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Enbridge Gas Inc.
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December 17, 2020

VIA EMAIL and RESS

Ms. Christine Long
Registrar
Ontario Energy Board
2300 Yonge Street, 27th Floor
Toronto, ON M4P 1E4

Dear Ms. Long:

Re: Enbridge Gas Inc. (Enbridge Gas)
Ontario Energy Board (OEB) File: EB-2020-0198
NPS 20 Waterfront Relocation Project (Project)

In accordance with Procedural Order No. 2 dated December 14, 2020, enclosed please find Enbridge Gas' submission on the two questions regarding the OEB's jurisdiction regarding cost allocation in the above noted proceeding.

For future communications on this matter please also copy Mr. Scott Stoll, Aird & Berlis LLP by using the email below:

sstoll@airdberlis.com

Please contact the undersigned if you have any questions.

Yours truly,

Joel Denomy
Technical Manager, Regulatory Applications

cc: G. Pannu – Counsel - Enbridge Gas Inc.
S. Stoll – Counsel - Aird & Berlis LLP
Intervenors (EB-2020-0198)

ONTARIO ENERGY BOARD

IN THE MATTER OF The *Ontario Energy Board Act, 1998*, S.O. 1998, c.15, Schedule B, and in particular, S.90.(1) and S.97 thereof;

AND IN THE MATTER OF an Application by Enbridge Gas Inc. for an Order granting leave to construct natural gas pipelines in the City of Toronto.

ENBRIDGE GAS INC.

SUBMISSIONS ON THE JURISDICTION OF THE ONTARIO ENERGY BOARD ("BOARD") ON THE ALLOCATION OF COSTS

Introduction

Simply put, Enbridge Gas Inc. ("**Enbridge Gas**") is seeking to have the OEB grant it leave to construct for a relocation project (the "**Proposed Pipeline**") resulting from Waterfront Toronto's Port Land Flood Protection Project ("**PLFPEI**"). Absent the PLFPEI there would be no need to relocate the existing NPS 20 pipeline off of the Keating Railway Bridge. In this Application Enbridge Gas is seeking to have the Board grant leave in order that it may undertake the Proposed Pipeline. In order to grant leave, the OEB must determine whether the Proposed Pipeline is in the public interest – such a determination rightfully includes consideration of cost responsibility. As part of this Application, Enbridge Gas has indicated that Waterfront Toronto is responsible for providing a capital contribution of 100% of the cost of the relocation, similar to that of any other third party requesting a pipeline be relocated.

There are only 3 potential groups or persons that can pay for the relocation of a pipeline: (a) the third party, such as Waterfront Toronto, that drives the need for the relocation; (b) ratepayers; or (c) where costs were not prudently incurred, Enbridge Gas shareholders. Enbridge Gas submits that the determination of cost responsibility is part of the OEB's core function as an economic regulator of the natural gas industry. If the OEB lacks jurisdiction to determine cost responsibility for the Proposed Pipeline, it will be impeded in fulfilling its statutory mandate to set just and reasonable rates and in making the determination the Proposed Pipeline is in the public interest as it considers whether to grant leave to construct. Enbridge Gas notes the OEB's exclusive jurisdiction "*in all cases and in respect of all matters*" provided by Section 19(6) of the OEB Act. Finally, Enbridge

Gas is not aware of any statutory restrictions of the Boards authority in the present case nor is it aware of any other authority that would have jurisdiction to determine cost responsibility.

Enbridge Gas is making these submissions pursuant to Procedural Order No. 1 in this Proceeding in respect of two preliminary issues regarding the OEB's jurisdiction. For the reasons set out herein, Enbridge Gas' position is the Board does have the jurisdiction to determine the cost responsibility of the Proposed Pipeline including the jurisdiction to allocate costs to Waterfront Toronto – including a 100% allocation as requested by Enbridge Gas in the Application. Given the answer to Issue a) is "Yes", there is no requirement to answer Issue b).

Background

The existing NPS 20 pipeline located on the Keating Railway Bridge is an important element of Enbridge Gas' distribution system providing service to thousands of customers in the downtown Toronto Core. Waterfront Toronto, is a government created entity for the purpose of transforming the waterfront area in the City of Toronto. As part of its mandate, it has embarked on the PLFPEI to improve the waterfront area. This is an important objective for all three levels of government, federal, provincial and municipal.

In order for the PLFPEI to be completed as currently planned, the existing NPS 20 Enbridge Gas pipeline located on the Keating Railway Bridge must be relocated. Enbridge Gas has filed for leave to construct the Proposed Pipeline which it has submitted is required in the public interest to continue to be able to provide natural gas service to the thousands of customers in the downtown Toronto core and permit the PLFPEI to proceed.

The Issues

The OEB has ordered parties to make submissions in respect of the following issues:

a) Does the OEB have the jurisdiction to determine cost responsibility for the Proposed Pipeline, including any allocation of costs to Waterfront Toronto? If the answer, to this question is "yes", what steps, if any, should the OEB take to address this situation?

b) If the answer is "no", what steps can the OEB take to ensure that the costs of the Proposed Pipeline are not unfairly shifted to ratepayers and that the OEB is able to meet its statutory objectives which include protecting the interests of consumers with respect to prices and the adequacy, reliability and quality of gas service (OEB Act, s. 2)?

Discussion and Analysis

Enbridge Gas submits the OEB has the jurisdiction to determine cost responsibility for the Proposed Pipeline. Cost responsibility is part of its core responsibility in regulating both just and reasonable rates and determining the public interest in determining whether to grant leave to construct. It would be contrary to Section 19(6) of the OEB Act, and lead to confusion and potentially inconsistent results in the fulfillment of the OEB's mandate if it were to lose jurisdiction over the cost responsibility of the Proposed Pipeline. Further, despite its public purpose, Waterfront Toronto has no special status exempting it from the OEB's jurisdiction which could have been provided by legislation but was not included in recent legislative initiatives.

a) Does the OEB have the jurisdiction to determine cost responsibility for the Proposed Pipeline, including any allocation of costs to Waterfront Toronto? If the answer, to this question is "yes", what steps, if any, should the OEB take to address this situation.

Enbridge Gas is subject to the OEB's oversight in setting "just and reasonable rates"[1] and the OEB has exclusive authority over rates.[2] Enbridge Gas is permitted to recover through rates its prudently incurred costs. A "rate" means a rate, charge or other consideration and includes a penalty for late payment.[3] Enbridge Gas' capital expenditures, including accounting for capital contributions, are part of the ratemaking process employed by the OEB for Enbridge Gas and other utilities. Recently the Board approved the System Expansion Surcharge and the Temporary Connection Surcharge. In addition to its authority to set rates, the OEB has exclusive jurisdiction to determine the following:

- whether certain projects are in the public interest;
- whether leave to construct such projects should be granted;
- whether to order expropriations;[4] and
- to order construction of a pipeline upon over or under a highway.[5]

It is accepted law in Canada that utilities be allowed to recover their prudently incurred costs and earn a fair return on invested capital. The Ontario Court of Appeal recently acknowledged this in *Union Gas Limited v. Ontario Energy Board*[6] wherein it stated:

> [23] The Board is a statutory tribunal governed by the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sch. B. Among other powers, the Board has authority to set rates for the sale, transmission, distribution and storage of gas in the natural gas sector: s. 36(1).[2] The Board carries out its rate-setting function by issuing orders: s. 19(2). In making orders, the Board is not bound by the terms of any contract: s. 36(1).

[1] OEB Act, Section 36.
[2] OEB Act, Section 19(6).
[3] OEB Act. Section 3.
[4] OEB Act, Section 99.
[5] OEB Act, Section 101.
[6] *Union Gas Limited v. Ontario Energy Board*, 2015 ONCA 453 (CanLII), <http://canlii.ca/t/gjm7j>, retrieved on 2020-12-14.

> [24] Under s. 36(2) of the Act, the Board may "make orders approving or fixing *just and reasonable rates* for the sale of gas by gas transmitters, gas distributors and storage companies, and for the transmission, distribution and storage of gas" (emphasis added).
>
> [25] Just and reasonable rates permit a utility to recover its prudently incurred costs and earn a fair return on invested capital: see, for example, *Power Workers' Union, Canadian Union of Public Employees, Local 1000 v. Ontario (Energy Board)*, 2013 ONCA 359, 116 O.R. (3d) 793, at paras. 13, 30-32, leave to appeal to S.C.C. granted, [2013] S.C.C.A. No. 339, appeal heard and reserved December 3, 2014; *Northwestern Utilities Ltd. v. Edmonton (City)*, 1929 CanLII 39 (SCC), [1929] S.C.R. 186, pp. 192-3.[7]

The prudence of expenditures and the capital invested by the utility in setting rates are core elements of the OEB discharging its duties. In general, utilities, including Enbridge Gas, forecast and include projects to relocate existing facilities pursuant to third party requests. Where available, third party funding is recognized as a capital contribution in the calculation of rates reducing amounts that would otherwise be paid by ratepayers. In such cases, the percentage of contributed capital may be subject to an OEB approved franchise agreement or the provisions of the *Public Service Works on Highways Act* ("**PSWHA**")[8] or other arrangement.

The courts have long recognized the broad jurisdiction and specialized nature of the OEB's expertise especially in balancing the various interests that come before it. In *Toronto Hydro-Electric System Limited v. Ontario Energy Board* [9] the Court of Appeal expressly recognized the breadth of the OEB's jurisdiction in a rate setting context.

