the word "shall" in the statute. They argued that once the Board makes a factual finding that there is sufficient competition to protect the public interest, the *OEB Act* requires that the Board then refrain from setting prices through a cost of service regime.

142 The Board does not agree with Enbridge and MHP Canada's conclusion. Section 29 says that the Board shall make a determination to refrain "in whole or part" which the Board believes allows considerable flexibility in this regard. In addition, the Board concludes that it is required by the statute to address the public interest trade-offs, for example, between price impacts and the development of storage and the Ontario market generally.

143 We will now review each objective and discuss some of the public interest factors which the Board considers relevant to the assessment of whether the level of storage competition is sufficient to protect the public interest if the Board refrains from rate regulation and contract approval.

4.1 TO FACILITATE COMPETITION IN THE SALE OF GAS TO USERS

144 The Board has worked over time to ensure that Ontario consumers reap the benefits of commodity competition. The Board must continue to pursue this objective and can do so by facilitating the evolution of a robust market in Ontario. The development of the Dawn Hub has brought substantial benefits to consumers in Ontario and to other market participants.

145 The Board concludes that it is in the public interest to maintain and enhance the depth and liquidity of the market at the Dawn Hub as a means of facilitating competition. One way to do this is to encourage the development of innovative services and to ensure access to those services. Choice is the bedrock of competition. The evolution of the transactional services market is an example where innovative and flexible services have evolved within a market-based pricing structure.

146 Enbridge argued that forbearance will foster innovation by facilitating the provision of storage services in the competitive market. The Board agrees that regulating storage rates does place constraints on the development of flexible and innovative services; forbearance, within a framework of non-discriminatory access, can remove these constraints.

147 In the current industry structure, the gas utilities both acquire storage for their own customers and operate storage for their own needs and for other customers. The utilities also operate integrated storage and transportation systems. The Board considers later in this decision whether forbearance requires that there be greater separation between these operations or whether other procedures should be developed to ensure non-discriminatory access to storage and transportation.

4.2 TO PROTECT THE INTERESTS OF CONSUMERS WITH RESPECT TO PRICES AND THE RELIABILITY AND QUALITY OF GAS SERVICE

148 The interests of consumers were a primary focus for many intervenors. The submissions addressed issues related to the direct and indirect impacts of forbearance and competition. Interestingly, no ex-franchise customer opposed paying market-based rates; nor was there any evidence of a price impact on this market segment in the event of forbearance. This is consistent with the Board's finding that these customers have alternatives and that competition will provide adequate protection for these customers.

149 With respect to in-franchise customers, two rate impacts were discussed: the direct impact on storage rates and the indirect impact on the sharing of the storage premium. With respect to the direct impact, the utilities proposed to freeze the allocation of in-franchise storage and to acquire incremental storage at market-based prices. This would have the effect of increasing in-franchise storage rates (under current market conditions), albeit only marginally given the relatively slow growth of in-franchise storage demand. The utilities were of the view that this afforded in-franchise customers a significant level of protection. The other direct storage rate impact arises from the proposal that Enbridge be treated as an ex-franchise customer in respect of its contracts with Union. This would have the effect of raising Enbridge's storage rates.

150 However, attention of the parties was primarily focussed on the indirect impact arising from the premium which exists between the price of market-based storage and the underlying costs. Currently, that premium is shared between utility ratepayers and utility shareholders. Under the utilities' proposals for forbearance, the premium would be retained by the shareholders. This would result in significant transfer of funds in the case of Union (2007 estimate is $44.5 million); less so in the case of Enbridge (2007 estimate is $5 million to $6 million). The intervenors in general rejected these proposals and, as a result, opposed forbearance.

151 IGUA/AMPCO argued that there should be no forbearance if there will be any adverse impact on ratepayers. Similarly, they argued that the level of return under forbearance should be no greater than the regulated return; otherwise the level of competition is not sufficient, because the regulated return is a proxy for a competitive result. The Consumers Council argued that there should be no forbearance if a material increase in price is not offset by the prospect of decreasing prices.

152 Union argued that on IGUA/AMPCO's and the Consumers Council approach, the Board would never forbear, no matter how competitive the market. It argued that the financial impact is not a factor as to whether forbearance is warranted. Union argued that the Board should consider that new storage development would attract additional volumes to Ontario, increasing market liquidity and enhancing security of supply for Ontario consumers.

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

154 Apart from the premium issue, the direct expected storage rate impacts under a forbearance scenario are modest for Union's in-franchise customers, under the utility proposal of fixing the in-franchise storage allocation. The impact for Enbridge customers is more pronounced given its lower level of storage assets. The Board must consider whether the allocation to Union's in-franchise customers should be fixed and whether Enbridge (and possibly other ex-franchise customers) should be entitled to cost-based storage from Union.

155 A key consideration with respect to this issue is the question of which consumers the Board is responsible for protecting. Some parties, such as Kitchener, have argued that our duty is to end-use consumers in Ontario -- either to them directly or to them indirectly through their local distributor. These parties advocate cost-based storage pricing for Ontario end-users and market-based pricing for those outside Ontario.

156 While the Board concurs that a key objective (and therefore a key public interest consideration) is the protection of consumers in Ontario, the Board concludes that this approach of separate treatment depending upon location is problematic. This is discussed further later in Chapter 5.

157 The Board concludes that long-term consumer protection in terms of price, reliability and quality of service is best achieved through thriving competition for the competitive elements of the storage market and effective regulation of the non-competitive elements of the market. The Board is of the view that refraining from rate regulation and contract approval in the ex-franchise market has the potential to foster more competition in the storage market, to the benefit of all customers, provided there are clear rules and non-discriminatory access by all market participants. In a competitive market, customers have choices, resources are distributed efficiently, and there are incentives to innovate and respond to customer needs.

4.3 TO FACILITATE RATIONAL DEVELOPMENT AND SAFE OPERATION OF GAS STORAGE

158 Discussion in this area focussed on the impact of forbearance on the development of new storage in Ontario, through the utilities directly, through their affiliates, or through independent storage developers. The estimates of new storage potential ranged from 50 Bcf to around 120 Bcf.

159 The Board has as an explicit objective to facilitate the rational development of gas storage. The Board therefore must look for means by which to achieve this objective. A number of authorities have identified the need to develop additional storage. For example, FERC has acknowledged that additional storage development will mitigate commodity price volatility and improve winter peak availability. The utilities and their affiliates took the position that this should be a key consideration for the Board and argued that new storage development will not take place in Ontario under the current regulatory regime. In their view, forbearance from setting rates and approving contracts would encourage storage development and the development of storage services. Nexen agreed with the utilities that forbearance will allow needed new services to develop.

160 Energy Probe also agreed and argued that there has been limited recent storage development despite the appearance of significant opportunities and that this can be contrasted with the level of development elsewhere. In Energy Probe's view, Ontario storage development has been artificially constrained due to unfavourable regulatory conditions. Energy Probe argued that forbearance will drive enhancements to meet the needs of gas-fired generators and that the public interest will benefit from having storage developers manage the risks and rewards of development.

161 Others, primarily consumer groups, took the view that new storage, to the extent that it is needed, can be stimulated by allowing market-based rates for new storage developers only. The position of these groups, including the London Property Management Association (LPMA), the Wholesale Gas Service Purchasers Group (WGSPG), VECC, and Consumers Council, can be summarized as follows:

* The existing facilities are more than sufficient to meet Ontario's needs.
* The utilities could further develop existing facilities under the current regulatory framework if additional capacity is needed. There is evidence that they have done so in the past.
* Forbearing from setting storage rates and transferring the rents to the shareholders will not provide an incentive to non-utility developers, and continued regulation of the utilities will not provide a disincentive to third-party storage development. The way to stimulate new storage development by third parties is by forbearing or regulating at market rates, which is consistent with FERC Order 678.
* There is no evidence that forbearing from regulating the utilities will cause them to increase capacity. The Enbridge evidence is that even with forbearance it might not invest in storage enhancements.

162 The evidence suggests that there is no need for significant new storage within Ontario to serve the traditional requirements of Ontario consumers. However, there is a demonstrated desire for more specialized services to meet the load characteristics of power generators. The Board also agrees that further development of storage in Ontario would be of benefit to Ontario consumers in terms of reduced price volatility, enhanced security of supply and an overall enhanced competitive market at Dawn. There is also evidence that new services, once they are generally available, can enhance the service offerings of other parties, such as marketers, thereby increasing the liquidity of the market.

163 The Board concludes that it is appropriate to facilitate the development of storage to offer these services without undue risk for ratepayers. The issue is how this objective is best achieved. At a minimum, for third-party storage development, whether independent or affiliated, the Board agrees that it should refrain from setting storage rates and approving storage contracts. There was no significant opposition to this approach.

164 The more contentious issue concerns the utilities and whether forbearance on price setting is necessary to stimulate their investment in storage. The utilities claimed they would only develop storage under a forbearance scenario but would not commit to doing so. On the other hand, the evidence shows the utilities have been willing to invest in the past under regulation, and indeed, the Board has the authority to order the utilities to provide storage services. The Board concludes that while there is no guarantee that the utilities will develop storage under forbearance, it is apparent they will not develop it under a regulatory framework unless ordered to do so. The Board does not believe that the best way to stimulate development of storage assets and services is to order utilities to develop these resources. The Board's preferred approach is to use market mechanisms where possible, and under forbearance, the Board concludes, the utilities will have an incentive to develop assets and services.

165 A related question is whether it continues to be appropriate for storage to be developed as part of the regulated utility business or whether it should in the future be developed separately. The Board accepts the evidence of Enbridge Inc. that storage development is more akin to exploration and development and is riskier than other distribution activities. Some parties disagreed that enhancements to existing storage facilities were as risky as new storage development. However, the Board is convinced by the evidence that storage investments are generally riskier than other regulated activities, such as distribution or transmission expansions, given the difficulty, for example, in accurately predicting the achievable operating parameters related to storage projects. This evidence was not significantly challenged. The Board therefore agrees with Energy Probe's view, namely that the risks associated with new storage development are best borne by storage developers. This approach is consistent with a rational development of storage in the Board's view. Under forbearance, the utility shareholders would be expected to bear the risk of any storage development for the competitive market.

5. FORBEARANCE

166 The Board has determined that the storage market is workably competitive. We have also considered some of the key elements of the public interest. The issue we address in this chapter is whether the Board should refrain from setting storage prices and approving storage contracts. The Board has the discretion under section 29 to refrain from regulating "in whole or part". The Board interprets this to mean that it has substantial flexibility to establish a framework which recognizes the circumstances of various segments of the market.

167 At its simplest, the issue is who is entitled to cost-based rates and who will pay market-based rates. The Board will consider this issue in the context of the public interest factors described in Chapter 4. First, the Board will address the issue of third-party storage, and then the Board will address utility storage. The chapter concludes with a consideration of reporting requirements.

5.1 THIRD-PARTY STORAGE

168 Third-party storage is not yet available in Ontario. Currently, Union and Enbridge own and operate all of the storage facilities. The Board has heard an application by Tribute, and approvals required to develop the Tipperary Storage Pool have been issued. However, the development of the project has been delayed and some of the Board approvals granted in 2005 have expired; Tribute is in the process of seeking renewals. Until renewals are granted, the Tipperary Storage Pool cannot be developed and made operational. The current development schedule proposes that operation of the pool will begin by June 2007.

169 MHP Canada has recently filed a series of applications in relation to its proposed St. Clair storage facility and has indicated that it intends to pursue its Sarnia Airport Pool project at some time in the future. The Board also heard testimony from Enbridge Inc. regarding its work in this area.

170 In its Natural Gas Forum Report, the Board indicated that it did not intend to regulate the rates of new independent storage operators. In our earlier partial decision on MHP Canada's core points, the Board determined that MHP Canada would be authorized to charge market-based rates within the Board approved range.[33] The issue before the Board now is whether it should refrain from setting the rates of all third-party storage (both independent and affiliated) and refrain from approving storage contracts entered into by these companies.

171 MHP Canada and Enbridge Inc. argued that the Board should refrain from regulating the rates of third-party storage. MHP argued that cost-based rates do not compensate for the risk of developing storage. It also took the position that the *Affiliate Relationships Code for Gas Utilities* (ARC) is sufficient to govern the relationship between Union and MHP Canada, but it sought confirmation on two points:

* that under a market-based rate framework the Board would not require disclosure of MHP Canada's costs and revenues where the services to Union arise from a fair and open competitive bidding process, and
* that section 2.3.10 of the ARC (which relates to services provided in a market which is not competitive) would not apply because the Board has found the market to be competitive.

172 Tribute was also of the view that the ARC requirements are sufficient to protect the competitive interests of affiliate and unaffiliated market players without placing undue additional conditions on utilities and their affiliates.

173 There was no substantial opposition to the proposal that the Board should refrain from setting the rates and approving the contracts of new storage operators. Most intervenors recognized that doing so would stimulate storage investment in Ontario. For example, LPMA/WGSPG argued that without market-based pricing, little or no additional capacity or deliverability would likely be developed in Ontario and it therefore supported full market-based rates for third-party developers or utility affiliates (provided there is compliance with ARC). IGUA/AMPCO also agreed that market-based pricing for new storage developers would stimulate development of new storage although they argued that the Board should not refrain from regulating these rates.

Board Findings

174 The Board will refrain from setting the rates and approving the contracts related to third-party storage, both utility-affiliated storage and independent storage. These storage developers will be operating in the competitive storage market, and the Board agrees that they should have the ability to offset the substantial risks of these developments with the flexibility to price storage in a way which captures the market value of those storage services.

175 The ability to charge market prices in the absence of price regulation will provide a positive investment incentive and, to the extent new third-party storage is developed, this will enhance competition in storage -- as well as competition in the market generally. This is in the public interest. If the new storage is used by Ontario consumers they may well face higher prices for this storage than they would for cost-based utility storage. However, these storage providers will have no captive customers, and Ontario consumers will not bear the risks associated with these new developments. The Board also finds this to be in the public interest. In conclusion, the Board finds that these storage operators will be subject to competition sufficient to protect the public interest.

176 MHP Canada requested that the Board confirm MHP Canada's interpretation of two aspect of the ARC. The ARC provides that if an open and fair tender is held, the prices in that tender will establish the market price for the service. Under those circumstances, the ARC would not require that a contracting party disclose its cost and revenue data.

5.2 UTILITY STORAGE

177 The Board must address a number of issues with respect to storage services offered by Union and Enbridge:

* Which storage services should the Board continue to regulate at cost-based rates?
* Should the Board set cost-based rates for the storage services Union provides to other Ontario LDCs?
* Should the rates for new storage services, such as high deliverability storage, be regulated at cost-based rates?
* Having determined which services will continue to be regulated at cost-based rates, should the Board refrain from regulating the prices of other services?
* Should the Board require separation of the competitive storage operations from other parts of the business, or is a cost allocation study sufficient to distinguish between regulated and unregulated storage?

178 The Board will address these issues in the following sections, 5.2.1 through 5.2.5.

5.2.1 Regulated Storage Services

179 In the current framework, the demarcation between cost-based and market-based rates is commonly expressed in terms of "in-franchise" and "ex-franchise": "in-franchise" customers pay cost-based rates and "ex-franchise" customers pay market-based rates. However, as pointed out in Chapter 2, this nomenclature is not entirely accurate. Kitchener, for example, is not in Union's franchise territory but does receive cost-based storage; similarly Gazifère is outside Enbridge's franchise territory (and outside the Province) but also receives cost-based storage. Until recently, Enbridge's contract with Union was at cost-based rates, and Enbridge's rates continue to include Union storage costs at cost-based rates even though the contracts entered into as of April 1, 2006 are at market-based rates. However, the term "in-franchise" is commonly used to refer to all customers that take bundled, unbundled or semi-unbundled distribution, storage and contract carriage transportation services, and the term "ex-franchise" is commonly used to refer to customers that take cross-franchise storage and transportation services.

180 Virtually all parties agreed that the Board should continue to regulate storage rates for "in-franchise" customers and that these customers should pay cost-based storage rates. One exception was MHP Canada, which argued that conditions exist for the Board to forbear in relation to the market as a whole. While MHP advocated full forbearance, it recognized that the elimination of the bifurcated market may require a transition. MHP Canada proposed that the Board adopt a policy direction to move to full forbearance in the storage services market.

Board Findings

181 In terms of a section 29 analysis, the goal would be to continue to regulate (and set cost-based rates) for those customers who do not have competitive storage alternatives and to refrain from regulating (allow market-based prices) for those who do have competitive alternatives. The Board concludes that it should continue to regulate and set cost-based rates for existing storage services provided to in-franchise customers up to their allocated amounts. This approach was supported by all the intervenors, except by MHP Canada, as noted above.

182 The parties recognized that bundled customers, in particular, do not acquire storage services separately from distribution services, do not control their use of storage, and do not have effective access to alternatives in either the primary or secondary markets. Competition has not extended to the retail end of the market, and therefore is not sufficient to protect the public interest. However, the Board finds that customers taking unbundled or semi-unbundled service should have equivalent access to regulated cost-based storage for their reasonable needs. The Board finds that it would not further the development of the competitive market, or facilitate the development of unbundled and semi-unbundled services, if these unbundled and semi-unbundled services were to include current storage services at unregulated rates. The Board also agrees with the parties that noted that re-pricing existing storage will not provide an incentive for investment in new storage and therefore cannot be said to provide that public interest benefit.

183 However, customers taking unbundled and semi-unbundled services do have greater control over their acquisition and use of storage than do bundled customers. It is also the Board's expectation that these customers will have access to and use services from the secondary market. Therefore, the Board concludes it is particularly important to ensure that the allocation of cost-based regulated storage to these customers is appropriate. This issue is addressed in Chapter 6.

184 MHP Canada has suggested that the Board adopt full forbearance in storage pricing as a policy direction. Similarly, Union has characterized its allocation proposal and Enbridge has characterized its "exemption" approach for in-franchise customers as being "transitions" to full competition. The Board has found that the current level of competition is not sufficient to refrain from regulating all storage prices; nor do we see evidence that it would be appropriate to refrain from regulating all storage prices in the future. The current structure (for example, the full integration of Union's storage and transportation businesses and the full integration of Union as a provider of storage services and as a user of storage services) is not conducive to full forbearance from storage rate setting. In addition, there would be significant direct and indirect rate impacts associated with full forbearance from rate setting, and there is little evidence of significant attendant public interest benefits. The current situation is that these customers are not subject to competition sufficient to protect the public interest; nor is there a reasonable prospect that they will be at some future time.

185 Although there was general support for the continued regulation of storage rates for the bundled, unbundled and semi-unbundled customers, three aspects of its application were disputed:

* The amount of storage which should be allocated to these customers, both in aggregate and individually;
* Whether Ontario utilities should receive access to cost-based storage from Union;
* Whether the rates for new storage services from utilities should be regulated.

186 The first issue, the allocation of storage to customers both individually and in total, is addressed in Chapter 6. We address the other two issues next.

5.2.2 Union's Storage Services for Other Utilities

187 Union currently provides storage service to a number of other utilities. It provides storage at cost-based rates to Kitchener, NRG and Six Nations. These customers, while not in Union's franchise territory, take "in-franchise" services. As such, the Board's finding regarding the continuation of regulated cost-based rates applies to these utilities as well.

188 Union also provides storage services to Kingston, Enbridge and GMi. These are cross-franchise storage and transportation services, and while they were originally provided at cost-based rates, Union received authority to charge market-based rates (within the C1 range) to these customers in the Board's RP-1999-0017 Decision. Due to differences in the terms of the contracts, Kingston and GMi have been paying market-based rates for some time, but Enbridge has only recently entered into a series of market-based contracts with Union.

189 Enbridge is one of Union's largest storage customers. Enbridge and Union entered into a long-term market-based contract for the period April 1, 2004 through March 31, 2014. Enbridge proposed to have its 2005 rates reflect the new storage costs. In the RP- 2003-0203 decision, the Board did not approve the flow through of market-based storage costs into Enbridge's rates on the basis that the claimed long-term benefits were speculative and that a reversion to cost-based rates until March 31, 2006 (which under the contract would be triggered by the Board's rejection of Enbridge's original proposal) would result in substantial cost savings. The Board did not question the Board's RP-1999-0017 decision to allow existing contracts to be renewed at market-based rates.

190 Upon the expiry of that cost-based arrangement on March 31, 2006, Union and Enbridge entered into three contracts with market-based prices with the following expiry dates and volumes:

2008	9.4 Bcf
2009	5.6 Bcf
2010	4.9 Bcf

191 Although these contracts began April 1, 2006, the costs associated with these services are not reflected in Enbridge's current distribution rates. At the time of Enbridge's 2006 rates case, it had not negotiated any agreement with Union, and therefore its rates proposal was based on the assumption that storage costs for Union services would continue at the same level.

192 Enbridge currently provides cost-based storage services to Gazifère, its affiliated Quebec distributor, under a bundled distribution service. Enbridge proposed to charge Gazifère market-based rates on the basis that it is an ex-franchise customer.

193 A number of parties argued that Union should provide regulated cost-based storage to all Ontario utilities. (No party argued that GMi should receive storage services at cost-based rates.) The Board Hearing Team grounded its argument on the basis of price discrimination; other parties relied on the notion that storage is a Provincial asset (as articulated in the 1962 Langford Report[34]) as the basis for their argument.

194 The Board Hearing Team noted that the decision allowing Union to renew its cost-based storage contracts at market-based rates has resulted in the situation where customers in Union's franchise area pay cost-based rates, while customers in the Kingston area pay market-based rates. The Board Hearing Team noted that the Board in its Natural Gas Forum Report raised the issue of whether this pricing structure was inappropriately discriminatory.

195 In order to remedy this, the Board Hearing Team recommended that customers be split into two groups: "core" and "non-core". Under this proposal, the core customer category would include all Ontario end-use customers that take bundled and unbundled regulated services from the gas utilities. Core customers would receive regulated cost-based storage services from the total inventory of Union and Enbridge's storage assets. Retailers would also have access to cost-based storage. Non-core customers would include customers who have opted out of regulated rate protection and assume the total risk of their portfolio management, including storage. Non-core customers would also include marketers (excluding retailers serving the core market) and out-of-province utilities. These customers would pay market prices for storage.

196 The Board Hearing Team argued that this separation would ensure a consistent treatment of customers across all gas utility franchises in Ontario. Under this approach the current contracts between Union and Enbridge, and between Union and Kingston, would be revised to reflect cost-based rates. The Consumers Council suggested a similar approach. It argued that the definition ex-franchise should be refined and that it is more reasonable to distinguish between services which are provided using the integrated storage systems that have been developed by the utilities for the purpose of providing a "core" or "utility related" delivery service, and discretionary services that are available because the utility storage infrastructure is not needed from time to time to perform the utility function.

197 Other parties took the view that storage is a Provincial asset and noted that the Langford Report recommended that distribution companies should have first call on Ontario gas storage. Those parties argued that Union's storage should be provided at cost-based rates to consumers throughout Ontario, and specifically at cost-based rates to Enbridge and Kingston.

Board Findings

198 The Board finds that the core/non-core approach may be appropriate in some situations. It could serve, for example, as a means of determining which segment of the in-franchise customers should continue to have its storage rates regulated. However, the Board concludes, for reasons outlined below, that it is not necessary for Union to continue to provide cost-based storage to Enbridge, or to revert to cost-based storage for Kingston, in order to ensure that there is no undue price discrimination in the Province.

199 The Board agrees that effective competitive storage options do not exist for the in-franchise customers of Union and Enbridge. The Board has already determined that these customers will continue to receive regulated cost-based storage rates. However, Enbridge and Kingston, which are buying storage services on behalf of their customers because they do not have sufficient storage resources of their own, do have access to alternatives. This is as true for Enbridge as it is for GMi. Therefore, the question is whether Enbridge (for its storage needs beyond the capacity of Tecumseh) and Kingston (for all of its storage needs) should be entitled to cost-based storage rates from Union.

200 The Board Hearing Team cited the principle that customer rates for storage should not vary on the basis of where they are located in Ontario but should be based on the customer load profile and the costs to provide service. The Board notes that distribution rates for similar customers do vary across the Province, and even within Union's territory, to reflect the different underlying costs of serving customers.

Union has developed sufficient storage to serve the needs of its distribution customers, while Enbridge has not. As Enbridge's storage requirements have increased, it has had to decide whether to contract for its requirements or develop additional assets itself. It is not surprising that Enbridge has continued to acquire services from Union, when it had access to cost-based rates, given that the costs of developing new storage have undoubtedly grown. This does not mean that if Union charges market-based rates the result is price discrimination. The Board Hearing Team appeared to recognize this when it stated that price differentiation should also be driven by the specific costs of a utility.

201 Other parties advocating regulated cost-based storage for all Ontario utility customers drew upon the Langford Report for support for their position, arguing that Ontario has historically recognized gas storage as a Provincial asset for the benefit of all Ontarians. The Board disagrees with this application of Langford's conclusions for two primary reasons. First, the Langford Report was prepared within a very different market context. The North American natural gas market was in its infancy. In the intervening period there has been extensive infrastructure development from wellhead to burner tip, market integration across North America, and the deregulation of the commodity. Utilities are no longer the only suppliers of gas to customers. We must determine the appropriate regulatory tools for Ontario storage within the current market context -- one which is very different from the time of the Langford Report.

202 The Langford Report is relevant, however, in that it articulates the historic perspective on storage and its appropriate development, without being prescriptive on financial matters. The Langford Report, for example, does not express any explicit view in respect of pricing, and this relates to the Board's second reason for disagreeing with those relying on the Langford Report as a reason for requiring Union to provide storage at cost-based rates to all Ontario customers. Advocates of cost-based pricing assume an automatic link between the concept of a Provincial asset and cost-based prices, but the Board finds that this approach is flawed. The public interest in Ontario is best served if Ontario storage assets are used efficiently. The Langford Report in fact recognizes this, when it states at page 56: "The role of the Provincial Government with respect to storage should be that of controlling and regulating it *only so far as is necessary to ensure efficient and economical development of the industry*" (emphasis added). It is in the Ontario public interest for storage and storage services to be further developed, and it is in the public interest for those customers who have access to alternatives to pay prices set in the competitive market.

203 There are also two other drawbacks to continuing to regulate cost-based rates for Union's service to Kingston and Enbridge. First, an "Ontario-utilities first" policy would send a negative market signal about what is otherwise a deep liquid trading point within the integrated North American market. Second, this approach could tip the playing field in favour of utilities over marketers, who may well serve Ontario customers but which under the various proposals would pay market-based rates. Neither of these market signals is consistent with the Board's objective of ensuring the continued strength and development of the Dawn Hub.

204 The issue is whether Enbridge and Kingston, as purchasers of storage for bundled customers, should receive regulated cost-based storage services from Union. The Board concludes that they should not, because the storage services they acquire are subject to competition sufficient to protect the public interest, but that in the case of Enbridge, a transition framework is required. The Board must also consider the application of its conclusions to the case of Gazifère. We will now address each of these utilities in turn.

Kingston

205 Kingston, which is connected to the TCPL system, not the Union system, has been operating at market-based rates for its cross-franchise service for some time and took no active part in the NGEIR

Proceeding. The Board therefore concludes that Kingston is not opposed to paying market-based rates. The Board notes that because it does not set rates for Kingston's customers, the Board has no authority or control over how Kingston charges its own customers for storage. The Board is satisfied that Kingston has effective access to competitive alternatives and therefore does not require the protection of regulation for its acquisition of storage from Union. Because Kingston already receives market-based storage services, no transition framework is necessary.

Enbridge

206 The Board finds that a transition framework is warranted in the case of Enbridge. Enbridge does have access to storage alternatives and does operate within the competitive storage market. However, the quantity of storage it acquires from Union is a substantial portion of its total requirement, and, given the uncertainty around storage price regulation at the time Enbridge entered into its current contracts, it may have had limited effective access to alternatives at that time.

207 Given the current substantial difference between cost-based and market-based storage prices, if the prices of the new contracts were included in Enbridge's rates, there would be an increase in Enbridge's total storage costs (although the majority of Enbridge's storage costs would still be based on the costs of Tecumseh). The Board must be concerned about the impact on consumers from refraining from rate regulation and balance that consideration with the objectives of facilitating storage development and the competitive market. With respect to storage development, in section 5.2.1 we concluded that re-pricing existing storage does not provide an incentive to develop new storage; the Board is similarly satisfied that retaining cost-based rates for existing storage for a transition period will not create an adverse impact on new storage development.

208 With respect to protecting consumers, the Board finds that it is in the public interest to provide Enbridge and its customers with a transition to market-based pricing for its storage needs (in excess of its Tecumseh capacity), rather than requiring it to access the competitive market for its full requirement all at one time. This will have the effect of phasing-in the rate impact on Enbridge's customers, and facilitating the development of competitive alternatives -- to the benefit of Enbridge's customers and competitive storage providers. The Board finds that this transition should begin in 2008 and be completed in 2010. This timing will allow Enbridge to tender for services during 2007. Enbridge's rates in 2007 will continue to reflect cost-based storage rates for the services it acquires from Union.

209 The way to achieve this transition is for Union and Enbridge to amend the current contracts (which under section 4.04 would expire as of March 31, 2007 as a result of the Board's NGEIR decision) to maintain the current volumes and expiration dates but to replace the market-based rates with cost-based rates. The result of this approach would be that in 2008 Enbridge would need to acquire 9.4 Bcf (less than 10% of its storage requirement) from the competitive market. Smaller incremental amounts would be sourced from the competitive market in 2009 and 2010. The Board concludes that the phased approach, and the relatively small amounts of competitively sourced storage added each year, will result in a small net impact on Enbridge customer rates. In this way, the interests of consumers will be sufficiently protected.

210 The Board's decision to refrain from regulating the prices of Union's ex-franchise storage services will be conditional on the amendment of the Union/Enbridge contracts as described above in order that these services will be subject to competition sufficient to protect the public interest.

Gazifère

211 The Board must also consider the application of its findings to Gazifère. Gazifère is a small Quebec distributor, serving 30,000 customers, which is connected to the Enbridge system and is an affiliate of Enbridge. Enbridge proposed to charge market based rates to Gazifère on the basis that it is an ex-franchise customer. Others argued that all customers outside Ontario should pay market-based rates.

212 As outlined earlier in this section, the Board has found that a decision to refrain from regulating storage rates should not be based on an in-Ontario, ex-Ontario approach, but rather on the competitive position of the customer. The appropriate consideration is whether Gazifère has access to alternatives. The evidence is that it does not; it is connected to the Enbridge system and takes a bundled distribution service. In all respects, Gazifère is similarly situated to the distributors attached to Union's system (namely, Kitchener, NRG, and Six Nations) which each take bundled or semi-unbundled service. The Board finds that it is appropriate for Gazifère to receive regulated cost-based service, just as Kitchener, NRG and Six Nations do, because the service they receive is not subject to competition sufficient to protect the public interest.

5.2.3 New Storage Services, including High Deliverability Storage

213 This issue concerns a set of new storage services and, in particular, high deliverability storage services. The services include Enbridge's proposed Rate 316 and services related to the Tecumseh storage enhancement project and Union's proposed high deliverability storage services and three ex-franchise services: F24-S, Upstream Pipeline Balancing Service (UPBS) and Downstream Pipeline Balancing Service (DPBS). These services are of particular interest to dispatchable gas-fired power generators, and indeed were developed in response to generator requests, because they provide the means by which these customers can conduct intra-day balancing.

214 The storage requirements for dispatchable gas-fired power generators are very different from existing customers. Whereas existing customers use storage for seasonal or daily balancing, dispatchable generators want to use storage for intra-day balancing. And whereas existing customers can meet their needs with the standard deliverability service (daily delivery of 1.2% of storage space allocation), dispatchable generators want daily deliverability as high as 10% of their storage space allocation.

215 Many of the issues which existed between Union and Enbridge and their generator customers were resolved in the Settlement Proposals which were filed and accepted by the Board. These settlements, which can be found at Appendices D and F, set out the parameters for multiple nomination windows, the inter-franchise movement of gas, the redirection of gas, title transfers for gas in storage, and the allocation methodology for 1.2% deliverability storage. What remained unresolved was the pricing for the new high deliverability storage services.

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

217 APPrO argued that the utilities have an obligation to provide these services and, because allocations of 1.2% standard deliverability space have been agreed, power generators have no options (other than through the utilities) for acquiring the necessary deliverability services to make use of these storage allocations. In APPrO's view, storage in other geographic areas is not an option because all other transmission systems are limited to the four NAESB nomination windows. APPrO submitted that the utilities may have options as to how to meet the requirements -- in particular storage enhancements and/or additional transportation capacity. Sithe Global Power Goreway ULC, Sithe Global Power Southdown

ULC, TransCanada Energy Ltd., Portlands Energy Centre (collectively, the GTA Generators) agreed with APPrO's position.

218 The consumer representatives also generally agreed that services for power generators should be considered part of the in-franchise market and regulated accordingly.

219 Union argued that it would not develop assets to provide these services unless the rates are deregulated. If the rates remain regulated, then Union would plan to acquire the services in the market. Enbridge explained that if the Board refrains from regulating the prices for new storage developments, it will plan to offer capacity related to the Tecumseh storage enhancement project through an open season. This project might or might not proceed depending upon the economics at the time. Regardless of whether the Board refrains from regulating in this area, Enbridge will acquire services to underpin its unbundled high deliverability storage service (Rate 316) through an open tender, and it proposed to pass through those market-based costs to customers taking the service.

220 Enbridge maintained that the evidence supported a conclusion that the generators themselves acknowledge that they expect to have access to competitive alternatives. Union pointed out that the generators could acquire additional space in order to achieve a higher deliverability and if the additional space is not required, it could be resold in the market.

221 The marketers expressed some concern with the possibility that these services would be provided at cost exclusively to generators. Nexen argued that there should be no discrimination in favour of power generators and that on the Union system the playing field should be level between marketers and other ex-franchise customers such as Enbridge and generators outside Union's franchise area. BP cautioned that the Board should not confer a competitive advantage to some players to the detriment of others as a result of forbearance or through the development of new services and identified its objective as being a level playing field with equal treatment or access.

222 The issue of automatic renewal rights was also raised. Enbridge indicated that it is not considering automatic renewal rights for storage contracts under its Rate 316 proposal, since that service will be acquired by Enbridge through a tender. APPrO maintained that Rate 316 is a companion service to Rate 125 and that if a customer renews its Rate 125 service, that customer should have the right to renew its Rate 316 service as well.

Board Findings

223 There was no disagreement that these services are needed and should be developed. The generators have convincingly expressed the importance of these types of service to the effective functioning of their operations -- both physically and financially. The issue for the Board, within a section 29 context, is how best to achieve this objective. APPrO and the GTA Generators (supported by the consumer intervenors) advocated a regulated framework; the utilities argued for a competitive framework.