> [12] This court has held that the OEB is a highly specialized expert tribunal with broad authority to regulate the energy sector in Ontario and to balance competing interests: see Natural Resource Gas Ltd. v. Ontario Energy Board, 2006 CanLII 24440 (ON CA), [2006] O.J. No. 2961, 214 O.A.C. 236 (C.A.), at para. 18.
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> [13] The analysis must begin with the legislation that establishes the OEB and gives the OEB its powers. The OEB's objectives in respect of electricity are stated in s. 1 of the Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Sch. B (the "Act"): Boards objectives, electricity

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[7] *Union Gas Limited v. Ontario Energy Board*, 2015 ONCA 453 (CanLII), <http://canlii.ca/t/gjm7j>, retrieved on 2020-12-14

[8] R.S.O. 1990, c. P-49.

[9] *Toronto Hydro-Electric System Limited v. Ontario Energy Board,* 2010 ONCA 284 (CanLII), <http://canlii.ca/t/29c86>, retrieved on 2020-12-17.

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

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

The Court of Appeal then went on to state the following:

> [24] Courts should hesitate to analyze the decisions of specialized tribunals through the lens of jurisdiction unless it is clear that the tribunal exceeded its statutory powers by entering into an area of inquiry outside of what the legislature intended. If the decision of a specialized tribunal aims to achieve a valid statutory purpose, and the enabling statute includes a broad grant of open-ended power to achieve that purpose, the matter [page489] should be considered within the jurisdiction of the tribunal. Its substance may still be reviewed for other reasons -- on either a reasonableness or correctness standard -- but it does not engage a true question of jurisdiction and cannot be quashed on the basis that the tribunal could not "make the inquiry" or "embark on a particular type of activity".[10]

As such, Enbridge Gas submits that there would have to be an explicit restriction of the OEB's jurisdiction in order for the Board to lose its jurisdiction. Enbridge Gas is not aware of any such restriction.

Enbridge Gas would note that the OEB has considered the allocation of costs for relocating plant in the context of two electrical utilities E.L.K. Energy Inc. (EB-2016-0155) and Orangeville Hydro (EB-2012-0181) seeking license amendments. In both situations, the cost of relocating the infrastructure resulting from developments was subject to compensation from third parties (a municipality and a developer) and the costs of the relocation were excluded from the analysis of costs for connecting the customers.

In a recent Toronto Hydro matter, EB-2014-0116, the OEB approved the creation of a variance that would capture the difference between the amounts included in rates related to capital spending on third party initiated relocation and expansion projects. In the evidence (9-OEBStaff-91), OEB Staff asked for an explanation of why, when a third party requests the relocation of Toronto Hydro's assets, the third party does not pay for 100%

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[10] *Toronto Hydro-Electric System Limited v. Ontario Energy Board,* 2010 ONCA 284 (CanLII), <http://canlii.ca/t/29c86>, retrieved on 2020-12-17, paragraph 24.

of Toronto Hydro's costs. Toronto Hydro explained that all third party relocation requests of Toronto Hydro assets, with the exception of a road or rail authority, require 100% payment of Toronto Hydro's relocation costs. A relocation request by a road or rail authority is subject to the apportionment of costs in accordance with existing legislation. While not expressly dealt with in the decision, it appears all parties accepted the premise that third parties contribute 100% of the relocation costs absent the PSWHA or being subject to the rail authority.

Enbridge Gas notes in addition to the PSWHA, Ontario recently passed the *Building Transit Faster Act, 2020*,[11] section 51, which provides that a utility and Metrolinx may agree on an apportionment of costs related to utility relocations necessitated by a transit project. However, section 51(2) provides that absent agreement, Metrolinx must bear the actual costs of the work. This is a recognition that a public entity carrying out a public purpose may pay the entirety of the costs to relocate utility infrastructure. Waterfront Toronto has not been afforded any special status by the province, despite the City's request for inclusion of such provisions in the *Building Transit Faster Act, 2020*.[12]

As part of considering whether to grant leave to construct for proposed facilities, the OEB must consider whether the proposed facilities are in the public interest. Where the OEB determines the projects are in the public interest, it is mandated by the OEB Act to grant leave to the Applicant to construct the project.[13]

> *96 (1) If, after considering an application under section 90, 91 or 92 the Board is of the opinion that the construction, expansion or reinforcement of the proposed work is in the public interest, it shall make an order granting leave to carry out the work.*

The legislature has left the determination of what constitutes the "public interest" in any situation to the OEB. In most leave to construct applications, the Board considers the economic consequences of the project as a factor in considering whether the project is in the public interest.

> "When determining whether a project is in the public interest, the OEB typically examines the need for the project, the project cost and economics, the environmental impacts, Aboriginal consultation, and the impacts on land owners. Each of these issues is addressed below." [14]

The question of what cost ratepayers or other persons should bear in rates is relevant to the OEB's consideration. In EB-2015-0366, a relocation to accommodate the customs and immigration plaza at the Windsor-Detroit Bridge, the OEB specifically identified the

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[11] S.O. 2020, c.12.
[12] EB-2020-0198, Exhibit B, Tab 1, Schedule 1, Attachment 7, pages 1 and 2.
[13] OEB Act, section 96.
[14] EB-2015-0366, page 3.

fact the Union Gas would receive 100% reimbursement and no ratepayer would be impacted as a factor in its consideration of the public interest.

For a system reinforcement, it may be the ratepayers pay 100% of the costs of the project through rates. In other situations where a new customer requires a new pipeline to be constructed the new customer may be required to provide a capital contribution to support the project pursuant to the OEB's approved methodology originally developed in EBO-188. The costs and economics of any project are of interest to and within the jurisdiction of the OEB.

Enbridge Gas cannot undertake the removal of the pipeline along the Keating Bridge without the construction and installation of the Proposed Pipeline. Enbridge Gas has designed the Proposed Pipeline and facilities to maintain the level of distribution service within the downtown Toronto core. The nature of the project, size and pressure, and the cost of the Proposed Pipeline obligate Enbridge Gas to obtain leave to construct from the OEB pursuant to the OEB Act, s. 90(1)(b) and (c) prior to commencing construction. Enbridge Gas submits that the issue of cost responsibility is a relevant factor in determining whether the Proposed Pipeline is in the public interest and whether leave to construct should be granted.

Enbridge Gas notes the broad objectives in the OEB Act, section 2, which require the OEB to balance several considerations. These objectives include protecting both ratepayers and the utility.

> **2** The Board, in carrying out its responsibilities under this or any other Act in relation to gas, shall be guided by the following objectives:
>
> > 2. To inform consumers and protect their interests with respect to prices and the reliability and quality of gas service.
> > 3. To facilitate rational expansion of transmission and distribution systems.
> > …..
> > 5.1 To facilitate the maintenance of a financially viable gas industry for the transmission, distribution and storage of gas.

To fulfill these objectives, the OEB has in other situations required utilities to obtain financial assurance from the party requiring the work. Only in determining the responsibility for costs can the OEB assess the risks and ensure proper measures are taken to protect the public interest.

Enbridge Gas submits it is necessary for the OEB to have the jurisdiction to allocate cost responsibility in order to fulfill its statutory mandate to determine the amount of Enbridge Gas' invested capital on which it can earn a return, set just and reasonable rates and determine whether the Proposed Pipeline is in the public interest.

What Steps Should be taken?

Enbridge Gas submits the OEB's procedure in this Application should ensure the principles required of a tribunal for a full and fair hearing are satisfied in order to allow it to have a proper record to discharge its statutory duties. In Enbridge Gas' submission, this may include the opportunity for intervenors to file evidence which would be subject to interrogatories. Following the evidentiary portion of the proceeding, parties would be expected to make submissions on the allocation of costs. Enbridge Gas would suggest that it would file its argument in chief, followed by responding submissions from intervenors; followed by reply submissions from Enbridge Gas.

However, beyond this hearing, given the amounts involved, Enbridge Gas would expect that its costs may be reviewed in detail for prudence at a time and in a manner similar to other large capital expenditures. Enbridge Gas submits there is no need, nor practically any ability, to specify a precise process for such a review at this time. However, the assurance that such a process will exist should provide comfort to parties that will be obligated to pay for the cost of the project.

b) If the answer is "no", what steps can the OEB take to ensure that the costs of the Proposed Pipeline are not unfairly shifted to ratepayers and that the OEB is able to meet its statutory objectives which include protecting the interests of consumers with respect to prices and the adequacy, reliability and quality of gas service (OEB Act, s. 2)?

There is no need to answer this question as a) has been answered in the affirmative.

Conclusion:

As such, Enbridge Gas submits the OEB does have jurisdiction to determine the cost responsibility for the Proposed Project. The allocation of specific costs will be the subject of further submissions in this proceeding.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 17TH DAY OF DECEMBER 2020.

Scott Stoll, Aird & Berlis LLP
Counsel to Enbridge Gas

Toronto Hydro-Electric System Limited v. Ontario Energy Board

[Indexed as: Toronto Hydro-Electric System Ltd. v. Ontario (Energy Board)]

2010 ONCA 284 (CanLII)

99 O.R. (3d) 481

Court of Appeal for Ontario,
Feldman, Lang and MacFarland JJ.A.
April 20, 2010

Public utilities -- Ontario Energy Board -- Ontario Energy Board concerned about large dividends paid by electricity distributor to affiliate at time when capital was needed for reinvestment in aging infrastructure -- Board imposing, as condition of rate decision, requirement that distributor obtain approval of majority of its independent directors before declaring any future dividends payable to its affiliates -- Board not exceeding its jurisdiction by imposing that condition -- Decision reviewable on standard of reasonableness -- Decision reasonable.

THESL is an electricity distributor licensed and regulated by the Ontario Energy Board. It is a wholly owned subsidiary of THC. All of the shares of THC are owned by the City of Toronto. When THESL applied to the Board for approval of its distribution rates to be effective May 2006, the Board expressed a concern about large dividends paid by THESL to its affiliates at a time when capital was required for reinvestment in aging infrastructure. The Board imposed a duty on THESL to obtain the approval of a majority of its independent directors before declaring any future dividends payable to its affiliates. The Divisional Court allowed THESL's appeal, holding that the Board had no jurisdiction to impose the

condition and that the imposition of such a condition represented an unwarranted and unlawful restriction on the authority of the board of directors to declare a dividend. The Board appealed.

Held, the appeal should be allowed.

Courts should hesitate to analyze the decisions of specialized tribunals through the lens of jurisdiction unless it is clear that the tribunal exceeded its statutory powers by entering into an area of inquiry outside of what the legislature intended. If the decision of a specialized tribunal aims to achieve a valid legislative purpose, and the enabling statute includes a broad grant of open-ended power to achieve that purpose, the matter should be considered within the jurisdiction of the tribunal. The Ontario Energy Board's power in respect of setting rates is to be interpreted broadly. The Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Sch. B specifies that in carrying out its responsibilities, the Board shall be guided by the objectives in s. 1(1), which include protecting the interests of customers with respect to prices and the adequacy, reliability and quality of electricity services. The Act also permits the Board in making an order, to impose such conditions as it co nsiders proper, and states that those conditions may be general or particular in application. It was apparent that as part of its rate-setting function, the Board was entitled to consider the history of THESL's dividend payments. That was part of the inquiry into whether and how to control outgoing cash-flows from THESL in order to ensure adequate capital. That line of inquiry went to the heart of the Board achieving its statutory objectives. The inquiry and the condition imposed were within the Board's jurisdiction.

The Board's decision to impose the impugned condition was reviewable on a standard of reasonableness. The Board's reasons provided an intelligible explanation for the condition. The reasons disclosed a concern relating to prices and the adequacy, reliability and quality of service and explained how the chosen [page482] remedy would help alleviate that concern. The Board was concerned because THESL was paying THC very large dividends even though increased capital spending was going to

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be needed to maintain system reliability. THESL was either going to ignore its aging infrastructure or have to borrow funds to address it. Both courses of conduct would ultimately have adverse effects on ratepayers. The Board also explained how it reached the conclusion that an appropriate response to the concerns raised by the substantial dividend payouts was to require that any dividend paid by THESL be approved by a majority of its independent directors. The decision was reasonable.

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Cases referred to

Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp., [1979] 2 S.C.R. 227, [1979] S.C.J. No. 45, 97 D.L.R. (3d) 417, 26 N.R. 341, 25 N.B.R. (2d) 237, 79 CLLC 14,209 at 111, [1979] 2 A.C.W.S. 108; Council of Canadians with Disabilities v. VIA Rail Canada Inc., [2007] 1 S.C.R. 650, [2007] S.C.J. No. 15, 2007 SCC 15, 279 D.L.R. (4th) 1, 360 N.R. 1, J.E. 2007-670, 59 Admin. L.R. (4th) 1, 155 A.C.W.S. (3d) 7, EYB 2006-116801, 59 C.H.R.R. D/276, apld

ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board), [2006] 1 S.C.R. 140, [2006] S.C.J. No. 4, 2006 SCC 4, 263 D.L.R. (4th) 193, 344 N.R. 293, [2006] 5 W.W.R. 1, J.E. 2006-358, 54 Alta. L.R. (4th) 1, 380 A.R. 1, 39 Admin. L.R. (4th) 159, 145 A.C.W.S. (3d) 725, distd

Other cases referred to

Advocacy Centre for Tenants-Ontario v. Ontario (Energy Board), [2008] O.J. No. 1970, 293 D.L.R. (4th) 684, 166 A.C.W.S. (3d) 384, 238 O.A.C. 343 (Div. Ct.); Canada (Citizenship and Immigration) v. Khosa, [2009] 1 S.C.R. 339, [2009] S.C.J. No. 12, 2009 SCC 12, 304 D.L.R. (4th) 1, 385 N.R. 206, 77 Imm. L.R. (3d) 1, 82 Admin. L.R. (4th) 1, EYB 2009-155418, J.E. 2009-481; Dunsmuir v. New Brunswick, [2008] 1 S.C.R. 190, [2008] S.C.J. No. 9, 2008 SCC 9, 329 N.B.R. (2d) 1, 64 C.C.E.L. (3d) 1, 164 A.C.W.S. (3d) 727, EYB 2008-130674, J.E. 2008-547, [2008] CLLC 220-020, 170 L.A.C. (4th) 1, 372 N.R. 1, 69 Imm. L.R. (3d) 1, 291 D.L.R. (4th) 577, 69 Admin. L.R. (4th) 1, 95 L.C.R. 65, D.T.E. 2008T-223; Enbridge Gas Distribution Inc. v. Ontario Energy Board (2005), 74 O.R. (3d) 147, [2005] O.J. No. 33, 193 O.A.C. 180, 136 A.C.W.S.

(3d) 375 (C.A.); Law Society of New Brunswick v. Ryan, [2003] 1 S.C.R. 247, [2003] S.C.J. No. 17, 2003 SCC 20, 223 D.L.R. (4th) 577, 302 N.R. 1 , J.E. 2003-713, 257 N.B.R. (2d) 207, 48 Admin. L.R. (3d) 33, 31 C.P.C. (5th) 1, 121 A.C.W.S. (3d) 172; Natural Resource Gas Ltd. v. Ontario Energy Board, [2006] O.J. No. 2961, 214 O.A.C. 236, 149 A.C.W.S. (3d) 889 (C.A.); Pasiechnyk v. Saskatchewan (Workers' Compensation Board), [1997] 2 S.C.R. 890, [1997] S.C.J. No. 74, 149 D.L.R. (4th) 577, 216 N.R. 1, [1997] 8 W.W.R. 517, J.E. 97-1695, 158 Sask. R. 81, 50 Admin. L.R. (2d) 1, 30 C.C.E.L. (2d) 149, 37 C.C.L.T. (2d) 1, 73 A.C.W.S. (3d) 560; Toronto Hydro-Electric System Ltd. v. Ontario Energy Board, [2009] O.J. No. 1872, 252 O.A.C. 188 (Div. Ct.); U.E.S., Local 298 v. Bibeault, [1988] 2 S.C.R. 1048, [1988] S.C.J. No. 101, 95 N.R. 161, J.E. 89-141, 24 Q.A.C. 244, 35 Admin. L.R. 153, 89 CLLC 14,045 at 12372, 13 A.C.W.S. (3d) 23

Statutes referred to

Alberta Energy and Utilities Board Act, R.S.A. 2000, c. A-17 [rep. R.S.A. 2007, c. A-37.2, s. 83]

Business Corporations Act, R.S.O. 1990, c. B.16, s. 127(3)(d)

Electricity Act, 1998, S.O. 1998, c. 15, Sch. A, ss. 29, 142

Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Sch. B, ss. 1 [as am.], (1), [as am.], 23(1), 36(3), 44(1), 78 [as am.], (2) [as am.], (3) [as am.], 128(1) [page483]

Authorities referred to

Jones, David Phillip, and Anne S. de Villars, Principles of Administrative Law, 5th ed. (Toronto: Carswell, 2009)

Ontario Energy Board, Affiliate Relationships Code for Electricity Distributors and Transmitters (Toronto: Ontario Energy Board, 2003)

APPEAL from the order of the Divisional Court (Lederman, Kiteley and Swinton JJ.) (2008), 93 O.R. (3d) 380, [2008] O.J. No. 3904 (Div. Ct.) allowing an appeal from a decision of the Ontario Energy Board.

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

2010 ONCA 284 (CanLII)

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

The judgment of the court was delivered by

[1] MACFARLAND J.A.:-- This is an appeal with leave of this court from the order of the Divisional Court (Kiteley, Swinton JJ.; Lederman J. dissenting) dated September 9, 2008. The court declared that the Ontario Energy Board exceeded its jurisdiction and erred in law when it imposed, as a condition in its rate decision for 2006, a duty on Toronto Hydro-Electric System Limited to obtain the approval of a majority of its independent directors before declaring any future dividends payable to its affiliates (the "condition").

Overview

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

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

[4] When THESL applied to the OEB for approval of its distribution rates to be effective May 2006, the OEB expressed concern about the level of dividend payments and the above-market rate of interest being paid by THESL. Evidence before the OEB disclosed that the City anticipated a significant shortfall in its [page484] 2006 operating budget; that the City regarded THC as "a revenue source in the 2006 operating budget"; and that the City demanded substantial increases in dividends from THC, which, in turn, demanded increased

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dividends from THESL.

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

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

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

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

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

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ratepayers. If a utility fails to operate in this way, it is incumbent on the OEB to intervene in order to strike this balance and protect the interests of ratepayers.

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

[11] The issue for this court is whether the OEB had the ability, as part of its 2006 rate decision, to require THESL to obtain the approval of a majority of its independent directors before declaring any dividends. [page485]

Analysis

[12] This court has held that the OEB is a highly specialized expert tribunal with broad authority to regulate the energy sector in Ontario and to balance competing interests: see Natural Resource Gas Ltd. v. Ontario Energy Board, [2006] O.J. No. 2961, 214 O.A.C. 236 (C.A.), at para. 18.