224 These services are not currently offered, indeed they need to be developed, and investments must be made in order to offer them. Union has been conducting open seasons for its new offerings and is committed to providing these services if the Board refrains from regulating them. The Board concludes that these services are substantially different from the bundled, unbundled and semi-unbundled distribution services offered by Enbridge and Union. There is demand for these services from marketers (for example, BP and Nexen) and likely others. In addition, when the capacity generators hold is excess to their needs, they expect to be able to offer this excess into the competitive market. It follows that they expect to be able to acquire these services through the competitive market as well as sell them.

225 The Board could order the utilities to provide these services on a regulated basis. However, the Board concludes that this would not be the best approach to ensuring the development of these services. The key consideration is to ensure that new innovative services are developed and offered into the market. The Board concludes that the best way to ensure this public interest is met is to refrain from regulating these services. This will stimulate the development of these services, by the utilities and by other providers. The Board finds that competition in these services will be sufficient to protect the public interest.

226 The Board does have a duty to protect the interests of consumers using these services with respect to price and reliability and quality of service. In this context we find that the crucial factor is the availability of the service itself -- namely its reliability and quality. The Board notes that Enbridge committed to offer Rate 316, whether or not the Tecumseh enhancement project goes ahead, and to price it on a cost pass-through basis. The Board expects Enbridge to fulfill this commitment. Union has proceeded with its open season, and the Board expects Union to offer these services on an open season basis, without withholding capacity. These commitments will ensure a level of consumer protection.

227 Pricing considerations are relevant, but the Board finds that the development of competitive options will provide appropriate price protection for these consumers. The Board will also be developing a reporting mechanism and complaint process, discussed at the end of this chapter, and we expect that parties will bring any issues of market failure to the Board's attention.

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

229 Although this issue was discussed in the context of high deliverability services, the Board finds that its conclusions have general application, namely that any new storage which is developed by the utilities will be included as part of the competitive market. The utilities will bear the risk of these investments, not ratepayers. Similarly, the Board will not regulate the rates, nor approve the contracts, arising from these investments. If the utilities provide storage to their regulated business through these investments, the ratemaking implications of that approach will be considered in the context of a rates proceeding.

5.2.4 Forbearance in the Ex-Franchise Market

230 Most parties argued that ex-franchise customers should pay market-based rates. Some parties took the position that the Board could refrain from regulating the prices in this market (if the Board determined the market was competitive), and others were of the view that the Board should continue to approve market-based range rates.

231 For example, the Consumers Council argued that the Board should not refrain from regulating storage but that it is appropriate for the utilities to charge market rates for Transactional Services and long-term storage services to maximize revenue from the assets for the benefit of ratepayers.

Board Findings

232 The evidence shows that other than for in-franchise customers, the storage market is competitive. With the exception of Enbridge, the customers in this competitive part of the market (commonly referred to as ex-franchise) have been acquiring storage at market-based rates for some time. The Board sees no benefit from continuing to regulate the prices of these services; on the contrary, competition in this area is sufficient to protect the public interest. The Board will therefore refrain from regulating rates or approving contracts for Union's short- or long-term ex-franchise storage services and will refrain from regulated the rates or approving the contracts for Enbridge's Transactional Storage Services.

5.2.5 Separation of Unregulated Storage Costs and Revenues

233 Both Union and Enbridge proposed to separate the unregulated costs and revenues from the regulated costs and revenues using a cost allocation study. The issue is whether a cost allocation approach is sufficient, or if a greater degree of separation is required. Further, if a cost allocation approach is sufficient, there is an issue as to whether Union's current cost allocation study is adequate.

234 During the oral hearing, Union's witnesses indicated that Union would be preparing a new cost allocation study as the basis for revising the allocation of the costs of its storage assets between in-franchise (regulated) and ex-franchise (unregulated). In its final argument, however, Union submitted that the cost allocation necessary to split the costs of its storage assets between in-franchise and ex-franchise has already been completed in its 2007 rates case. According to Union, that allocation would result in the total storage rate base being split as follows ($ million):

Included in regulated rate base	$380.703	(79%)
Allocated to ex-franchise activities	$102.916	(21%)
Total	$483.619	(100%)

235 Enbridge proposed to separate the costs and revenues associated with its Transactional Storage Services at the next rates proceeding. It was Enbridge's position that no adjustment to rate base would be required if the Board were to forbear from price regulation.

236 Some parties argued that a greater degree of separation was required; others argued that Union's cost allocation study was inadequate.

237 Energy Probe argued that accounting separation is not sufficient because the historic cost allocation work could not have anticipated the dramatic change of storage forbearance. It took the position that the Board should encourage full structural separation at least, and that ratepayers should be held harmless for any associated costs.

238 The Board Hearing Team also recommended that Union's transmission and storage operations should be functionally separated, and that both Union and Enbridge's regulated and non-regulated storage should be functionally separated. The Board Hearing Team was of the view that this separation is necessary to ensure the development of the competitive storage market and to encourage new entrants. However, if no separation were required, the Board Hearing Team suggested that there should be a generic cost allocation review to examine the cost allocation thoroughly and to ensure no cross-subsidization.

239 LIEN argued that it would be difficult to separate costs for Union's integrated storage business. In LIEN's view, the current cost allocation study may be adequate to set rates, but it is not sufficient to separate price-regulated storage from non-price-regulated storage. LIEN proposed that an alternative would be to transfer assets which are surplus to distribution needs to a separate entity at fair market value which, in LIEN's view, would put Union on an equal footing with other storage providers.

240 Similarly, LPMA/WPSPG argued that Union's current cost allocation is not necessarily appropriate;

there may be fundamental methodology issues to be addressed and there are storage-related costs that are included in distribution costs that should be considered for allocation to Union.

Board Findings

241 The Board finds that functional separation is not necessary. The evidence before the Board is that it would be costly and difficult to establish a functional separation of utility and non-utility storage, and there was no evidence to suggest that there would be significant benefits from such a separation. To the extent there may be concerns regarding the integrated operations, these will be addressed through the reporting requirements set out in section 5.4.

242 We also conclude that Union's current cost allocation study is adequate for the purposes of separating the regulated and unregulated costs and revenues for ratemaking purposes. The Board agrees with the Board Hearing Team that it is important to ensure that there is no cross-subsidization between regulated and unregulated storage. However, the Board is content that with its findings on the treatment of the premium on short-term storage services (Chapter 7) Union will have little incentive to use the cost allocation for purposes of cross-subsidy.

243 The issue of Enbridge's cost allocation is addressed in Chapter 7.

5.3 CONCLUSIONS ON FORBEARANCE

244 In the previous sections, the Board has found that it will refrain, in part, from regulating storage rates under section 36 (as that section relates to storage) of the *OEB Act* and refrain from approving certain storage contracts under section 39(2) of the *OEB Act.* Specifically:

* The Board will refrain from regulating the storage rates or approving the contracts of new storage providers.
* The Board will continue to regulate storage rates for bundled, unbundled and semi-unbundled customers of Union and Enbridge (up to the allocated amount).
* The Board will refrain from regulating the storage rates or approving the contracts of cross-franchise, or ex-franchise, storage customers of Union and Enbridge.
* The Board will refrain from regulating the rates or approving the contracts for new storage services offered by Union and Enbridge.

5.4 REPORTING

245 A number of parties made recommendations regarding ongoing reporting by utilities and other storage operators. The utilities and their affiliates generally agreed to provide the type of reporting required by FERC for interstate pipelines (FERC Regulations, s.284.13) although to some extent they challenged whether it was necessary. FERC Regulation s.284.13 contains requirements for regular reporting on customer and system information.

246 Kitchener suggested that the Board develop a Storage and Transportation Access Rule or "STAR" to ensure non-discriminatory access to storage and transportation services, following on from the Gas Distribution Access Rule.

247 The Board Hearing Team identified four principles in this area:

* Create a level playing field for market participants,
* Adopt rules and practices to govern affiliate behaviour that protect the public interest,
* Support open and non-discriminatory access to transmission, and
* Establish a transparent storage/transmission market so market participants can make informed decisions.

248 The Board Hearing Team supported the development of a STAR. It also proposed that the ARC be amended to control the interaction between the utilities and their storage affiliates and that reporting requirements be put in place for all storage providers in order to enhance transparency in the market.

Board Findings

249 The Board agrees with the Board Hearing Team's principles and shares the concerns related to forbearance raised by a number of parties. Specifically, in refraining from regulating storage rates or approving storage contracts, the Board must:

* Ensure consumer protection within the competitive market for storage in Ontario.
* Ensure access to Union's transportation system on a non-discriminatory basis to new and existing storage operators.

250 The Board concludes that it is necessary to develop appropriate operating and reporting procedures to ensure these objectives are addressed. The Board finds that Kitchener's proposal for the development of a STAR (Storage and Transportation Access Rule) has merit.

251 The Board will initiate a process to develop rules of conduct and reporting related to storage. The Board will ensure that the process addresses the following:

* Requirements to ensure that Union cannot discriminate in favour of its own storage operations or those of its affiliates and cannot discriminate to the detriment of third-party storage providers;
* Reporting requirements for all storage providers, although the requirements may vary as between utility and non-utility storage providers, and which may include: terms and conditions, system operating data, and customer information;
* A complaint mechanism for customers (or other market participants).

6. ALLOCATION OF STORAGE AVAILABLE AT COST-BASED RATES

252 Having decided that Union and Enbridge should retain regulated, cost-based rates for storage used by in-franchise customers, the question becomes how much of the existing storage space should be reserved for those customers. There are two issues arising from this allocation matter.

253 First, should the amount of storage available to Union's in-franchise customers at cost-based rates be fixed at an amount less than the total working gas capacity of Union's storage pools, currently 152 Bcf?

Union proposed to fix the amount of existing storage allocated to in-franchise customers at the amount Union estimates those customers will use in 2007.

254 Second, what method should Union and Enbridge use to allocate the amount of storage available at cost-based rates to individual unbundled and semi-unbundled customers? The evidence shows that, for various reasons, many of Union's T-service (semi-unbundled) customers have been allocated amounts of storage that are inconsistent with amounts determined under Union's standard "aggregate excess" method. In addition, Kitchener argued that as a gas distributor embedded in Union's distribution system, it requires more storage space at cost-based rates than the amount calculated under the aggregate excess method.

6.1 UNION'S TOTAL COST-BASED STORAGE ALLOCATION

255 Union proposed to freeze, on January 1, 2007, the amount of its storage capacity available to in-franchise customers at cost-based rates. The frozen amount would be 92.1 PJ (approximately 87 Bcf), Union's estimate of in-franchise requirements for 2007. Incremental in-franchise storage requirements due to load growth would be met by Union purchasing the required additional amounts in the market and passing through the contract costs to its in-franchise customers.

256 Union noted that the in-franchise storage requirement has been very stable over the past seven years, increasing from 88.2 PJ in 2000 to 90.6 PJ in 2006, an annual growth rate of just 0.45%.

257 In its evidence, Union explained the rationale for its proposal as follows:

> Under the current regulatory framework, any future increase to in-franchise storage requirements would be provided through a reallocation of the portfolio of storage capacity owned and managed by Union.
>
> This current practice is not appropriate as it does not reflect the fact that the storage market is competitive, nor does it encourage or support the development of new storage capacity. Specifically, Union would not be incented to assume the risk and commit the capital and resources to develop new storage capacity with economics premised on competitive market pricing, when there is a risk of this storage being reallocated in the future to meet in-franchise requirements at a cost of service rate.[35]

258 In argument, Union summarized the reasons for its proposal as follows:

* "Claw-back" of assets etc. allocated to ex-franchise sales would undermine development of new storage capacity premised on market pricing.
* "Claw-back" would also make cost allocation issues more complex.
* Meeting incremental demand with services sourced from competitive markets is consistent with a transition to competition and a step toward sending better "price signals" to in-franchise customers.
* This proposal will not result in "rate shock" of any kind.[36]

259 Kitchener, LPMA/WGSPG, Consumers Council, VECC, and IGUA/AMPCO argued that there should be no freeze on the amount of Union's storage available at cost-based rates to in-franchise customers. GMi and the Board Hearing Team supported Union's proposal.

Board Findings

260 Under the existing regulatory framework, Union's in-franchise customers have had first call, at cost-based rates, on Union's storage capacity. Said differently, Union has sold storage services to ex-franchise customers only when it can demonstrate that the storage being sold is surplus to in-franchise needs.

261 From an operational perspective, it is not necessary (nor would it appear to be feasible) for Union to physically split its storage facilities between "in-franchise" and "ex-franchise" uses. And until now, Union has been able to offer storage services in the ex-franchise market without capping or freezing the amount of capacity that is available for in-franchise uses.

262 Giving in-franchise customers a priority call at cost-based rates on all of Union's storage may be supportable if one takes the view that every Bcf of Union's storage capacity is a "utility asset" and is required to provide "utility services." But that view needs to be re-examined in light of the evidence presented at this hearing about the development and use of Union storage in recent years, and the Board's determination that the storage market is competitive.

Amount of Union's "surplus" capacity

263 There is no doubt that Union's existing storage capacity far exceeds the current requirements of its in-franchise customers. Some 40% of the current capacity has been sold in the ex-franchise market. And the requirements of in-franchise customers have grown slowly (less than 0.5% per year over the past six years according to Union's evidence). The excess is so large that it would take several decades for all of the current capacity of 152 Bcf to be required for in-franchise customer needs if those needs grow at 1% per annum, and more than 100 years at the current rate of growth.

264 In past decisions on storage, the Board has required Union to file forecasts of storage capacity and in-franchise needs to demonstrate that space being sold to ex-franchise customers is surplus to in-franchise needs. For example, in the EBRO 494-03 decision, the Board approved four long-term ex-franchise storage contracts based on Union's 10-year forecast of capacity and in-franchise needs. The Board considered, but did not require, Union to insert a clause into the contracts that would allow Union the right of recall because the Board "found...that the Company's forecast of its in-franchise storage needs is reasonable."[37]

Union's storage development

265 During the hearing, a common argument from many parties on several different issues (particularly on the issue of sharing the premium on ex-franchise sales) was that in-franchise customers have "paid for" or "substantiated" the storage assets of the utilities. If true, is this a basis for continuing to grant in-franchise customers a perpetual call on all of Union's storage capacity at cost-based rates?

266 This argument breaks down on two fronts. First, Union's rate base excludes capital costs of storage that underpins long-term ex-franchise sales. Second, the sheer magnitude of the current surplus makes it unlikely that Union's expansion of its storage facilities in the recent past has been driven primarily, or perhaps even to any significant extent, by the anticipated needs of in-franchise customters. For example, since 1999 Union has added almost 18 Bcf of capacity through greenfield developments and enhancements to existing pools, capacity that was not necessary to cover in-franchise needs. This additional capacity has been directed to, and taken up by, the "ex-franchise" market, not distribution customers of Union.

267 Ex-franchise customers have contracted for Union's long-term surplus space and have paid market-based rates, rates that have been much higher than cost-based rates. Rather than bearing the costs of surplus Union storage space that is offered long-term to the ex-franchise market, Union's in-franchise customers have in fact benefited through receiving most of the premium on long-term sales.

Union's rationale

268 Union claims that development of new storage capacity would be undermined unless the amount of storage allocated to in-franchise customers is capped. This claim appears to have little merit. First, no party to this proceeding has opposed market rates for new storage capacity by third parties. Second, a freeze on space for in-franchise customers would have a neutral effect on the development of the competitive market. This was illustrated by LPMA/WGSPG, which put forward the following scenario in its argument: Assume the incremental storage requirement for the in-franchise customers is, say, 2 Bcf in a particular year. Under Union's proposal, Union would purchase that 2 Bcf from third-party providers. Under the existing framework, that 2 Bcf would be supplied by Union, leaving it with 2 Bcf less for ex-franchise sales. That 2 Bcf shortfall could be provided by third-party providers. The net impact on third-party providers is 2 Bcf of additional storage in either case.

269 Union also claims that meeting incremental in-franchise demand at market prices is consistent with a "transition to competition" and would send "better price signals to in-franchise consumers." No one in this proceeding, however, has advocated that any in-franchise customers, except for some of the largest gas customers, should be obligated to take a service that might require them to participate directly in the competitive storage market.

270 GMi, currently Union's largest ex-franchise customer, and Nexen expressed concerns about "claw-back" that the Board finds more compelling than Union's argument. GMi opposed any storage allocation rules that could result in "clawing back storage capacity held by ex-franchise customers for the benefit of in-franchise consumers." It said it would view any such measure as unfair discrimination. Nexen submitted that "claw-back" of storage services from ex-franchise customers would be "discriminatory and detrimental to not only GMi but to the very existence of the secondary market that Ontario currently supports and benefits from."

Conclusion

271 The Board finds that there should be a cap on the amount of Union's existing storage space that is reserved for in-franchise customers at cost-based rates. In the Board's view, Union's existing storage assets are, in substance, a combination of "utility assets" required to serve Union's in-franchise distribution customers and "non-utility assets" that are not required for regulated utility operations and that are sold in the competitive storage market. This distinction is supported by the significant excess of total capacity over in-franchise needs for the foreseeable future and by the fact that development in recent years has been driven by the ex-franchise market, not in-franchise needs. The Board does not accept IGUA/AMPCO's submissions that the entire amount of Union's storage is a "utility asset" and that ex-franchise customers (such as gas marketers and utilities in the U.S. Northeast) are buying "utility services" when they purchase storage from Union. The Board has determined that the ex-franchise market is competitive and that it will refrain from rate regulation or contract approval; these will no longer be "utility" services.

272 The Board concludes that its determination that the storage market is competitive requires it to clearly delineate the portion of Union's storage business that will be exempt from rate regulation.

Retaining a perpetual call on all of Union's current capacity for future in-franchise needs is not consistent with forbearance. As evidenced by the arguments from GMi and Nexen, two major participants in the ex-franchise market, retaining such a call is likely to create uncertainty in the ex-franchise market that is not conducive to the continued growth and development of Dawn as a major market centre.

273 The Board concludes that it would be inappropriate, however, to freeze the in-franchise allocation at the level proposed by Union. Union's proposal implies that a distributor with an obligation to serve would be prepared to own, or to have under contract, only the amount of storage needed to serve in-franchise customers for just the next year. In the Board's view, it is appropriate to allow for some additional growth in in-franchise needs when determining the "utility asset" portion of Union's current capacity.

274 The Board acknowledges that there is no single, completely objective way to decide how much should be reserved for future in-franchise needs. The Board has determined that Union should be required to reserve 100 PJ (approximately 95 Bcf) of space at cost-based rates for in-franchise customers. This compares with Union's estimate of 2007 in-franchise needs of 92 PJ (87 Bcf). At an annual growth rate of 0.5% each year, which Union claims is the growth rate since 2000, in-franchise needs would not reach 100 PJ until 2024. The limit would be reached in 2016 if the annual growth is 1%; at a very annual high growth rate of 2% per annum, the 100 PJ limit would be reached in 2012.

275 The 100 PJ (95 Bcf) amount is the capacity that Union must ensure is available to in-franchise customers if they need it. Union should continue to charge in-franchise customers based on the amount of space required in any year. If Union's in-franchise customers require less than 95 Bcf in any year, as measured by Union's standard allocation methodology, the cost-based rates should be based on that amount, not on the full 95 Bcf reserved for their future use. Union will have the flexibility to market the difference between the total amount needed and the 95 Bcf reserve amount.

6.2 ALLOCATION OF COST-BASED STORAGE: METHODOLOGY AND APPLICATION

276 Union and Enbridge have developed methods of allocating cost-based storage space to their in-franchise customers -- both bundled customers as a group, and individual unbundled and semi-unbundled (T1 and T3) customers. The amount allocated currently has two implications for customers:

* It is the basis for determining how much a customer will be charged at cost-based rates.
* For unbundled or semi-unbundled customers, the amount is the maximum amount of cost-based storage to which they are entitled. Any storage they demand above the allocated amount must be procured at market-based rates.

277 In Union's case, the allocation methodology will take on greater significance in the future because it will also be used to determine when in-franchise needs exceed the 100 PJ of Union storage reserved for in-franchise customers.

278 The issues addressed in this section are:

* Should Union and Enbridge continue to use their current methods to determine the amount of cost-based storage allocated in total to customers taking bundled service?
* What method should be used to allocate cost-based storage to unbundled and semi-unbundled customers? Should a single method be used consistently by both Union and Enbridge or should the Board permit variations or exceptions?

6.2.1 Aggregate Excess Method -- Bundled Service

279 Union has used the "aggregate excess method" since 2000. This method, which was approved by the Board in RP-1999-0017, calculates a standard amount of storage space to meet seasonal load balancing needs. It involves a comparison of forecast gas consumption in the winter (the five months November through March) with gas consumption for an entire year. Total winter consumption is forecast assuming normal weather conditions. The formula can be expressed:

Aggregate excess = Total winter consumption -- [(151/365)* (Total annual consumption)]

280 To simplify the computation of overall storage needs for bundled customers, Union has developed standard aggregate excess volumes for residential customers in each of its operations areas. The calculation of the space required to serve bundled commercial and industrial M2 customers is also simplified by applying a standard percentage to those customers' forecast annual consumption.

281 Union reduces the total aggregate excess amount for bundled customers by 2.4% to recognize that not all of the bundled customers have the load profiles assumed by the aggregate excess method. Some bundled customers consume more gas in the summer than the winter, which reduces the amount of storage space Union needs to manage seasonal load balancing for its portfolio of bundled customers.

282 Kitchener raised concerns with respect to the aggregate access method, particularly in respect of its own storage allocation, and VECC echoed Kitchener's concerns. This issue is dealt with separately later in this chapter. No other party objected to Union continuing to use its "aggregate excess method" to determine total storage requirements for bundled customers.

283 Enbridge indicated it uses the same methodology as Union except that it uses 121 days for "rate-making purposes." At the Technical Conference, Enbridge indicated that it is "open to using the actual withdrawal cycle period, which is 151 days."

Board Findings

284 The Board accepts the continued use of the aggregate excess method by Union to determine the total storage space it requires to manage the seasonal load balancing needs of bundled customers.

285 Based on the evidence in this proceeding, it not clear that there is a single "official" aggregate excess method policy document in which Union outlines the calculation, the source of the inputs, how the method is to be applied in each of its operations areas, and how Union validates the appropriateness of its 2.4% reduction factor. Given the Board's decision to "freeze" total in-franchise cost-based storage, it will be increasingly important that all stakeholders have a common understanding of exactly how the method works in all circumstances. The Board directs Union to file such a policy document within 90 days of this decision. The policy should also cover the issues addressed in the next section of this decision, namely the application of the allocation method to individual customers.

286 Enbridge appears to use a generally similar method although there was no detailed evidence filed on Enbridge's calculation at this hearing. The Board therefore also directs Enbridge to file an aggregate excess policy document with the Board within 90 days of this decision. Enbridge should also address the application of the allocation method to individual customers.

287 In order to ensure consistency where it is warranted, the Board will consider whether to pursue these matters on a generic basis.

6.2.2 Storage Allocation -- Unbundled and Semi-unbundled Customers

288 There was considerable debate in this proceeding about using the aggregate excess method for allocating cost-based storage to individual unbundled and semi-unbundled (Union T1 and T3) customers. We first address the issue generally. We then address the specific issues which arise for gas-fired generators and Kitchener. While this issue has immediate application for Union, because it has customers taking semi-unbundled service, it will also be relevant for Enbridge because the Board is approving new unbundled rates as part of this proceeding, and Enbridge expects that there will be migration to these new rates.

289 Union has not consistently applied a single method to allocate cost-based storage to in-franchise customers taking semi-unbundled and unbundled service. The official position seems to be that Union uses the aggregate excess method. It became clear during the hearing, however, that many T1 and T3 customers have been allocated amounts of storage that are considerably different than amounts derived from an aggregate excess calculation.

290 Union produced a document showing that 44 T1 customers, over half of Union's T1 customers, and one T3 customer (Kitchener) have been permitted to contract for volumes of cost-based storage that differ from the amounts that would be allocated under the aggregate excess method. Nine of the 44 T1 customers listed have contracts for quantities less than the aggregate excess amount. The other 35 T1 customers and Kitchener have more (and in many cases, significantly more) cost-based storage space under contract than would be permitted if the aggregate excess method were followed. For example, one T1 customer has a storage contract for 1,434,120 GJ but its aggregate excess amount is only 139,902 GJ. Another has a contract for 1,100,000 GJ but an aggregate excess amount of zero.

291 Union indicated there are three reasons for the differences:

* The cost-based storage allocations of 21 customers that were on T1 service before June 7, 2000 were "grandfathered" by the settlement agreement approved by the Board in RP-1999-0017. The contract quantities were not required to be adjusted to the customer's aggregate excess amount.
* The amount of the cost-based storage under contract generally does not get changed at the time of the annual contract renewal even when the customer's updated consumption profile results in a higher or lower aggregate excess amount. The reason for this is that the only "trigger" for a revision to a storage quantity at the annual renewal date is a five percent increase or decrease in Contract Demand (maximum daily gas demand as agreed between the customer and Union). A change in consumption profile, by itself, has no effect on the amount of storage under contract. Union pointed out that using the change in Contract Demand as the trigger to amend storage contract quantities was agreed to in the RP-1999-0017 settlement agreement.
* At least three of the T1 customers that have contract quantities above aggregate excess amounts are gas-fired generators that have multi-year storage contracts with firm space and deliverability amounts.

292 Union proposed no changes to the way in which storage is currently allocated to in-franchise customers at cost-based rates.

293 IGUA/AMPCO submitted that the guiding principle should be to allocate to customers a sufficient amount to meet "reasonable load balancing requirements." For large volume customers, they argued that the allocation methodology should be as flexible as it has been in the past and that the grandfathering under the RP-1999-0017 settlement agreement should be preserved on the grounds of estoppel. IGUA/AMPCO said no changes in allocations should be made without customer consent.

294 The Board Hearing Team supported using the aggregate excess method for allocating cost-based storage to individual unbundled and semi-unbundled customers. The Board Hearing Team advocated adjusting the contract quantities of all existing T-1 contracts to the aggregate excess amount at the next contract renewal date. It also proposed, however, that a T1 customer that requires more storage than calculated by the aggregate excess method should make a case to its utility. Under that approach, any departure from aggregate excess would have to be submitted to the Board for approval.

Board Findings

295 The Board concludes it is essential that there be clear, standardized, and consistently applied rules for allocating cost-based storage to unbundled and semi-unbundled in-franchise customers. These types of rules clearly are not in effect today. The current allocations to a large proportion of Union's T1 and T3 customers bear no resemblance to aggregate excess volumes due to: the "grandfathering" process endorsed in RP- 1999-0017; the lack of an effective mechanism to adjust contract volumes for changed customer circumstances; and, some "non-grandfathered" T1 storage contracts with volumes that may have been at odds with the aggregate excess method even at the time the contracts were first negotiated.

296 The Board supports the continued use of the aggregate excess method as the default method for allocating cost-based space. That method is clearly designed for customers with the traditional seasonal load balancing need and fits well with the storage needs of many unbundled or semi-unbundled customers. But it appears that the storage requirements of at least some of the larger industrial and commercial customers may have little or nothing to do with seasonal load balancing. Allocating cost-based storage using a method that is based on assumptions that are materially at odds with a customer's circumstances, in the Board's view, would be unfair and unsupportable. Therefore, the Board concludes it is necessary to consider whether one or more additional allocation methodologies should be developed for cases where the aggregate excess method is clearly inappropriate.

297 Board does not, however, support a unique allocation approach for each customer. In the Board's view, the objective of allocation of cost-based storage space is to assign an amount that is reasonably in line with what a customer is likely to require. The objective is not to allocate precisely the amount a particular customer claims it might need. That would require in-depth knowledge of each customer's expected consumption, its gas supply portfolio, and the non-storage options (such as spot gas purchases) the customer might use to manage its needs. That would be impractical for the utilities to implement, both administratively and because it would never be possible to determine that one, and only one, allocation of storage is the "right" amount for any particular customer. Unbundled or semi-unbundled in-franchise customers that desire more storage than allocated to them by the utilities under the standard method(s) have the ability, as they do today, to purchase additional storage services at market-based rates or alternative services in the market.

298 The Board is not ordering any change in the contract quantities of T1 customers at this time for the following reasons:

* First, although it appears likely that one (or more) additional allocation methods may be necessary, the Board does not have enough information to reach a firm conclusion. Further evidence is required.
* Second, the Board is conscious that many of the existing contracts with volumes above the aggregate excess amounts have been in effect for several years. The Board does not accept the estoppel argument advance by IGUA/AMPCO, but even if one or more appropriate additional allocation methodologies were already developed, any changes to contracts should be done in a controlled and deliberate manner.

299 The Board does want to have better allocation rules developed in the near future. To further that objective, the Board orders Union (a) to review the use of storage by existing T1 customers to determine the extent to which their storage needs are not driven by traditional seasonal load balancing, (b) to develop one or more storage allocation methods that would result in better estimates of certain customers' needs than the aggregate excess method, and (c) submit within 90 days a proposed storage allocation policy for Board review that details the aggregate excess method and the proposed new method(s), including the circumstances in which each allocation model would be applicable.

300 Enbridge currently has only one customer taking unbundled service but it is likely that more customers will opt for unbundled service in the future. The Board therefore directs Enbridge to file, within 90 days, the methodology or methodologies it proposes to use to allocate cost-based storage to unbundled customers.

301 In order to ensure consistency where it is warranted, the Board will consider whether to pursue these matters on a generic basis.

6.2.3 Storage Allocation -- Gas-Fired Generators

302 All parties in this proceeding recognized that the operators of dispatchable gas-fired power plants have very different needs for gas storage than the typical gas user that has seasonal load balancing needs. Several aspects of enhanced services for gas-fired generators were settled by the parties before the oral hearing started. Rate issues related to high deliverability storage services were not settled; however, there was a settlement on how much 1.2% deliverability storage should be made available at cost-based rates.

303 The Enbridge and Union Settlement Proposals take different approaches to the allocation of standard storage space to gas-fired generators. The portions of the Settlement Proposals that describe the agreed allocations are set out below.

> **Enbridge Settlement Proposal**
>
> Currently, the Company's customers only receive an allocation of cost-based storage at standard deliverability that meets 57% of the gap between system peak demand and the amount of gas delivered through pipeline supplies. The remainder of this gap is met through other balancing means such as peaking supplies and curtailment. In order to achieve consistency, the Company will limit the storage allocation available to gas fired generators to the same level, such that the allocation of storage at standard deliverability to gas fired generators will be scaled to 57% of the amount of storage at standard deliverability required to meet the gap between demand and pipeline supply. (Page 23)

The allocation for gas fired generators for cost-based storage at 1.2% deliverability is as follows:

(g) A gas fired generator is assumed to provide gas supply equal to 17 times the maximum hourly demand of the facility. In the event that the plant is not dispatched, up to 17 hours of supply may need to be injected into storage, assuming that storage is the only means of balancing available.

(h) Assuming that high deliverability storage at 10% is available to meet the gas fired generator's needs, this would result in a space demand of 17 times the maximum hourly demand, divided by 10%.

(i) The space demand is then multiplied by .57 to determine the amount of cost-based standard storage at 1.2% deliverability available to the gas fired generator. (Page 24)

Union Settlement Proposal

The parties agree that new T1 and U7 customers with non-obligated supply shall be entitled to contract for T1 and U7 storage service with firm storage deliverability up to 24 times the customer's peak hourly consumption and storage space up to 24 times the customer's peak hourly consumption multiplied by 4 days. Should a customer elect to contract for firm storage deliverability that is less than the maximum entitlement, the maximum storage space that a customer is entitled to at cost shall be ten times the firm storage deliverability contracted for. In no event, shall the storage space exceed the maximum storage space entitlement previously described. Storage space with 1.2 % deliverability will be available at cost-based rates. Storage deliverability above the base firm deliverability of 1.2% up to the customer's firm CD shall be made available by Union to in-franchise customers in a manner to be determined by the Board as part of Issue No.2 [to Procedural Order No.2] (Pages 14 and 15)

Board Findings

304 The Board approved the Settlement Proposals with the cost-based storage allocations described above. The Union and Enbridge approaches to this issue are obviously somewhat different. The Board considered whether to carry out a detailed comparison of the proposed allocation methods to determine if greater consistency between the Enbridge and Union methodologies could be achieved. The Board has decided that step is not necessary. The developers of all the proposed Ontario dispatchable gas-fired facilities participated in the settlement process and were parties to the Settlement Proposals (directly or through their trade association). The Board also recognizes that the allocation of 1.2% deliverability space at cost-based rates is tied to some extent to the individual proposals of each utility for high deliverability storage.

305 The Union approach to allocation of cost-based space is available only to new T1 and U7 customers with non-obligated supply. During the hearing, the Board became aware that three operating gas-fired generators in Union's territory have multi-year T1 contracts for amounts of cost-based storage significantly greater than the amounts calculated by the aggregate excess method. The evidence in this hearing indicated that those contracts were not among the pre-June 7, 2000 contracts that were "grandfathered" by RP-1999-0017. The Board does not know the basis on which the storage allocations for these three customers were determined. We also do not know the extent to which the contracted storage amounts exceed the amounts that would be available were the generators to be subject to the new allocation rules contained in the Union Settlement Proposal.

306 The Board concludes that in the future, allocations of cost-based storage should be made using clear, standardized rules that are consistently applied. If there are to be non-standard allocations, it is important that the Board understand the circumstances and be satisfied that any such exceptions are justified. As indicated in section 6.2.2, the Board has ordered Union to analyze the use of storage by existing T1 customers to determine if one or more allocation methodologies should be developed to deal with cases where the aggregate excess method is clearly inappropriate. As part of that work, the Board directs Union to file with the Board, on a confidential basis if necessary, the terms and conditions of these three contracts, the basis for the storage allocations, and the terms and conditions of any other multi-year T1 storage contracts.

6.2.4 City of Kitchener

307 Kitchener intervened in these proceedings to question the appropriateness of the aggregate excess methodology as it applies to embedded utilities in general and Kitchener in particular.

308 Kitchener owns and operates a gas distribution utility connected to Union's system. The rates Kitchener charges its approximately 60,000 customers are not subject to regulation by the Board.

309 Until 1999, Kitchener was a Rate M9 system gas customer. In 1999, it switched from Rate M9 to Rate T3 and negotiated a cost-based storage allocation of 89.3 million m^3 (3.37 million GJ). That initial T3 storage contract expired in 2005. Since then, Kitchener has received two Board-approved one-year extensions at the same contract volume.

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

311 In this proceeding, Kitchener claimed that the aggregate excess method does not provide sufficient cost-based storage space for a gas distributor like Kitchener. It argued for an allocation of cost-based storage space that:

* Provides Kitchener with full deliverability from storage on March 1, recognizing the contractual requirement of Kitchener to maintain a minimum storage balance of 20% for maximum firm deliverability, and
* Provides Kitchener with a reserve on March 31 to enable it to manage temperature risk for the first two weeks of April.[38]

312 In the alternative, Kitchener argued that if the Board continues to approve the grandfathering of storage volumes in certain T1 contracts, it should extend the grandfathering to the amount of storage space in Kitchener's current T3 contract.

313 Kitchener made a number of arguments about why it believes the aggregate excess method is the wrong way to calculate its allocation of cost-based storage space. Kitchener's main objection seems to be that the aggregate excess method assumes "normal" weather. Kitchener says the allocation of cost-based space for an embedded distributor must provide for the possibility of a colder than normal winter and provide protection for a cold snap after March 31.[39] Kitchener also asserted that the aggregate excess method understates the amount of storage required by Union itself to serve its bundled customers and that Union rectifies that problem by purchasing winter gas. Kitchener charged that such a strategy results in significant additional costs for Union's system gas customers.

314 Union supported the continued use of the aggregate excess method and argued against Kitchener's proposals. Union stated that Kitchener is confusing the issue of managing gas supply inventory during the winter months to meet a design day with the issue of allocation of physical storage space based on a seasonal requirement for storage.

315 Union pointed out that Kitchener acknowledges there has been only one occasion in the past five years when Kitchener's storage allocation was insufficient. On that occasion, Kitchener avoided any overrun charges by purchasing incremental gas. Union also observed that Kitchener has the option to contract to have Union provide the March 1 deliverability inventory if it so chooses. If it chose this option, Kitchener would no longer have to maintain 20% inventory on March 1.

Board Findings

316 In section 6.2.2, the Board expressed its view that the objective of the allocation of cost-based storage to unbundled and semi-unbundled customers is to assign an amount that is reasonably in line with what a customer is likely to require; the objective is not to allocate precisely the amount that a particular customer claims it might need. The Board also acknowledged that the seasonal balancing assumption that underlies the aggregate excess method might be materially at odds with the way that some customers use storage. The Board has directed Union to develop one (or possibly more) allocation methods that can be used to allocate storage to those customers.

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

318 Kitchener acknowledges that it requires storage for seasonal load balancing, which is consistent with the assumptions of the aggregate excess method. Kitchener's circumstances are vastly different from those of dispatchable gas-fired generators, for example, a class of customer that everyone acknowledges does not use storage for seasonal load balancing.

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

320 The Board does not see the relevance of Union's gas supply plan to an allocation formula used to assign cost-based space to unbundled or semi-unbundled customers. Kitchener argued that Union "makes no attempt to produce a least cost [gas] supply plan which optimizes the level of cost based storage for in-franchise customers." The argument seems to be that if Kitchener's "least cost supply plan" advice were followed, Union would allocate more cost-based space to its bundled in-franchise customers, which would then cause Union to realize that all in-franchise customers should also get more cost-based storage. In the Board's view, the method of allocating cost-based storage should not be linked to any specific gas supply plan. The aggregate excess method is based on the simple -- and for most customers, realistic -- assumption that natural gas is delivered from the supply regions in equal amounts each day of the year. The cost-based storage allocation is then derived from a particular customer's usual winter consumption.

321 The Board is not going to order that the amount of storage under contract to T1 customers be revised until the Board receives and considers information from Union on its development of one or more additional allocation methodologies, as described in section 6.2.2. That is unlikely to be completed by April 1, 2007, the date Kitchener's current contract expires. The Board will direct Union to renew Kitchener's storage contract for an additional year at current volumes to ensure that Kitchener receives equitable treatment with the other T1 customers which may have their storage allocations adjusted. This extension should not be interpreted as an indication that the Board intends to revisit the storage allocation method for Kitchener.

7. TREATMENT OF THE PREMIUM ON MARKET-BASED STORAGE TRANSACTIONS

322 Union and Enbridge ratepayers have received a significant portion of the premium over cost-based rates that results from the sale of storage services to ex-franchise customers at market-based rates. Chapter 2 provided information on the magnitude of the margins in recent years and the basis on which these margins are shared between the utilities and ratepayers. Union's ratepayers have received 90% of the forecast margins related to both long-term ex-franchise sales (contract terms of two years or more) and short-term transactions (contract terms of less than two years). Ratepayers also receive 75% of any margins that are greater than forecast amounts. Enbridge ratepayers have received approximately 75% of Enbridge's Transactional Services margins.

323 Union proposed to end the sharing of long-term and short-term margins with ratepayers. Specifically, Union proposed that the Board adjust distribution rates effective January 1, 2007, to exclude all storage costs and revenues associated with ex-franchise sales from 2007 rates and to eliminate five existing storage and transportation deferral accounts that currently capture market-based margins in excess of amounts incorporated into rates. Union has forecast 2007 margins at $29.9 million (long-term) and $14.6 million (short-term).

324 Enbridge also proposed to end margin sharing with ratepayers. It is seeking approval to exclude revenues and expenses associated with Transactional Storage Services from its distribution rates commencing in 2007. All Transactional Storage Service revenues, forecast to be $5 to $6 million in 2007, would accrue to Enbridge. The costs to be excluded from distribution rates in 2007 would be some portion of the approximately $800,000 of O&M costs of Enbridge's Transactional Services business. Enbridge proposed to continue to include the entire net book value of its storage facilities in rate base.

325 The Board Hearing Team and Energy Probe supported the Union and Enbridge proposals. LPMA/WPSPG, Consumers Council, LIEN, VECC, IGUA/AMPCO, and Schools generally objected to any change in how margins are shared.

7.1 MARGINS ON SHORT-TERM STORAGE TRANSACTIONS

326 During the hearing, most parties presented views on the rationale for requiring the utilities to credit most of their storage margins to ratepayers. Several parties opposing the Union and Enbridge proposal to cease margin sharing referred to earlier Board decisions that they believed supported margin sharing.

327 The Board first dealt with margin sharing in the context of Union's short-term storage services, which Union started to sell at market-based rates in 1989. In 1996, the Board considered essentially the same issue when Enbridge proposed to start marketing its Transactional Services more aggressively and retain some of the margin. The Board has expressed a consistent view that Union's short-term storage transactions and Enbridge's Transactional Services involve sales at market-based rates of services derived from utility assets that are temporarily surplus.

328 In its decision in EBRO 492, dated September 10, 1996, the Board stated:

> The Company [Enbridge] stated that the objective of offering transactional services is to make additional use in off-peak periods of the Company's physical and contractual storage and transportation assets acquired in the first place to serve the in-franchise customers. [Paragraph 3.3.2, emphasis added]
>
> The Board does not agree that an incentive to provide these services should be necessary, and notes that the Company has offered both peak and off-peak services, along with assignments and exchanges in prior years without the need for an incentive. However, the Board acknowledges that the Company does incur some risk associated with its participation in these activities, and finds that a 10 percent incentive will be adequate to address these modest risks. [Paragraph 3.3.30]

329 In 1997, the Board for the first time approved Union entering long-term storage contracts at market-based rates with ex-franchise customers. In its decision in EBRO 494-03 dated September 26, 1997, the Board described the basis for allowing Union's short-term transactions as follows:

> Short-term storage for ex-franchise customers has been marketed on the basis that it is space required to provide in-franchise service. Due to weather and other variables part of the space is temporarily surplus to in-franchise needs. Customers already pay the costs of this storage in rates. Any revenue from short-term sales of storage services that is beyond the direct marginal cost to provide the service is a benefit to in-franchise consumers. [Paragraph 2.3.19, emphasis added]

Board Findings

330 The Board concludes that its decision to refrain in part from regulating rates for storage services does not invalidate the basis for sharing margins with ratepayers on short-term deals. Union's short-term storage transactions and Enbridge's Transactional Services storage sales are sales of services derived from utility assets that are temporarily surplus to in-franchise needs. The Board concurs with VECC's final argument on this point:

> In Union's case, the assets underpinning the short-term storage and balancing services sold in the ex-franchise market are presently included in rate base. In the case of Enbridge, all of the assets underpinning their transactional services sold in the ex-franchise market are included in rate base. As stated earlier, VECC views it as highly inappropriate for the utilities to seek the entire margin associated with these assets given that they have been "substantiated" by captive ratepayers who have paid in rates for the full opportunity cost of the associated capital investment (including a fair return on equity) along with overhead costs and direct operational costs associated with providing the services. In VECC's view, the utilities should be required to provide a rationale for receiving any of the associated margins given their earlier mentioned obligation to optimize the use of utility assets. [Page 16]

331 Requiring the utilities to share these margins with ratepayers is not in any way inconsistent with a finding that the storage market is competitive. The basis for sharing these margins is the nature of the assets that underpin the transactions, not the prices at which the transactions occur.

332 The Board finds that the entire margin on storage transactions that are underpinned by "utility asset" storage space, less an appropriate incentive payment to the utilities, should accrue to ratepayers. Ratepayers bear the cost of that space through the regulated storage rates and should benefit from transactions that utilize temporarily surplus space. The Board finds that shareholders will retain all of the margin on short-term transactions arising from the "non-utility" storage space.

Short-term margins derived from "utility assets"

333 The decision to require Union to notionally divide its existing storage into two pieces -- a "utility asset" (maximum of 100 PJ) and a "non-utility asset" (the balance of Union's capacity) is set out in Chapter 6. Union's storage facilities will not be physically split into two pieces and Union is likely to continue operating its storage assets in much the same way as it does today. Union presumably will determine its ability to execute short-term deals based on the amount of temporarily surplus space in the entire storage facility. As long as the utility and non-utility storage is operated as an integrated asset, it will not be possible to determine that any particular short-term transaction physically utilizes space from either the "utility asset" or the "non-utility asset."

334 Given the impossibility of physically linking a short-term transaction to a specific slice of storage space, the Board considered other methods of determining the amount of storage margins that should accrue to Union's ratepayers. The Board has decided that the calculation should be based on how the costs of the storage facilities are split between the utility and non-utility businesses. Specifically, Union's revenues in any year from short-term storage transactions, less any incremental costs incurred by Union to earn those revenues, should be shared by Union and ratepayers in proportion to Union's allocation of rate base between utility and non-utility assets.

335 As indicated in Chapter 5, the allocation is currently 79/21 utility/non-utility. Union's existing policy on what constitutes a short-term storage transaction will continue to apply. As and when Union requires more capacity for in-franchise needs (up to the 100 PJ cap) or adds storage capacity or enhances deliverability of its storage facilities, the cost allocation will presumably change. Once a revised cost allocation has been approved in a Union rates case, the basis on which margins on short-term storage transactions are shared will also change.

336 All of Enbridge's current storage assets (storage facilities and contracts) are required to serve its in-franchise customers. Thus, all of Enbridge's storage-related transactional services revenues today are derived from "utility assets." If and when Enbridge increases the capacity of its Tecumseh storage facilities, it will be necessary for the company to adopt a method of allocating storage-related Transactional Services revenues between utility and non-utility assets.

Incentive payments to utilities for short-term transactions

337 The Board has considered whether to continue allocating a portion of the margins from short-term transactions to the utilities as an incentive to optimize the use of the "utility assets" of each company.

338 The Board has decided that Enbridge should continue to share in margins on Transactional Services storage deals. Eliminating any sharing would leave Enbridge with no financial incentive to market temporarily surplus storage space. An incentive mechanism aligns Enbridge's interest with the interest of ratepayers. The size of the incentive is a matter of judgement and that issue has been debated in several past rates cases. The Board finds that the current 25% incentive is excessive given that ratepayers bear all of the costs of the existing storage assets. The Board believes a 10% incentive is sufficient. In the future, 10% of the storage component of Enbridge's Transactional Services revenue, less any incremental costs incurred by Enbridge to earn those revenues, will be for the account of Enbridge. The remainder will be for the benefit of ratepayers. As a result, Enbridge will not be required to separate its revenues and costs for Transactional Storage Services.

339 With respect to Union, an argument might be made that an incentive is not necessary. Union will receive margins from short-term storage deals that are deemed to arise from the "non-utility" portion of its storage facilities. Thus, Union will already be motivated to maximize the revenues on all short-term transactions. The Board has decided, however, that it would be appropriate for Union and Enbridge to be treated consistently and to each receive 10% of the net revenues deemed to arise from the "utility asset" portion of storage.

340 The Board is currently undertaking a process to determine a multi-year incentive ratemaking framework for Union and Enbridge. That process will address how best to implement the Board's findings on the sharing of short-term storage transaction margins within an incentive ratemaking framework. Enbridge's 2007 rates case is in progress; the Board's finding with respect to short-term margin sharing will be implemented through that proceeding.

7.2 MARGINS ON UNION'S LONG-TERM TRANSACTIONS

341 Margins on both Union's short-term storage transactions and its long-term deals historically have been shared with ratepayers in essentially the same way. Although the Board has devoted considerable time to long-term contracting issues in past Union cases, it has not determined that margins on the two types of transactions should be shared on fundamentally different bases. In its decision on Union's 2000 rates (RP-1999-0017), the Board described the rationale for sharing the margins on all of Union's storage sales:

> The Board recognizes that the assets necessary to provide both transactional services and long-term storage services have been paid for by Union's customers. Providing that the Company has a financial incentive to maximize revenues for these services should increase the benefits to both the customer and the shareholder. Consequently the Board authorizes a sharing of net revenues for transactional services and market premium for a long-term storage services in the ratio of 75:25 between ratepayer and shareholder as an incentive to maximize the revenue associated with both these services. [Paragraph 2.505]

342 Union's rationale for the sharing of storage margins has changed over time. In 1996, when it was unsuccessful in obtaining Board approval for long-term storage sales at market-based rates, Union had submitted that all of the margins would be credited to ratepayers "since in-franchise customers had paid for the development of the storage." In Union's 2000 rates case (RP-1999-0017), the Board noted that "Union's position was that ratepayers have paid for the services from the assets, not for the assets themselves." This is the position that Union advanced in this proceeding.

343 IGUA/APMCO claimed Union is estopped from changing its position on margin sharing. The argument is that the Board was persuaded to allow market-based rates on the condition that the bulk of the proceeds would go to the ratepayer. Accordingly, IGUA/AMPCO argued that it is now improper for Union to change its mind and to argue that these proceeds now need to go to the shareholder in order to promote the development of new storage.

Board Findings

344 The Board has determined that storage space in excess of the amount made available at cost-based rates (which is to be capped at 100 PJ -- see Chapter 6) can be considered a "non-utility" asset. This is the space that will support Union's long-term storage sales. The Board finds that profits from new long-term transactions should accrue entirely to Union, not to ratepayers.

345 In comparing this decision with the past Board decisions on the sharing of margins on long-term storage sales, it is important to remember the context in which the Board made its earlier decisions. Until this proceeding, the Board had never reviewed the state of competition in storage and had not considered whether to refrain, in whole or in part, from regulating storage prices. Thus, there was little basis for the Board to treat the margins on short-term and long-term sales differently. Further, the Board's decision in RP-1999-0017 to allow all then existing cost-based contracts with ex-franchise customers to be renewed at market rates has resulted in a substantial growth in long-term margins, margins that have been largely for the benefit of ratepayers. It is certainly not possible today to assert that ratepayers have "paid for" the space that underpins Union's long-term storage contracts.

346 The Board does not accept IGUA/AMPCO's estoppel argument. Estoppel as a principle of contract law is sometimes called "detrimental reliance". IGUA/AMPCO's theory seems to be that when the Board made its decision on the sharing of long-term margins it relied upon an undertaking by Union to continue the sharing. Perhaps that might have been part of the Board's rationale at the time but the Board itself has now questioned the continuing need for the practice and whether the rationale developed at that time continues to exist.

347 This after all, is the purpose of section 29. Section 29 requires the Board to re-examine the need for regulation or the degree of regulation where market structures have changed. This Board in the Natural Gas Forum Report recognized that market conditions in energy markets have in fact changed. When such changes occur, regulators, particularly those such as the Board and the CRTC with statutory forbearance mandates in their governing legislation, must re-examine the regulatory construct in light of the current market conditions. That is what this proceeding seeks to accomplish. The concept of estoppel has no meaning in such a framework.

7.3 TRANSITION RELATED TO LONG-TERM MARGINS

348 IGUA/AMPCO and LPMA/WGSPG argued that in the event the Board decides to eliminate the sharing of any margins with ratepayers there should be some mitigation. As a precedent, LPMA/WGSPG referred to the 2003 decision by the Board on the phase-out of the Delivery Commitment Credit (DCC). There the Board recommended a five-year period based on a cost increase of 11.3 cents per GJ on a specific class of customers. LPMA/WGSPG argued that the phase-in period in the current case should be eight years, because the cost impact is a greater impact of 17.5 cents per GJ across all customer classes.

Board Findings

349 The Board recognizes that, particularly in recent years, Union's ratepayers have had a significant benefit due to sharing the bulk of the margins on long-term deals. The Board would prefer to have a smooth transition away from the status quo rather than an abrupt change in rates.

350 The Board finds, however, that there is no basis for retaining a requirement that Union share the margins on new long-term storage transactions, that is, long-term deals executed after the Board's forbearance decision. To continue sharing those margins with ratepayers would conflict with the Board's decisions (a) to recognize that part of Union's storage capacity constitutes a non-utility asset, and (b) to forbear from regulating the prices of ex-franchise transactions. Union should reap the benefits and bear the risks of those new transactions.

351 The margins that will be recorded in future years in respect of existing long-term deals are different. Those margins flow from long-term contracts that were negotiated and priced prior to the Board's forbearance decision and prior to the Board's decision that there is a non-utility part of Union's storage facilities. When those contracts were signed, Union had no reason to expect that it would receive anything more than 10% of the margin. The Board has concluded that ratepayers should continue to receive some of the margin on those existing contracts.

352 The Board considered whether to require Union to record the margins on existing long-term contracts separately from the margins on new long-term contracts. Under this approach, ratepayers would be credited with 90% of the margins on existing contracts for the remaining terms of those contracts. This approach conceptually has appeal but could give rise to ongoing implementation questions. For example, the Board might have to consider how contract re-negotiations or defaults by customers are to be treated. This level of complexity and potential ongoing review is unwarranted.

353 The Board has concluded that it should adopt a simpler phase-out mechanism that is a rough sort of "proxy" for the conceptual approach described above. The phase-out of the sharing of margins on Union's long-term storage transactions will take place over four years. The share accruing to Union will increase over that period to recognize that contracts will mature and a larger part of Union's total long-term margins will be generated by new transactions. For 2007, forecast margins (on long-term and short-term transactions) now included in the determination of Union's rates will remain unchanged. After 2007, Union's share of long-term margins will be as follows: 2008 -- 25%, 2009 -- 50%, 2010 -- 75%, 2011 and thereafter -- 100%.

354 The Board is currently undertaking a process to determine a multi-year incentive ratemaking framework for Union and Enbridge. That process will address how best to implement the Board's findings on the transition for long-term storage transaction margins within an incentive ratemaking framework.

7.4 ATCO DECISION

355 During the oral hearing and in final argument, several parties referred to the recent Supreme Court of Canada decision on the proceeds of an asset sale by ATCO Gas and Pipelines Ltd. Some parties claimed the case supported a cessation of margin sharing by the utilities, while other parties questioned whether the facts of that case were relevant to the Ontario storage market.

356 ATCO, a public utility in Alberta, applied to the Alberta Energy and Utilities Board (AEUB) as required by the Alberta *Gas Utilities Act*[40], for the approval of the sale of buildings and land located in the City of Calgary. The utility argued that the property was no longer useful and the sale caused no harm to ratepayers. The AEUB agreed that the customers would not be harmed and approved the sale.

357 In a second decision, the AEUB determined that it would allocate the net profits from the proceeds of the sale between the utility and ratepayers. The AEUB held that it had jurisdiction to order this allocation because it had authority to attach conditions to the order approving the sale to protect the public interest.

358 The Alberta Court of Appeal set aside the AEUB's decision[41] referring the matter back to the AEUB to allocate the entire proceeds from the sale to ATCO. The City of Calgary, representing the customers' interest, appealed to the Supreme Court of Canada, which upheld the Court of Appeal finding that the AEUB did not have the requisite jurisdiction. On February 9, 2006 the Supreme Court of Canada released its decision in the ATCO case.[42]

Board Findings

359 The Supreme Court of Canada found as follows:

> The customers pay an amount for the regulated service that equals the cost of the service and the necessary resources...The payment does not incorporate acquiring ownership or control of the utility's assets.[43]

360 There are differences between the ATCO case and the present case. The ATCO case involved the sale of a capital asset (land), while this case involves providing a service (storage).

361 The Alberta case related to section 26 of the *Gas Utilities Act* in Alberta, which required ATCO to apply to the AEUB for approval to sell any asset. The sharing of the premium from the sale of storage services to ex-franchise customers at market-based rates has been decided in the context of rates cases.

362 The findings of fact in this case indicate that there are certain storage assets in rate base that are used to provide storage service to in-franchise ratepayers. This decision also finds that those services should be provided at cost-based rates as they have been in the past.

363 The utility also uses these assets to generate profits from sales to ex-franchise customers. The bulk of the revenues have historically flowed to ratepayers and a small share has gone to the utility. That share represents a "fee" that provides an incentive to the utility to generate these sales and profits from what at certain times of the year is excess capacity. This does not give rise to any claim by the utility under the ATCO principles. The ratepayers are receiving service relating to assets in rate base. No sale of assets is involved. The utility is being compensated for certain services.

364 At the same time, this decision finds that there are certain storage assets that are not part of the utility rate base and finds that the return from those assets, in terms of profit on sales to ex-franchise customers, should accrue entirely to the utility and its shareholders. Again, no claim arises under the ATCO principles. There is no appropriation to the benefit of the ratepayer of any utility assets or for that matter any proceeds from that asset. Accordingly, the Board finds that ATCO decision has no application to this decision.

7.5 STORAGE AND TRANSPORTATION SERVICE DEFERRAL ACCOUNTS

365 The deferral accounts at issue in this proceeding are the following:

* Short-Term Storage and Other Balancing Services Account (179-70)
* Long-Term Peak Storage Services Account (179-72)
* Transportation Exchange Services Account (179-69)
* Other S&T Services Account (179-73)
* Other Direct Purchase Services Account (174-74)

366 On March 15, 2006, the Board notified Union and the intervenors that Union's proposal to eliminate the five deferral accounts, made as part of the rate application EB-2005-0520, had been moved to this proceeding. The relevant evidence from EB-2005-0520 was re-filed in this proceeding.

367 Union explained that of the five accounts in question, the storage accounts (179-70 and 179-72) are directly related to the storage forbearance issue, while the remaining three transmission accounts (179-69, 179-73 and 174-74) are not directly related to the storage forbearance issue.

368 Union proposed to eliminate the Short-Term Storage and Other Balancing Services Account (179-70) and Long-Term Peak Storage Services Account (179-72) on the basis that these accounts would no longer be necessary if the Board decides to forbear from regulating ex-franchise storage service sales.

369 Union also proposed to eliminate the other three transmission-related deferral accounts (179-69, 179-73 and 179-74). Union advanced two reasons for this proposal. First, Union stated that the forecast of S&T revenue should not be treated any differently than the forecast of any other source of revenue. Second, Union submitted that its proposal is consistent with the Board's policy direction, as outlined in its Natural Gas Forum Report, that in an incentive regulation framework there should be no earnings sharing and transactional services revenues should not receive special treatment. Union also expressed concern that there may not be another opportunity or forum to deal with this issue prior to the beginning of the proposed incentive regulation framework.

370 Most intervenors took the position that the storage related accounts (179-70 and 179-72) should continue if the Board determines that it will not refrain from regulating the prices of ex-franchise storage sales services. However, intervenors also acknowledged that if the Board were to forbear from regulating the prices of ex-franchise storage services, then these accounts would no longer be needed and under those specific circumstances should be eliminated. For example, the Board Hearing Team argued that under forbearance, gas utilities' shareholders will be bearing the risk associated with storage transactions in the ex-franchise market and any premium or shortfalls should accrue to the shareholder.

371 With respect to the transmission-related deferral accounts (179-69, 179-73 and 179-74), most intervenors were of the view that these accounts should not be eliminated because transmission will remain a regulated service. LPMA/WGSPG supported the objective of reducing the number of variance and deferral accounts but took the position that a comprehensive review of all such accounts should be undertaken as part of the incentive regulation mechanism that is still to be determined. Many intervenors adopted the LPMA/WGSPG position.

372 The Board Hearing Team supported Union's proposal. It argued that because transactional transportation services are part of the gas utility's monopoly service, these revenues should be treated no differently than any other regulated revenue.

Board Findings

373 With respect to the storage related accounts (179-70 and 179-72), most intervenors were of the view that the resolution of this issue depends on whether the Board refrains from regulating ex-franchise storage. The Board has determined that it will refrain from regulating rates in this area. However, we have also concluded that there should continue to be a sharing of the premium arising from short-term storage transactions, for both Union and Enbridge, and that there should be a phase-out of the sharing of the premium arising from Union's long-term storage transactions. Accordingly, the Board concludes that the accounts should be maintained for now. As outlined in sections 7.1 and 7.3, we have determined that the gas incentive ratemaking process is the best place in which to determine the precise implementation of these findings.

374 With respect to the transmission-related accounts, there was general acknowledgement that the issue related to the structure of the incentive regulation framework and not the issue of storage regulation. Union was concerned that this proceeding would be the only opportunity to deal with its proposal before the introduction of incentive regulation. The Board does not agree. On September 11, 2006, the Board issued a letter indicating its intent to establish a consultation process to use in relation to the development of the gas incentive regulation framework. This process is specifically designed to address issues about the framework prior to the commencement of incentive regulation for natural gas utilities. The Board finds that the proposed elimination of these three transmission-related accounts should be considered as part of a comprehensive review that includes all deferral accounts under an incentive regulation mechanism.

375 The Board therefore concludes that all of the accounts will be maintained and will be reviewed as part of the process for setting the incentive regulation mechanism for natural gas utilities.

8. OUTSTANDING ENBRIDGE RATES ISSUES (RATES 125 AND 300)

376 The unresolved issues arising from the Enbridge Settlement Proposal relate specifically to the allocation of implementation costs and migration revenue deficiencies attributable to changes in Rates 125 and 300, and the Rate 125 eligibility criteria.

377 Early in the proceedings, there were two threshold issues. The first issue was whether the allocation of implementation costs and migration revenue deficiencies should be addressed in this proceeding or Enbridge's next rates proceeding. The Board determined that the issue should be addressed in this proceeding, and that decision was rendered orally on June 27, 2006. The second issue was whether residential customers should be allocated any of the implementation costs or migration revenue deficiencies. The Board rendered its decision orally on July 14, 2006, in which it stated that both the implementation costs and the migration related revenue deficiencies should be recovered from large volume customers as they are the main beneficiaries of these services. (The transcript of the Board's oral decisions on these issues is included at Appendix C.)

378 The remaining issues before the Board are the following:

* Smoothing of Migration-Related Impacts:
* Rate 125 Eligibility Criteria

8.1 SMOOTHING OF RATE MIGRATION IMPACTS

379 Enbridge stated that the offering of new services, such as Rate 125 and Rate 300, typically leads to the migration of customers from the existing rates to the new rates, if there is an economic advantage or a reduction in rates, for these customers. This migration typically leads to an increase in the existing rate because the customers who are less costly to serve are often the ones which migrate. Enbridge's initial estimate of the impact of migration related deficiencies was based on the assumption that customers with the largest benefit would migrate away from Rate 115. This would result in a 60% increase in the Rate 115 distribution charges, or a 14% bill impact excluding commodity charges and a 2% bill impact including commodity charges. Enbridge subsequently proposed an approach that aims to mimic the Settlement Proposal, which restricts the initial migration to Rate 300 to 20 customers. The impact of this proposal would be an increase in Rate 115 distribution charge of 38%, which results in a bill impact of 7% excluding commodity charges or 1% including commodity charges.

380 In order to further limit the impact on Rate 115 customers, Enbridge presented the Board with a rate smoothing proposal that limits the distribution rate impact on Rate 115 customers to 15%. This proposal reflects the migration of the largest customer (TransAlta) and some additional load from Rate 115. As a result of this smoothing, the distribution rate impact on Rates 100, 110 and 115 would be 3%, 2% and 15% respectively. The corresponding bill impacts, excluding commodity costs, are 1%, 0.5% and 2.7%.

381 IGUA supported Enbridge's rate smoothing proposal. Enbridge stated that it does not have a preference for whether smoothing is used or not, but noted that it is important for the Board to indicate if smoothing should be used, to enable customers to make a well informed decision about whether they want to move to unbundled rates.

Board Findings

382 The evidence indicates that the migration of customers from an existing rate to a new rate will have rate consequences for the remaining customers in the rate class from which the customer migrates. The Board agrees that from a cost allocation perspective it is appropriate that the remaining customers in the rate class pay the higher average cost resulting from the migration of customers which are less costly serve. However, from a pricing perspective, the Board is mindful of the rate impacts on the remaining customers. The Board concludes that a smoothing of the distribution-related impacts, as proposed by Enbridge, is appropriate. While the precise details of the resulting rates will be determined in the fiscal 2007 rates case, the Board concludes it is appropriate to signal now to all parties that this smoothing will be incorporated.

383 The Board therefore approves Enbridge's rate smoothing proposal which would limit the distribution rate increase to 15% for Rate 115 and spread the remainder of the migration related deficiencies over Rate 100 and Rate 110 resulting in distribution rate increases for these rates of 3% and 2% respectively.

8.2 RATE 125 ELIGIBILITY CRITERIA

384 There is agreement amongst all parties that the dedicated service (or "contract demand billing") portion of Rate 125 is to be limited to new customers only, and this is reflected in the Settlement Proposal. This aspect of the service is designed to make utility service competitive against the bypass option for new customers. The parties disagreed on whether the non-dedicated provision of service under Rate 125 is to be limited to new customers.

385 Enbridge maintained that when the Board first approved Rate 125 there was no distinction between new and existing customers and it was always known that there was a large customer which was eligible to migrate to Rate 125. This customer was subsequently identified in this hearing as TransAlta.

386 IGUA's position, supported by AMPCO and CME, is that the re-design of Rate 125 should not be treated as an existing rate with a bypass clause. IGUA argued that since there are no existing customers taking service under Rate 125 the Board should treat this as a new rate. APPrO argued that throughout the re-design of Rate 125, the Board has been aware of the likelihood of TransAlta migrating to Rate 125 and the resultant impacts of that migration.

Board Findings

387 The Board notes that from the time Rate 125 was first developed, TransAlta has been eligible to migrate to this rate. The primary change in the rate in this proceeding was the introduction of a bypass competitive component. TransAlta is not eligible for this aspect of the rate; nor has it sought access to this aspect. The Board concludes that it would be unfair to now deny TransAlta access to Rate 125 service unless there were compelling reasons to do so.

388 IGUA seeks to limit access to Rate 125 to new customers only. It appears to the Board that this position is driven mostly by a concern for the rate impact on remaining customers resulting from TransAlta's migration. The Board notes that this potential impact has always existed, and we believe that this concern is adequately mitigated by Enbridge's proposed smoothing mechanism which the Board has approved.

389 Accordingly, the only aspect of Rate 125 that will be restricted to new customers is the billing contract demand feature.

9. CUSTOMER IMPACTS AND IMPLEMENTATION OF BOARD DECISIONS

9.1 CUSTOMER IMPACTS

390 The Board's decisions in this proceeding will affect the future gas bills of all distribution customers of Union and Enbridge in some fashion over the next few years.

9.1.1 Enbridge

Union storage contracts

391 Amending the existing storage contracts with Union to include cost-based pricing will have no effect on customers' bills. Enbridge has not yet started to pass through the current higher contract prices to customers so the Board's decision preserves the status quo. When those contracts mature over the period 2008 to 2010, Enbridge will likely procure the needed storage, which is about 18% of what Enbridge currently requires to serve its customers, at market prices. Those prices will depend on market conditions at the time and cannot be predicted. It is likely, however, they will be higher than the cost-based rates Enbridge charges for storage services from its own storage facilities.

Reducing Enbridge's share of the storage-related margins from its Transactional Services business

392 This reduction, from 25% to 10%, will reduce consumers' bills in the future compared to the status quo. The impact will depend on the amount of margins Enbridge is able to earn, which will depend on future market prices. Based on the level of margins earned by Enbridge in recent years, the impact of this change on a customer's bill is likely to be modest.

9.1.2 Union

Enbridge storage contracts

393 Amending these contracts to include cost-based pricing will reduce the amount of long-term storage margins Union will earn over the period until the contracts mature (2008 to 2010) and will therefore reduce the share of the margin flowing to ratepayers.

Changing the sharing of short-term storage revenues

394 The Board has decided that Union should be credited with the portion of short-term storage margins that are deemed to use the "non-utility" space at Union's storage facilities. Union's share of the margin will also include an incentive related to the utility portion of Union's storage assets. Based on the current level of short-term storage margins, this change will result in a small reduction in the margins that are for the benefit of ratepayers.

Phase-out of sharing long-term storage margins

395 This is the most significant change for Union ratepayers, who currently are credited with 90% of Union's long-term margins. Starting in 2008, the ratepayer share of these margins will decline each year and reach zero by 2011.

9.1.3 Overall Impact

396 The Board's decisions on the sharing of premiums on storage transactions will have virtually no effect on consumers' bills in 2007. The impact after that cannot be precisely quantified because it will depend on future market prices of storage and the level of margins earned by the utilities on ex-franchise storage sales. The impact on any individual consumer will also depend on the amount of gas they consume in the future.

397 The total annual gas bill for a typical residential consumer in Enbridge's territory (Rate 1) and in Union's Southwestern Ontario operations area (Rate M2) is in the range of $1,000 to $1,500 depending on the price of natural gas during the year. Assuming (a) that Union and Enbridge are able to earn the same amount on ex-franchise storage sales in the period 2008 through 2010 that they are forecast to earn in 2007, and (b) that gas prices and other delivery charges remain the same, the Board's decisions in this proceeding are likely to increase rates by a small amount -- perhaps around 1% on the typical residential consumer's bill by 2011.

9.2 COMPLETION OF THE PROCEEDINGS AND COST AWARDS

398 As part of this proceeding, new unbundled rates have been approved for Enbridge and they are to be implemented as soon as possible. The Board therefore directs Enbridge to file a draft Rate Order within 15 days of this decision. The draft Rate Order should reflect the findings in this decision.