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

Boards objectives, electricity

1(1) The Board, in carrying out its responsibilities under this or any other Act in relation to electricity, shall be guided by the following objectives:

1. To protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service.
2. To promote economic efficiency and cost effectiveness in the generation, transmission, distribution, sale and demand management of electricity and to facilitate the maintenance of a financially viable electricity industry. [See Note 1 below]

[14] In short, the OEB is to balance the interests of

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ratepayers in terms of prices and service while at the same time ensuring a financially viable electricity industry that is both economically efficient and cost effective.

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

> 78(2) No distributor shall charge for the distribution of electricity or for meeting its obligations under section 29 of the Electricity Act, 1998 except in accordance with an order of the Board, which is not bound by the terms of any contract.
>
> . . . . .
>
> (3) The Board may make orders approving or fixing just and reasonable rates for the transmitting or distributing of electricity . . . and for the retailing of electricity in order to meet a distributor's obligations under section 29 of the Electricity Act, 1998. [page486]

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

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

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

Avoiding the "jurisdiction" trap

[18] In recent years, administrative law has undergone a significant transformation. Ever since Dickson J. championed the notion of increased deference to specialized administrative tribunals in Canadian Union of Public Employees, Local 963 v.

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New Brunswick Liquor Corp., [1979] 2 S.C.R. 227, [1979] S.C.J. No. 45 ("CUPE"), courts have sought to avoid labelling matters as jurisdictional where such a label might lead to a more searching review of the administrative decision than is appropriate in the circumstances. In Dunsmuir v. New Brunswick, [2008] 1 S.C.R. 190, [2008] S.C.J. No. 9, Bastarache and LeBel JJ. underlined the importance of CUPE in this regard, at para. 35:

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

[19] Support for the CUPE conceptualization of jurisdiction is also found in the majority reasons of Abella J. in Council of Canadians with Disabilities v. VIA Rail Canada Inc., [2007] 1 S.C.R. 650, [2007] S.C.J. No. 15, at paras. 88-89:

> The Federal Court of Appeal also concluded that the standard for reviewing the Agency's decision on the issue of whether an obstacle is undue, is patent unreasonableness. I agree. I do not, however, share the majority's view that VIA raised a preliminary, jurisdictional question falling outside the Agency's expertise that was, therefore, subject to a different standard of review. Applying such an approach has the capacity to unravel the essence of the decision and undermine the very characteristic of the Agency which entitles it to the highest level of deference from a court -- its specialized expertise. It ignores Dickson J.'s caution in [CUPE] that courts "should not be alert to brand as

jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so".

If every provision of a tribunal's enabling legislation were treated as if it had jurisdictional consequences that permitted a court to substitute its own [page487] view of the correct interpretation, a tribunal's role would be effectively reduced to fact-finding. Judicial or appellate review will "be better informed by an appreciation of the views of the tribunal operating daily in the relevant field". Just as courts "should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so", so should they also refrain from overlooking the expertise a tribunal may bring to the exercise of interpreting its enabling legislation and defining the scope of its statutory authority.

(Emphasis added; citations omitted)

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

Administrative bodies must also be correct in their determinations of true questions of jurisdiction or vires. We mention true questions of vires to distance ourselves from the extended definitions adopted before CUPE. It is important here to take a robust view of jurisdiction. We neither wish nor intend to return to the jurisdiction/preliminary question doctrine that plagued the jurisprudence in this area for many years. "Jurisdiction" is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. The tribunal must interpret the grant of authority correctly or its action will be found to be ultra vires or to constitute a wrongful decline of jurisdiction. An

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> example may be found in United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City), [2004] 1 S.C.R. 485, 2004 SCC 19. In that case, the issue was whether the City of Calgary was authorized under the relevant municipal acts to enact bylaws limiting the number of taxi plate licences. That case involved the decision-making powers of a municipality and exemplifies a true question of jurisdiction or vires. These questions will be narrow. We reiterate the caution of Dickson J. in CUPE that reviewing judges must not brand as jurisdictional issues that are doubtfully so.

(Emphasis added; citations omitted)

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

> In its broadest sense, "jurisdiction" means the authority to do every aspect of an intra vires action. In a narrower sense, however, "jurisdiction" means the power to commence or embark on a particular type of activity. A defect in jurisdiction "in the narrow sense" is thus distinguished from other errors -- such as a breach of a duty to be fair, considering irrelevant evidence, acting for an improper purpose, or reaching an unreasonable result -- which take place after the delegate has lawfully started its activity, but which cause it to leave or exceed its jurisdiction. [page488]
>
> . . . . .
>
> It is important to remember that virtually all grounds for judicial review of administrative action depend upon an attack on some aspect of the delegate's jurisdiction (in the wider sense) to do the particular activity in question. Consequently, it is equally important to remember that any behaviour which causes the delegate to exceed its jurisdiction is just as fatal as any error which means that it never had jurisdiction "in the narrow sense" even to commence the exercise of its jurisdiction.

(Italics in original; footnotes omitted)

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[22] Further guidance in terms of defining exactly what constitutes "true" questions of jurisdiction can be gleaned from the reasons of Abella J. in VIA Rail. At para. 91, she cited Pasiechnyk v. Saskatchewan (Workers' Compensation Board), [1997] 2 S.C.R. 890, [1997] S.C.J. No. 74, at para. 18, for the proposition that "[t]he test as to whether the provision in question is one that limits jurisdiction is: was the question which the provision raises one that was intended by legislators to be left to the exclusive decision of the Board?" In the same paragraph, Abella J. also referred to U.E.S., Local 298 v. Bibeault, [1988] 2 S.C.R. 1048, [1988] S.C.J. No. 101, at p. 1087 S.C.R., where Beetz J. held that "the only question which should be asked [is], 'Did the legislator intend the question to be within the jurisdiction conferred on the tribunal?'"

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[23] Thus, the focus is on discerning legislative intent with respect to the scope of a tribunal's authority to undertake an inquiry. This reading is consistent with Bastarache and LeBel JJ.'s observation that "[d]eference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity" (Dunsmuir, at para. 54), and Abella J.'s conclusion that "[a] tribunal with the power to decide questions of law is a tribunal with the power to decide questions involving the statutory interpretation of its enabling legislation" (VIA Rail, at para. 92). It also accords with Jones and de Villars observation, at p. 146:

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

[24] Courts should hesitate to analyze the decisions of specialized tribunals through the lens of jurisdiction unless it is clear that the tribunal exceeded its statutory powers by entering into an area of inquiry outside of what the legislature intended. If the decision of a specialized tribunal aims to achieve a valid statutory purpose, and the enabling

statute includes a broad grant of open-ended power to achieve that purpose, the matter [page489] should be considered within the jurisdiction of the tribunal. Its substance may still be reviewed for other reasons -- on either a reasonableness or correctness standard -- but it does not engage a true question of jurisdiction and cannot be quashed on the basis that the tribunal could not "make the inquiry" or "embark on a particular type of activity". In contrast, where a tribunal is pursuing an illegitimate objective, or is engaging in actions that clearly defy the limits of its statutory authority, then a reviewing court may properly declare its dec isions to be ultra vires. These principles are consistent with Abella J.'s reasoning in VIA Rail, at para. 96:

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

II. Broad powers of the OEB

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

[26] For example, in Advocacy Centre for Tenants-Ontario v. Ontario (Energy Board), [2008] O.J. No. 1970, 293 D.L.R. (4th) 684 (Div. Ct.), the majority of the court held that the OEB had the jurisdiction to establish a rate affordability assistance program for low-income consumers purchasing the distribution of natural gas from the utility. Section 36(3) of the Act states that "[i]n approving or fixing just and reasonable rates, the Board may adopt any method or technique it considers appropriate". In paras. 53-56, the majority noted the breadth of the OEB's rate-setting power when its actions were in furtherance of the statutory objectives:

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> [T]he Board is authorized to employ "any method or technique that it considers appropriate" to fix "just and reasonable rates." . . . the Board must determine what are "just and reasonable rates" within the context of the objectives set forth in s. 2 of the Act. Objective #2 therein speaks to protecting "the interests of consumers with respect to prices."
>
> . . . . .
>
> [T]he Board in the consideration of its statutory objectives might consider it appropriate to use a specific "method or technique" in the implementation of its basic "cost of service" calculation to arrive at a final fixing of rates that are considered "just and reasonable rates." This could mean, for example, to further the objective of "energy conservation", the use of incentive rates or differential pricing dependent upon the quantity of energy consumed. As [page490] well, to further the objective of protecting "the interests of consumers" this could mean taking into account income levels in pricing to achieve the delivery of affordable energy to low income consumers on the basis that this meets the objective of protecting "the interests of consumers with respect to prices."
>
> The Board is engaged in rate-setting within the context of the interpretation of its statute in a fair, large and liberal manner.