399 The Board also directs Union to file a Draft Rate Order reflecting the findings in this decision within 90 days. This should be done in conjunction with Union's filing of amended contracts with Enbridge.

400 The Board will issue a cost awards decision separately.

9.3 IMPLEMENTATION

401 The following table summarizes the Board's decisions in this proceeding and outlines next steps. Each item is cross-referenced to the relevant section of this decision.

	Implementation Issue	Regulatory Process	Timing
1.	Continued cost-based rate regulation for most in-franchise storage service (section 5.2.1)	No additional process required	
2.	Amendments to Enbridge's storage contracts with Union (19.9 Bcf) to incorporate cost-based rates (section 5.2.2)	Union to file amended contracts for Board approval	Within 90 days of this decision
3.	Refrain from rate regulation for Union and Enbridge ex-franchise storage services (section 5.2.4) and new storage services (section 5.2.3)	Union and Enbridge to file Draft Rate Orders	Enbridge to file within 15 days. Union to file within 90 days.
4.	Refrain from rate regulation and contract approval for third-party storage operators (section 5.1)	The Board will rescind MHP Canada's and Tribute's Rate Orders	
5.	Refrain from requiring Board approval of storage contracts (section 5.1, 5.2.4)	The Board to rescind Blanket Storage Orders	
6.	Union and Enbridge policies on aggregate excess method and its application (section 6.2.1)	Union and Enbridge to file policies; Board will consider possible generic process.	Within 90 days of this decision
7.	Development of storage allocation methodology (or methodologies) for use in cases where aggregate excess method is inappropriate (section 6.2.2)	Union and Enbridge to file proposals; Union to file long-term T1 contracts; Board will consider possible generic process.	Within 90 days of this decision

	Implementation Issue	Regulatory Process	Timing
8.	Extension to City of Kitcheners' contract with Union (section 6.2.4)	Union to amend contract and file with the Board	Within 90 days of this decision
9.	Share of margin on short-term storage transactions for Union to be based on non-utility assets (21%) and incentive related to utility assets (7.9%, that is 10% of 79%) (section 7.1)	Implementation to be determined through gas incentive ratemaking process	Beginning 2008 Rates
10.	Share of margin on short-term storage transactions for Enbridge to based on incentive (10%) (section 7.1)	Implementation through 2007 rates, with follow on implementation through the gas incentive ratemaking process	2007 rates
11.	Phase-out of ratepayer share of margins on Union's long-term storage transactions (section 7.3)	Implementation to be determined through gas incentive ratemaking process	2008 through 2011
12.	Smoothing of rate impacts from migration to Enbridge Rate 125 and Rate 300 (Chapter 8)	Implementation through Enbridge's 2007 rates proceeding	2007 rates
13.	Implementation of Enbridge unbundled rates (section 5.2.3 and Chapter 8)	Enbridge to submit draft Rate Order	Within 15 days of this decision
14.	Development of rules of conduct and reporting related to storage (section 5.4)	Board to initiate process.	

DATED at Toronto November 7, 2006

ORIGINAL SIGNED BY

Gordon Kaiser
Presiding Member and Vice Chair

ORIGINAL SIGNED BY

Cynthia Chaplin
Member

ORIGINAL SIGNED BY

Bill Rupert

Member

* * * * *

APPENDIX A

Details of the Proceeding

The Issues

The Board, in Procedural Order No. 2, set out the following issues for the NGEIR Proceeding:

I. Rates for gas-fired generators (and other qualified customers):

Should the Board order new rates for the provision of natural gas, transmission, distribution and storage services to gas-fired generators (and other qualified customers)? If the Board does order new rates, should that order contain the following requirements:

1. More frequent nomination windows for distribution, storage and transportation that correspond with the nominations of upstream pipelines that connect to the Ontario gas system.
2. Firm high deliverability service from storage with customer options for 1.2%, 5% and 10% deliverability.
3. Gas storage and distribution offered as discrete services.
4. Inter-franchise movement of gas (i.e., the ability to access services across Ontario, whether to a customer's own account or as a sale to a third-party).
5. Redirection of gas to a different delivery point on short notice (i.e., the ability to redirect or acquire gas on short notice to a different delivery point).
6. The ability to transfer the title of gas in storage (i.e., the title transfer in gas storage is treated as an administrative matter instead of a physical withdrawal or injection of gas).

II. Storage regulation:

Should the Board refrain, in whole or part, from exercising its power to regulate the rates charged for the storage of gas in Ontario? In making this determination, the Board will have regard to a number of considerations, including:

1. Do gas utilities (and/or their affiliates) either collectively or individually have market power in the provision of storage services for all or some categories of customers in Ontario?
2. If gas utilities (and/or their affiliates) do have market power in storage, is it appropriate for them to charge "market rates" for transactional and long-term storage services?
3. If gas utilities (and/or their affiliates) do not have market power, is it in the public interest that all or some customers continue to pay storage rates at cost as opposed to market rates? How should the extra revenue from storage services at market rates be allocated?
4. If the Board determines, based on considerations of market power and the public interest more generally, that some customers should pay for storage services at cost and others should pay for storage services at market prices, how should the line be drawn between the two types of customers and, specifically, should there be a constraining allocation of physical storage facilities to some types of customers based on measures such as aggregate

excess or whether customers are considered "in-franchise" or "ex-franchise"? How should the extra revenue from storage services at market rates be allocated?

III. Transportation capacity bidding process and allocation:

Should the Board allow a gas transmitter to charge a premium above costs for gas transmission services and, if so, how should that premium be allocated?

IV. Enbridge rates for large volume customers (Rate 300 Series):

Should the Board consider any other terms and conditions in addition to those outlined in Appendix B [to Procedural Order No. 2 -- "Mandatory Evidence to be filed by Enbridge with respect to Rate 300 Series Rates"]?

What should be the maximum waiting period for customers to make the transition to the new Rate 300 series rates?

The Board also moved four issues from Union's 2007 rates proceeding (EB-2005-0520) to the NGEIR Proceeding. These issues, as set out in Procedural Order No. 3, were:

1. Matters relating to market pricing of storage services;
2. Union's proposal to eliminate storage and transmission deferral accounts;
3. Union's proposal to change the blanket storage order; and
4. Power services -- M12 service upgrades for power producers.

Technical Conferences

On April 5 and 6, 2006, the Board held a technical conference on the mandatory evidence filed by Enbridge and Union with respect to potential rates for gas-fired generators and other qualified customers (Issue I of this proceeding). At the April 6, 2006 technical conference, Enbridge presented revisions to Rate 125 -- Extra Large Firm Transportation Service and proposed a new High Deliverability Storage Service (Rate 316). The proposed rates were presented on a conceptual basis only, and Enbridge took the position that the setting of rates associated with Rate 125 and Rate 316 should only be done in the context of Enbridge's 2007 rate hearing. The Board did not agree and directed Enbridge to file supplemental evidence to complete the mandatory evidence on the potential rates for gas-fired generators and other qualified customers (Issue I) and added a one-day technical conference on April 27, 2006 on Issues I and IV.

A further technical conference was held on May 16-19, 2006 to provide participants with the opportunity to present their evidence relating to Issues II, III and IV and to allow other participants to obtain further clarification of the evidence.

Settlement Conference

A settlement conference was held for Issues I (rates for gas-fired generators and other qualified customers), III (transportation capacity bidding process and allocation) and IV (Enbridge's Rate 300 series rates). The Board indicated that it would not receive a settlement proposal on Issue II (storage regulation), so a settlement conference was not held in relation to this issue.

Two separate Settlement Proposals were filed with the Board on June 13, 2006. Enbridge submitted a Settlement Proposal for Issues I and IV (the "Enbridge Proposal") and Union submitted a Settlement

Proposal for Issues I and III (the "Union Proposal"). A presentation of the Settlement Proposals was made to the Board on June 19, 2006. On July 14, 2006, the Board approved the Enbridge Proposal.[44] On June 27, 2006,[45] the Board approved the Union Proposal.

Proceeding

The oral hearing commenced on June 19, 2006 and concluded on July 20, 2006. Arguments were delivered orally and in writing during August and final reply arguments were heard on September 7, 2006.

* * * * *

APPENDIX B

Participants and Witnesses

List of Participants

Board Hearing Team	Donna Campbell Pascale Duguay Laurie Klein
Board Support Team	Kristi Sebalj David Brown Zora Crnojacki Ronald Man Rudra Mukherji
Union Gas Limited	Glenn Leslie Michael Packer Connie Burns
Enbridge Gas Distribution	Fred Cass David Stevens
Aegent Energy Advisors	Valerie Young
Association of Major Power Consumers of Ontario	Mark Rodger Adam White
Association of Power Producers of Ontario	Patrick Moran Richard King David Butters
BP Canada	David Brett Cheryl Worthy
Canadian Association of Petroleum Producers	Nick Schultz
Canadian Manufacturers & Exporters	Brian Dingwall
City of Kitchener	Alick Ryder James Gruenbauer
Competition Bureau	Mark Ronayne

Consumers Council of Canada	Robert Warren Julie Girvan
Coral Energy Canada Inc.	Paul Kerr
Direct Energy Marketing Inc.	Dave Matthews
Enbridge Inc.	Robert J. Howe Bob Craig
Energy Probe Research Foundation	David S. MacIntosh Thomas Adams
EPCOR Utilities Inc.	Elisabeth (Lisa) De Marco Leigh-Anne Palter
Greenfield Energy Centre LP	Patrick Moran John Rosenkranz
Hydro One Networks Inc.	Glen MacDonald
IESO	John M. Rattray George Katsuras
Inco Limited	John LeMay John Butler
Industrial Gas Users Association	Peter Thompson Peter Fournier
London Property Management Association	Randy Aiken
Low Income Energy Network	Malcolm Jackson
Natural Gas Consultant	Jason Stacey
Nexen Marketing Inc.	Debbie White Shannon Young
Market Hub Partners Canada	Laurie Smith Karen Illsey Toby Bishop Jim Redford

Ontario Energy Savings L.P.	Nola L. Ruzycki
Ontario Power Authority	Miriam Heinz Gia DeJulio
Ontario Power Generation Inc.	Barry Green Greg Olsen
Portlands Energy Centre	David Brown Nicolle Butcher John Wolnik
Pristine Power Inc.	Michael Peterson Kevin Gilchrist
School Energy Coalition	John DeVellis Jay Shepherd Brian Cain
Sithe Global Power Goreway ULC Sithe Global Power Southdown ULC	David Brown Duane E. Cramer
Société en Commandite Gaz Métro	Louis-André Leclerc Louis-Charles Ratelle Frederic Morel
TransAlta Cogeneration L.P. and TransAlta Energy Corp.	Sandy O'Connor
TransCanada Energy Ltd.	David Brown Margaret Duzy Jennifer Nichols John Wolnik
TransCanada PipeLines Limited	Bernard Pelletier Patrick Keys Murray Ross
Tribute Resources Inc.	Peter Budd Robert Lockhart
Vulnerable Energy Consumers Coalition	Michael Janigan Roger Higgin James Wightman
Wholesale Gas Service Purchasers Group	William Blake Nick Petruzzella Randy Aiken

Expert Witnesses

The Board Hearing Team presented the following expert witness:

Bruce McConihe	LECG, LLC

Union Gas Limited presented the following expert witnesses:

Bruce Henning	Energy and Environmental Analysis
Michael Sloan	Energy and Environmental Analysis
Richard Schwindt	Simon Fraser University

Enbridge Gas Distribution presented the following expert witnesses:

David McKeon	View Communications Inc.
Richard Smead	Navigant Consulting Ltd.

Market Hub Partners Canada L.P. presented the following expert witness:

John Reed	Concentric Energy Advisors

The Industrial Gas Users Association, Association of Major Power Consumers of Ontario, Consumers Council of Canada, Vulnerable Energy Consumers Coalition, School Energy Coalition, City of Kitchener, Canadian Manufacturers & Exporters, Inc. jointly sponsored the following expert witness:

Mark Stauft	Consultant

The Association of Power Producers of Ontario presented the following expert witnesses:

Robert Cary	Rob Cary & Associates
Michael Nolan	Ontario Power Generation
John Rosenkranz	Consultant
John Wolnik	Elenchus Research Associates

Witnesses by Party

Enbridge Gas Distribution	Jody Sarnovsky Malini Giridhar David Charleson James Grant Anton Kacicnik
Union Gas Limited	Mark Isherwood Mark Kitchen Chris Shorts Steven Poredos Steven Baker Mike Sloan Drew Quigley Mike Broeders
Market Hub Partners Canada	Jim Redford
Board Hearing Team	Ajit Ratra
Société en Commandite Gaz Métro	Jean-Pierre Bélisle Sophie Brochu Frédéric Morel
Association of Power Producers of Ontario	Duane Cramer Brian Kelly
Enbridge Inc.	Robert Craig
City of Kitchener	Dwayne Quinn James Gruenbauer
BP Canada	Cheryl Worthy Stephen Acker
Industrial Gas Users Association Association of Major Power Consumers of Ontario	Peter Fournier Adam White Darren MacDonald John Butler

* * * * *

[Editor's note: Appendix C, Decision on Enbridge Settlement Proposal, could not be reproduced online. Please contact Quicklaw Customer Service at 1-800-387-0899 or service@lexisnexis.ca and request the following document: 06oebd023.PDF]

* * * * *

[Editor's note: Appendix D, Enbridge Settlement Proposal, could not be reproduced online. Please contact Quicklaw Customer Service at 1-800-387-0899 or service@lexisnexis.ca and request the following document: 06oebd023.PDF]

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[Editor's note: Appendix E, Decision on Union Settlement Proposal, could not be reproduced online. Please contact Quicklaw Customer Service at 1-800-387-0899 or service@lexisnexis.ca and request the following document: 06oebd023.PDF]

* * * * *

[Editor's note: Appendix F, Union Settlement Proposal, could not be reproduced online. Please contact Quicklaw Customer Service at 1-800-387-0899 or service@lexisnexis.ca and request the following document: 06oebd023.PDF]

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[Editor's note: Appendix G, Decision on MHP CanadaAEs Core Points, could not be reproduced online. Please contact Quicklaw Customer Service at 1-800-387-0899 or service@lexisnexis.ca and request the following document: 06oebd023.PDF]

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1 Board File No. RP-2004-0213, 2005 LNONOEB 61

2 Board File No. EB-2005-0306, 2005 LNONOEB 59

3 *Natural Gas Regulation in Ontario: A Renewed Policy Framework*, Report on the Ontario Energy Board Natural Gas Forum, March 30, 2005 at page 84.

4 Federal Energy Regulatory Commission, *2004 State of the Markets Report*, June 2005, page 161.

5 Derived from information in Union Gas Undertaking K3.1, which was expressed in PJs. Table 1 was prepared using a conversion factor of 1Bcf = 1.055 PJ.

6 Space Allocation derived from Exhibit J5.02, converted to Bcf using a factor of 1Bcf=1.055 PJ.

7 Union Gas has long-term contracts covering 6.7 Bcf of Tecumseh storage facilities, which reduce the space available to Enbridge to around 92 Bcf.

8 RP-2003-0253, 2005 LNONOEB 43 *Decision with Reasons to Follow*, June 17, 2005

9 The Board's decision on MHP Canada's core points is reproduced in Appendix G.

10 Derived from Union Exhibit J5.02. Figure 3 was prepared using a conversion factor of 1 Bcf = 1.055 PJ.

11 Union Gas prefiled evidence Exhibit A, Tab 1, footnotes 1 and 2.

12 *RP-1999-0017, 2001 LNONOEB 3 Decision with Reasons*, July 21, 2001

13 Page 25 of the Settlement Agreement in RP-1999-0017 stated: "In order to facilitate the transition to the new allocation methodology [aggregate excess], Union agrees to grandfather existing T-service customers currently operating within there current deliverability level, whether those customers remain as t-service or select the new unbundled service."

14 Union information extracted from Exhibit K2.3, and the settlement agreement for Union's 2007 distribution rates.

15 RP-2005-0520 dated June 29, 2006

16 Enbridge information extracted from Exhibit K6.1 and, for the 2006 estimate, Transcript Day 7, page 20.

17 *EB-2005-0001/EB-2005-0437, 2006 LNONOEB 25, Decision with Reasons*, February 9, 2006

18 S.O. 1998, c.15

19 Telecommunications Act S.C. 1993 c.38

20 Economic Council of Canada, *Responsible Regulation -- An Interim Report of the Economic Council of Canada (Ottawa, Supply and Services, 1979)*

21 Economic Council of Canada, *Reforming Regulation* (Ottawa, Supply and Services, 1982)

22 Royal Commission on the economic and development prospects for Canada, Volume 2, at 254 (1985)

23 Further Notice of Proposed Rulemaking, 84 F.C.C. 2d 445, at 472-74, 478 (1981). See, Enhanced services, Telecom Decision CRTC 84-18, at 6-17, 118 CAN GAZETTE PT I, 6117, at 6123-25 (12-July, 1984).

24 Telecommunications Act S.C. 1993 c.38

25 Exhibit E, Tab 2, Schedule 1, Attachment 2

26 Further Notice of proposed Rulemaking, 84 FCC 2nd 445 at 472-74,478, (1981)

27 The HHI is a measure of the competitive structure of an industry. It is equal to the sum of the squares of the market shares of all the companies in the industry (multiplied by 10,000). Thus an industry with ten equally sized firms would have an HHI of 1,000. An industry with five equally sized firms would have an HHI of 2,000.

28 Telecommunications Decision CRTC 2006-15

29 The Canadian and U.S. MEGs, while distinct, follow exactly the same methodology for the purposes of identifying market power.

30 Mr. Stauft's evidence was sponsored by IGUA, AMPCO, Consumers Council, Schools, Kitchener, and CME.

31 In this proceeding there were two Board Staff teams. The Board Support Team took the traditional role of completing the public record and providing assistance to the Panel. The Board Hearing Team acted as a public interest intervenor, presented evidence, and made submissions.

32 "Basis blowout" was described by Mr. Henning as "a description of the market conditions whereby the value, market value, of the pipeline services exceeds the maximum regulated costs". (Tr. 4, p. 27)

33 The Board's decision regarding MHP Canada's core points appears at Appendix G.

34 *Report of Committee on Oil and Gas Resources*, *Part II Underground Storage of Natural Gas*, June 1962 (commonly referred to as the "Langford Report")

35 Union Pre-filed evidence, Exhibit C, Tab 1, page 15.

36 Exhibit Y2.1, outline of Union reply argument, page 4.

37 EBRO 494-03 Decision with Reasons, September 26, 1997, paragraph 2.2.29.

38 In its pre-filed evidence and during the oral hearing, Kitchener also put forward the idea that it should receive a proportionate share of Union's system integrity space. In its final argument, however, Kitchener withdrew that proposal.

39 Kitchener also made submissions on some problems with the way cost-based storage has been allocated to Union's T1 customers, including the deviations from aggregate excess that were grandfathered by the Board. Some of Kitchener's general concerns about the aggregate excess methods are addressed in section 6.2.2 of this decision.

40 R.S.A. 2000, c. G-5, s.26

41 ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board), [2004] 24 Alta. L.R. (4th) 205 (C.A.)

42 ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board), [2006] S.C.J. No. 4, 2006 SSC 4.

43 Ibid, par. 68

44 Board File No. RP-2004-0213

45 Board File No. EB-2005-0306

End of Document

TAB C

Para. 7

2010 CAF 200, 2010 FCA 200
Federal Court of Appeal

Canada (Attorney General) v. United States Steel Corp.

2010 CarswellNat 2483, 2010 CarswellNat 3104, 2010 CAF 200, 2010 FCA 200, [2010] F.C.J. No. 902, 191 A.C.W.S. (3d) 707, 406 N.R. 297

United States Steel Corporation and U.S. Steel Canada, Appellants and Attorney General of Canada, Respondent

Carolyn Layden-Stevenson J.A.

Heard: July 21, 2010
Judgment: July 23, 2010
Docket: A-242-10

Counsel: Michael Barrack, Marie Henein, Ronald Podolny, for Appellants
John L. Syme, Jeffrey G. Johnston, for Respondent
David Wilson, for Intervener, Lakeside Steel
Paula Turtle, for Intervener, United Steelworkers

***Carolyn Layden-Stevenson J.A.*:**

1 The Attorney General (the Crown) filed an application in the Federal Court (Court File No. T-1162-09) (the T-1162 application) under section 40 of the *Investment Canada Act*, R.S.C. 1985, c. 28 (1st Supp.) (ICA) alleging that United States Steel Corporation and U.S. Steel Canada Inc. (U.S. Steel) had failed to comply with certain undertakings given to the Minister of Industry in connection with U.S. Steel's acquisition of Stelco Inc..

2 U.S. Steel moved to challenge the validity of sections 39 and 40 of the ICA on the basis that they contravened section 11(d) of the *Canadian Charter of Rights and Freedoms* (the Charter) and paragraph 2(e) of the *Canadian Bill of Rights*, R.S.C. 1985 (the Bill of Rights). The T-1162 application was held in abeyance pending the disposition of U.S. Steel's motion.

3 On June 14, 2010 [*Canada (Attorney General) v. United States Steel Corp.*, 2010 CarswellNat 1617 (F.C.)], the Federal Court dismissed U.S. Steel's motion (the validity order). On June 24, 2010, U.S. Steel filed a notice of appeal from the validity order.

U.S. Steel now seeks to stay the T-1162 application in the Federal Court pending this Court's disposition of the appeal from the validity order. For the reasons that follow, I conclude that U.S. Steel's motion should be dismissed.

Stay of Proceeding

4 To obtain a stay, U.S. Steel must satisfy all three components of the tri-partite test articulated in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.) (*RJR*). That is, U.S. Steel must demonstrate that:

(i) a serious issue exists;

(ii) it would suffer irreparable harm is the stay is not granted; and

(iii) the balance of convenience favours the granting of the stay.

Serious Issue

5 The serious issue component imposes a low threshold. It requires only a preliminary assessment of the merits to ensure that the appeal is neither frivolous nor vexatious: *RJR*, pp. 337-338. The Crown conceded that U.S. Steel's appeal of the validity order is not frivolous or vexatious and therefore meets the low threshold. I agree that U.S. Steel's appeal cannot be characterized as frivolous or vexatious, therefore it meets the requisite threshold to establish the existence of a serious issue.

Irreparable Harm

6 *RJR* described the central question regarding irreparable harm as "whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application": para. 63. Irreparable harm refers to the nature of the harm, not the magnitude. The nature of the harm must be such that it cannot be quantified in monetary terms or cannot be cured: para. 64.

7 The jurisprudence of this Court holds that the party seeking the stay must adduce clear and non-speculative evidence that irreparable harm will follow if the motion for a stay is denied. It is not sufficient to demonstrate that irreparable harm is "likely" to be suffered. The alleged irreparable harm may not be simply based on assertions: *Syntex Inc. v. Novopharm Ltd.* (1991), 36 C.P.R. (3d) 129, 126 N.R. 114 (Fed. C.A.), leave to appeal refused (1991), 39 C.P.R. (3d) v (note), 137 N.R. 391 (note) (S.C.C.); *Centre Ice Ltd. v. National Hockey League* (1994), 53 C.P.R. (3d) 34 (Fed. C.A.); *Canada (Attorney General) v. Canada (Information Commissioner)*, 2001 FCA 25, 268 N.R. 328 (Fed. C.A.).

8 U.S. Steel's written memorandum of fact and law focussed on the serious nature of the remedies at issue in the T-1162 application as the basis for the irreparable harm. It submitted that it will be deprived of its right of appeal from the validity order if the stay is not granted. More specifically, it asserted that if the stay is not granted, the validity appeal will be moot because the hearing of the T-1162 application will have proceeded on the basis of a provision and process that is unconstitutional and inconsistent with the Bill of Rights. It also alleged that it will incur significant pecuniary loss and waste considerable legal resources. The last assertion was not pursued at the hearing and I will say no more about it.

9 At the hearing of the motion, U.S. Steel centered its argument on the process, arguing that if it has to proceed on the T-1162 application and produce evidence (which will be required within seven days of the denial of the stay), its constitutional rights will be irreparably harmed. It relies, by analogy, on cases where the production of documents was held to constitute irreparable harm because the right to be accorded protection was one of privacy or confidentiality: *Bisaillon c. R.* (1999), 251 N.R. 225, 99 D.T.C. 5517 (Fr.) (Fed. C.A.) (*Bisaillon*) and *Bining v. R.*, 2003 FCA 286, 4 C.T.C. 165 (Fed. C.A.) (*Bining*).

10 More particularly, U.S. Steel claims that the process under section 40 of the ICA violates the right to know the case it has to meet and to make full answer and defence. It must respond to the Crown's case without having had any opportunity to cross-examine the Crown's witnesses. As U.S. Steel's counsel put it, if a stay of the T-1162 application is not granted, the egg will have already been scrambled.

11 Turning to the evidence, U.S. Steel relied upon the affidavit of its Executive Vice President and Chief Operating Officer, John H. Goodish, sworn June 29, 2010. In addressing the issue of irreparable harm at paragraphs 18 and 19 of his affidavit, Mr. Goodish attested as follows:

> If the relief sought in the pending appeal is granted in whole or in part, it will either dispose of this Application or fundamentally alter the manner in which it proceeds. However, in the absence of a stay, by the time the pending appeal of the [validity] order is decided, the substantive hearing will be nearly, or fully completed. The pending appeal will then be moot. Accordingly, in the absence of a stay, [U.S. Steel] will be effectively deprived of its right to appeal the [validity] order, thus suffering irreparable harm through the loss of an appeal granted as of right under the *Rules*.
>
> In light of the expected deadlines under which the present application will proceed in the absence of a stay, by the time the appeal of the [validity] order is resolved, the issues at its core will become moot.

12 These paragraphs, in my view, constitute a combination of opinion and argument. There is no factual foundation to support the bare and conclusive assertions. There is no specificity regarding the application process, no disclosure as to known or anticipated timelines and no information regarding any expedited deadline. There are no facts contained within the affidavit as it pertains to irreparable harm.

13 Absent evidence of irreparable harm, the second component of *RJR* is not met. Even accepting the submissions of U.S. Steel's counsel (which are not evidence) as to the application process prescribed by the *Federal Courts Rules*, S.O.R/98-106, (the Rules), there is no basis for a finding of irreparable harm. Counsel complained that U.S. Steel does not know the case it has to meet and cannot cross-examine the Crown's witnesses before it has to respond. The Crown's application (filed July 17, 2009) must be supported by an affidavit. U.S. Steel advanced neither evidence nor argument that the Crown's documentation was deficient to the extent that U.S. Steel did not know the case it had to meet, or at all. If such deficiency exists, U.S. Steel ought to have addressed it on this motion.

14 As to cross-examination, it is correct that, under the Rules, in matters proceeding as applications, cross-examination is conducted after the affidavit evidence has been served. Again, there was neither evidence nor argument regarding the nature of the irreparable harm that would result because of this process. Even if this were a situation where irreparable harm was self-evident (and it is not), it must be stated as such.

15 In relation to the allegation of mootness, U.S. Steel's position is that, if the very procedure that is the subject of the appeal is implemented (in the T-1162 application), the appeal as to process is rendered moot. This, it is said, renders any remedy this Court could grant nugatory and accordingly, constitutes irreparable harm.

16 The first difficulty in this respect is, as discussed above, U.S. Steel's failure to explain on this motion what deficiencies exist with respect to the procedure. While counsel spoke of a right to full answer and defence and a right of full disclosure, there was no disclosure of the perceived frailties of the impugned procedure.

17 Second, even if, for the purposes of this motion, I were to accept U.S. Steel's position as correct, it assumes that an appeal rendered moot automatically gives rise to a finding of irreparable harm. That is not so. As Rothstein J.A. (as he then was) explained in *El Ouardi v. Canada (Solicitor General)*, 2005 FCA 42, 332 N.R. 76 (Fed. C.A.), if such a proposition were adopted, it would apply to virtually all circumstances in which a stay is sought and would essentially deprive the court of the discretion to decide questions of irreparable harm on the facts of each case.

18 Third, I am not persuaded, if the T-1162 application continues and the application is determined before the disposition of the appeal from the validity order (which is speculative at this point) that this Court could not fashion an appropriate remedy. It is not insignificant that U.S. Steel sought declaratory relief in the Federal Court. Specifically, as noted earlier, with respect to section 40 of the ICA, it sought a declaration of invalidity on the basis that it contravened section 11(d) of the Charter and paragraph 2(e) of the Bill of Rights. If U.S. Steel were to succeed on appeal (which is speculative at this point), it would be open to this Court to grant a declaration of invalidity. If that were to occur, and U.S. Steel had been unsuccessful in the T-1162 application (which is speculative at this point), the declaration of invalidity would constitute grounds upon which to set aside the judgment in the T-1162 application.

19 Further, the Crown's point that U.S. Steel's validity attack is premised on only two of the seven options enumerated in paragraph 40(2)(a) of the ICA is well-taken. The prospect exists, if U.S. Steel's appeal were successful (which is speculative at this point) that this Court would sever the offensive elements in which case the Federal Court could still utilize the remaining options, if U.S. Steel were unsuccessful in the T-1162 application (which is speculative at this point).

20 All of which is to say, the only remedy that would be unavailable to this Court would be to retroactively alter the process in the T-1162 application. However, it does not necessarily follow that an appeal from the validity order would be moot. In my view, sufficient options would remain available to this Court to remedy any harm sustained by U.S. Steel. That was not the situation in *Bisaillon* and *Bining* where private information would become public and the breach would be irreversible.

21 U.S. Steel has not established that it would suffer irreparable harm.

Balance of Convenience

22 U.S. Steel argued that the balance of convenience favours it because the constitutional issues are of significant importance and widespread impact and there is no prejudice to the Crown. It claimed that it is in the public interest to have the issues determined with finality and it would be expedient and efficient to do so. Last, it asserted that the violations of the Charter and the Bill of Rights would be perpetrated if a stay is not granted.

23 At the hearing, there was debate as to whether the ICA is a public interest statute. I need not make a determination as to whether it is or is not. It is apparent, on its face, that it has a public interest dimension because it is aimed at encouraging investment, economic growth and employment opportunities for the benefit of Canadians. Additionally, it is

aimed at ensuring that proposed investments will not be injurious to national security. This is sufficient, in my view, to bring it within the purview of the comments of the Chief Justice in *Harper v. Canada (Attorney General)*, [2000] 2 S.C.R. 764 (S.C.C.) (*Harper*) that the motions judge must proceed on the basis that the law is directed to the public good and serves a valid public purpose. The assumption of the public interest in enforcing the law weighs heavily in the balance. The statement at paragraph 9 of *Harper*, reproduced below, is apt.

> The assumption of the public interest in enforcing the law weighs heavily in the balance. Courts will not lightly order that laws that Parliament or a legislature has duly enacted for the public good are inoperable in advance of complete constitutional review, which is always a complex and difficult matter. It follows that only in clear cases will interlocutory injunctions against the enforcement of a law on ground of alleged unconstitutionality succeed.

24 To delay the commencement of the T-1162 application would effectively suspend the application of the legislation. U.S. Steel has not persuaded me that such an approach would itself provide a public benefit. The balance of convenience favours the Crown.

25 The motion will be dismissed with costs.

Postscript

26 Counsel for the parties indicated at the hearing that they have agreed to an abridged schedule in relation to the appeal from the validity order. Counsel for U.S. Steel undertook to file a formal motion to expedite the hearing of the appeal. I am confident that the motion will be filed, on consent, forthwith.

Motion dismissed.

TAB D

2013 CAF 126, 2013 FCA 126
Federal Court of Appeal

Gateway City Church v. Minister of National Revenue

2013 CarswellNat 1314, 2013 CarswellNat 3097, 2013 CAF 126, 2013 FCA 126, [2013] F.C.J. No. 514, 2013 D.T.C. 5100 (Eng.), 228 A.C.W.S. (3d) 285, 445 N.R. 360

Gateway City Church, Applicant and The Minister of National Revenue, Respondent

David Stratas J.A.

Heard: May 07, 2013
Judgment: May 7, 2013
Docket: A-151-13

Counsel: Osborne G. Barnwell, for Applicant
Joanna Hill, for Respondent

***David Stratas J.A.*:**

1 The Gateway City Church applies for an order that, if granted, will prevent the Minister from revoking its charitable status under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.). For the reasons set out below, I dismiss the application, with costs.

A. Background

2 The Gateway City Church is registered as a charity under the Act.

3 Recently, the Minister has given notice of her intention to revoke the Church's registration as a charity: Act, subsection 168(1). The Church loses its registration as a charity when the Minister's notice is published in the *Canada Gazette*.

4 In her notice, the Minister alleges that the Church has failed to comply with the Act in several respects:

- Failure to maintain adequate books and records: Act, subsection 149.1(2), paragraph 168(1)(*e*) and section 230;

- Failure to devote all of its resources to its own charitable activities: Act, subsections 149.1(1) and 149.1(2) and paragraph 168(1)(*b*);

- Provision of personal benefits to a proprietor, member, shareholder, trustee or settlor: Act, subsections 149.1(1) and 149.1(2) and paragraph 168(1)(*b*).

5 Where, as here, the charity has not requested the revocation, the publication of the Minister's notice is deferred for 30 days in order to allow the charity to challenge it: Act, paragraph 168(2)(*b*). The challenge consists of the making of an objection and, if necessary, an appeal to this Court: Act, section 172. The Church has filed an objection.

6 The 30 day period can be extended: Act, paragraph 168(2)(*b*).

7 By application brought under Rule 300(*b*) of the *Federal Courts Rules*, the Church seeks an extension until the Minister decides upon the Church's objection, or until this Court determines the appeal from the Minister's decision, whichever is later. In effect, the Church wishes to maintain its charitable status under the Act until the merits of its objection have been determined.

B. A preliminary issue

8 The parties agree that the proper respondent is the Minister of National Revenue, not Her Majesty the Queen in Right of Canada. Therefore, to reflect this, the style of cause shall be amended.

C. The legal test to be applied in this application

9 The parties agree that the Church's application can be granted only if the Church meets the test for the granting of stays and injunctions: *International Charity Assn. Network v. Minister of National Revenue*, 2008 FCA 114 (F.C.A.) at paragraph 5. The Church must show:

- it has an arguable case against the revocation;

- it will suffer irreparable harm if the revocation is allowed to happen; and

- the balance of convenience lies in its favour.

(*RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.).)

D. Applying the legal test

(1) Arguable case

10 On the first branch of the threefold test, the Church must establish that its objection raises a serious question to be tried.

11 The threshold for seriousness is "a low one" and "liberal": *RJR-Macdonald*, *supra* at page 337; *143471 Canada Inc. c. Québec (Procureur général)*, [1994] 2 S.C.R. 339 (S.C.C.) at page 358, *per* La Forest J. (dissenting, with apparent concurrence on this point from the majority). The Church need only show that the matter is not destined to fail or that it is "neither vexatious nor frivolous": *RJR Macdonald*, *supra* at page 337.

12 Given the lowness of this threshold, the Minister does not contest that the Church has met this branch of the threefold test.

(2) Irreparable harm

13 If the Church's registration as a charity is revoked, it will not be able to issue receipts for donations. Future donors will not be able to claim deductions for their donations. The Church says donations will fall off, preventing it from doing essential work for its congregation and the wider community.

14 Such a general assertion is insufficient to establish irreparable harm: *Holy Alpha & Omega Church of Toronto v. Canada (Attorney General)*, 2009 FCA 265 (F.C.A.) at paragraph 22. That sort of general assertion can be made in every case. Accepting it as sufficient evidence of irreparable harm would unduly undercut the power Parliament has given to the Minister to protect the public interest in appropriate circumstances by publishing her notice and revoking a registration even before the determination of the objection and later appeal.

15 General assertions cannot establish irreparable harm. They essentially prove nothing:

> It is all too easy for those seeking a stay in a case like this to enumerate problems, call them serious, and then, when describing the harm that might result, to use broad, expressive terms that essentially just assert — not demonstrate to the Court's satisfaction — that the harm is irreparable.

(*Stoney First Nation v. Shotclose*, 2011 FCA 232 (F.C.A.) at paragraph 48.) Accordingly, "[a]ssumptions, speculations, hypotheticals and arguable assertions, unsupported by evidence, carry no weight": *Glooscap Heritage Society v. Minister of National Revenue*, 2012 FCA 255 (F.C.A.) at paragraph 31.

16 Instead, "there must be evidence at a convincing level of particularity that demonstrates a real probability that unavoidable irreparable harm will result unless

a stay is granted": *Glooscap*, *supra* at paragraph 31. See also *Dywidag Systems International Canada Ltd. v. Garford Pty Ltd.*, 2010 FCA 232 (F.C.A.) at paragraph 14; *Canada (Attorney General) v. Canada (Information Commissioner)*, 2001 FCA 25, 268 N.R. 328 (Fed. C.A.) at paragraph 12; *Canada (Superintendent of Bankruptcy) v. MacLeod*, 2010 FCA 84 (F.C.A.) at paragraph 17.

17 In this case, the evidence tendered by the Church falls short in a number of respects:

• The evidence shows that the Church's members seem loyal and have donated much in past years. Much is said about the Church's importance and value to its congregation and the community. Will donors suddenly reduce their donations to zero because they cannot obtain a charitable receipt?

• There is no evidence from donors in the record. It is speculative to conclude that donations will fall off to such an extent that the Church's existence is imperilled.

• Even if donations fall off to some extent, there is no evidence showing how this will affect the Church's overall budgetary position. What is the Church's budgetary position? What assets does it have? What liabilities does it have? Between now and the ultimate determination of the Church's objection or later appeal, what financial events will take place? The record is silent.

• The Church asserts that it will no longer be able to rent facilities for its services and Bible classes. It adds that benevolence assistance to local food banks and singleparent households in need will stop. It says that other beneficial payments it makes will stop. But without information about the financial circumstances of the Church and the size of these expenditures, these assertions cannot qualify as irreparable harm.

18 Irreparable harm must be demonstrated, not just asserted. Demonstration is achieved by supplying particular information that empowers the Court to find the existence of harm that cannot be repaired later. In the record before this Court, there is only assertion, not demonstration.

19 Counsel for the Church fairly conceded that particularity was missing from the evidence the Church tendered. However, he urged the Court to view this in the context of this application — a proceeding brought urgently, with little time to prepare.

20 I accept there was urgency in bringing this application. However, to some extent, the urgency was created by the Church's delay in retaining and instructing counsel.

21 In her notice of intention, the Minister told the Church it had thirty days to apply to this Court for relief. Thirty days was more than enough time for the Church to retain

counsel and file evidence disclosing the particular information known to it and readily at hand.

(3) The balance of convenience

22 It is not necessary to consider this branch of the threefold test.

E. Disposition

23 The Church has failed to demonstrate irreparable harm. For this reason, its application must be dismissed, with costs.

Application dismissed.

TAB E

2008 CAF 3, 2008 FCA 3
Federal Court of Appeal

I.L.W.U. v. Canada (Attorney General)

2008 CarswellNat 10, 2008 CarswellNat 5862, 2008 CAF 3, 2008 FCA 3,
[2008] F.C.J. No. 8, 159 C.L.R.B.R. (2d) 72, 168 A.C.W.S. (3d) 315, 371 N.R. 357

In the Matter of a reference by the Attorney General of Canada pursuant to subsections 18.3(2) and 28(2) of the Federal Courts Act, R.S.C. 1985, c. F-7 as amended, of questions or issues of the constitutional validity, applicability or operability of an Act of Parliament or of Regulations made under an Act of Parliament that have arisen in proceedings before the Canadian Industrial Relations Board

The Attorney General of Canada, Applicant Application
Under Section 18.3(2) of the Federal Courts Act

In the Matter of the Canada Labour Code

International Longshore and Warehouse Union, Canada; International Longshore and Warehouse Union, Local 500; International Longshore and Warehouse Union, Local 502; International Longshore and Warehouse Union, Local 514; and International Longshore and Wareshouse Union, Local 517, Applicants and The Attorney General of Canada; British Columbia Maritime Employers Association on Behalf of Its Member Companies Including Dp World (Canada) Inc., Fraser Surrey Docks LP, TSI Terminal Systems Inc. and Cerescorp Company; Le Syndicat Des Débardeurs, Scfp Section Locale 375; Maritime Employers Association; and Vancouver Port Authority, Respondents

J. Richard C.J.

Judgment: January 7, 2008
Docket: A-497-07, A-592-07

Counsel: Mr. Craig Bavis, for Applicants, International Longshore and Warehouse Union Canada, Locals 500,502,517
Mr. William Clements, for Applicant, International Longshore and Warehouse Union, Local 514
Mr. Lorne Lachance, Ms Lisa Riddle, for Respondent, Attorney General of Canada
Mr. Tom Roper, Q.C., for Respondent, British Columbia Maritime Employers' Association
Mr. David Edinger, for Respondent, Vancouver Port Authority
Mr. Jacques Lamoureux, for Respondent, Syndicat des débardeurs, SCFP, locale 375

***J. Richard C.J.*:**

1 The International Longshore and Warehouse Union, Canada, (the ILWU) the International Longshore and Warehouse Union, Local 500, the International Longshore and Warehouse Union, Local 502, the International Longshore and Warehouse Union, Local 514 and the International Longshore and Warehouse Union, Local 517 (the applicants) have brought a motion dated December 23, 2007, for an Order that Part 5 of the *Marine Transportation Security Regulations* SOR/2004-144 (the Regulations) made pursuant to section 5 of the *Marine Transportation Security Act*, S.C. 1994, c. 40, be stayed as it applies to the Vancouver and Fraser River Ports pending the determination of the Reference in this matter and that the December 20, 2007 Order of the Canada Industrial Relations Board in matter File No. 26305-C (the CIRB Order) be stayed pending the determination of the application for judicial review in this matter pursuant to section 18.2 of the *Federal Courts Act*.

2 The Attorney General of Canada and the British Columbia Maritime Employment Association oppose the granting of the interim relief sought by the applicants.

3 The Vancouver Port Association states that it:

> (a) takes no position on the application to stay the coming into force of Part 5 of the *Marine Transportation Security Regulations*, SOR/2004-144 (the "*Regulations*"), as to whether or not Part 5 of the *Regulations* is stayed, VFPA's Operations will continue as at present, as in either case, its employees have obtained transportation security clearances ("TSC") under Part 5 of the *Regulations*.
>
> (b) takes no position on the application to stay the December 20, 2007 Order of the Canadian Industrial Relations Board in matter File No. 25305-C [sic] (the "CIRB Order").

4 However, the Vancouver Port Authority does make the following submissions:

> However, if this Honourable Court considers the balance of convenience in deciding whether or not to stay the *Regulations* or the CIRB Order, VFPA provides the following facts for this Honourable Court to take into consideration, particularly if this Honourable Court is considering refusing to stay the Regulations, but staying the CIRB Order, in which case, VFPA believes there if a real risk of harm to VFPA and to the local Vancouver and Canadian economy.
>
> If the CIRB Order is stayed, it appears certain that the employees of terminal operators who are also members of the applicants will not apply for TSC's under the *Regulations*.

> If the lack of employees who are also members of the applicants with TSC's results in the cessation of operations of the container and cruise ship terminal operators, VFPA has provided evidence that there will be likely be severe economic consequences to the Port, and discrediting of the International reputation of the Port leading to additional severe impacts on the Port's and the Canadian economy.

5 This motion was brought in both Court File Numbers A-497-07 and A-592-07 on the basis of a single motion record. Although these files have not been consolidated for the purpose of dealing with the motions, I will give a single set of reasons.

6 I should also note at the outset, that there is no real argument between the parties as to the material facts.

7 This matter came before the Board as a result of the British Columbia Maritime Employers' Association (the BCMEA) applying to the Canadian Industrial Relations Board (the CIRB) for a declaration of unlawful strike under section 91 of the Canada Labour Code (the Code) due to an alleged concerted refusal by identified employees represented by the ILWU to apply for security clearances pursuant to Part 5 of the *Marine Transportation Security Regulations* which requires certain identified employees who work in safety sensitive positions to obtain a Transportation Security Clearance (TSC) by the implementation date which has been changed from December 15, 2007 to February 20, 2008.

8 In its decision dated December 22, 2007 (Board File: 26503-C), the Board, with one dissent, issued a remedial order confirming that an unlawful strike occurred when the ILWU advised the identified employees, in writing, not to apply for the security clearance, which they would be required to hold by the Implementation Date, and the employees refused in concert to apply. The order of the Board was to become effective only on January 8, 2008, to allow the parties time to consider their next legal steps.

9 In its decision, the Board recognized that there is nothing in the wording of subsection 18.3(2) of the *Federal Courts* Act to suggest that a reference causes a de facto stay of the tribunal's process. However, the Board concluded that the questions referred by the Attorney General of Canada to the Federal Court of Appeal should be heard and determined by that Court. The Board however decided to continue with the unlawful strike application.

10 On December 31, 2007, the applicants also filed an application for judicial review alleging that the CIRB erred by:

> a. Denying the applicants a fair hearing;
>
> b. Conducting a hearing in breach of the principles of natural justice;

c. Failing to allow the applicants to call evidence;

d. Failing to allow the applicants to cross-examine witnesses;

e. Finding that the applicants were engaged in an illegal strike without evidence of actual interference of the respondents' operations;

f. Failing to adjourn the proceedings pending a determination of the Attorney General of Canada reference pursuant to subsections 18.3(2) and 28(2) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 as amended, of questions or issues of the constitutional validity, applicability or operability of the *Maritime Transportation Security Act*, S.C. 1994, c. 40 (the Act) and the *Maritime Transportation Security Regulations*, SOR/2004-144 (the Regulations) (the Reference);

g. Finding that a collective refusal to submit MTSCP forms was a strike;

h. Issuing an order without consideration of irreparable harm to the applicants; and

i. Issuing an order without permitting the applicants to present their defence.

11 All parties filed a motion record by Friday, January 4, 2008, and as ordered by the Court on December 31, 2007, the motion was heard by telephone conference between Ottawa, Vancouver and Montreal on January 7, 2008.

12 This Court has directed that the reference by the Attorney General of Canada pursuant to subsection 18.3(2) of the *Federal Courts Act* be heard on an expedited basis.

13 The Unions have combined their motions for a stay in both the Reference and the judicial review application and have treated the separate motions as one for the purpose of their memoranda of fact and law.

14 The BCMEA submits that the Federal Court of Appeal does not have jurisdiction to stay the CIRB order within the context of a motion brought under the Reference and submits that the correct forum to hear a motion to stay the order of the Board is within the context of the judicial review application.

15 At the hearing, I indicated that I would proceed on the basis that the motion is properly before the Court since the applicants have raised both the Reference by the Attorney General of Canada and the Order of the Board in their application for judicial review.

16 The Supreme Court of Canada has established a three part test to determine whether a stay should be granted in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.). The applicants must show: 1) that there is a serious question to be tried; 2) that

irreparable harm will be suffered by the applicants if the stay is not granted; and 2) that the balance of inconvenience favours the granting of a stay.

17 Each stage of this test must be satisfied by the applicants, and the analysis must occur in proper sequence. Thus, the applicants must first show a serious question to be tried. The applicants must then show irreparable harm. It is only after having satisfied the first two stages that the analysis moves to the balance of convenience.

18 For the following reasons, I have concluded that the applicants have not satisfied the three part test to determine whether a stay or interim relief should be granted.

19 The threshold to be met in order to satisfy the test of a serious question to be tried is a low one. I am satisfied that the grounds raised by the applicants are not vexatious or frivolous. However, I express no opinion on their likelihood of success.

20 Accordingly, I will proceed to consider the second and third parts of the test.

21 The second stage of the test is irreparable harm. At this stage of the analysis, the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicant's own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application (*RJR-MacDonald Inc.* , supra at para. 58).

22 Further, the applicants must prove that actual harm will be suffered if the stay if not granted. It is not sufficient for the applicants to allege hypothetical or speculative harm.

23 The Unions' allege that they face irreparable harm if they are not granted an interim constitutional exemption from the Regulations and an interim stay of the CIRB's order. However, they offer little or no evidence of exactly what that harm is or, more importantly, how it will actually impact their members, other than financially, which can be compensated through damages.

24 Many of their arguments about irreparable harm are hypothetical assertions of what their members may face should the stays not be granted (e.g. members "may" be disciplined or lose employment or the information obtained "may" be disclosed by the Minister to foreign governments (ILWU Canada, at paras. 47, 48).

25 The need for an applicant to conclusively prove irreparable harm that is not speculative, but "will occur", was clearly confirmed by this Court in *Canada (Attorney General) v. Canada (Information Commissioner)*, 2001 FCA 25 (Fed. C.A.) that when it held (at para. 12):

> ... the fact that irreparable harm *may* arguably arise does not establish irreparable harm. What the respondents had to prove, on a balance of probabilities, is that irreparable harm would result from compliance with the *subpoena* issued on behalf of the Commissioner (*Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, 1987 CanLII 79 (S.C.C.), [1987] 1

S.C.R. 110 at para. 35). <u>The alleged harm may not be speculative or hypothetical</u> (*Imperial Chemical Industries PLC v. Apotex Inc.*, [1990] 1 F.C. 211 (C.A.))

[emphasis added].

26 The Unions allege unreasonable privacy invasion. This Court has made it clear that such bald allegations of unconstitutionality (including claims of privacy violations rooted in section 8 of the *Charter*) are not sufficient to establish irreparable harm under the tripartite *RJR-MacDonald* test (*Groupe Archambault Inc. c. CMRRA/SODRAC Inc.*, 2005 FCA 330 (F.C.A.) at para. 16).

27 In an affidavit filed by the Attorney General of Canada, Laureen Kinney, the Director General of Marine Security at Transport Canada, stated that she had worked for Transport Canada in transportation security since May 2004 and had worked as Director General of Marine Security since May 2006.

28 She stated that the objective of the Marine Transportation Security Clearance Program (the Program) is to enhance marine and port security by requiring background security checks for port workers who either access restricted areas or perform duties that could impact upon the security of marine facilities. In Vancouver, less than 20% of port workers are expected to require security clearances.

29 The Program has been fully implemented in the Ports of Halifax and Montreal and the control centres on the St. Lawrence Seaway with the cooperation of Unions and other stakeholders. As of December 28, 2007, 2,575 port workers from those Ports and the Seaway had submitted applications for security clearances and security clearances had been granted to 2,291 port workers with the outstanding applications still being processed.

30 More than 1400 port workers from the Ports in Vancouver have submitted applications for security clearances, with over 1300 security clearances granted and less than 100 applications outstanding. The applications received to date have been from non-union and union port workers although only Vancouver Port Authority employees of Local 517 of the International Longshore and Warehouse Union has applied.

31 The Regulations provide for the protection of information and documentation contained in an application for security clearance.

32 The applicants in this case have not provided evidence that any privacy violations have occurred under the security clearance process.

33 The applicants have failed to prove irreparable harm due to potential breaches of privacy if the stay is not granted. Mere allegations of speculative privacy and Charter violations are not sufficient to establish irreparable harm.

34 Finally, in assessing the applicant's claim of irreparable harm, it is relevant to note that some members of the applicant ILWU Local 517 have applied for security clearances under the Regulations with the support of their Union.

35 I find that the applicants have failed to establish that they will suffer irreparable harm if the requested relief is not granted. For this reason alone, the interim order sought by the applicants must be denied. However, the applicants similarly do not satisfy the third stage of the test i.e. the balance of inconvenience.

36 At this stage, the Court must determine which of the two parties will suffer the greater harm from granting or refusing to grant the stay, pending the decision on judicial review, *RJRMacDonald*, supra, at para. 62.

37 The BCMEA submits that the Member Companies will suffer irreparable harm if the stay is granted.

38 In its motion record, the respondent BCMBA filed supporting affidavits to establish the following facts:

> (a) that unionized longshore employees in Montreal and Halifax have applied for security clearances under the MTSCP. As well, unionized employees of the Vancouver Port Authority, represented by the applicant ILWU, Local 517 have been authorized by the Union to apply for security clearances and have done so;
>
> (b) that it is imperative that ILWU members, who are required to have security clearances under the MTSCP, make application for same upon the CIRB Order becoming effective on January 8, 2008 to allow sufficient time to receive and process the applications and issue clearances prior to February 20, 2008;
>
> (c) there are approximately 750 ILWU members who are required to possess security clearances by February 20, 2008. The BCMEA's affected member companies (Member Companies) operate container terminals in the Ports of Vancouver and Fraser River, and the cruise ship terminal in the Port of Vancouver;
>
> (d) all of the positions and work areas identified by the Member Companies as requiring security clearance have been approved by the Minister of Transportation, Infrastructure and Communities pursuant to the Regulations, by way of the approval of security plans filed by the Member Companies as required by the Regulations;
>
> (e) if security clearances are not issued to ILWU employees who require them, prior to February 20, 2008, the Member Companies will not be able to operate in compliance with the Regulations. The impact on the Member Companies will be severe both in financial terms and

in terms of their reputation and potential permanent loss of business, all of which constitutes irreparable harm. There will be a profound negative impact on the Ports of Vancouver and Fraser River, the economy of British Columbia and those businesses that rely on the operation of the container terminals and the cruise ship industry.

39 In her affidavit, Laureen Kinney gave the opinion that the further failure to implement the Program in Vancouver as scheduled, could result in Canada falling behind key trading partners. With continued delay, there is the potential for irreparable harm to the Port of Vancouver and to the Canadian economy.

40 The Supreme Court of Canada has stated that, in all constitutional stay cases, the public interest is a special factor that must be considered in assessing where the balance of convenience lies: *Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832*, [1987] 1 S.C.R. 110 (S.C.C.).

41 At this stage, it is open for either party to rely on considerations of public interest. Public interest includes both the concerns of society generally and the particular interests of identifiable groups, *RJR-MacDonald*, supra at para. 66.

42 The applicants are seeking to stay the operation of validly enacted Regulations which were promulgated in order to, *inter alia*, minimize the threat of terrorism that presently faces the public.

43 As stated by the Supreme Court of Canada in *Harper v. Canada (Attorney General)*, [2000] 2 S.C.R. 764 (S.C.C.) (at para. 9):

> ... It follows that in assessing the balance of convenience, the motions judge must proceed on the assumption that the law ...is directed to the public good and serves a valid public purpose...The assumption of the public interest in enforcing the law weighs heavily in the balance. Courts will not lightly order that laws that Parliament or a legislature has duly enacted for the public good are inoperable in advance of complete constitutional review, which is always a complex and difficult matter. It follows that only in clear cases will interlocutory injunctions against the enforcement of a law on grounds of alleged unconstitutionality succeed.

44 In this case, the Regulations are for public safety and to promote the public interest. They were promulgated by the Governor in Council pursuant to section 5 of the *Marine Transportation Security Act*, which provides (in part):

> 5.(1) The Governor in Council may make regulations respecting the security of marine transportation, including regulations
>
> > (a) for preventing unlawful interference with marine transportation and ensuring that appropriate action is taken where that interference occurs or could occur;

(b) requiring or authorizing screening for the purpose of protecting persons, goods, vessels and marine facilities;

45 Further, the purpose behind the Marine Transportation Security Clearance Program (the MTSCP) was explicitly articulated in the "Regulatory Impact Analysis Statement" that was published in the Canada Gazette Part II, Vol. 140, No. 23 along with the Regulations: "The purpose of the MTSCP is to enhance the security of the marine transportation system, benefiting the public, passengers, marine workers, and operators of vessels, ports and marine facilities".

46 The public interest purpose underlying the Regulations is undeniable.

47 Accordingly, under the three part test, the balance of convenience does not favour granting the stay and the consideration of the public interest favours denying the stays sought by the applicants.

48 Accordingly, the motions for interim relief will be dismissed.

Motion dismissed.

TAB F

Para. 23

2019 ONSC 2663
Ontario Superior Court of Justice

Weston Gardens Retirement Inc. v. 2540250 Ontario Ltd.

2019 CarswellOnt 6525, 2019 ONSC 2663, 305 A.C.W.S. (3d) 388

Weston Gardens Retirement Inc. and 2540250 Ontario Limited

Nishikawa J.

Heard: April 24, 2019
Judgment: April 30, 2019
Docket: CV-19-617708

Counsel: Stephen Schwartz, for Applicant
Jeffrey Levine, Guneev Bhinder, for Respondent

***Nishikawa J.*:**

Overview

1 The Applicant, Weston Gardens Retirement Home Inc. ("Weston Gardens"), brings this Application for an injunction to enforce a restrictive covenant to preclude the Respondent, 2540250 Ontario Limited ("254"), from operating a retirement home.

2 The Application proceeded on a short timeline, resulting in some ambiguity as to whether the Applicant was seeking an interlocutory or permanent injunction. The relief sought in the Notice of Application includes an "interim, interlocutory and permanent injunction" as well as damages. No separate motion for interlocutory relief was brought. At the hearing, Applicant's counsel advised that, the Applicant seeks interlocutory or permanent injunctive relief, but that the issue of damages would be deferred to a later date. Respondent's counsel had proceeded on the understanding that the Applicant was seeking interlocutory relief.

3 I adopt the reasoning of Templeton J. in *Wonderland Power Centre Inc. v. Post and Beam on Wonderland Inc.*, 2018 ONSC 7589 (Ont. S.C.J.) at paras. 106-107, where he noted that the test for a permanent injunction is different from the test for interlocutory injunctive relief, and that permanent relief can only be granted after a final adjudication. In order to obtain a permanent injunction, the Applicant must establish its legal rights. This cannot be adjudicated on the record before me, as there are highly contested factual issues, as further detailed below.

4 The Applicant has failed to meet the test for an interlocutory injunction. As the Application raises further issues that cannot be determined at this stage, the balance of the Application is adjourned.

Factual Background

5 The Applicant, Weston Gardens Retirement Inc. ("Weston Gardens"), carries on business as a retirement home at the property municipally known as 303 Queens Drive, Toronto. Weston Gardens purchased the existing building and business in November 2013 for a price of $9.3 million and made substantial improvements to the property.

6 Weston Gardens is licensed as a retirement home by the Retirement Homes Regulatory Authority (the "RHRA") and provides services and amenities to its residents, as well as short-term accommodations for individuals recovering from surgery. These individuals are often referred to the home by nearby hospitals or rehabilitation facilities. Weston Gardens views its location as key to its success, because many residents are from the neighbourhood or have family in the area.

7 A nearby property at 265 Queens Drive, Toronto (the "Property") is subject to a restrictive covenant which prohibits the use of the Property as a seniors and/or long-term care housing, including a retirement home. The restrictive covenant was registered on September 13, 2011, for a period of ten years, for the benefit of the owner of 303 Queens Drive.

8 In August 2017, the Respondent, 2540250 Ontario Limited ("254") acquired the Property. 254 was aware of the restrictive covenant when it acquired the Property. 254 is the general partner of QD Realty Holdings LP ("QD Realty"). In February 2019, QD Realty obtained a licence from the RHRA and opened a retirement home known as Queens Estate at the Property. Queens Estate operates under the brand "Metta Lifestyles" which has other retirement homes. For ease of reference, the retirement home will be referred to as "Queens Estate" and the company will be referred to as 254. 254 describes Queens Estate as a "complex care facility" offering services such as a dementia care program and assistance with feeding.

9 254 submits that QD Realty's Chief Executive Officer, Astrum Nanji, contacted Weston Gardens' President, Samuel Posner, in October 2017 and obtained Weston Gardens' consent to operate a retirement home at the Property.

10 Weston Gardens denies this. It maintains that during a meeting between Mr. Nanji and a representative of Weston Gardens, Allan Silber, on October 19, 2018, Mr. Nanji stated that 254 had not yet decided what business it would operate at the Property and would contact Mr. Silber when it decided. 254 alleges that this statement was intended to mislead Mr. Silber in order to prevent Weston Gardens from moving to obtain an injunction before Queens Estate was operational.

Analysis

Has the Applicant Met the Test for an Interlocutory Injunction?

11 In order to obtain an interlocutory injunction, a moving party must satisfy the well-known test from *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.) at para. 48, which requires that:

(i) There is a serious question to be tried;

(ii) The moving party will suffer irreparable harm if the relief is not granted; and

(iii) The balance of convenience favours granting the injunction.

The Parties' Positions

12 Weston Gardens argues that 254 breached the restrictive covenant by opening a retirement home at the Property. The Applicant denies that it consented. Weston Gardens alleges that it will suffer irreparable harm if an injunction is not granted because Queens Estate is a competing retirement home with a new, renovated facility less than 180 metres away from Weston Gardens. Weston Gardens alleges that it will suffer a loss of goodwill and market share, and that its reputation will be damaged.

13 254 maintains that Weston Gardens consented to it opening a retirement home at the Property. 254's further argues that Weston Gardens cannot demonstrate irreparable harm because Queens Estate is not a competing retirement home, since it caters to a different clientele and offers services that Weston Gardens is not licensed to provide. 254 submits that any potential harm to Weston Gardens is not irreparable, and can be compensated by damages.

Serious Question

14 At the first stage, the question is whether the claim is frivolous or without merit, and the court does not engage in a prolonged examination of the merits: *RJR-MacDonald* at para. 55. The Respondent acknowledges that for the purposes of interlocutory injunctive relief, Weston Gardens has met this low threshold.

Irreparable Harm

15 Irreparable harm is harm that "cannot be quantified in monetary terms or which cannot be cured." *RJR McDonald* at para. 59.

16 The case law makes clear that proof of irreparable harm must be clear and not speculative: *Les Equipements de Ferme Curran Ltée/Curran Farm Equipment Ltd. v. John Deere Ltd.*, 2011 ONSC

3791 (Ont. Div. Ct.) at para. 16. The obligation is on the plaintiff to put forward sufficient evidence to establish irreparable harm: *Paradigm Shift Technologies Inc. v. Oudovikine*, 2012 ONSC 148 (Ont. S.C.J.) at paras. 54-55.

17 Weston Gardens argues that in cases involving a clear breach of a negative covenant, there is a presumption of irreparable harm or the irreparable harm standard may be relaxed. See *Canpages Inc. v. Quebecor Media Inc.*, 2008 CarswellOnt 3193 (Ont. S.C.J.); *Pet Valu Canada Inc. v. 1381114 Ontario Ltd.*, 2013 ONSC 5361 (Ont. S.C.J.) at para. 10.

18 However, in *Stop 'N Cash 1000 Inc. v. 1553785 Ontario Ltd.* (2006), 332 O.A.C. 392, 2006 CarswellOnt 11652 (Ont. Div. Ct.) at para. 9, the Divisional Court stated: "[u]ntil the Supreme Court has spoken again, we must follow the RJR criteria faithfully. See also, *MD Management Ltd. v. Campbell*, 2010 ONSC 6373 (Ont. Div. Ct.) at para. 5. Weston Gardens must provide clear evidence of irreparable harm. Moreover, based on the contradictory evidence regarding Weston Gardens' consent, it cannot be said that this case involves a clear breach of a negative covenant.

19 Weston Gardens alleges that the harm caused by 254's breach of the restrictive covenant is irreparable because:

- Unfair competition and loss of market share cannot easily be quantified because of the fluidity in the resident base and the multiple factors that determine an individual's choice of retirement home;
- Weston Gardens will suffer a loss of reputation and goodwill in the form of decreased referrals from hospitals and other facilities when they discharge patients to retirement homes;
- Queens Estate will cause a decrease in available parking in the area, which will make families less likely to choose Weston Gardens; and
- Weston Gardens' staff may choose to seek employment with Queens Estate, leading to a loss of staff.

20 Numerous cases have found that lost sales or market share can be compensated in damages. While such damages may be difficult to calculate, they nonetheless can be quantified in monetary terms: *Curran Farm Equipment* at paras. 16-17; *Paradigm Shift* at para. 54. In *MD Management Ltd. v. Campbell*, 2010 ONSC 2315 (Ont. Div. Ct.) at para. 33, Grace J. found that calculating a loss of clients in the highly regulated investment industry would not be insurmountable. In *Wonderland Power*, which involved the enforcement of a restrictive covenant on a neighbouring property, Templeton J. refused the injunction because he was not convinced that the alleged harm to the plaintiff could not be cured of quantified in monetary terms (at para. 98).

21 Weston Gardens states that it suffered a seven percent drop in occupancy in March 2019, after Queens Estate opened. Based on the numbers provided, the drop in occupancy is closer to 5.5

percent. This decrease is not directly attributable to Queens Estate, however, because none of the residents of Queens Estate came from Weston Gardens. The numbers show that Weston Gardens' occupancy rates fluctuate a few percentage points from month to month, but have consistently remained above 93 percent.

22 As a regulated entity, Weston Gardens keeps detailed records of residents' arrivals and departures, as well as the referring institutions. While it may be difficult to calculate a loss of residents to Queens Estate, it is nonetheless harm that would be quantifiable. See *MD Management Ltd. v. Campbell*, 2010 ONSC 2315 (Ont. Div. Ct.) at para. 26.

23 Weston Gardens claims that it will suffer a loss of reputation and goodwill, however, the evidence supporting this claim is speculative. Weston Gardens has not explained how its reputation, which has been established a reputation over a period of years, would be negatively affected by Queens Estate's presence. While a risk of being put out of business could constitute irreparable harm, Weston Gardens has not alleged or provided evidence that Queens Estate threatens its continued existence: *2256598 Ontario Inc. v. World Bowl Entertainment Centre Inc.*, 2013 ONSC 3097 (Ont. S.C.J.) at para. 24.

24 In respect of a potential loss of staff, to date, two Weston Gardens' employees applied to work at Queens Estate. They were not hired by Queens Estate because 254 has undertaken not to hire any Weston Gardens staff and has implemented a policy to this effect. In relation to parking, Queens Estate has 38 spaces of its own parking on the Property and visitors to Queens Estate do not need to park on the street. Weston Gardens has not provided evidence of visitors being unable to find parking.

25 Based on the foregoing, Weston Gardens has failed to demonstrate that it will suffer irreparable harm if the injunction is not granted.

Balance of Convenience

26 Weston Gardens argues that the balance of convenience weighs in favour or granting an injunction because Queens Estate has only been open for two months, and has filled 40 of the 120 spots available. Weston Gardens further submits that because 254 opened Queens Estate with full knowledge of the restrictive covenant, it took a calculated risk and should not be entitled to benefit from that choice. *Ezmoney Tario Inc. v. 7724934 Canada Inc.*, 2016 ONSC 7177 (Ont. S.C.J.) at para. 55-57, aff'd 2018 ONSC 1542 (Ont. Div. Ct.).

27 The evidence shows that the forty residents of Queens Estate all require either dementia care services or assistance with feeding. Weston Gardens recognizes that if an injunction is granted, the residents cannot simply be forced to move elsewhere, and that some process may have to be put in place. The Applicant has not suggested that the residents could be moved to Weston Gardens, likely because it is not currently licensed to provide the required services. As a facility that provides

dementia care, Queens Estate has secured exits to prevent patients wandering off the Property. Weston Gardens is not a secured facility.

28 I agree with Weston Gardens' submission that 254 has been able to establish a "foothold" in the same community, which the restrictive covenant was intended to protect against. Moreover, the evidence of Weston Gardens' consent is equivocal. Nonetheless, now that there are forty residents requiring significant levels of care that Weston Gardens would not be able to provide, an injunction enforcing the restrictive covenant would be unduly harmful to vulnerable third parties who have no involvement in this litigation. Moreover, in the event that Weston Gardens is ultimately unsuccessful on the Application, the residents will have been moved out of Queens Estate needlessly.

29 While this litigation is between two private parties, the public interest in protecting the residents of Queens Estate is a relevant factor when weighing the balance of convenience. See *Bell Canada v. Cogeco Cable Canada GP Inc.*, 2016 ONSC 6044 (Ont. S.C.J.) at para. 40. I find that the balance of convenience weighs against granting an injunction because the harm to the Respondent in granting the injunction exceeds the harm to the Applicant in not granting the injunction.

30 In the context of this litigation, Mr. Nanji has stated that "if this court deemed it necessary, 254 would undertake to refrain from accepting residents that Weston Gardens could accommodate through to the end of September, 2021 when the restrictive covenant expires to guarantee for Weston Gardens that the Queens Estate is not competing with it for that period." Weston Gardens' position is that such an undertaking would be impossible to enforce due to patient confidentiality and privacy. An undertaking of this nature, at least until the final adjudication of the Application, would appear to address some of the concerns raised by Weston Gardens.

Conclusion

31 Based on the foregoing, the Application for an interlocutory injunction is dismissed, and the balance of the Application is adjourned.

32 Counsel submitted their costs outlines at the hearing. The Respondent's costs on a partial indemnity basis total $39,231.20, including disbursements of approximately $2,686.00 and HST. The Applicant's costs were $30,970.00, including disbursements of approximately $2,022.79 and HST.

33 Pursuant to the *Courts of Justice Act*, s. 131(1), the Court has broad discretion when determining the issue of costs. The overall objective of fixing costs is to fix an amount that is fair and reasonable for the unsuccessful party to pay in the circumstances, rather than an amount fixed by actual costs incurred by the successful litigant: *Boucher v. Public Accountants Council (Ontario)* (2004), 71 O.R. (3d) 291 (Ont. C.A.). Rule 57.01(1) of the *Rules of Civil Procedure* sets out the factors to be considered by the Court when determining the issue of costs.