[27] The jurisdiction of the OEB was also reviewed in Enbridge Gas Distribution Inc. v. Ontario Energy Board (2005), 74 O.R. (3d) 147, [2005] O.J. No. 33 (C.A.). In Enbridge, the OEB issued a rule permitting the gas vendor to determine who will bill its customers for the gas they buy from a vendor and for its transportation to them by the distributor. The appellants argued that this rule went beyond the jurisdiction conferred on the OEB by s. 44(1) of the Act, which provides that the OEB may make rules "governing the conduct of a gas distributor as such conduct relates to [a gas vendor]". Goudge J.A. ultimately found that the OEB had the jurisdiction to issue the rule. He endorsed a broad understanding of the Act,

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in paras. 27-28:

[The appellants] say that the intention of this subsection is to limit the Board's jurisdiction to a rule governing only the part of a gas distributor's conduct that relates to its business relationship with a gas vendor, such as when the gas vendor acts as agent on behalf of its gas supply customer to arrange with the gas distributor for delivery of that gas supply to that customer. . . .

In my view, there is nothing in either the language of s. 44(1)(b) or its statutory context to suggest such a narrow interpretation. . . . Moreover, such a narrow reading would be inconsistent with the broad purpose of the Act, which is to regulate all aspects of the gas distribution business, not simply those aspects that involve a direct business relationship with gas vendors.

[28] A recent decision from the Divisional Court offers further support for the proposition that the OEB enjoys a wide ambit of power in its rate-setting function. In Toronto Hydro-Electric System Ltd. v. Ontario Energy Board, [2009] O.J. No. 1872, 252 O.A.C. 188 (Div. Ct.), leave to appeal to Ont. C.A. refused, the OEB allocated THESL's net after-tax gains on the sale of three properties to reduce THESL's revenue requirement, and thereby also reduce electricity distribution rates to ratepayers. The court unanimously held that the proper approach to a review of the OEB decision did not involve a "true" jurisdictional analysis as contemplated in Dunsmuir. Rather, a reasonableness standard applied because the decision in the case -- whether and how the OEB may allocate the net after-tax gains on the sale of properties to reduce THESL's revenue requirement -- was squarely within the rate-setting authority of the OEB and went to [the] [page491] very core of the OEB's mandate. The cou rt noted the expansive content of the rate-setting power, at para. 17:

An OEB decision may well engage or impact principles of corporate law, given that it regulates incorporated distributors, but the nature of the issue must be viewed in light of the regulatory scheme. While the decision in this

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case may have the effect of curtailing the appellant's ability to otherwise distribute or invest the net after tax gains from the sale of the properties, the substance of the OEB's decision relates to whether and how to apply those gains in its rate setting formula. Unlike the cases relied upon, this issue directly relates to the OEB's determination of rates and goes to the heart of its regulatory authority and expertise. There is no dispute that the OEB has rate-setting powers under the OEBA which are broad enough to encompass the power to determine reduced revenue requirements as a result of the sale of non-surplus assets. Although there is no privative clause, the OEB is a highly specialized expert tribunal with broad authority to regulate the energy sector in Ontario and to balance competing interests.
(Citations omitted)

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

[30] Further, it is apparent that as part of its rate-setting function, the OEB was entitled to consider the history of THESL's dividend payments. This was part of the inquiry into whether and how to control outgoing cash flows from THESL in order to ensure adequate capital. This line of inquiry goes to the heart of the OEB achieving its statutory objectives. In its reasons, the OEB noted that at the hearing there was considerable discussion of the dividend issue and that information concerning the dividend payouts had been filed. An

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inquiry into dividend payments was an inquiry that all parties believed was within the OEB's jurisdiction. The "true" nature of the respondent's challenge cannot be characterized as a matter of jurisdiction. Of course, it does not follow that the methods chosen are insulated from review (see Part IV).
[page492]

III. The ATCO decision

[31] THESL argues that the Supreme Court of Canada's recent decision in ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board), [2006] 1 S.C.R. 140, [2006] S.C.J. No. 4 militates in favour of reviewing OEB decisions using a correctness standard. ATCO involved an application by ATCO to have the sale of a property approved by the Alberta Energy and Utilities Board as required by the statute. The Board approved the sale and imposed a condition requiring that a certain portion of the sale proceeds be allocated to rate-paying customers. The Alberta Energy and Utilities Board Act, R.S.A. 2000, c. A-17 set out that with respect to an order, the Board may "impose any additional conditions that the Board considers necessary in the public interest".

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

[33] This case is distinguishable from ATCO. The statutory grant of power in ATCO to "impose any additional conditions that the Board considers necessary in the public interest" is different than the statutory grant of power in this case. Bastarache J. referred to this provision as vague, elastic and open-ended. In the present case, the OEB's imposition of a condition it considers proper (s. 23(1)) has to be guided by the legislated objectives set out in s. 1(1). These objectives

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are not vague, elastic and open-ended. To the extent that there is uncertainty with respect to the achievement of the s. 1(1) objectives, that is a matter undeniably within the expertise of the OEB. Further, unlike the ATCO provision, the objectives in the Act require that the OEB protect the interests of both the customer and the utility.

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[34] There are four other factors that support distinguishing ATCO from this case. First, the decision in ATCO reveals that Bastarache J. reasoned that ATCO was not a rate-setting case. He noted that the provision granting the power to impose conditions could not be read in isolation. Rather, he explained that the provision had to be considered within the context of the purpose and scheme of the legislation. Bastarache J. stated that the [page493] main purpose of the Board is rate setting. The allocation of the sale proceeds did not fit within the limits of the powers of the Board, which "are grounded in its main function of fixing just and reasonable rates ('rate setting') and in protecting the integrity and dependability of the supply system" (para. 7).

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

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

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

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

IV. Reviewing the exercise of OEB jurisdiction: The reasonableness standard

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

[39] Recently, a reasonableness standard was used by this court in Natural Resource Gas Ltd. v. Ontario Energy Board, supra. The case arose from the application by a gas distributor seeking an order increasing its rate over a 12-month period, in order to allow for the recovery of unrecorded costs which were the result of an accounting error. Writing for the panel, Juriansz J.A. reviewed some of the recent appellate jurisprudence and concluded that reasonableness was the appropriate standard of review as the question was one of mixed fact and law, and also involved policy considerations [at paras. 7-10, 18-19, 23-24]:

> In two recent decisions, Graywood Investments Ltd. v. Toronto Hydro-Electric System, [2006] O.J. No. 2030 (C.A.) [page494] and Enbridge Gas Distribution Inc. v. Ontario (Energy Board), [2006] O.J. No. 1355 (C.A.), this court has considered the standard of review of decisions of the OEB.
>
> In Enbridge, while the result did not turn on the standard of review, Doherty J.A. did note (at para. 17) that the OEB had advanced a "forceful argument that the standard of review should, at the highest, be one of reasonableness".
>
> In Graywood, MacPherson J.A. recognized the expertise of the OEB in general (at para. 24):
>
> > First, the OEB is a specialized and expert tribunal dealing with a complicated and multi-faceted industry. Its

decisions are, therefore, entitled to substantial deference.

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

. . . . .

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

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

. . . . .

While the question does involve the meaning of the phrase "just and reasonable", it requires the application of that phrase to the particular and unusual facts of this case. The question is one of mixed fact and law and involves policy considerations as well. The OEB possesses greater expertise relative to the court in determining the question.

Consequently, I conclude that the OEB's decision is reviewable on a standard of reasonableness.

[40] The facts of this case do not warrant departure from the reasonableness analysis. In my view, the nature of the OEB decision -- structuring a condition that will protect the long-term integrity of THESL's energy infrastructure -- falls

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squarely within the category of "mixed fact and law" with "policy considerations".

[41] One of the reasons given by the majority below for applying a correctness standard was because the case dealt with principles of corporate law. When dealing with a regulated corporation, the fact that corporate law principles are at play [page495] does not alone suggest a correctness standard of review. Corporate law principles will often be engaged when making decisions in respect of regulated corporations. It is the regulator's duty to use its expertise to apply corporate law principles within the context of its objectives; this implies a reasonableness standard.

V. Is the decision a reasonable one?

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

> Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

(Emphasis added)

[43] The first inquiry of the reasonableness analysis is into the "existence of justification, transparency and intelligibility within the decision-making process". The second

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

(a) Justification, transparency and intelligibility

[44] The inquiry into the justification, transparency and intelligibility of the decision-making process is focused on the reasons for the decision. In an oft-cited passage from Law Society of New Brunswick v. Ryan, [2003] 1 S.C.R. 247, [2003] S.C.J. No. 17, Iacobucci J., at para. 55, articulated the relationship between the reasons of a tribunal and the ultimate reasonableness of its decision:

> A decision will be unreasonable only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived. If any of the reasons that are sufficient to support the conclusion are tenable in the sense that they can [page496] stand up to a somewhat probing examination, then the decision will not be unreasonable and a reviewing court must not interfere. This means that a decision may satisfy the reasonableness standard if it is supported by a tenable explanation even if this explanation is not one that the reviewing court finds compelling.

(Emphasis added; citations omitted)

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

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

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

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[2009] S.C.J. No. 12, at para. 59:

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

and, at para. 63:

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

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

[48] Before addressing these two elements, it is important to note one factor about the context of the decision. THESL is what has been described as a "regulated monopoly". As Bastarache J. explained in ATCO, at para. 3, "utility regulations exist to protect the public from monopolistic behaviour and the consequent inelasticity of demand while ensuring the continued quality of an essential service". In other words, the OEB's regulatory power is designed to act as a proxy in the public interest for competition: see Advocacy Centre for Tenants-Ontario. Because there is no competition, THESL could easily pass on the expense of business decisions to ratepayers through increased utility prices, or through the degradation of the quality of service, without the usual risk of losing customers. As was explained in para. 39 of Advocacy Centre for Tenants-Ontario, "[t]he Board's mandate through economic regulation is directed primarily at avoiding the potential problem of excessive prices resulting because of a monopoly distributor of an essential service". [page497]

[49] While THESL is incorporated, as is required by s. 142 of

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the Electricity Act, under the provisions of the [Ontario] Business Corporations Act, R.S.O. 1990, c. B.16 ("OBCA"), it is publicly regulated rather than a private corporation. This distinction is an important one. As Lederman J. noted in his dissenting reasons [(2008), 93 O.R. (3d) 380, [2008] O.J. No. 3904 (Div. Ct.)] in the court below, at para. 78:

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

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

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

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

> The question arises as to whether the Board should restrict the dividend payout by the utility. To the extent a utility pays all of its retained earnings to the shareholder, it will become more dependent on borrowing and this may have an adverse effect on its credit rating. [page498]

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

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

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

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directors.