34 I have considered these factors, as well as the principle of proportionality in R. 1.01(1.1) of the *Rules of Civil Procedure*, while keeping in mind that the Court should seek to balance the indemnity principle with the fundamental objective of access to justice. The Respondent was successful in defending against the Application. Neither party has taken steps to unduly lengthen the proceeding, which appears to have been conducted in an efficient and cooperative manner. I fix costs on a partial indemnity basis at $35,000.00, inclusive of disbursements and HST, payable by the Applicant to the Respondent within thirty days.

Application dismissed.

TAB G

Para. 43

2005 BCCA 392
British Columbia Court of Appeal

Zeo-Tech Enviro Corp. v. Maynard

2005 CarswellBC 1830, 2005 BCCA 392, [2005] B.C.W.L.D. 5897, [2005] B.C.W.L.D. 5898, [2005] B.C.W.L.D. 5903, [2005] B.C.W.L.D. 5905, 141 A.C.W.S. (3d) 640, 17 C.P.C. (6th) 181, 215 B.C.A.C. 93, 355 W.A.C. 93

Zeo-Tech Enviro Corp. (Appellant / Plaintiff) and Angela Jean Maynard, Kimball George Maynard, Russell Roy Musselman, Dierra Jean Musselman, Janet Leslie Young, Joan Margaret Young, and Her Majesty the Queen in Right of the Province of British Columbia (Respondents)

Southin, Ryan, Donald JJ.A.

Heard: February 25, 2005
Judgment: July 29, 2005
Docket: Vancouver CA032444

Proceedings: affirming *Zeo-Tech Enviro Corp. v. Maynard* (2004), 2004 CarswellBC 2704, 2004 BCSC 1516 (B.C. S.C. [In Chambers])

Counsel: J.R. Schmidt, A.P. Prior for Appellant
M.F. Welsh for Respondents, Angela Jean Maynard, Kimball George Maynard, Russell Roy Musselman, Dierra Jean Musselman

***Ryan J.A.*:**

Introduction

1 This is an appeal from the decision of Mr. Justice Goepel pronounced November 19, 2004 in Supreme Court Chambers dismissing the application of Zeo-Tech Enviro Corp. ("Zeo-Tech"), the appellant in these proceedings, for an injunction enjoining the respondents, a family of ranchers, from interfering with passage over Wright's Road near Princeton.

2 Leave to appeal was granted by Mr. Justice Mackenzie on December 7, 2004.

Application to Adduce Fresh Evidence

3 The respondent sought to adduce fresh evidence to further support the conclusions of the chambers judge. Since I am of the view that the appeal cannot succeed on the grounds raised by the appellant, it is unnecessary to deal with the application to adduce fresh evidence.

Factual Background

4 In 1999 Zeo-Tech began exploratory work on certain mineral claims located southwest of Princeton. In December 2000 the provincial government issued Zeo-Tech a mineral lease which gives Zeo-Tech the right to mine the minerals in the area. After the mineral lease was obtained Zeo-Tech received a quarry permit in June 2001 to begin a full mining program which at present involves the extraction and crushing of zeolite on the site (the "mine").

5 Zeolite is a generic term used to describe a group of hydrous aluminosilicate minerals. Its primary application at present is as an additive in the manufacture of cement which it can serve to lighten and strengthen.

6 In May 2004 Zeo-Tech's partner, United Zeolite, purchased a five acre parcel of industrial land in Princeton for the construction of a processing facility. It is the stated intention of the two companies to employ up to thirty people in the processing of zeolite.

7 The mine is directly accessible by road from Princeton via Highway 3 and Wright's Road. From Highway 3 the distance to the mine is about eight kilometres.

8 From the highway, Wright's Road runs in a westerly direction through a parcel of land owned by the Crown. This part of the road is paved. The road then enters property owned by Angela Maynard and her son Kimball Maynard. The road runs between the property owned by the Maynards and property, to the south, owned by Russell and Dierra Musselman. The road becomes a gravel road after it reaches a cattle guard at the entry to the Maynard ranch.

9 Dierra Musselman is the daughter of Angela Maynard. The Musselmans do not live on the property to the south. They have a home on the Maynard ranch. Their home is near the road to the west of Ms. Maynard's house.

10 After Wright's Road passes the Maynard ranch it continues running to the west into Crown land and the mine site.

11 After passing through the mine site the road continues in a westerly direction past property owned by Janet Leslie Young and Joan Margaret Young. Joan Margaret Young and her husband Don Young have a vacation home on this property. Wright's Road then continues south through another lot (lot 74) owned by the Maynards, then back down to Highway 3.

12 There is a gate across Wright's Road just past the Musselman house. The evidence did not reveal how long the gate has been in that place. It was there when Mr. Paquette, president of Zeo-Tech, began to explore his mine site. The Musselmans have placed a lock on the gate which prevents public access past the gate. This means that access to the mine cannot be obtained by travelling down Wright's Road from Highway 3. There was evidence that the gate itself is on Crown land.

13 When the mine was in its exploratory phase, Mr. Paquette drove to the mine down Wright's Road. The gate was locked from time to time, but not always.

14 Mr. Paquette soon learned that the Musselmans and the Maynards claimed ownership of the property over which part of Wright's Road apparently runs. He also became aware that Weyerhaeuser, who had tree farm licences in the area, was paying the property owners a fee for transporting logs across the contested part of the road.

15 Mr. Paquette said that because he did not wish to engage in confrontation with the property owners, he began to drive to the mine by taking a longer, more difficult route. This route required him to leave Highway 3 two kilometres east of Wright's Road, drive up a gravel road known as Blackmine Road, through a series of logging roads, across the Youngs' property, then into the mine site.

16 In November 2003 Zeo-Tech reached an agreement with a customer for the supply of 30,000 tonnes of zeolite from the mine. Zeo-Tech says that because of its inability to use Wright's Road, it must move zeolite in two stages, first from the mine in dump trucks, then to a second property where the zeolite is loaded into much larger capacity semi-trailer units ("B-train units"). They must pay the Youngs a fee to cross their property and must travel over the Blackmine Road.

17 Zeo-Tech maintains that the entirety of Wright's Road is a public road. It has started the action herein with a view to obtaining a declaration from the Supreme Court that Wright's Road is a public highway.

18 There was evidence that Wright's Road was established in the early 1900s. At that time the area just past the present day mine, now owned by the Maynards, was known as "Dalby Meadows" and the road was known as the Dalby Meadows Road.

19 In 1923 the Province closed a section of the road that passes through the Maynard and Musselman properties. It was 30 feet wide and 2330 feet long and lay to the west of the present day Maynard and Musselman homes. The property was leased to a third party for a term of five years. In 1928 the lease ended. The appellant says that portion of the road reverted to the Crown.

20 In 1968 the Maynard property was owned by the Wright family. In February 1968 the District Engineer for the Department of Highways wrote to Mrs. Jean Wright advising her that the road was a public road from the highway to the "gate of your ranch, and does not extend beyond".

21 The Maynards purchased their property in 1978. They deposed that since their purchase the portion of Wright's Road running through their property has not been used by the general public. They say that anyone attempting to use the road is advised that the road is private and not for public use. They have erected a sign on the property which reads: "THIS AREA CLOSED TO HUNTERS AND THE PUBLIC".

22 In December of 1989 a member of the research section of the Department of Highways prepared an internal memorandum for the District Highways Manager in Penticton advising him that the Ministry has "sufficient evidence to assert public status" for Wright's Road extending from Highway 3 to an area just past the present-day mine. The conclusion was based on the expenditure of public funds on the road.

23 During the hearing of this appeal the Court was directed to the maps of the area setting out the disputed portions of the road. Wright's Road takes many twists and turns. Branch roads were built over the course of time and there are other roads in the area. It is not altogether clear that the portion of the road that was closed in 1923 comprises the whole of the disputed area. It may be that the road has changed since that time. This is something that will have to be sorted out at trial.

The Injunction Decision

24 In refusing the injunction the chambers judge referred to the well known tests in *British Columbia (Attorney General) v. Wale* (1986), 9 B.C.L.R. (2d) 333, [1987] 2 W.W.R. 331 (B.C. C.A.), aff'd [1991] 1 S.C.R. 62 (S.C.C.); and to *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385 (S.C.C.) [cited to S.C.R.]. He noted that the test is two-pronged. First, the applicant must establish that there is a fair question to be tried as to the right which is alleged and the breach thereof. Second, the applicant must show that the balance of convenience favours the granting of an injunction.

25 As to the first part of the test the chambers judge observed that the threshold that the applicant must pass is a low one. The Court must be satisfied that the application is neither frivolous nor vexatious.

26 The chambers judge found that there was a reasonable question to be tried. He said:

> [33] Many of the issues raised by the parties require further development of the evidence, particularly historical research of the use and location of the road. Although I am satisfied that [Zeo-Tech] has met the relatively low threshold of establishing that there is a fair question

> to be tried, it is not possible, on the evidence before me, to come to any definitive view as to which party will succeed.

27 Next, the chambers judge considered the balance of convenience. He referred to decisions of this Court which have recognized that interference with an on-going business causes irreparable harm but placed no weight on that factor. He concluded that the economic loss that would be suffered by the increased costs of transport could be calculated and borne by the respondents. As for harm to the respondents he said:

> [37] The [Maynards and Musselmans] say there is a significant difference between the intermittent use of Wright's Road by Weyerhaeuser and [Zeo-Tech's] intention to run large B-train units through an area where young children play that is close to residential houses and where dangers such as a large propane tank are adjacent to the road. The also note that the B-trains will be disruptive to the [Maynards' and Musselmans'] cattle operations.

28 The chambers judge also referred to the *status quo*. In response to the respondents' submission that the appellant sought to alter the *status quo* he said at para. 42: "Wright's Road has been a private road since at least 1978. It is [Zeo-Tech] who seeks to change the *status quo*."

29 Finally, he noted that there had been some delay by Zeo-Tech in seeking the injunction.

The Grounds of Appeal

30 At the outset of his argument in this Court counsel for the appellant recognized that the order made by Goepel J. was discretionary, and as such, the Court will not interfere with it unless it is demonstrated that the judge at first instance erred in principle or made an order not supported by the evidence, or it appears that the impugned decision will result in an injustice: *British Columbia (Attorney General) v. Wale*, *supra*.

31 Counsel for the appellant says that the chambers judge erred in three ways:

> 1. In materially misapprehending or disregarding evidence before him concerning the strength of the appellant's case;
>
> 2. In deciding whether the balance of convenience favoured the granting of the injunction;
>
> 3. In refusing to grant the injunction, because to do so creates an injustice.

The First Ground of Appeal — The Strength of the Appellant's Case

32 Assuming that the whole of the disputed area is comprised by the portion of the road closed in 1923, the appellant says that Wright's Road, from its starting point at Highway 3 to at least the

gate on Crown land (past the Maynards' property), is a public highway created by expenditure of public money on the road.

33 Section 4 of the *Highway Act*, R.S.B.C. 1996, c. 188, provides:

> 4(1) If public money has been spent on a travelled road that has not before then been established by notice in the Gazette or otherwise dedicated to public use by a plan deposited in the land title office for the district in which the road is located, that travelled road is deemed to be and is declared to be a public highway.

34 In chambers the appellant argued that it had a strong case because there was a documented history of public expenditures on Wright's Road. Evidence in support of that position was provided in the form of copies of provincial government expenditure reports. The appellant said that there was also evidence of continuing maintenance of all or part of Wright's Road by the Province.

35 The respondents' position was that Wright's Road is a public highway only up to the point where the paved section of the road ends and the gravel begins. They say that it becomes a private road at that place and continues to the western boundary of the Maynards' property. They submitted that there was no evidence that Wright's Road continued to be travelled, or that public money was spent after the 1923 closure. They submitted that for a road to be "travelled" the whole length of it must be travelled.

36 At the hearing in this Court the respondents submitted the road that closed in 1923 and re-opened in 1928 does not follow the same route today that it followed before the closure. They maintain that part of the road lies on their property.

37 The appellant had two alternative positions. First, the appellant said that if the disputed part of the road was comprised entirely of the part of the road closed in 1923, then the property is not part of the Maynard property at all. When it re-opened, the property reverted to the Crown. The arguments about expenditures and travel across the road become irrelevant. If the disputed part of the road lies on Crown property, the respondents have no right to stop the appellant from travelling over it.

38 Alternatively, the appellant argues that if part of Wright's Road now lies on private property, s. 10 of the *Mining Right of Way Act*, R.S.B.C. 1996, c. 294, would permit it access as a "recorded holder" of a mineral lease and quarry permit under the appropriate Act. The respondent notes that s. 10(3) of the *Mining Right of Way Act* requires the recorded holder to serve written notice on the owner of the road and to pay compensation. There was no evidence before the chambers judge that any such steps were taken in this case.

39 In the end I am of the view that the chambers judge did not err in failing to find that the appellant has a strong case. He found that the appellant has at least a triable issue. On the basis

of the material before this Court I am not persuaded that he ought to have gone further than that. The strength of the appellant's case will be revealed at trial when all of the evidence is before the trier of fact.

The Second Ground of Appeal — The Balance of Convenience

a. Irreparable Harm

40 The appellant submitted that the chambers judge erred in "failing to follow authority, binding upon him, that interference with an on-going business constitutes irreparable harm." For this proposition the appellant relies on three cases: *Tlowitsis-Mumtagila v. MacMillan Bloedel Ltd.* (1990), 53 B.C.L.R. (2d) 69, [1991] 4 W.W.R. 83 (B.C. C.A.) [cited to B.C.L.R.]; *RJR-MacDonald Inc. v. Canada (Attorney General)*, *supra*; and *Douglas Lake Cattle Co. v. Holmes*, [1995] B.C.J. No. 3030 (B.C. S.C. [In Chambers]).

41 In *Tlowitsis-Mumtagila v. MacMillan Bloedel Ltd.*, Legg J.A. speaking for the Court at 78 endorsed the statement of the trial judge who had said:

> There is ample support for the proposition that interference with an ongoing business is, in itself, irreparable harm.

42 "Irreparable harm" was explained by Sopinka and Cory J.J. writing for the Court in *RJR-MacDonald Inc. v. Canada (Attorney General)*, at 341:

> "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision (*R.L. Crain Inc. v. Hendry* (1988), 48 D.L.R. (4th) 228 (Sask.Q.B.)); where one party will suffer permanent market loss or irrevocable damage to its business reputation (*American Cyanamid*, *supra*); or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined (*MacMillan BloedelLtd. v. Mullin*, [1985] 3 W.W.R. 577 (B.C.C.A.)). The fact that one party may be impecunious does not automatically determine the application in favour of the other party who will not ultimately be able to collect damages, although it may be a relevant consideration (*Hubbard v. Pitt*, [1976] Q.B. 142 (C.A.)).

43 The cases cited by the appellant have no application in the case at bar. They state the obvious: that where an on-going business will close, or lose market position as a result of the granting or refusal to grant an injunction, the loss will be irreparable. They do not say, as the appellant would have it, that any interference with a business constitutes irreparable harm.

44 In the case at bar, well before the mine was established, the appellant was aware that the respondents asserted that a certain portion of Wright's Road was a private road. The respondents have not interfered with an ongoing business plan. Their activity has prevented Zeo-Tech from developing a route along Wright's Road. As a result, the company must utilize the longer, more expensive Blackmine Road. The chambers judge found that any harm in the case at bar was quantifiable in damages and could be paid, if necessary, by the respondents. I cannot say he erred in his conclusions.

45 The appellant also submitted that the chambers judge erred in finding that the respondents would suffer irreparable harm if the injunction were granted. I have reproduced his findings about that harm at para. 27. I agree that the harm is not "irreparable"; the chambers judge did not make such a determination. In the end he found that neither side would suffer irreparable harm if an injunction was or was not ordered. This neutralized the issue and left it open to the chambers judge to decide the question on the other factors.

b. The Status Quo

46 The appellant also submitted that the chambers judge erred in his approach to the *status quo*. Counsel says that reference to the *status quo* is of limited value in private law cases.

47 Mr. Justice Robert J. Sharpe has said in his text, *Injunctions and Specific Performance*, Aurora, Ontario: Canada Law Book, 2003 (loose-leaf updated November 2004, release 12) at para. 2.550:

> Properly understood, the phrase merely restates the basic premise of granting an interlocutory injunction, namely, that, the plaintiff must demonstrate that, unless an injunction is granted, his or her rights will be nullified or impaired by the time of trial.

48 In my view, when the chambers judge referred to the *status quo*, he was doing no more than recognizing this principle.

49 I am not persuaded that the chambers judge erred in his analysis of the balance of convenience. I would dismiss this ground of appeal.

The Third Ground of Appeal — The Order Creates an Injustice

50 This last ground amalgamates the others. The appellant argues that it has a strong chance of success at trial, and that there would be little harm to the respondents if the injunction is granted, but much damage to the appellant if it is not. Therefore, the appellant says, to refuse an injunction in these circumstances is unjust.

51 I have concluded that the chambers judge did not err in analyzing the strength of the appellant's case, nor did he err in assessing the balance of convenience. The appellant began his submissions by recognizing that the order made by the chambers judge is a discretionary one. In the end the chambers judge decided not to interfere with the situation as it stood at the time the matter was before him and to let it go to trial for a final resolution. The appellant has failed to demonstrate an error in principle. It has failed to demonstrate that the order is unjust.

52 I would dismiss the appeal.

***Southin J.A.*:**

I agree.

***Donald J.A.*:**

I agree.

Appeal dismissed.

TAB H

Para. 32

1998 CarswellBC 2289
British Columbia Court of Appeal

Mark Anthony Group Inc. v. Vincor International Inc.

1998 CarswellBC 2289, [1998] B.C.J. No. 2475, [1999] 4 W.W.R. 167, 113 B.C.A.C. 280, 184 W.A.C. 280, 23 C.P.C. (4th) 232, 58 B.C.L.R. (3d) 124, 82 C.P.R. (3d) 541, 83 A.C.W.S. (3d) 475

The Mark Anthony Group, Inc., Mark Anthony Properties Ltd., Mark Anthony Cellars Ltd. and Mark Anthony Brands Ltd., Plaintiffs, Appellants and Vincor International Inc., Defendant, (Respondent)

Macfarlane, Newbury, Hall JJ.A.

Heard: October 19, 1998
Judgment: October 27, 1998 *
Docket: Vancouver CA024515

Proceedings: affirming (1998), 80 C.P.R. (3d) 564 (B.C. S.C.); allowed leave to appeal (1998), 80 C.P.R. (3d) 573 (B.C. C.A. [In Chambers])

Counsel: *George K. Macintosh, Q.C.* and *Lisa A. Warren*, for the Appellants.
Howard Shapray and *Brad Cramer*, for the Respondent.

The judgment of the court was delivered by *Macfarlane J.A.* :

1 The appellants, the holders of a trade-mark, "Mike's Hard Lemonade", and the manufacturer of that product, bring this appeal from the refusal of a grant of an interlocutory injunction against the respondent, the manufacturer of "Joe Hard Alcoholic Lemonade". The respondent does not hold a registered trade-mark, although it has applied for one.

2 The chambers judge in the Supreme Court of British Columbia found that the appellants had established a serious question to be tried but that they had not established irreparable harm.

3 The appeal is confined to legal questions concerning the issue of irreparable harm in injunction cases generally and particularly where trade-mark rights are concerned.

4 The facts are not in dispute and they are stated by Mr. Justice Brenner in his judgment which is reported at (1998), 80 C.P.R. (3d) 564 (B.C. S.C.).

5 For the purposes of this appeal the pertinent facts are that the appellants applied for a trade-mark in 1996 which was registered 29 January 1998. The trade-mark is "Mike's Hard Lemonade". The registration asserts that "the right to the exclusive use of the words 'HARD' and 'LEMONADE' is disclaimed apart from the trade-mark." The trade-mark is used in connection with the marketing of alcoholic lemonade.

6 At the time of the application for the interlocutory injunction Joe Hard Alcoholic Lemonade was not being marketed, but it was known that it was about to be marketed. Sales began in May 1998.

7 There is intense competition in the marketing of alcoholic lemonade. The sale of the appellants' product has been very successful. They allege that they will suffer irreparable harm if the respondent is permitted to market its product pending trial.

Reasons for Judgment of Mr. Justice Brenner

8 Mr. Justice Brenner applied the test taken from *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396 (U.K. H.L.) and approved in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.).

9 In finding that there was a serious question to be tried Mr. Justice Brenner said at paragraph [18]:

> ... I do not propose to engage in an extensive review of the merits of the case. It is clear that when the two products are placed side by side that there are both similarities and differences. I conclude only that the plaintiffs have made out a serious question to be tried.

10 I pause to say that the question to be tried is whether the respondent's product name will cause confusion with the appellants' trade-mark and likely lead to the inference that the wares or services associated with the names are manufactured, sold, leased, hired or performed by the same person. The applicable sections of the *Trade-Marks Act*, R.S.C. 1985, c. T-13 are s. 6 and s. 20.

11 Mr. Justice Brenner then turned his attention to the question of irreparable harm. He said:

> [19] In my view this application must be resolved on the issue of irreparable harm. The harm the applicant must demonstrate is harm that cannot be compensated in money damages. It is not the amount of the damages but their character the court must consider. If the damage suffered, even if great, can be compensated by a recoverable monetary award against the unsuccessful party, an injunction will ordinarily be refused. However if the damages are of a nature that will be impossible to assess, then irreparable harm will have been demonstrated. The issue here is whether the damages the plaintiffs will suffer between now and trial are capable of assessment by the court.

12 I pause to note that the appellants submit that the issue is not whether damages can be calculated, but whether damages are an adequate remedy.

13 Mr. Justice Brenner concluded:

> [35] In the case at bar I am not persuaded that if the plaintiffs are successful at trial that their damages cannot be assessed. Because of the manner in which the liquor industry is monitored and its products sold in Canada, a precise record of the unit sales of the defendant's product up to the time of trial will be known. Also known will be the sales of the plaintiffs' product as well as the sales of any other entrants into this market. Finally overall market share figures for the refreshment beverage segment will also be available. Presumably the parties may also elect to lead the type of evidence referred to by Rudson in his affidavit.
>
> [36] In any event I am not convinced that the assessment of damages in this case will prove to be any more or less difficult than the types of assessments usually conducted in this court.

14 Having found that the appellants had failed to establish irreparable harm Mr. Justice Brenner did not consider the question of the balance of convenience.

Issues

15 The appellants submit that the chambers judge erred in finding that damages would be adequate remedy simply because they were calculable.

16 They also submit that the chambers judge failed to recognize that the interest to be protected, a registered trade-mark conferred by statute, is a unique proprietary interest. They also submit that he failed to recognize that less evidence is required to be advanced by the appellants to demonstrate irreparable harm in the case of a *quia timet* injunction.

Discussion

17 The appellants have correctly stated the test to be applied if the appeal is to succeed. They set forth the appropriate test in para. 17 of their factum which reads:

> 17. In *Canadian Broadcasting Corp. v. CKPG Television Ltd.* (1992), 64 B.C.L.R. (2d) 96 (B.C. C.A.), this Court applied the following test for appeals from interim injunction decisions, at pp. 103-104:
>
> > **Interim Injunction Appeals**
> >
> > 27 The granting or refusal of an interim injunction is discretionary in this sense: that it involves an assessment of the balance of convenience and thus a reference to a number of factors which cannot be precisely weighed or measured, all assessed on

> the basis of incomplete or partial evidence which has probably not been tested by cross-examination. Because the decision is an interim one and because the evidence is necessarily incomplete, this Court is reluctant to interfere with the decision of the chambers judge who granted or refused to grant the injunction.
>
> 28 But the discretion of the chambers judge is not absolute. It must be guided by the established principles, flexible though they may be, and it must be based on the evidence.
>
> 29 Accordingly, this Court has followed its usual rule for dealing with appeals from the exercise of a principled discretion: the chambers order will not be interfered with unless the chambers judge erred in principle, or clearly and demonstrably misconceived the evidence, or made an order which has resulted in a clear injustice: See *British Columbia (Attorney General) v. Wale*, at p. 344 [B.C.L.R.], and *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, at p. 154 [S.C.R.] (emphasis added)

18 The appellants submit that Mr. Justice Brenner erred in principle in holding that damages were an adequate remedy simply because they were capable of calculation. They also submit that the chambers judge erred in concluding that if damages are capable of calculation that irreparable harm is negated.

19 I am not persuaded that Mr. Justice Brenner erred in principle, misconceived the evidence or made an order which has resulted in a clear injustice.

20 In my opinion Mr. Justice Brenner adopted the correct approach, as stated in paragraph [19] of his reasons. He recognized that the issue was adequacy of damages when he said this:

> [26] The issue of adequacy of damages has been considered in a number of cases referred to by both parties. In a number of trial decisions cited by the plaintiffs' injunctions have been granted where the applicant has either made out a strong prima facie case or established trade mark infringement and where the court has concluded that it may be impossible to ascertain or calculate the damages that would be suffered by the plaintiff between the time of the application and the trial. (See ***Armature Electric Ltd. v. K & A Stator & Armature Electric Ltd.*** (1977), 37 C.P. 145, ***Popsicle Industries Ltd. v. Ault Foods Ltd.*** (1987), 17 C.P.R. (3d) 1, ***Philips Export B.V. et al. v. Windmere Consumer Products Inc.*** (1985), 4 C.P.R. (3d) 83, ***Jercity Franchises Ltd. v. Foord, dba Jersey Joe's Apparel*** (1990), 34 C.P.C. (3d) 289, ***Mascot International d.b.a. Mascot International Inc. et al. v. Harman Investments Ltd. d.b.a. Harman Imports et al.*** (1993), 46 C.P.R. (3d) 161).

21 Mr. Justice Brenner had evidence upon which it was open to him to find that damages would provide an adequate remedy. He preferred the evidence of the respondent's expert, Mr. Rudson, to the alternative position advanced by the appellants. In my view there is no proper basis for interfering with the learned trial judge's conclusion.

22 Mr. Justice Brenner referred to and applied three recent decisions of the Federal Court of Appeal, namely, *Imperial Chemical Industries plc v. Apotex Inc.* (1989), 27 C.P.R. (3d) 345 (Fed. C.A.), *Nature Co. v. Sci-Tech Educational Inc.* (1992), 41 C.P.R. (3d) 359 (Fed. C.A.), and *Centre Ice Ltd. v. National Hockey League* (1994), 53 C.P.R. (3d) 34 (Fed. C.A.).

23 Counsel for the appellants submits that the test derived from those cases is too strict a test when the application for an injunction is made *quia timet*. He refers to *CIBA-Geigy Canada Ltd. v. Novopharm Ltd.* (1994), 56 C.P.R. (3d) 289 (Fed. T.D.) and *826129 Ontario Inc. v. Sony Kabushiki Kaisha* (1995), 65 C.P.R. (3d) 171 (Fed. T.D.), ("*C.D. Plus*") in support of that proposition.

24 In *Centre Ice* Heald, J.A. reviewed the decisions of the Federal Court of Appeal in *Apotex, Nature Co.* and other cases that emphasize that irreparable harm is harm in respect of which the damages recoverable at law would not be an adequate remedy, and that the evidence as to irreparable harm must be clear and not speculative.

25 The appellants submit that *Apotex, Nature Co.* and *Centre Ice Ltd.*did not involve *quia timet* situations and that the appropriate approach on a *quia timet* application is that proposed by Rothstein, J. in *Ciba-Geigy* as approved by McKeown, J. in *C.D. Plus*, both of which were decided after the chambers judgment in this case had been pronounced. Rothstein, J. expressed this opinion at p. 325 of *Ciba-Geigy*:

> It will be remembered that these applications are brought *quia timet*. There is no actual evidence of harm because the defendants are not yet in the market-place. The evidence relating to loss resulting in irreparable harm must, of necessity, be inferred.

26 In the absence of any evidence in that case that damages were calculable he inferred irreparable harm and granted injunctive relief (p. 335 to 338 of his reasons).

27 I do not quarrel with the modification proposed by Rothstein, J. in *quia timet* situations but, in my view, the application of that proposition in this case would not produce a different result.

28 In the case at bar, unlike the *Ciba-Geigy* case, there was evidence which the chambers judge was entitled to accept to show that damages were calculable and were an adequate remedy. In such circumstances it is open to the chambers judge to infer that irreparable harm has not been established.

29 The appellants submit that the registration of a trade-mark bestows a unique proprietary right which, if the integrity of the Federal trade-mark regime is to be preserved, must be protected by injunctive relief.

30 Section 19 of the *Trade-Mark Act* gives the owner of a registered trade-mark the exclusive right to its use. Section 20 extends the protection in cases of confusion arising from the use of a trade name by another person.

31 The appellants' position appears to be that no competitor may use a name, alleged to cause confusion, pending the trial of whether such use constitutes infringement. If that were so then the holder of a trade-mark would, until trial, have a monopoly over any competitor it alleged to be infringing its trade-mark.

32 The purpose of an interlocutory injunction is not to prevent competition but to provide an equitable remedy designed to protect the parties pending a final determination of a serious question. It is designed to prevent irreparable harm. It is a discretionary remedy. Whether it is granted or not is to be determined on a case by case basis with a view to providing a just and convenient result. The bare fact that the applicant has a registered trade-mark does not necessarily provide a basis for prohibiting competition pending trial.

33 I can find no basis for interfering with the order made by Mr. Justice Brenner and would dismiss the appeal.

Appeal dismissed.

Footnotes

* A corrigendum issued by the court on December 2, 1998 has been incorporated herein.

TAB I

Para. 46

2014 BCSC 12
British Columbia Supreme Court

Sobeys West Inc. v. College of Pharmacists of British Columbia

2014 CarswellBC 34, 2014 BCSC 12, [2014] B.C.W.L.D. 1363, [2014] B.C.W.L.D. 1402, [2014] B.C.W.L.D. 1463, [2014] B.C.J. No. 519, 236 A.C.W.S. (3d) 474

Sobeys West Inc. and Jace Holdings Ltd., Petitioners and College of Pharmacists of British Columbia, Respondent

Hinkson C.J.S.C.

Heard: December 20, 2013
Judgment: January 7, 2014
Docket: Vancouver S139071

Counsel: Peter A. Gall, Q.C., Andrea Zwack, for Petitioners
Robert J. McDonell, Erica C.L. Miller, for Respondents

***Hinkson C.J.S.C.*:**

1 The petitioners seek an interim order to enjoin the respondent from applying or enforcing certain bylaws prohibiting customer incentive programs (the "Incentive Prohibition Bylaws") pending the hearing of their petition to quash those same bylaws. The hearing of the petition is scheduled for January 31, 2014.

Background

2 The petitioner Sobeys West Inc. owns and operates the Canada Safeway grocery business in British Columbia, and the petitioner Jace Holdings Ltd. owns and operates the Thrifty Foods grocery business in British Columbia. Each is part of a larger group of companies.

3 Both petitioners have retail stores that contain pharmacies which have offered customer benefits in conjunction with their pharmacy services, including benefits from customer loyalty programs.

4 The respondent is the regulatory body responsible for registering and licensing pharmacies and pharmacy technicians throughout British Columbia. It is governed by the provisions of the *Health Professions Act*, R.S.B.C. 1996, c. 183 [the *Health Professions Act*] and has additional authority under the *Pharmacy Operations and Drug Scheduling Act*, S.B.C. 2003, c. 77.

5 The respondent has approximately 5200 pharmacist members employed in approximately 1200 pharmacies. 75 of these pharmacies are located in Canada Safeway stores in British Columbia and 12 in Thrifty Foods stores in this province.

6 Section 16 of the *Health Professions Act* describes the duties of the respondent and other colleges established under that legislation:

> **16** (1) It is the duty of a college at all times
>
> (a) to serve and protect the public, and
>
> (b) to exercise its powers and discharge its responsibilities under all enactments in the public interest.
>
> (2) A college has the following objects:
>
> (a) to superintend the practice of the profession;
>
> (b) to govern its registrants according to this Act, the regulations and the bylaws of the college;
>
> (c) to establish the conditions or requirements for registration of a person as a member of the college;
>
> (d) to establish, monitor and enforce standards of practice to enhance the quality of practice and reduce incompetent, impaired or unethical practice amongst registrants;
>
> (e) to establish and maintain a continuing competency program to promote high practice standards amongst registrants;
>
> (f) to establish, for a college designated under section 12 (2) (h), a patient relations program to seek to prevent professional misconduct of a sexual nature;
>
> (g) to establish, monitor and enforce standards of professional ethics amongst registrants;
>
> (h) to require registrants to provide to an individual access to the individual's health care records in appropriate circumstances;
>
> (i) to inform individuals of their rights under this Act and the *Freedom of Information and Protection of Privacy Act*;
>
> (i.1) to establish and employ registration, inquiry and discipline procedures that are transparent, objective, impartial and fair;
>
> (j) to administer the affairs of the college and perform its duties and exercise its powers under this Act or other enactments;

(k) in the course of performing its duties and exercising its powers under this Act or other enactments, to promote and enhance the following:

(i) collaborative relations with other colleges established under this Act, regional health boards designated under the *Health Authorities Act* and other entities in the Provincial health system, post-secondary education institutions and the government;

(ii) interprofessional collaborative practice between its registrants and persons practising another health profession;

(iii) the ability of its registrants to respond and adapt to changes in practice environments, advances in technology and other emerging issues.

7 Pursuant to s. 19 of the *Health Professions Act*, the respondent may make bylaws, consistent with the duties and objects of a college under section 16, that it considers necessary or advisable, including bylaws to:

(k) establish standards, limits or conditions for the practice of the designated health profession by registrants;

. . .

(l) establish standards of professional ethics for registrants, including standards for the avoidance of conflicts of interest; [and]

. . .

(s) regulate and prohibit advertising and marketing or types of advertising and marketing by registrants[.]

8 The Incentive Prohibition Bylaws provide:

(1) A registrant must not provide or distribute, or be a party to the provision or distribution o, and incentive to a patient's representative for the purpose of inducing the patient or patient's representative to

(a) deliver a prescription to a particular registrant or pharmacy for dispensing of a drug or device specified in the prescription, or

(b) obtain any other pharmacy service from a particular registrant or pharmacy.

(2) Subsection (1) does not prevent a registrant from

(a) providing free or discounted parking to patients or patient's representatives,

(b) providing free or discounted delivery services to patients or patient's representatives, or

(c) accepting payment for a drug or device by a credit or debit card that is linked to an incentive.

(3) Subsection (1) does not apply in respect of a Schedule III drug or an unscheduled drug, unless the drug has been prescribed by a practitioner.

9 These bylaws define an "incentive" as:

money, gifts, discounts, rebates, refunds, customer loyalty schemes, coupons goods or rewards.

10 In his affidavit sworn in response to the petitioners' application, Robert S. Nakagawa, the Registrar of the respondent, described his various administrative and employment positions with the respondent from 1989 to the present. He swore that he has for a number of years been aware of "considerations and concerns by [the respondent's Board of Directors], as well as pharmacists, with incentives or rewards offered by pharmacists or pharmacies to their customers." He also swore that the respective provincial authorities and Colleges of Pharmacists across Canada have similarly considered, and in some cases regulated or prohibited, such incentives.

11 The matter of pharmacy loyalty points programs has been under consideration by the respondent since at least 2005. Registrar Nakagawa described some of the more recent events that have led to the passage of the Incentive Prohibition Bylaws, which include:

a) a request by the respondent to its pharmacist members for input regarding such incentives in 2012;

b) a Government of British Columbia prohibition, beginning in 2012, on incentive rewards being provided to patients for that portion of their pharmacy and dispensing fees covered by the provincial Pharmacare program;

c) a request by the respondent for public input on the subject of prohibiting loyalty programs on December 28, 2012;

d) the passage of a resolution by the respondent's Board of Directors in June of 2013 to prohibit such incentives, subject to acceptable wording of the prohibition;

e) a meeting on September 20, 2013 where the respondent's Board of Directors passed the impugned Incentive Prohibition Bylaws by a unanimous resolution;

f) the filing of the Incentive Prohibition Bylaws with the Ministry of Health as a part of the legislative process to bring the bylaws into force effective 60 days thereafter; and

g) an email campaign by the respondent commencing October 4, 2013, to notify all managers, directors and owners of community pharmacies in British Columbia of the filing of the Incentive Prohibition Bylaws and the fact that they would be in force on December 2, 2013.

12 It is clear from the affidavit material filed by the petitioners that they were aware of the developments described by Registrar Nakagawa, but that they initially endeavoured to negotiate against passage of the Incentive Prohibition Bylaws. When they were unsuccessful in so doing, they endeavoured to negotiate the withdrawal of the Incentive Prohibition Bylaws up until the time their petition in these proceedings was filed on December 5, 2013.

13 The petitioners contend that although they are not challenging a law or a regulation passed by a branch of government, they are able to challenge the impugned bylaws on the basis that they represent an excess of jurisdiction on the part of the respondent, and that the wording of the Incentive Prohibition Bylaws is too vague to be enforceable in any reasonable way. They also contend that the Incentive Prohibition Bylaws are simply an attempt to regulate prices or price competition by pharmacists and pharmacies, and are thus beyond the power of the respondent. I will not endeavour to resolve these issues on the present application.

The Test for an Interim Injunction

14 As applicants, the petitioners bear the onus of establishing that they meet the test for the issuance of an interim injunction.

15 The test to be applied on the application before me has been variously described, as discussed by Mr. Justice Smith in *Expert Travel Financial Security (E.T.F.S.) Inc. v. BMS Harris & Dixon Insurance Brokers Ltd.*, 2005 BCCA 5 (B.C. C.A.) at paras. 54-56, (2005), 36 B.C.L.R. (4th) 254 (B.C. C.A.):

> [54] The test for the granting of an interlocutory injunction has been expressed as both a three-part test (see *RJR-MacDonald Inc. v. Canada (Attorney General)* [1994] 1 S.C.R. 311 at [paragraph] 77) and a two-part test (see *A.G. British Columbia v. Wale* (1986), 9 B.C.L.R. (2d) 333 (C.A.) at 345, aff'd [1991] 1 S.C.R. 62). As Madam Justice Saunders said in *Coburn v. Nagra* (2001), 96 B.C.L.R. (3d) 327, 159 B.C.A.C. 299, 2001 BCCA 607:
>
>> [7] Whether the criteria for an injunction is two part or three may be a topic of debate for scholars. In British Columbia the common test for injunctions has been two-pronged since *British Columbia (Attorney General) v. Wale* (1986), 9 B.C.L.R. (2d) 333 (B.C.C.A.), with the issue of irreparable harm being subsumed into the discussion of balance of convenience (or inconvenience). As Madam Justice McLachlin (now C.J.C.) noted in *Wale*, the distinction is likely without practical effect. The question in most

> cases is the relative weight of the convenience and inconvenience of the order sought, always considering the paramount measure, the interests of justice.

> [55] The test set out in *A.G. British Columbia v. Wale*, *supra*, was described in *Canadian Broadcasting Corp. (CBC) v. CKPG Television Ltd*. (1992), 64 B.C.L.R. (2d) 96 (C.A.) at p. 101:

>> The two-pronged test is this: "First, the applicant must satisfy the court that there is a fair question to be tried as to the existence of the right which he alleges and a breach thereof, actual or reasonably apprehended. Second, he must establish that the balance of convenience favours the granting of an injunction."

> [56] The burden on the applicant to show a fair question to be tried is a low one; generally, unless the case can be said to be frivolous or vexatious, this part of the test will be satisfied: see *RJR-MacDonald Inc. v. Canada (Attorney-General)*, *supra*, at [paragraph] 49, 50, 78.

16 I will consider the three parts of the test described in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.), at 348-49, (1994), 111 D.L.R. (4th) 385 (S.C.C.):

> At the first stage, an applicant for interlocutory relief in a *Charter* case must demonstrate a serious question to be tried. Whether the test has been satisfied should be determined by a motions judge on the basis of common sense and an extremely limited review of the case on the merits. The fact that an appellate court has granted leave in the main action is, of course, a relevant and weighty consideration, as is any judgment on the merits which has been rendered, although neither is necessarily conclusive of the matter. A motions court should only go beyond a preliminary investigation of the merits when the result of the interlocutory motion will in effect amount to a final determination of the action, or when the constitutionality of a challenged statute can be determined as a pure question of law. Instances of this sort will be exceedingly rare. Unless the case on the merits is frivolous or vexatious, or the constitutionality of the statute is a pure question of law, a judge on a motion for relief must, as a general rule, consider the second and third stages of the [*Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110, 38 D.L.R. (4th) 321] test.

> At the second stage the applicant must convince the court that it will suffer irreparable harm if the relief is not granted. 'Irreparable' refers to the nature of the harm rather than its magnitude. In *Charter* cases, even quantifiable financial loss relied upon by an applicant may be considered irreparable harm so long as it is unclear that such loss could be recovered at the time of a decision on the merits.

> The third branch of the test, requiring an assessment of the balance of inconvenience, will often determine the result in applications involving *Charter* rights. In addition to the damage each party alleges it will suffer, the interest of the public must be taken into account. The effect a decision on the application will have upon the public interest may be relied upon by

> either party. These public interest considerations will carry less weight in exemption cases than in suspension cases. When the nature and declared purpose of legislation is to promote the public interest, a motions court should not be concerned whether the legislation actually has such an effect. It must be assumed to do so. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit.
>
> We would add to this brief summary that, as a general rule, the same principles would apply when a government authority is the applicant in a motion for interlocutory relief. However, the issue of public interest, as an aspect of irreparable harm to the interests of the government, will be considered in the second stage. It will again be considered in the third stage when harm to the applicant is balanced with harm to the respondent including any harm to the public interest established by the latter.

a) Serious Question to be tried

17 The petitioners contend it is in the public interest that their customers receive whatever incentives or inducements they are prepared to provide, so long as those incentives or inducements don't offend the established standards of professional ethics for the respondent's registrants. If the incentives or inducements do offend the standards of professional ethics, the petitioners contend that the legislation and bylaws as they were prior to the passage of the Incentive Prohibition Bylaws are sufficient to permit the respondent to take disciplinary action to enforce its standards of professional ethics.

18 For example, I was provided with one version of the respondent's Code of Ethics, wherein Value 4, Obligation 1 provides:

> A pharmacist places concern for the well-being of the patient is at the centre of professional practice, providing the best care that circumstances, education and experience permit.

19 At the root of the petitioners' stance is their assertion that the respondent has not acted in the public interest in passing the impugned bylaws, but rather has acted in response to the lobbying efforts of its smaller pharmacy registrants in order to permit them to compete with larger pharmacy operations such as those of the petitioners.

20 The respondent contends that it passed the impugned bylaws in an effort to address public safety concerns.

21 Chad Rieger is the Director of Regulatory Affairs for Canada Safeway. Attached to his affidavit dated December 6, 2013, is a copy of a letter from Bruce Bowman, Vice President Legal & General Counsel, Canada Safeway Limited to the British Columbia Ministry of Health and

the respondent, dated December 27, 2012, where, in reference to research published by other Provincial Colleges of Pharmacists, he stated that:

> In this research patients were asked to rate factors influencing choice of pharmacy; reward programs rated very low. The top reasons in the SK Research were the pharmacist's expertise (4.5)[,] how customers are treated by pharmacists and staff (4.5) and location (4.2). Reward programs were rated very low at 2.7. Similarly, in the NB/NS Research, patients rated factors influencing choice of pharmacy as: the expertise of the pharmacist (4.7)[,] location (4.4), the pharmacist's familiarity with individual (4.2), and friendliness of staff (4.3) as much higher in importance than reward programs. Reward programs scored the lowest of all factors (3.0).
>
> [Footnotes omitted.]

Mr. Bowman also stated:

> There is also independent evidence that offering benefits such as loyalty points has little effect on a patient's choice of pharmacy.

22 In the same affidavit, Mr. Rieger swore that research commissioned by Canada Safeway and its incentive plan partner showed that during a 12 month period in 2012, chronic patient retention rates by pharmacies were higher in provinces with incentives, and that patients in more than one province are in favour of pharmacies offering loyalty reward programs.

23 An affidavit sworn by Jason Hoffman, the Senior Director, Pharmacy for Sobeys Inc., makes similar assertions regarding the lack of an evidentiary basis to justify the passage and enforcement of the Incentive Prohibition Bylaws.

24 The respondent has filed no affidavit disclosing any evidence of any past harm to the public that it attributes to the use of customer loyalty programs by the petitioners, or any of its registrants. It concedes that it has adduced no evidence of any particular problem arising from a loyalty program in British Columbia. Instead, it appears to rely solely upon speculative danger to the public to justify the passage and enforcement of its Incentive Prohibition Bylaws.

25 There is a note in the minutes of one of the respondent's Board Meeting minutes of June 15, 2012 stating that:

> A Board member raised the point that offering patient incentives has been known to compromise continuity of care as patients are waiting to fill prescriptions at times when additional 'points' may be earned, essentially compromising therapy in order for the patient to earn the most points.

26 This concern appears to have been addressed by the petitioners' agreement to refrain from specifying a particular "bonus" day or days on which additional loyalty points beyond what are otherwise available would be offered to customers.

27 The respondent referred to the factors identified by its Alberta counterpart supporting a prohibition of customer loyalty programs for pharmacists and pharmacies in Alberta. These included the following:

a) The scope of pharmacists' practice is expanding to include additional responsibilities for medication management. The number of pharmacists obtaining authorization to independently prescribe medications and administer injections is increasing steadily in Alberta;

b) Pharmacists are increasingly working as part of healthcare teams;

c) Pharmacists are paid for professional pharmacy services in addition to dispensing;

d) There now needs to be a different type of professional relationship between a pharmacist and a patient. The interaction of the pharmacist with a patient is more than a transaction based on dispensing medication. The pharmacist has an increased responsibility for the ongoing healthcare of their patients;

e) In recent years, there have been increases in the quantities and frequency of inducements, and the targeting of vulnerable populations;

f) Within the context of the current role of pharmacists, the use of inducements in pharmacy negatively impacts the integrity and trust of the patient-pharmacist relationship, and negatively impacts the reputation of the profession;

g) Inducements create a fundamental conflict in patients, between their desire to seek economic and psychological rewards versus following the professional health knowledge and advice of their pharmacist;

h) The shift of pharmacists' primary responsibility from retailing drugs to delivering professional practices has, in retail environments, generated a new dynamic between pharmacist employees, who need to make unbiased professional judgments in the best interests of the patient, and their retail employers, who have financial interests in offering the inducement; and

i) Inducements can drive individuals to access pharmacy services in ways that are not health-rational, jeopardizing their continuity of care and driving up costs to the health system, governments, insurance companies and taxpayers.

28 There is no evidence before me on this application that any of these factors were determined by the respondent's Board of Directors to be appropriate considerations, or that they were in any way influential in the Board's decision to pass the Incentive Prohibition Bylaws.

29 Other than referring to these factors, there is no evidence that the respondent considered that the factors were relevant in this province.

30 I am persuaded that the petitioners have met the relatively low threshold of establishing that their petition raises a serious question to be tried.

b) Irreparable Harm

31 I am not persuaded that the petitioners have established, as they allege, that members of the public will be harmed by being prevented from obtaining prescription drugs at a reduced price if the interim injunction sought does not issue. There is nothing in the evidence before me to suggest that more is presently at stake than the customer loyalty programs. Those programs provide benefits, but not price reductions.

32 Mr. Rieger also swore that if the Incentive Prohibition Bylaws are enforced "before their legality is determined, Canada Safeway will suffer irreparable harm" due to the loss of customers and revenue to competitors. In his third affidavit of December 19, 2013, he referred to a one page chart which he swore demonstrated an annualized loss of some $450,000 if the impugned bylaws are enforced. I am unable to attach any significant weight to his view, as the reliability of the information he relies upon is unknown.

33 That said, I am prepared to accept that the petitioners may well suffer some loss of customers and revenue if they are not permitted to continue their loyalty incentive programs prior to the hearing of their petition, as there is some evidence that the incentives and inducements encourage some customer loyalty.

34 I am not, however, persuaded that any loss of sales by the petitioners could not be determined in a way that would permit an award of damages, if such an award is recoverable against the respondent.

35 In their petition, the petitioners have alleged that the respondent acted for an improper purpose in adopting the Incentive Prohibition Bylaws, and I am advised that the petitioners have recently filed a complaint with the Competition Bureau, although the details of that complaint were not provided to me.

36 An award of damages may be recoverable against the respondent pursuant to the provisions of the *Competition Act*, R.S.C.1985, c. C-34 [the *Competition Act*]. Section 36 of that legislation permits any person who has suffered loss or damage as a result of conduct that is contrary to any

provision of Part VI of the *Competition Act* to sue for and recover from the person who engaged in the conduct an amount equal to the loss or damage proved to have been suffered by him.

37 While the quantification of the petitioners' alleged financial loss may not be a simple exercise, I am not persuaded that it could not be quantified if the petitioners are not permitted to pursue their loyalty incentive programs prior to the hearing of their petition.

38 Given the allegations in their petition, I am also not persuaded that the petitioners' damages could not be recovered through the petitioners' complaint to the Competition Bureau.

c) Balance of Convenience

39 I am not persuaded that the balance of convenience favours the petitioners at this juncture.

40 In *Canadian Broadcasting Corp. v. CKPG Television Ltd.* (1992), 64 B.C.L.R. (2d) 96 (B.C. C.A.) at para. 23, (1992), 4 C.P.C. (3d) 134 (B.C. C.A.), Mr. Justice Lambert identified several considerations to be taken into account in determining the balance of convenience using the two-part test on an application for an interim injunction:

> I would also adopt and follow the approach of Madam Justice McLachlin to the second prong of the test, namely the assessment of balance of convenience. I would summarize that approach in this way: in assessing the balance of convenience a judge should consider these points: the adequacy of damages as a remedy for the applicant if the injunction is not granted, and for the respondent if an injunction is granted; the likelihood that if damages are finally awarded they will be paid; the preservation of contested property; other factors affecting whether harm from the granting or refusal of the injunction would be irreparable; which of the parties has acted to alter the balance of their relationship and so affect the status quo; the strength of the applicant's case; any factors affecting the public interest; and any other factors affecting the balance of justice and convenience.

41 I have addressed irreparability, the adequacy of damages, and the likelihood of their payment in the event that the requested injunction is not issued above. While the petitioners maintain a property interest in their customers, I am unable to find that the short period of time before the petition will be heard will result in a permanent or long-term loss of the petitioners' customers.

42 At this juncture, I find that I am unable to assess the strength of the petitioners' case. They contend that there is no potential harm to the public if the interim injunction sought is issued. I do not regard the matter as quite that simple. The fact that there has been no documented harm to the public from customer loyalty programs to date does not mean that the risk of harm is non-existent.

43 There are competing public interests at stake in this case. On the one hand, the public have an interest in obtaining pharmacy services and prescriptions at the lowest price. If customers can

obtain incentives, even without a reduction in the price that they pay, that may be to the public advantage. On the other hand, the public also have an interest in receiving safe pharmaceutical services.

44 The principal functions of the respondent are to serve and protect the public, and to exercise its powers and discharge its responsibilities under all enactments in the public interest. In my opinion, they must do so both retrospectively and prospectively. However, I am mindful of the constraint upon me at this stage of the proceedings that I should only go beyond a preliminary investigation of the merits when the result of the interlocutory motion will in effect amount to a final determination of the action.

45 In *Harper v. Canada (Attorney General)*, 2000 SCC 57, [2000] 2 S.C.R. 764 (S.C.C.), the petitioner sought a declaration that the provisions in the *Canada Elections Act*, S.C. 2000, c. 9, imposing limits on third-party spending on advertising in the course of a federal election campaign were unconstitutional. At para. 9 of her reasons for the majority, Chief Justice McLachlin held:

> Another principle set out in the cases is that in considering the grant of an interlocutory injunction suspending the operation of a validly enacted but challenged law, it is wrong to insist on proof that the law will produce a public good. Rather, at this stage of the proceeding, this is presumed. As Sopinka and Cory JJ. stated in *RJR — MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, at pp. 348-49:
>
>> When the nature and declared purpose of legislation is to promote the public interest, a motions court should not be concerned whether the legislation actually has such an effect. It must be assumed to do so. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit.

46 I consider that the respondent must be afforded the opportunity to develop its position as to public safety on the hearing of the petition, and that I cannot assume that the statutorily created body charged with the protection of the public relating to pharmacists and pharmacies has proceeded contrary to its statutory obligations in passing the impugned bylaws.

47 I may ultimately be persuaded that the wording of the Incentive Prohibition Bylaws is so broad that they cannot be enforced in any reasonable way, but at this juncture, I am of the view that the portion that pertains only to customer loyalty programs may be salvageable even if the balance is not.

48 Finally, the reality is that the 5200 pharmacist members and approximately 1200 pharmacies in British Columbia other than those working for the petitioners must be taken to have organized their affairs in order to comply with the Incentive Prohibition Bylaws as of December

2, 2013, when they came into force. The petitioners elected to attempt to negotiate a delay in the implementation of these bylaws, and were unable to do so. The *status quo ante* as of the date of their petition and interim injunction application was that the Incentive Prohibition Bylaws were effective.

49 I conclude that the petitioners must live with their election during the short period of time before their petition can be heard. To decide otherwise would potentially affect the vast majority of pharmacists and pharmacies in the province, and their customers, when the petitioners could have moved sooner to avoid that consequence. I do not wish to be taken as critical of the petitioners for their election, but the situation that presently prevails is not one that can have come as a complete surprise to them.

Conclusion

50 The petitioners' application for an interim order to enjoin the respondent from applying or enforcing its Incentive Prohibition Bylaws pending the hearing of their petition on January 31, 2014 is dismissed.

Application dismissed.

TAB J

2009 BCCA 581
British Columbia Court of Appeal

Telus Communications Co. v. Rogers Communications Inc.

2009 CarswellBC 3424, 2009 BCCA 581, [2009] B.C.J. No. 2520, [2010] 2 W.W.R. 425, [2010] B.C.W.L.D. 846, 183 A.C.W.S. (3d) 1095, 281 B.C.A.C. 38, 315 D.L.R. (4th) 99, 475 W.A.C. 38, 66 B.L.R. (4th) 1, 99 B.C.L.R. (4th) 229

TELUS Communications Company (Respondent / Plaintiff) And Rogers Communications Inc. (Appellant / Defendant)

K. Smith, Chiasson, Groberman JJ.A.

Heard: December 2, 2009
Judgment: December 4, 2009
Docket: Vancouver CA037669

Proceedings: affirming *Telus Communications Co. v. Rogers Communications Inc.* (2009), 2009 CarswellBC 3168, 2009 BCSC 1610 (B.C. S.C.)

Counsel: Stephen R. Schachter, Q.C., Geoffrey B. Gomery for Appellant
Robert S. Anderson, Q.C., Eli C. Walker for Respondent

***K. Smith, Groberman JJ.A.*:**

1 Rogers Communications applies for leave to appeal, and, if granted, appeals from an order that prohibits it from making certain claims in its advertising pending trial. While the language of the order is somewhat complex, the basic question is whether Rogers should be subject to an interlocutory injunction that prohibits it from advertising its wireless network as "Canada's most reliable network".

2 This matter came on for hearing on an expedited basis on December 2, 2009. At the end of the hearing, we advised the parties that we were unable to give judgment immediately. As we were aware that the parties required a decision without delay, we stated that we would pronounce judgment expeditiously, with reasons to follow. We refused to stay the injunction in the meantime.

3 On December 4, 2009, we gave judgment granting leave to appeal and dismissing the appeal, with reasons to follow. These are the reasons.

Technical Background

4 There are three major players in the wireless telecommunications industry in Canada: the two parties to this litigation and Bell Mobility. TELUS and Bell share major parts of their network infrastructure with one another, while Rogers has a completely separate network.

5 Two basic standards for wireless cellular telecommunications have been used in Canada in recent years. The Rogers network is based on GSM ("Global System for Mobile communications"), while the Bell and TELUS network has, until very recently, been based on CDMA ("Code Division Multiple Access"). The two standards are not compatible; equipment that works on one type of network will generally not work on the other.

6 Early in their history, wireless telecommunications networks were used mainly for voice communications. As the industry developed, however, data transmission became more important. Mobile devices today are used not only for voice communications, but also for various types of data exchanges (web browsing, email and text messaging, and music and video streaming, among others). In order to facilitate data exchanges, the protocols used to transmit data over GSM and CDMA networks have evolved through various "generations". The most advanced protocol used on CDMA networks is EVDO ("Evolution-Data Optimized"), a "third generation" or "3G" protocol. The advanced GSM protocol is HSPA ("High Speed Packet Access"), the most recent version of which is called HSPA+. In industry jargon, HSPA and HSPA+ are referred to as "3.5 generation" (3G+) technology.

7 As protocols have evolved, it has become clear that the potential for development of CDMA is not as great as the potential for development of GSM. It is anticipated that all fourth generation networks will be based on GSM.

8 Rogers began using the HSPA protocol in September 2007. This made its network more advanced than the TELUS/Bell network, and it started marketing itself as having "Canada's fastest network" and "Canada's most reliable network".

9 The reference to speed was consistent with the technological differences between the networks. HSPA provides faster speeds for transmission of data than does EVDO (network speed is effectively irrelevant for voice communication). Roger's HSPA can deliver up to 7.2 megabits of data per second (Mbps) while TELUS's EVDO delivers only up to 2 Mbps. The newer HSPA + protocol can deliver up to 21 Mbps. In practice, actual data throughput is much lower, with end-users on EVDO networks achieving download speeds of 300-700 kilobits per second, and end-users on HSPA+ networks achieving download speeds 4-6 Mbps. HSPA can deliver data transmission speeds that are more than twice as fast as EVDO. HSPA+ can deliver about 10 times the data speed that EVDO can. The Rogers network was, therefore, the fastest wireless data network in Canada.

10 The claim that the Rogers network was the "most reliable" was based on empirical research commissioned by Rogers, which measured the rate of dropped voice calls and uncompleted data sessions on the networks. The research also rated the average clarity of calls on the networks.

11 Rogers has provided the Court with confidential research data showing its network to be more reliable than the TELUS/Bell CDMA network. The data, gathered in the first half of 2009, show that both the TELUS/Bell and the Rogers networks are very reliable, but that the Rogers network had a small edge in reliability, with a somewhat lower percentage of dropped calls and uncompleted data sessions. The data also give Rogers a higher average call clarity rating.

12 In 2008, TELUS and Bell announced that they intended to build a new network, using GSM technology and the HSPA and HSPA+ protocols. The new network is said to be entirely new infrastructure. TELUS began using the new network on November 5, 2009 (Bell's launch was the previous day). The network exists as a parallel network to the TELUS/Bell CDMA network. Almost all TELUS customers continue to be on the CDMA network. Most equipment being marketed by TELUS continues to work only on the CDMA network, though it is starting, as well, to sell equipment that is compatible with the HSPA/HSPA+ network.

13 TELUS says that its HSPA/HSPA+ network is faster than the Rogers network. It bases this allegation on the fact that both its HSPA+ and HSPA coverage areas are larger than those of Rogers. It accepts, however, that the total coverage area of its new network is somewhat smaller than the coverage area of Rogers's GSM network, parts of which continue to operate on second generation protocols. TELUS also says that the HSPA protocol that it uses is faster than Rogers's HSPA protocol, though it admits that the two companies' HSPA+ protocols operate at identical speeds. It also acknowledges that most Smartphones are not capable of taking advantage of the highest data transmission rates, though it says that some wireless devices typically used with computers can do so. It appears, therefore, that the Rogers network may no longer be "Canada's fastest network".

14 In any event, Rogers has ceased to advertise itself as having "Canada's fastest network". It says that its research shows that consumers are more concerned about reliability than speed of data transmission. Accordingly, it has decided to concentrate its advertising on its superior "reliability" rather than on speed.

15 There are differences of opinion as to whether the use of HSPA/HSPA+ technology will result in TELUS's new network being as "reliable" as the Rogers network in terms of call completion and call clarity. TELUS has provided evidence indicating that reliability is related to the technology being used, such that it expects its new network to be the equal of Rogers's in terms of reliability.

16 Rogers, on the other hand, has produced evidence to the effect that factors other than the transmission protocol affect call completion rates - factors such as tower and antenna placement and configuration, network congestion, and call handover algorithms. It says that call clarity is

dependent on the encoding rate, which can be affected both by the software being used and by radio channel availability and capacity. Rogers contends that the launching of an HSPA/HSPA+ network by TELUS and Bell will not necessarily result in those companies having a network that is as reliable as the Rogers network.

17 Because the TELUS/Bell HSPA/HSPA+ network is entirely new infrastructure, however, Rogers acknowledges that it does not know, at present, whether its network is more reliable than the TELUS/Bell HSPA/HSPA+ network. It says that it will be necessary to gather empirical evidence for several months before it can evaluate the reliability of the new network. In the meantime, it wishes to continue to market itself as "Canada's most reliable network", based on a comparison between its HSPA/HSPA+ network and the TELUS/Bell EVDO network.

The Litigation

18 On November 12, 2009, only one week after TELUS launched its new network, it commenced the current action, which alleges that Rogers's representations that it has "Canada's fastest network" and "Canada's most reliable network" are false or misleading.

19 It immediately sought an interlocutory injunction to restrain Rogers from advertising itself as having "Canada's fastest network" or "Canada's most reliable network", claiming that the pre-Christmas retailing period represents the busiest time of the year for the sale of mobile devices, and that it would suffer irreparable harm in the event that Rogers continued its advertising campaign.

20 Rogers opposed the application. It contends that the claim that it operates Canada's most reliable network is based on its past performance, and that there is no proof that it will not continue to apply into the future. Further, it agrees that marketing in the pre-Christmas period is critical. It says that it planned its current marketing campaign months ago, and that it was scheduled to cover the period from November 2 to December 28, 2009. The campaign is built around the "most reliable network" claim.

21 The matter was quickly brought on for hearing. The Supreme Court heard the application for an interlocutory injunction on November 19. As Rogers made it clear that it does not intend to continue advertising its network as "Canada's fastest network", the parties agreed that the application should simply be adjourned insofar as it concerned that claim. TELUS proceeded to seek an injunction prohibiting Rogers from advertising itself as having "Canada's most reliable network".

22 On November 24, 2009, Grauer J. granted an interlocutory injunction. The detailed terms of the order were worked out at a further hearing on November 27. Reduced to the essentials, the operative term of the order is as follows:

> Rogers ... is ... prohibited from ... publishing ... advertising ... containing a representation ... suggesting, without qualification or explanation in plain terms based on a comparison to its competitors' HSPA/HSPA+ network, that Rogers' network is the most reliable network in Canada.

23 A detailed list of different modes of advertising then sets out the various dates on which the order takes effect. With some exceptions, the injunction took effect on December 3, 2009.

The Legislation

24 The primary foundation for TELUS's claim is found in Part VI of the *Competition Act*, R.S.C. 1985, c. C-34. Section 52(1) provides:

> 52.(1) No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, knowingly or recklessly make a representation to the public that is false or misleading in a material respect.

25 Section 36(1) of the *Act* provides a civil remedy for a person who alleges that he, she or it has suffered damages by reason of a violation of Part VI of the *Act*:

> 36. (1) Any person who has suffered loss or damage as a result of
>
> (a) conduct that is contrary to any provision of Part VI, or
>
> . . . . .
>
> may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.

26 One issue in the litigation is whether an injunction can be granted to a private litigant to restrain conduct that is found to violate s. 52(1). The statute does not specifically give private parties the right to seek injunctive relief, but does allow the Attorney General of Canada or of a province to seek an interim injunction where it appears that an offence has been committed. On the other hand, nothing in the statute expressly precludes courts from granting equitable injunctions at the behest of private parties.

The Chambers Judge's Reasons

27 The chambers judge applied the usual test for an interlocutory injunction, citing the judgments of this Court in *British Columbia (Attorney General) v. Wale* (1986), 9 B.C.L.R. (2d) 333 (B.C.

C.A.), aff'd [1991] 1 S.C.R. 62 (S.C.C.), and in *Bell Mobility Inc. v. Telus Communications Co.*, 2006 BCCA 578 (B.C. C.A.), as well as the judgment of the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.). He described the test in these terms:

> [21] The first prong is whether the applicant's claim raises a fair question to be tried. The cases make it clear that this is a relatively low threshold.
>
> [22] The second prong is whether the balance of convenience favours the granting of the injunction. One of the factors to be considered in this regard is whether either of the parties will suffer irreparable harm from allowing or denying the application. In the three-pronged test, irreparable harm is considered separately from the balance of convenience, but in either event we are warned to view the picture as a whole, rather than concentrate on its individual components.
>
> [23] Other factors include, but are not limited to, which of the parties has acted to alter the balance of the relationship so as to affect the status quo, and matters affecting the public interest. Also to be considered in assessing the balance of convenience is the strength of the applicant's case, particularly where the extent of incompensable disadvantage to each party would not differ significantly....

28 He first considered whether TELUS's claim raises a fair question to be tried. In this regard, he considered the impression left by Rogers's advertising. He noted that some (but not all) of Rogers's advertisements included a disclaimer in small print qualifying the claim that it has the "most reliable network" in the following terms:

> Most reliable network refers to call clarity and dropped calls (voice) and to session completion rate (data) as measured within Rogers HSPA footprint and comparing with competitors' voice and data 1xEvdo networks. Rogers HSPA network is not available in all areas.

29 He found (at paragraph 33) that the disclaimer does not assist Rogers, because most consumers would not appreciate the meaning of the disclaimer, and would take from the advertisement that the Rogers network is the most reliable of all Canadian networks.

30 After considering the arguments put forward by the parties, the chambers judge commented that TELUS's case was a strong one:

> [39] I conclude that Telus in fact has a very strong case against Rogers based on the allegation that Rogers has knowingly made a representation to the public that is misleading in a material respect. Reliability is clearly material, or we would not be here. Rogers must, on the evidence, be taken to know that its representation that it has Canada's most reliable network is based on a comparison that is no longer valid. It compares apples to oranges, but that fact is not

evident. Indeed, it would be of little use to Rogers to advertise itself as having what was, until recently, Canada's most reliable network.

31 He found that TELUS had "easily" satisfied the first branch of the test for an interlocutory injunction. He then moved on to the balance of convenience.

32 On the balance of convenience, the Chambers judge concluded that TELUS would suffer irreparable harm if an injunction did not issue. He considered that problems of quantifying TELUS's loss in such circumstances would render the assessment very difficult. He found that Rogers would, equally, suffer irreparable harm if it were enjoined from proceeding with its advertising campaign.

33 Ultimately, the judge found that the balance of convenience did not favour one party or the other. In the circumstances, he considered that the deciding factor should be the strength of the case. As he considered TELUS to have a very strong case, he determined that an injunction ought to be granted.

Arguments on Appeal

34 The first issue for the Court was whether leave to appeal ought to be granted. We were satisfied that whether the injunction should stand is an issue of importance to the parties and the litigation, and that the appellant's case was arguable. Accordingly, we granted leave to appeal.

35 On the merits of the appeal, the Court raised, as a threshold issue, the question whether an interlocutory injunction should be available in a case such as this one. Section 36(1) of the *Competition Act* appears to limit the remedy available to a private party to compensatory damages. If a private party's ultimate remedy under the statute is damages, is it appropriate to grant injunctive relief at the interlocutory stage?

36 Even assuming that interlocutory relief might be available in this case, Rogers argues that the chambers judge made errors which led him to the erroneous conclusion that TELUS has a strong case:

a) He failed to take into account the absence of any history of reliability for the TELUS/Bell HSPA/HSPA+ network;

b) He misapprehended the nature of Rogers's claim to have "Canada's most reliable network";

c) He reversed the burden of proof by, in effect, requiring Rogers to prove that its network is more reliable than the TELUS/Bell HSPA/HSPA+ network.

37 Rogers also argues that the chambers judge made errors in assessing the balance of convenience. In particular, it says that:

d) He failed to consider the importance of maintaining the status quo, all else being equal;

e) He failed to recognize the importance of protecting freedom of expression.

Does the Court have Jurisdiction to Issue an Interlocutory Injunction?

38 Section 36(1) of the *Competition Act* provides a statutory cause of action sounding in damages. While the *Act* does have limited provisions for the granting of interlocutory injunctions, those provisions apply only where criminal proceedings are brought under the *Act*, and only provide for injunctions to be granted on the application of the Attorney General of Canada or of a province. There is no statutory basis in the *Competition Act* for the issuance of an interlocutory injunction in this action.

39 TELUS argues that the authority to grant an injunction in this case is within the inherent jurisdiction of the Supreme Court, and that it also finds expression in s. 39(1) of the *Law and Equity Act*, R.S.B.C. 1996, c. 253 and in Rule 45 of the Supreme Court Rules.