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

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

[56] The reasons also discuss the above-market interest rate THESL was paying the THC on a loan (s. 5.3), as well as the purchase of the City's street lighting business (para. 6.4.3). According to the OEB, the above-market interest rate resulted in THESL paying approximately an additional $16 million per year, which was being borne by the ratepayers. Amplifying the concern was the City's decision after the hearing, but before the decision was released, to extend the loan to 2013. This led the OEB to note, at para. 5.3.8, it is "apparent that the financing [page499] decisions are being made unilaterally by the City, which is the sole shareholder of the utility".

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

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

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financial markets where the level of dividends exceeds the net income.

(Emphasis added)

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

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

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

> A related question is the independence of the directors. The evidence in the hearing is that the directors of the utility and the parent, Toronto Hydro Corporation are currently identical. And none of the members of management are to be on the Board. This is an unusual situation.
>
> There is a requirement that at least one third of the directors of the distributor must be independent but that rule will not apply to this utility until July 1, 2006. In the course of these hearings the utility has confirmed that it will comply with the requirement and at that time, the independent directors will be appointed.

[60] Concern about affiliate transactions is not unique to THESL. The decision notes that there is extensive jurisprudence in gas cases with respect to transactions between a regulated utility and an affiliate (para. 5.3.17). The OEB has also established the Affiliate Relationships Code for Electricity Distributors and Transmitters ("ARC") with a separate compliance procedure to guard against harm to ratepayers that may arise as a result of dealings between a utility and its affiliates. One of the provisions of the ARC required that one

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third of the board of directors of a distributor be independent from any affiliate by July 1, 2006. It is evident that independence is viewed as a guard against harmful decisions that arise as a result of dealings between a utility and its affiliates. [page500]

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

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

(Emphasis added)

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

(b) Acceptable outcomes

[63] To reiterate, the second inquiry in a reasonableness analysis is that the decision fall "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law". It is in this part of the analysis where, in my

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opinion, this court should address THESL's argument that the imposed condition violated corporate law.

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

[65] The OEB submits that the authority to approve dividends was not taken away from the directors. Approval by the entire board is still required before a dividend can be issued. The independent directors are simply an additional check on the authority of the full board. The OEB also relies on s. 128(1) of the Act, which provides that "[i]n the event of a conflict between this Act and any other general or special act, this Act prevails". [page501]

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

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

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

Conclusion

[69] For these reasons, I would allow the appeal, set aside the order of the Divisional Court and in its place make an

order in accordance with these reasons. In the circumstances, I would not order costs.

Appeal allowed.

Notes

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

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COURT OF APPEAL FOR ONTARIO

CITATION: Union Gas Limited v. Ontario Energy Board, 2015 ONCA 453
DATE: 20150622
DOCKET: C58756

2015 ONCA 453 (CanLII)

Hoy A.C.J.O., and Simmons and Tulloch JJ.A.

BETWEEN

Union Gas Limited

Appellant

and

Ontario Energy Board

Respondent

Patricia D.S. Jackson, Crawford Smith and Alex Smith, for the appellant

Michael Millar, for the respondent

Heard: December 16, 2014

On appeal from the order of the Divisional Court (Justices Colin D.A. McKinnon and Susan G. Himel, Justice Herman J. Wilton-Siegel dissenting) dated December 20, 2013, with reasons reported at 2013 ONSC 7048, 316 O.A.C. 218, affirming the decision of the Ontario Energy Board, dated November 19, 2012.

Simmons J.A.:

A. INTRODUCTION

[1] Union Gas Limited appeals with leave from an order of the Divisional Court dismissing Union's appeal from a decision of the Ontario Energy Board. The

main issue on appeal is whether the Board's decision contravened the principle against retroactive ratemaking.

[2] In April 2012, Union applied to the Board for an order amending the rates it would charge to its customers for natural gas as of October 2012. A primary purpose of the application was to adjust rates as a result of allocating a portion of Union's 2011 utility earnings between Union and its ratepayers under the terms of an Earnings Sharing Mechanism ("ESM") contained in an Incentive Regulation Mechanism Settlement Agreement (the "IRM Agreement").

[3] In 2007, Union entered into the IRM Agreement with parties representing its major stakeholders and constituents (the "interveners") to provide for a five-year period of incentive regulation. By order made in January 2008, the Board approved the IRM Agreement. The IRM Agreement contained the ESM, under which Union agreed to share utility earnings greater than two per cent above its regulated rate of return with ratepayers.

[4] As part of the IRM Agreement, Union agreed to reduce its revenue requirement by $4.3 million. In exchange for this reduction, four deferral accounts previously established by the Board were eliminated.

[5] Deferral accounts allow a regulator to separately accumulate certain amounts (costs or revenues) before deciding by order, at specified intervals, to what extent, if at all, such costs or revenues will be charged to ratepayers as part

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of rates. Because it is contemplated from the outset that amounts in deferral accounts will be disposed of in a manner that affects rates, deferral accounts do not offend the principle against retroactive ratemaking.

[6] At least one of the four eliminated deferral accounts tracked upstream transportation optimization revenues. Union generated upstream transportation optimization revenues through transactions with third parties in which Union disposed of upstream transportation services.

[7] In the past, the Board had directed that Union share the upstream transportation optimization revenues in the eliminated deferral accounts with ratepayers based on a 75/25 split in favour of ratepayers.

[8] As a result of the elimination of the four deferral accounts, under the IRM Agreement, Union was able to keep net revenues that would previously have been recorded in those accounts, subject to the ESM.

[9] Union's April 2012 application for a rate order included a request to share with ratepayers $22 million in 2011 revenues Union had earned using TransCanada Pipelines Limited's ("TCPL") Firm Transportation Risk Alleviation Mechanism ("FT-RAM") program under the ESM.

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[10] Under the FT-RAM program, utilities earned credits for unused firm[1] transportation services, which the utilities could then use to purchase cheaper interruptible transportation services. Union was able to monetize the credits it earned under the FT-RAM program through various assignment and exchange transactions with third parties.

[11] Union classified its 2011 FT-RAM earnings as upstream transportation optimization revenues – that is, as utility earnings that would previously have been recorded in one of the eliminated deferral accounts. In a procedural order in Union's application, the Board directed that Union's classification of its 2011 FT-RAM revenues be dealt with as a preliminary issue in the proceeding.

[12] In its decision on the preliminary issue, the Board rejected Union's classification of its 2011 FT-RAM revenues as utility earnings and concluded instead that the disputed $22 million should be classified as "gas supply cost reductions". As such, the revenues would ordinarily be passed through to ratepayers, and Union would not be entitled to any portion of them.

[13] The Board found that Union had used the FT-RAM program to generate profits on its upstream transportation portfolio on a planned basis – whereas Union's past upstream transportation optimization activities had occurred on an unplanned basis. Because upstream transportation costs are passed through

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[1] Firm transportation refers to the quality of upstream transportation. Firm transportation cannot be interrupted by the transportation supplier, whereas interruptible transportation can be interrupted.

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entirely to ratepayers, the Board found that Union's planned profit-making on its upstream transportation portfolio was inconsistent with the IRM Agreement and the regulatory principle imbedded in it that a utility "cannot profit from the procurement of gas supply for its customers."

[14] The Board concluded that it was entitled to reclassify the FT-RAM revenues because it was part of its mandate to ensure that revenues were being properly characterized under the IRM Agreement and in a manner that resulted in just and reasonable rates.

[15] While acknowledging that gas supply costs (and gas supply cost reductions) are ordinarily passed through entirely to ratepayers, the Board directed that 90 per cent of the $22 million should be credited to ratepayers and that 10 per cent should be credited to Union as an incentive for generating the revenues. In a subsequent rate order, the Board directed that the funds should be recorded in a newly created deferral account.

[16] Union appealed the Board's decision on the preliminary issue to the Divisional Court.

[17] Before the Divisional Court, Union argued that the Board had already approved the gas supply cost reductions to be credited to ratepayers for 2011 through final rate orders made in Quarterly Rate Adjustment Mechanism ("QRAM") proceedings, which disposed of deferral accounts relating to upstream

gas and transportation costs. Accordingly, Union maintained that by reclassifying Union's 2011 FT-RAM revenues as gas supply cost reductions, the Board engaged in impermissible retroactive ratemaking.

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[18] In a split decision, the Divisional Court found that the Board's reclassification of the 2011 FT-RAM revenues did not amount to impermissible retroactive ratemaking. The majority concluded that the revenues at issue were not dealt with in the 2011 QRAM proceedings. Moreover, because the revenues were brought forward as part of the ESM proceeding, they were effectively "encumbered", and therefore subject to further disposition by the Board. The majority held that the Board's statutory rate-making authority is broad and "[does not] in any manner constrain the Board from making orders respecting matters which arose in a previous year but had not been specifically dealt with as a discrete item in the rate-setting process."

[19] Union now appeals to this court with leave and argues that the Board acted unreasonably in reclassifying Union's 2011 FT-RAM revenues as gas supply cost reductions for two reasons.

[20] First, it says the reclassification was an unauthorized departure from the terms of the IRM Agreement, which the Board had approved as the mechanism for setting rates during the IRM period. Second, it says the reclassification amounted to impermissible retroactive ratemaking. This is because gas supply

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cost deferral accounts had already been disposed of through final orders in the 2011 QRAM proceedings and because there was no separate deferral account for FT-RAM revenues in relation to which the Board could make a further disposition. According to Union, the Board's decision is thus a classic impermissible attempt to remedy past rates the Board later concluded were excessive.

[21] For the reasons that follow, I would dismiss Union's appeal.

B. BACKGROUND

(1) Union

[22] Union is an Ontario corporation that sells, distributes, transmits and stores natural gas. It does not produce natural gas. From its head office in Chatham, Union services approximately 1.4 million residential, commercial and industrial customers across northern, southwestern and eastern Ontario.

(2) The Board and its Authority

[23] The Board is a statutory tribunal governed by the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sch. B. Among other powers, the Board has authority to set rates for the sale, transmission, distribution and storage of gas in the natural gas sector: s. 36(1).[2] The Board carries out its rate-setting function by

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[2] The text of relevant provisions under the Act is included in Appendix "A".

issuing orders: s. 19(2). In making orders, the Board is not bound by the terms of any contract: s. 36(1).

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[24] Under s. 36(2) of the Act, the Board may "make orders approving or fixing *just and reasonable rates* for the sale of gas by gas transmitters, gas distributors and storage companies, and for the transmission, distribution and storage of gas" (emphasis added).

[25] Just and reasonable rates permit a utility to recover its prudently incurred costs and earn a fair return on invested capital: see, for example, *Power Workers' Union, Canadian Union of Public Employees, Local 1000 v. Ontario (Energy Board)*, 2013 ONCA 359, 116 O.R. (3d) 793, at paras. 13, 30-32, leave to appeal to S.C.C. granted, [2013] S.C.C.A. No. 339, appeal heard and reserved December 3, 2014; *Northwestern Utilities Ltd. v. Edmonton (City)*, [1929] S.C.R. 186, pp. 192-3.

[26] Under s. 36(3) of the Act, "[i]n approving or fixing just and reasonable rates, the Board may adopt any method or technique that it considers appropriate."

[27] Deferral accounts are not defined in the Act. However, under ss. 36(4.1) and (4.2), the Board must dispose of the balances in deferral accounts at specified intervals. Deferral accounts relating to the commodity of natural gas are to be reflected in rates within a maximum of three months, and deferral accounts

relating to other items, including transportation costs, are to be reflected in rates within a maximum of 12 months.

(3) The Board's Practice in Setting Union's Rates

[28] Historically, the Board set Union's natural gas rates following an annual cost of service hearing at which the Board established Union's revenue requirement, consisting of a forecast of Union's costs, including a return on equity, over a future year or test period. As part of the rate-setting process, typically the Board established various deferral accounts to allow it to defer consideration of revenues and expenses that could not be forecast with certainty.

[29] Between 2008 and 2012, Union's natural gas rates were set through a Board-approved Incentive Regulation Mechanism – the IRM Agreement.

[30] During incentive regulation, a utility's base rates are set initially through a cost of service proceeding and then adjusted annually using a pre-approved pricing mechanism intended to encourage productivity or efficiency improvements. If a utility is able to increase revenues or reduce costs during incentive regulation, it is permitted to retain its "over-earnings" in excess of its regulated return on equity – but subject to the terms of any earnings sharing mechanism under which the utility has agreed to share its earnings with its ratepayers.

[31] I will return later to the terms of the IRM Agreement.

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(4) Upstream Transportation Optimization

[32] To ensure a consistent supply of gas to its customers, Union holds a portfolio of upstream transportation contracts that provide gas transportation on a firm basis from supply basins across North America to Union's storage, transmission and distribution system in Ontario.

[33] Because it is difficult to predict with accuracy how much firm transportation capacity is required in any given year, as part of maintaining a conservative gas supply plan that will ensure a consistent supply of natural gas, a utility may, from time-to-time, have excess firm transportation capacity.

[34] Traditionally, the Board has passed through the cost of upstream transportation entirely to ratepayers through the use of deferral accounts. However, where a utility was able to generate revenue by disposing of unused transportation capacity through transactions with third parties, the Board has generally permitted the utility to retain some portion of the revenues generated from these transactions to encourage the utility to dispose of the unused capacity. The transactions themselves are generally referred to as "optimization activities" or "transactional services".

[35] Prior to the IRM Agreement, revenue earned from upstream transportation optimization activities was recorded in various deferral accounts. In the past, the Board had ordered that these accounts be cleared at least annually on the basis

that ratepayers receive 75 per cent of the revenues through a rate reduction and Union retain the remaining 25 per cent of revenues.

(5) The IRM Agreement

[36] As indicated above, for the period 2008 to 2012, Union entered into the IRM Agreement with the interveners. In January 2008, the Board approved the IRM Agreement as an acceptable incentive regulation program.

[37] The following aspects of the IRM Agreement are significant for the purposes of this appeal:

- The IRM Agreement identified so-called “Y factors”, which are costs incurred by Union that would be passed through entirely to customers during the term of the IRM Agreement. Items treated as “Y factors” in the IRM Agreement included upstream gas and transportation costs.
- The IRM Agreement eliminated four deferral accounts, which had been previously maintained. In return for closing these accounts, Union increased the optimization margin built into rates from $2.6 million to $6.9 million. Put another way, Union agreed to fund a $4.3 million annual decrease in rates and assumed the risk of earning sufficient optimization revenue to offset that decrease.

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- The IRM Agreement included the ESM, which initially provided that utility earnings greater than two per cent above Union's regulated rate of return would be shared 50/50 with ratepayers.
- The IRM Agreement permitted the parties to re-open it if Union's earnings exceeded its regulated return on equity by more than three per cent.

[38] When Union's earnings for 2008 did exceed three per cent, the parties to the IRM Agreement entered into a further Settlement Agreement amending the terms of the IRM Agreement (the "Amending Agreement"). Among other things, the Amending Agreement provided that earnings over three per cent of Union's regulated rate of return were to be shared 90/10 in favour of ratepayers. The Board approved this amendment by order.

(6) QRAM Proceedings

[39] As indicated above, depending on the type of deferral account, the Act requires that they be cleared at least quarterly or annually. Given the frequency with which deferral accounts must be cleared, the Board developed QRAM proceedings. They provide an abbreviated and mechanistic hearing process used to clear some, but not all, deferral accounts.

[40] In 2011, Union brought five deferral accounts forward for disposition every quarter through QRAM proceeding. Some of these accounts included gas

transportation related costs. Union did not bring the disputed $22 million in FT-RAM revenues forward for disposition in any of the 2011 QRAM proceedings.

(7) Union's April 2012 Application

[41] The application giving rise to this appeal was brought in April 2012. As indicated above, Union filed an application at that time seeking an order amending or varying the rates charged to customers as of October 2012. A key purpose of the application was to dispose of 2011 utility earnings in accordance with the ESM.

[42] In its application, Union included as utility earnings total optimization revenues for 2011 of $31.7 million, $22 million of which was attributable to FT-RAM optimization.

(8) Union's 2013 Cost of Service Proceeding

[43] On November 10, 2011, Union filed an application with the Board for an order approving or fixing its rates effective January 1, 2013. The appropriate treatment of FT-RAM revenues was an issue in that proceeding. The cost of service decision is relevant because the Board incorporated the evidentiary record from the 2013 cost of service proceeding as part of the record on the preliminary issue.

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C. DECISIONS BELOW

(1) The Board's decision on the Preliminary Issue

[44] Prior to dealing with Union's application, the Board determined that it would address Union's treatment of upstream transportation optimization revenues in 2011 as a preliminary issue.

[45] The Board described the preliminary issue as follows: "Has Union treated the upstream transportation optimization revenues appropriately in 2011 in the context of Union's existing IRM framework?"

[46] In its decision on the preliminary issue, the Board accepted the argument of several interveners that TCPL's FT-RAM program allowed Union to create revenue opportunities by planning to replace higher cost firm upstream transportation services paid for by ratepayers with lower cost upstream transportation arrangements:

> The Board agrees with the submissions of parties that *the utilization of TCPL's FT-RAM program by Union allows Union to manage its upstream transportation arrangements on a planned basis* by leaving pipe empty and flowing gas on a different and cheaper path. The Board finds that *the effect of this activity is that higher upstream transportation costs that are paid for by Union's customers, have been substituted with lower cost upstream transportation arrangements*. [Emphasis added.]

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[47] As noted by the Divisional Court, the Board used even stronger language in its companion decision on the related 2012 cost of service proceeding in describing Union's actions. For example, the Board said:

> The Board finds that the record in this proceeding is clear that firm assets are being made available for transactional services on a planned basis, with releases occurring prior to the commencement of the heating season and with capacity being assigned for up to a full year. …
>
> … the record in this proceeding suggests that Union's optimization activities have, in their own right, become a driver of the gas supply plan and are no longer solely a consequence of it.
>
> *The Board finds that Union's ability to "manufacture" optimization opportunities undermines the credibility of Union's gas supply planning process, the planning methodology, and the resulting gas supply plan.*
>
> As submitted by various parties to this proceeding and Board staff, *Union has had an incentive to contract excessive upstream gas transportation services to the detriment of the ratepayer. Union has not filed convincing evidence that the amount and type of upstream gas transportation contracts procured on behalf of ratepayers reflects the objective application of its gas supply planning principles.* [Emphasis added.]