40 In *B.M.W.E. v. Canadian Pacific Ltd.*, [1996] 2 S.C.R. 495 (S.C.C.), the Supreme Court of Canada considered the jurisdiction of a superior court to grant interlocutory relief. In that case, the union sought and obtained an interlocutory injunction prohibiting the employer from implementing a new work schedule pending the completion of an arbitration under the *Canada Labour Code*, R.S.C. 1985, c. L-2. Although the *Canada Labour Code* is a comprehensive code for settling labour disputes, and although the matter in question was governed by federal law, the Supreme Court of Canada accepted at paragraph 5 that the B.C. Supreme Court had acted properly in issuing an injunction:

> The governing principle on this issue is that notwithstanding the existence of a comprehensive code for settling labour disputes, where "no adequate alternative remedy exists" the courts retain a residual discretionary power to grant interlocutory relief such as injunctions, a power which flows from the inherent jurisdiction of the courts over interlocutory matters ....

41 The Court accepted that the inherent jurisdiction of the Supreme Court was that set out in what is now s. 39(1) of the *Law and Equity Act*:

> 39(1) An injunction or an order in the nature of mandamus may be granted or a receiver or receiver manager appointed by an interlocutory order of the court in all cases in which it appears to the court to be just or convenient that the order should be made.

42 Rule 45(1) of the Supreme Court Rules makes it clear that an interlocutory injunction may be granted even though there is no claim in an action for a permanent injunction:

> 45(1) An application for an interlocutory injunction may be made by a party whether or not a claim for an injunction is included in the relief claimed.

43 The present case does not present all of the difficulties that were present in *Brotherhood of Maintenance of Way Employees.* The *Competition Act* is not, on its face, a code purporting to comprehensively regulate an area of commerce in the way that the *Canada Labour Code* is a comprehensive code regulating labour relations. As well, we are, in this case, dealing with interlocutory relief in litigation that is before the Supreme Court. A major concern in *Brotherhood of Maintenance of Way Employees* was whether the Supreme Court of British Columbia could have any jurisdiction to deal with matters falling under a federal regulatory statute, where it was the Federal Court of Canada that had supervisory jurisdiction.

44 We are satisfied that the Supreme Court of British Columbia had jurisdiction to grant an interlocutory injunction in this case, notwithstanding that the plaintiff's claim is statutory and notwithstanding that the statute itself does not provide for the issuance of injunctions at the behest of a private party. The inherent jurisdiction of the Supreme Court of British Columbia to grant an injunction, as reflected in s. 39(1) of the *Law and Equity Act* has not been displaced by any of the provisions of the *Competition Act* applicable to the present litigation.

45 In saying that the Supreme Court had jurisdiction to grant an interlocutory injunction, we do not wish to be taken as endorsing the proposition that the plaintiffs might, at the conclusion of the case, be entitled to a permanent injunction. There is some authority that acknowledges jurisdiction to grant an interlocutory injunction in a claim under s. 36 of the *Competition Act* but denies there is jurisdiction to issue a permanent injunction: *947101 Ontario Ltd. v. Barrhaven Town Centre Inc.* (1995), 121 D.L.R. (4th) 748 (Ont. Gen. Div.); *Mead Johnson Canada v. Ross Pediatrics* (1996), 31 O.R. (3d) 237 (Ont. Gen. Div.). We express no view on whether a permanent injunction can be granted to a private party in a claim brought pursuant to s. 36 of the *Competition Act.*

46 While we are of the view that the Supreme Court has *jurisdiction* to grant an interlocutory injunction in a claim brought under s. 36 of the *Competition Act*, the scheme of the *Act*, and its concentration on damages as the appropriate final remedy are important considerations for the court in considering whether interlocutory relief ought to be granted. In particular, the court should be careful in considering whether the plaintiff can make out a case for "irreparable harm" in the analysis of the test for an interlocutory injunction.

47 In the case before us, the defendant did not contend that the concentration on damages as a remedy in the statute ought to have led the chambers judge to find that any harm that might be suffered by the plaintiff should not be characterized as "irreparable". We do not, therefore, propose to say anything further about this issue.

48 Given that we find that the Supreme Court did have jurisdiction to issue an injunction, we agree that the chambers judge applied the correct test to injunctive relief by first considering whether TELUS had demonstrated that it had an arguable case, next considering whether it would suffer irreparable harm if no injunction were granted, and finally considering where the balance of convenience lay as between the parties.

49 We also recognize that the granting of an injunction is a discretionary order, and that deference is owed to the findings of fact of the chambers judge: *Tracy v. Instaloans Financial Solutions Centres (B.C.) Ltd.*, 2007 BCCA 481 (B.C. C.A.). This is not a rehearing of the injunction application, but an appeal on which the defendant must demonstrate error on the part of the chambers judge.

Did the Chambers Judge Err by Failing to Require a Track Record of Reliability?

50 Rogers argues that the chambers judge erred in treating the concept of "reliability" as one that was solely concerned with the technology used by the competing networks. It says that "reliability", by its very nature, requires that a party's history or "track record" be taken into consideration. It contends that because the TELUS/Bell HSPA/HSPA+ network is brand new, it cannot be considered reliable.

51 The chambers judge had the initial task of determining what "general impression" would be formed by consumers upon seeing Rogers's advertising. The finding is a question of fact. After having completed that task, the judge was required to determine whether that general impression is misleading, as this Court held in *Bell Mobility Inc. v. Telus Communications Co.*:

> [16] First, the trial judge must determine the general impression conveyed to consumers, based only on the representations actually made in the advertisements. This is the impression formed by consumers upon seeing the advertising in its intended form. Once assessed in light of the information presented to the consumer in the body of the advertisement, the impression is fixed as the impression of the average consumer.
>
> [17] ... I would only add that s. 52(4) requires that the trial judge also examine the literal meaning of the representation in determining whether the advertisement is false or misleading.
>
> [18] ... The second step of the test requires the court, having regard to extraneous facts if necessary, to gauge whether the impression conveyed to consumers by the representation is false or, alternatively, misleading in a material respect. Only at this stage is extraneous evidence considered, not to alter the general impression, but to gauge whether the impression is false or misleading.

52 We are not persuaded that reliability, in the context of Rogers's advertising, is a concept necessarily rooted in the historical performances of the companies' networks. Rogers's advertising has concentrated on audio clarity and on the rate of dropped voice calls and incomplete data sessions. The evidence suggests that all of those measures depend on the technology, infrastructure, and management of the network. The chambers judge was of the view that the representation by Rogers that it has "Canada's most reliable network" was not a representation dealing with its track record, but rather a representation as to the quality of wireless service that consumers can expect from its network. On that interpretation of its advertisements, Rogers's representation of reliability is forward-looking.

53 The chambers judge was called upon to determine what general impression was created by Rogers's use of the phrase "Canada's most reliable network", and his determination was a question of fact. On the chambers judge's interpretation of the representation, it does not have an historical component. We are not convinced that the chambers judge erred in his interpretation. On his reading of the representation, the fact that the TELUS/Bell HSPA/HSPA+ network is a new one did not disentitle it from being considered "reliable".

Did the Chambers Judge Misinterpret Rogers's Claim of Reliability?

54 Rogers says that the chambers judge erred in interpreting its claim to have "Canada's most reliable network" in two further respects. First, it says that its ads contained a disclaimer or "explainer" that indicated that the comparison that it was making was between the TELUS/Bell EVDO network and the Rogers HSPA/HSPA+ network. Rogers says that informed consumers, at whom the advertising was directed, would understand the limited nature of the representation.

55 Second, Rogers says that the comparison that it makes - between the TELUS/Bell EVDO network and the Rogers HSPA/HSPA+ network - is a valid one, since the vast majority of TELUS subscribers use the EVDO network, and the bulk of handsets being sold by TELUS are CDMA rather than GSM units.

56 Rogers cites *R. v. International Vacations Ltd.* (1980), 124 D.L.R. (3d) 319 (Ont. C.A.), *Purolator Courier Ltd. - Courrier Purolator Ltée v. United Parcel Service Canada Ltd.* (1995), 20 B.L.R. (2d) 270 (Ont. Gen. Div.), and *Tele-Mobile Co., A Partnership v. Bell Mobility Inc.*, 2006 BCSC 161 (B.C. S.C. [In Chambers]), for the proposition that disclaimers should be interpreted by assuming that they are read by "the interested consumer - that is, the consumer who is concerned to understand the reliability claim". In our view, the concept of the "interested consumer" is not necessarily a helpful one here, particularly if it is taken to mean a particularly well-informed consumer, or one who will make special efforts to perform independent research in order to understand the nature of a claim. The cases cited by Rogers stand only for the proposition that a disclaimer must be read in context. In our view, the words of Lederman J. in *Purolator Courier* fairly set out the appropriate considerations at 285-286:

> [50] A disclaimer does not automatically nullify a misleading impression created by an ad. Its effect will depend on several factors, including the degree to which a representation misleads the public without the disclaimer, the prominence which it is given in the context of the entire advertisement, the degree of sophistication that the public to whom the advertisement is directed exhibits, and the likelihood that the audience would recognize the disclaimer. It is a question of fact whether, in the circumstances, a disclaimer is sufficient to ensure that the representation is not otherwise misleading.

57 The chambers judge found, at paragraph 33 of his judgment that "most consumers would not understand the significance of the reference to 'Rogers HSPA footprint'... and 'competitors' voice and data 1xEVDO networks'." He continued:

> [34] I conclude that the general impression of the representation, whether or not one includes the fine print, is that Rogers' network is more reliable than any other network in Canada, period.

58 We are not persuaded that the judge erred in making this finding. The Rogers ads purport, in large typeface, to state that the Rogers network is "Canada's most reliable." Some ads contain fine print explaining that it is more reliable than the TELUS/Bell EVDO network. The word "most" is a superlative. It was open to the chambers judge to find that if the Rogers network is the "most reliable" it must be more reliable than all of the other networks, not simply more reliable than certain specified networks. The "explainer" does not necessarily serve to alert a consumer to the fact that it is intended to undercut the claim that it is purporting to explain. In the circumstances, the judge made no reversible error in finding that most consumers would not understand the "explainer".

59 With respect to Rogers's assertion that the comparison between the Rogers network and the TELUS/Bell EVDO network was a valid one, because that network is the main one used by TELUS, the judge said:

> [35] Rogers submits that the comparison nevertheless remains relevant because not all customers of Telus will be using the new network. Many will continue to use the EVDO network. But the target of both companies is not that segment. As the ad quoted indicates, the target is the consumer population seeking increased data transference capability for webphones. It is to that segment that Rogers is most interested in representing itself as Canada's most reliable network. The sought-after consumer would not otherwise be interested in the HSPA data transmission advantage.

60 It may be that the chambers judge erred in reaching this conclusion. As we understand the evidence, the claim of superior reliability relates not only to webphones or data devices, but also to devices used only to make voice calls. Notwithstanding this possible error, the chambers

judge's view that a comparison between the Rogers network and the TELUS/Bell EVDO network was irrelevant remains supportable. The Rogers ads are aimed at new users of wireless devices, and at those considering switching service providers. Neither of those groups is tied to the EVDO network - both groups can choose to use devices that work on the TELUS/Bell HSPA/HSPA+ network as easily as they can choose devices that work on the Rogers network.

61 We are therefore of the view that the chambers judge was entitled to reach the conclusion that the comparison between the TELUS/Bell EVDO network and the Rogers network was a misleading one. His view that any claim that Rogers has Canada's "most reliable network" must have encompassed the TELUS/Bell HSPA/HSPA+ network as well as those companies' EVDO network is a supportable one.

62 Rogers also argues that the evidence does not support the proposition that TELUS's new network will be as reliable as that of Rogers. While it is true that there were conflicting affidavits as to the importance of the protocol to network reliability, there was some evidence on which the chambers judge was entitled to find that the protocol is an important determiner of reliability. While we would not necessarily have reached the same conclusion on the evidence, it was open to him to make the finding that he did.

Did the Chambers Judge Wrongly Place the Burden of Proof on the Defendant?

63 Rogers argues that before a civil claim under s. 36(1)(a) can succeed, a plaintiff must show that the defendant made a misrepresentation knowing that it is false, or being reckless as to its falsity. It argues that the chambers judge effectively reversed the burden of proof, by finding that Rogers was required to provide evidence in support of its claim that its network is the most reliable.

64 The alleged error arises out of paragraph 36 of the chambers judge's reasons:

> [36] Rogers then argues that there is no real evidence that Rogers' network is not still the most reliable network in Canada, notwithstanding the new HSPA/HSPA+ network developed by Telus and Bell. But the only basis Rogers ever had for making that representation was the comparison between its HSPA network and its competitors' first-generation EVDO networks. On the evidence before me, there is no basis whatsoever for stating that Rogers' HSPA/HSPA+ network is more reliable than Telus's HSPA/HSPA+ network. Moreover, there is no evidence that anyone at Rogers believes that Rogers' HSPA/HSPA+ network is more reliable than Telus's HSPA/HSPA+ network. What the evidence does indicate is that the technological advantage that allowed Rogers to represent that it has Canada's most reliable network has disappeared. Rogers' representation nevertheless continues to be made. In these circumstances, I conclude that it is misleading.

65 We do not read this passage as a reversal of the burden of proof. Rather, the judge concluded that because Rogers knew that the foundation of its claim of superior reliability - its technological advantage - had been removed, its claim had become a misleading one.

66 In this case, the evidence indicates that Rogers does not know whether its network is more reliable than the TELUS/Bell HSPA/HSPA+ network. Such a lack of knowledge will not necessarily immunize Rogers from liability under s. 52 of the *Competition Act*.

67 In saying this, we recognize that there was conflicting evidence before the chambers judge as to the significance of underlying technology to the reliability of a network. He appears to have accepted that TELUS has a strong case for the proposition that network reliability is primarily a function of the wireless protocol that a provider uses. Such a finding was within the province of the chambers judge. While we might not have made the same finding on the evidence, it is not the function of the appeal court to interfere with the finding or with the chambers judge's discretion in issuing an injunction.

68 We are unable to find any reversible error in the trial judge's conclusion that TELUS had made out a strong case. We turn, therefore, to the errors alleged in the weighing of the balance of convenience.

The Role of the Status Quo

69 Courts have frequently referred to the maintenance of the status quo as a factor to be considered in assessing the balance of convenience. In this Court's judgment in *British Columbia (A.G.) v. Wale*, the majority said at 344:

> One factor which may assist the court in assessing where the balance of convenience lies when the parties' interests are relatively evenly balanced is the fact that one side bases his claim on existing rights, while enforcement of the other's rights would change the status quo. To put it another way, where the only effect of an injunction is to postpone the date upon which a person is able to embark on a course of action not previously open to him, it is a counsel or prudence to preserve the status quo[.]

70 While this factor has been important in some cases, others have noted that it can be of limited utility. In *Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832*, [1987] 1 S.C.R. 110 (S.C.C.), the Supreme Court of Canada quoted with approval the chambers judge's view that the case was one in which the status quo could not, "practically speaking", be maintained. That, it seems to us, is a common problem. There are cases in which injunctions are sought to restrain longstanding practices, but they are the exception, not the rule. Most often, the "status quo" that is being argued for is a fluid situation. Further, the situation may partake of different interpretations of the "status quo".

71 In *RJR-MacDonald*, the Court said at 347:

> In the course of discussing the balance of convenience in *American Cyanamid* [*American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396], Lord Diplock stated at p. 408 that when everything else is equal, "it is a counsel of prudence to ... preserve the status quo." This approach would seem to be of limited value in private law cases, and, although there may be exceptions, as a general rule it has no merit as such in the face of the alleged violation of fundamental rights. One of the functions of the *Charter* is to provide individuals with a tool to challenge the existing order of things or status quo. The issues have to be balanced in the manner described in these reasons.

72 In the case before us, Rogers characterizes the "status quo" as consisting of a highly competitive marketplace, in which each participant is free to make claims of superiority over its competitors, citing, among other cases, an endorsement decision of the Ontario Superior Court of Justice in *Telus Communications Co. v. Rogers Wireless Inc.*, [2006] O.J. No. 1865 (Ont. S.C.J.). For our part, we do not find that description of the "status quo" particularly helpful in this case. It might equally be said that the status quo is "a regulated marketplace, in which each participant is prohibited from making unfounded claims of superiority over its competitors". The status quo is, to some extent, in the eye of the beholder.

73 The chambers judge rejected Rogers contention:

> [51] Rogers further maintains that it is engaged in a public debate with Bell over whose service is most reliable, and that this is part of the status quo. Rogers relies on *Boehringer Ingelheim (Canada) Ltd. v. Pharmacia Canada Inc.* (2001), 12 C.P.R. (4th) 317 (Ont. Sup. Ct. J.), and *Telus Communications Co. v. Rogers Wireless Inc.*, [2006] O.J. No. 1865 (Sup. Ct. J.), and submits that "[t]he order sought by Telus would have the court intervene with hob nailed boots, forestalling one side of the debate but not the other".
>
> [52] I see no merit in that position. Telus has done nothing different from what Rogers did in 2007 when it launched its 3G+ HSPA technology. Such change *is* the status quo. Adapting to it is part and parcel of competition in this industry. The evidence in the cases Rogers relies upon was quite different from the evidence before me. The order should not in any way prevent Rogers from jumping into the debate about whose HSPA/HSPA+ network is faster, better or more reliable. What it should do, in my view, is prevent Rogers from purporting to engage in that debate with a representation based on an entirely different and outdated comparison without clearly stating as much.

74 The chambers judge considered it inappropriate to use the concept of "status quo" to focus on a discrete period of time in a market that is ever-changing and freeze matters at that instant. We see no error in the chambers judge's inclination to see maintenance of the "status quo" (in terms

of representations that are made) as being of limited importance in the context of an industry in which the pace of technological change far outstrips the capacity of the courts to finally determine litigation.

75 Rogers also argues that the "status quo" when the application for the injunction was heard was that it had embarked on a short-term advertising campaign for the 2009 holiday season, which campaign had been based on a representation that its network was "the most reliable". It says that TELUS modified the status quo by launching its competing network on November 5, earlier than anticipated, and then moved immediately to disrupt the Rogers advertising campaign.

76 If Rogers had shown that TELUS's early launch of its HSPA/HSPA+ network was unanticipated, or had asserted that TELUS had deliberately embarked on a course of action designed to scuttle Rogers's holiday advertising campaign, we might well have concluded that the injunction was improper. The evidence, however, is equivocal on when Rogers learned that TELUS would launch its new network in November. Some evidence, relating to technical problems that Rogers encountered as a result of TELUS's testing of its network, suggests that Rogers became aware several months ago that the network was nearly ready for launch.

77 Rogers has expressly refrained from suggesting that the launch date of the new network, together with the rapid application for an injunction, is indicative of a deliberate plan by TELUS to abuse the court process. We are concerned by the timing of events, and wary of any suggestion that companies can use the courts as tools to implement their marketing strategies. However, in light of the position taken by Rogers and its counsel, we did not engage in further exploration of the possibility that this case involved an abuse of process.

78 The harm that Rogers will suffer as a result of disruption of its holiday advertising campaign was carefully considered by the chambers judge, and it is not suggested that he misapprehended the evidence of harm. His order was carefully constructed so as to take into account practical realities in terms of when the order takes effect.

79 In our view, the chambers judge made no error in his consideration of the relevance of the status quo to the injunction application.

The Importance of Freedom of Commercial Expression

80 Rogers also says that the chambers judge failed, in the exercise of his discretion, to give appropriate weight to the importance of the fundamental right of free expression.

81 The chambers judge dealt with the issue of the right to freedom of expression explicitly in his judgment:

> [54] I turn next to Rogers' submission that the public interest in free commercial speech must be taken into account in considering the balance of convenience. Rogers relies upon the words of my brother Silverman in *Telus Communications Co. v. Bell Mobility Inc*., 2007 BCSC 518 at paras 26-27:
>
>> [26] The fourth factor to be considered under balance of convenience is the public interest, and I note here the same comment I made under the status quo question, that is the question of the marketplace and that the public benefits by having information in the marketplace and not by having the court prevent information from getting into the marketplace. The *Competition Act* and similar guidelines always must be complied with even in those considerations. The court has no interest in micromanaging an advertising battle between two weighty competitors who have a lot of money to spend on this and do, apparently, wish to continue doing so, I presume, because they consider it in their financial interest to do so.
>>
>> [27] As Mr. Justice Kelleher said in the previous case I referred to [*Bell Mobility Inc. v. Telus Communications Co*., 2006 BCSC 1954]:
>>
>>> If the advertisements are false or misleading, public policy, as expressed in the *Competition Act*, favours restraining the advertisement. Public interest favours that consumers not be misled. Where the chambers judge concludes that the plaintiff does not have a strong case, another public interest comes to the fore.
>
> [55] It is important to note that both Silverman J. and Kelleher J. concluded that the case of the applicant before them was not particularly strong. I have come to the opposite conclusion. Accordingly, as Kelleher J. indicated, public policy favours restraining the representation. Misleading information in the marketplace does no one any good and cannot be justified by the fact that Rogers' campaign has been long-planned.

82 There is, in this case, no challenge to the constitutionality of the provisions of the *Competition Act*. The chambers judge was not wrong, in the circumstances, to presume that the governmental objectives of that *Act* are sufficiently weighty to override freedom of expression to the extent that they do so. That being the case, the statement of the law by Kelleher J. in *Bell Mobility Inc. v. Telus Communications Co.*, 2006 BCSC 1954 (B.C. S.C. [In Chambers]), aff'd 2006 BCCA 578 (B.C. C.A.) without reference to this issue, is unassailable. The chambers judge did not err by restraining freedom of expression in a case where he found a strong *prima facie* case of a violation of the provisions of the *Competition Act*.

Conclusion

83 In the result, we find no reversible error in the chambers judge's decision to grant an interlocutory injunction in this case. The weighing of evidence was a matter for him, as was the exercise of discretion.

84 Rogers has not, before us, challenged either the appropriateness of the specific wording of the injunction or its duration. We wish to make it clear that when this Court upholds the granting of an interlocutory injunction, it does not in any way diminish the jurisdiction of the Supreme Court to supervise the injunction and to modify it as it thinks necessary in response to applications by the parties.

85 We do note that, as a matter of practice, it might have been better for the chambers judge to time-limit the interlocutory injunction. In *TCT Canada Logistics Inc. v. Nordeen*, 1999 BCCA 597 (B.C. C.A.), Huddart J.A. stated that injunctions to enforce restrictive covenants in restraint of trade should generally be time-limited. We believe that there may be merit in time-limiting most interlocutory injunctions. Interlocutory injunctions are designed to be short-term remedies based on an expeditious, though incomplete, review of evidence. They should not last indefinitely. Indeed, it is arguable that they should not be allowed to subsist any longer than is reasonably necessary to allow the parties to bring the matter before the court to have a final determination of matters made on the merits. As the issue of the duration of the injunction has not been argued, however, we will not further address the issue.

86 For these reasons, we have dismissed the appeal.

***Chiasson J.A.*:**

87 I have had the privilege of reading a draft of the reasons of Mr. Justice Smith and Mr. Justice Groberman. I agree with their conclusion the appeal should be dismissed, but I would limit the jurisdictional basis for issuing an interlocutory injunction in this case.

88 Whether a plaintiff in an action brought pursuant to s. 36 of the *Competition Act* is entitled to a permanent injunction presently is a live issue in this case. On the authority of *B.M.W.E. v. Canadian Pacific Ltd.*, [1996] 2 S.C.R. 495 (S.C.C.), and s. 39(1) of the *Law and Equity Act*, R.S.B.C. 1996, c. 253, the Supreme Court clearly has inherent jurisdiction to grant an interlocutory injunction pending the trial court's resolution of that issue. Whether that jurisdiction would be available to the court if it were determined in this action or another proceeding that a plaintiff in an action brought pursuant to s. 36 is not entitled to a permanent injunction is a matter to be addressed on another day.

89 In my view, it is unnecessary for this Court to decide on this appeal whether the court has inherent jurisdiction to grant an interlocutory injunction if it were decided ultimately that a permanent injunction is not available to a plaintiff suing under s. 36 of the *Competition Act* and

this Court should not do so. It is the position of TELUS and the conclusion of my colleagues that the court has inherent jurisdiction to issue such an order. The matter has not been argued fully. It is complex. I know of no case that directly supports such a jurisdiction other than a decision of the Ontario General Division which provides no analysis of the issue.

90 In this case, neither the parties nor the chambers judge addressed the issue of whether the Supreme Court had jurisdiction to issue the injunction. It was raised by the Court at the hearing of the appeal. Counsel for TELUS relied on *Brotherhood* and contended the court has jurisdiction to issue an interlocutory injunction, even if a permanent injunction could not be obtained. (TELUS contends it is entitled to a permanent injunction; Rogers states such relief is not available under s. 36).

91 *Brotherhood* is not necessarily the answer. *Brotherhood* and the cases referred to in it concern the court's supervisory jurisdiction over an inferior tribunal, the ability of the court to grant remedies not available in another tribunal and the ability of the court to preserve a *lis*. To like effect was the decision of the House of Lords in *Channel Tunnel Group Ltd. v. Balfour Beatty Construction Ltd.*, [1993] 2 W.L.R. 262 (U.K. H.L.), which was followed in *Brotherhood* and was identified as the cornerstone of a change in relevant Canadian jurisprudence.

92 The interlocutory relief granted in *Channel Tunnel* was ancillary to a final order to be granted in another forum. In *Brotherhood* an arbitrator was deciding whether a company's alteration of the work schedule was proper. The court enjoined the company from making the change pending the arbitrator's decision. The injunctive relief was ancillary to the order sought in that proceeding and preserved the *status quo*.

93 In the present case, the question is whether the statutory cause of action provides TELUS with a remedy for irreparable harm. If it does, clearly the court is empowered to protect that interest with an interlocutory injunction. If it does not, the interlocutory relief likely would not be incidental to a final order.

94 To the extent the interlocutory injunction protects what the trial court may decide is a legitimate claim of TELUS - relief against irreparable harm - I conclude the court has inherent jurisdiction to grant relief pending the court's determination whether TELUS is entitled to such protection, but I question whether *Brotherhood* supports the proposition an interlocutory injunction can be issued to protect an interest Parliament has not protected in its grant of a statutory cause of action.

95 In *Brotherhood* the court, at 505, quoted from *Channel Tunnel*, "... the court has power to grant interlocutory relief based on a cause of action recognized by English law against a defendant...where such relief is ancillary to a final order whether to be granted by the English court or some other court *or arbitral body*" (emphasis added by McLachlin J.), and stated: "Canadian courts since *Channel Tunnel* have applied it for the proposition that the courts have

jurisdiction to grant an injunction where there is a justiciable right, wherever that right may fall to be determined". *Prima facie*, *Brotherhood* does not stand for the proposition a court can or should grant interlocutory relief where no forum will deal with the underlying claim. If a plaintiff under s. 36 has no justiciable right to an injunction, on what basis could the court grant it interlocutory relief to protect such a right?

96 My colleagues refer to two decisions of the Ontario General Division, *947101 Ontario Ltd. v. Barrhaven Town Centre Inc.* (1995), 121 D.L.R. (4th) 748 (Ont. Gen. Div.), and *Mead Johnson Canada v. Ross Pediatrics* (1996), 31 O.R. (3d) 237 (Ont. Gen. Div.), to support the grant of an interlocutory injunction even if s. 36 does not provide for granting a permanent injunction.

97 In *Barrhaven* Spence J. undertook a detailed analysis of ss. 36 and 50 of the *Competition Act* and concluded a plaintiff suing under s. 36 was not entitled to a permanent injunction. He stated, at 758:

> Based on these cases, I think the proper conclusion is that no injunction may be obtained by a party in the position of the plaintiff in this case against a breach or prospective breach of the s. 50 prohibition against predatory pricing unless, in the circumstances of the case, the person seeking the injunction can establish that the conduct complained of would give rise to a cause of action in favour of the plaintiff independently of any rights the plaintiff might have to damages under s. 36 of the *Competition Act.* In so deciding I take into account that the *Competition Act*, including its provisions dealing with predatory pricing, is legislation which implements public policy and that it is the subject of an enforcement infrastructure which involves the development and use of guidelines which address a range of considerations, such as the identification of markets and market shares, which may be very difficult to establish satisfactorily in ordinary proceedings between private parties. It is not inconsistent with such a view of the legislation that it would also include specific provisions such as s. 36, which provide for damages where loss has been suffered as a result of conduct contrary to s. 50. However, to construe s. 36 as supporting an independent right to injunctive relief would give rise to the prospect of proceedings which might result in the enforcement of the Act by way of injunction in circumstances where those charged with responsibility for the proper administration of the Act would consider that no such proceedings were warranted. The court should be wary of endorsing a statutory interpretation that would have that result. As mentioned above, nothing in the cases cited would seem to compel a different conclusion.

98 Spence J. then turned to "Intentional interference with economic relations" and stated, at 759:

> Applying these considerations in the present case, I think it would follow that if Loblaws "without just cause or excuse, deliberately interferes with trade or business" of the plaintiff, and "does so by unlawful means", in this case, predatory pricing contrary to s. 50 of the

Competition Act, then Loblaws would be acting unlawfully and would be liable in damages and, in a proper case, an injunction could be granted.

Accordingly, it is necessary to consider the plaintiff's claim that the pricing practices of the Wadland pharmacy contravenes s. 50.

99 While this case holds that a permanent injunction is not available under s. 36, it does not support the proposition an interlocutory injunction can be issued in a s. 36 action. To the contrary, the court felt obliged to explore whether the plaintiff was entitled to an injunction based on the tort of unlawful interference with trade. This is apparent from the court's conclusion expressed at 762:

... holding that the plaintiff has failed to establish a minimal level of probability of success, or lack of probability of failure, to justify an interlocutory injunction on grounds of the tort of intentional interference.... (Emphasis added.)

100 In *Mead Johnson* Brennan J. adopted *Barrhaven*, concluding s. 36 did not provide for injunctive relief. Based on *Brotherhood*, but without analysis, he concluded the court could grant an interlocutory injunction.

101 The scope of inherent jurisdiction has attracted much comment, particularly in the context of the court exercising jurisdiction involving rights granted by statute. Madam Justice Saunders of this Court provided a helpful analysis of the jurisdiction in *Lines v. Gordon*, 2009 BCCA 107 (B.C. C.A.):

Inherent Jurisdiction

[23] Inherent jurisdiction was described by Chief Justice Freedman in *Montreal Trust Co. v. Churchill Forest Industries (Manitoba) Ltd.* (1971), 21 D.L.R. (3d) 75 at 81, [1971] 4 W.W.R. 542 (Man. C.A.):

> Inherent jurisdiction is derived not from any statute or rule but from the very nature of the court as a superior court of law: "The jurisdiction which is inherent in a superior court of law is that which enables it to fulfil itself as a court of law." [I.H. Jacob, "The Inherent Jurisdiction of the Court" (1970) 23 Curr. Legal Probs. 23 at 27] Inherent jurisdiction cannot, of course, be exercised so as to conflict with a statute or rule. Moreover, because it is a special and extraordinary power, it should be exercised only sparingly and in a clear case.

[24] The Manitoba Court of Appeal again usefully added to the comment on inherent jurisdiction in *Gillespie v. Manitoba (Attorney General)*, 2000 MBCA 1, 185 D.L.R. (4th) 214:

[17] Although many instances can be found in which the inherent jurisdiction of the Queen's Bench (or equivalent court in other jurisdictions) has been invoked to justify an order, no satisfactory definition of inherent jurisdiction has been enunciated. That is perhaps because inherent jurisdiction has never been conferred on a court expressly, but exists as an auxiliary power to be invoked when necessary for the court "to fulfil itself as a court of law" (to use the words of Master I.H. Jacob, in his article "The Inherent Jurisdiction of the Court" (1970), 23 Curr. Legal Probs. 23 at p. 27).

[18] I have chosen the word "auxiliary" to describe the power in order to emphasize the power's supportive role. "Auxiliary" is defined in *Webster's New World Dictionary, Third College Edition*, 1988, as "giving help or aid; assisting or supporting" and as "acting in a subsidiary, or subordinate, capacity". Inherent power, as I understand it, is the power a judge may draw upon to assist or help him or her in the exercise of the ordinary jurisdiction of the court. It does not generally stand alone waiting to be exercised on the judge's own initiative without a suit or application or without parties.

[19] The auxiliary nature of inherent jurisdiction is reflected in the words of Lord Morris of Borth-y-Gest in *Connelly v. Director of Public Prosecutions*, [1964] A.C. 1254 (H.L.). In *obiter* comments, he said (at p. 1301):

> There can be no doubt that a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction. A court must enjoy such powers in order to enforce its rules of practice and to suppress any abuses of its process and to defeat any attempted thwarting of its process.

[25] I refer as well to *Borkovic v. Laurentian Bank of Canada*, 2001 BCSC 337, wherein Mr. Justice Smith endorsed this passage from *Halsbury's Laws of England* at para. 9:

> [the Court] has an inherent power to regulate its own procedure, save in so far as its procedure has been laid down by the enacted law, and it cannot adopt a practice or procedure inconsistent with rules laid down by statute or adopted by ancient usage.

102 In my view, a careful analysis is required to determine the reach of s. 39(1) of the *Law and Equity Act* in the context of a statutorily conferred cause of action and particularly its application to a civil cause of action conferred by Parliament. If the creation of the civil cause of action is within the constitutional competence of Parliament, to what extent can a Provincial Legislature endow a court with the ability to grant remedies not conferred by Parliament?

103 I agree with my colleagues' observation that the *Competition Act*, on its face, does not appear to be a complete Code like the *Canada Labour Code*, but, with respect, I do not think that is sufficient. The *Competition Act* criminalizes certain competitive conduct and provides

for regulation and sanction. The required analysis of the scope of the legislation has not been undertaken (see for example *Macaraeg v. E Care Contact Centers Ltd.*, 2008 BCCA 182 (B.C. C.A.)).

104 These comments are made merely to illustrate that, in my view, the issue whether in a s. 36 action the court can grant an interlocutory injunction if a permanent injunction were not available is one that requires full argument and consideration of a number of complex issues. I do not purport to opine on those issues, merely to identify some of them. In my view, resolution of them is not required in this case.

105 The chambers judge made a number of findings of fact which led him to conclude TELUS has a very strong case. Although I do not necessarily agree with a number of his findings, I conclude there was evidence on which he was entitled to make them. Similarly, I question the strength of TELUS' case, but recognize that, in the context of an application for interlocutory injunctive relief, it is not the role of an appellate court to substitute its discretion for that of the chambers judge: *Hadmor Productions Ltd. v. Hamilton*, [1982] 1 All E.R. 1042 (U.K. H.L.); *Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832*, [1987] 1 S.C.R. 110 (S.C.C.).

Appeal dismissed.