[48] In the light of its finding that Union had acted on a planned basis, the Board concluded that treating FT-RAM revenues as utility earnings was "inconsistent" with the IRM Agreement – and contrary to the regulatory principle inherent in it – that the cost of upstream transportation is a pass-through item from which Union is not entitled to profit:

> The Board finds that Union has used TCPL's FT-RAM program to create a profit from the upstream transportation portfolio and has treated this profit as utility earnings, subject only to the provisions of the earnings sharing mechanism.
>
> *The Board finds that this treatment is inconsistent with the Settlement Agreement on the IRM Framework and contrary to long standing regulatory principle inherent in the IRM Framework that the cost of gas and upstream transportation are to be treated as pass-through items, and therefore that Union cannot profit from the procurement of gas supply for its customers*. [Emphasis added.]

[49] Instead, the Board determined that the monies generated from FT-RAM activities should be treated as gas supply costs savings:

> As such, the Board finds that Union's upstream transportation FT-RAM optimization revenues are gas cost reductions, and are properly considered Y factor items in accordance with Union's IRM Framework.

[50] However, although gas supply cost reductions would normally be passed through completely to ratepayers, the Board noted that "absent an incentive, [Union] may not have undertaken these [optimization] activities."

[51] Accordingly, the Board directed that ratepayers would be entitled to 90 per cent of the $22 million net revenue amount related to Union's 2011 FT-RAM activities in the form of an offset to gas supply costs and that Union would be entitled to receive a 10 per cent incentive for having generated the net revenues.

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[52] In the course of its reasons, the Board rejected Union's arguments that reclassifying the FT-RAM revenues would undo the IRM Agreement and amount to retroactive ratemaking.

[53] The Board noted that it was reclassifying revenues based on evidence filed in Union's 2013 cost of service proceeding, which the Board incorporated by reference. The Board stated that the reclassification of revenues "[was] consistent with the IRM Framework".

[54] Moreover, the Board found that it had "an ongoing responsibility to determine whether activities undertaken during the IRM term [were] being characterized in accordance with the IRM Framework and have been characterized in a manner which results in just and reasonable rates."

[55] Accordingly, "the annual disposition of deferral accounts, earnings sharing, and other accounts that are part of Union's IRM Framework is not merely a mechanical exercise." Instead, "it is a process that is informed by evidence relating to the balances in those accounts and whether those balances reflect the appropriate application of the IRM Framework and the regulatory principles inherent in it."

[56] The Board also rejected Union's arguments that its FT-RAM activities were no different than optimization activities or transactional services in which Union had engaged in the past and that treating its FT-RAM activities as gas supply

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cost reductions would be inconsistent with the descriptions and historical use of deferral accounts.

[57] The Board found that evidence in prior proceedings led to the conclusion that upstream optimization opportunities were generally only available on an *unplanned* basis. Further, Union had not pointed to any evidence filed prior to the concurrent cost of service proceeding that fully explained how the FT-RAM revenues were being generated.

[58] In this regard, the Board noted that an "information asymmetry … exists" between Union and its ratepayers and that Union had an obligation to make "a much higher level of disclosure than was produced in prior proceedings" concerning "departures or potential departures … from regulatory principle inherent in the IRM Framework".

[59] Despite its findings concerning the 2011 FT-RAM revenues, the Board rejected submissions from some of the interveners that it should address FT-RAM revenues earned prior to 2011.

[60] The Board directed Union to advise it of the gas supply related deferral account(s) in which the reduction to ratepayers would be recorded and to file a draft accounting order for the account(s).

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[61] The Board subsequently issued a decision and rate order on February 28, 2013, under which the revenues from the 2011 FT-RAM optimization activities were to be recorded in a newly created deferral account.

(2) The Divisional Court's Decision

[62] Union appealed the Board's decision on the preliminary issue to the Divisional Court. Before the Divisional Court, Union argued that all 2011 gas supply related costs had been dealt with through final orders in 2011 QRAM proceedings. Accordingly, by reclassifying the utility revenues as gas supply cost reductions to be passed through to ratepayers, the Board varied what were final rate orders and engaged in impermissible retroactive ratemaking.

[63] The majority dismissed the appeal, holding that the Board's findings were clear that the disputed $22 million had not been dealt with as part of the 2011 QRAM proceedings and that Union had not met its disclosure obligations concerning the FT-RAM revenue. Because the "true scope and nature of the FT-RAM program" was only revealed during the 2012 rate hearing, that revenue could only be properly classified following the 2012 hearing. It followed that the $22 million was "encumbered" because "Union, in accordance with the statutory framework and Board policy, was bringing forward its 2011 accounts for review and approval."

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[64] During the course of their reasons, the majority stated, “the provisions of section 36 of the Act are liberal in construction and do not in any manner constrain the Board from making orders respecting matters which arose in a previous year but had not been specifically dealt with as a discrete item in the ratesetting process”.

[65] In the dissenting judge’s view, the elimination of the deferral accounts when the IRM Agreement was entered into led to the conclusion “that the intended Y factor under the [IRM Agreement] was gross transportation costs”.

[66] In other words, because the upstream transportation optimization deferral accounts were eliminated, the Y factor described as upstream transportation costs in the IRM Agreement referred to the costs associated with Union’s firm transportation contracts “without regard for any netting or pass-through of profits or losses on the sale of any such contracts.”

[67] Accordingly, under the terms of the IRM Agreement, the FT-RAM revenues were to be treated as utility revenues subject to the ESM because there was “no other account or provision that would mandate different treatment” for them.

[68] The dissenting judge also rejected the Board’s conclusion that a meaningful distinction could be made under the terms of IRM Agreement between FT-RAM revenues and other transactional services revenues. In his view, the Board’s conclusion that a distinction existed between planned and

unplanned upstream transportation optimization activities was not justified. He concluded, “[T]he concept of ‘transactional services revenues’ does not, by itself, provide a basis for the re-classification of FT-RAM related revenues as gas supply costs.”

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[69] Having concluded that the Y factor described in the IRM Agreement referred to gross transportation costs – and therefore that FT-RAM revenues were subject to the ESM – the dissenting judge turned to the question of the Board’s authority to reclassify such revenues as gas supply cost reductions. He rejected the Board’s submission on appeal that the amounts brought forward by Union were “encumbered” and questioned how, in the absence of an applicable deferral account, that condition could arise.

[70] The dissenting judge concluded that neither the IRM Agreement nor the Act authorized the Board to reclassify Union’s FT-RAM revenues. Rather, the Board’s reclassification of Union’s 2011 FT-RAM related earnings for the purposes of the ESM constituted retroactive ratemaking, and was, “by definition, unreasonable”.

D. ANALYSIS

(1) Standard of Review

[71] Under s. 33(2) of the Act, an appeal lies to the Divisional Court from an order of the Board “only upon a question of law or jurisdiction”.

[72] The parties agree that decisions of the Board are reviewable on appeal to the Divisional Court on a standard of reasonableness. I agree. (See, for example, *Power Workers'*).

(2) Discussion

[73] Union submits that the Board's decision to reclassify the FT-RAM revenues as gas supply cost reductions is unreasonable because it is an unauthorized departure from the terms of the IRM Agreement, which the Board had approved as the mechanism for setting just and reasonable rates during the incentive regulation period, and because it constitutes impermissible retroactive ratemaking.

[74] Union points out that, under the terms of the IRM Agreement, it reduced its revenue requirement in exchange for the elimination of the upstream transportation optimization deferral accounts. Union contends that its FT-RAM optimization activities were no different than other optimization activities in which it had previously engaged and that it is undisputed that, absent the IRM Agreement, such revenues would have fallen within the one of the eliminated upstream transportation optimization deferral accounts. By reclassifying FT-RAM revenues as gas supply cost reductions, the Board effectively unwound the IRM Agreement. Moreover, the reclassification is inconsistent with the Board's past treatment of such revenues.

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[75] In any event, all permissible 2011 rate adjustments based on gas supply cost reductions had already been made through final orders in the QRAM proceedings. In the absence of a deferral account that segregated specified amounts for future disposition, reclassifying the FT-RAM revenues from utility earnings to gas supply cost reductions was nothing more than an impermissible attempt to adjust rates that had been previously set based on unanticipated circumstances – namely, the unanticipated amount of revenue Union was able to generate by using the FT-RAM program. By definition, the Board's decision constitutes impermissible retroactive ratemaking.

[76] I would not accept these submissions.

[77] As a starting point, contrary to Union's position, the Board made an explicit finding that monies generated by Union's 2011 FT-RAM activities would not have fallen into one of the deferral accounts eliminated under the IRM Agreement. In the Board's view, this was because Union was using the program to create optimization opportunities on a planned basis, whereas the deferral accounts recorded optimization activities carried out on an unplanned basis:

> The Board notes that *Union has classified the revenues generated from its upstream transportation FT-RAM optimization activities as transactional service revenues because it believes that these activities are no different than its traditional transactional service activities.* However, *the Board finds that a review of the evidence* filed by Union in previous proceedings to answer the

> question: "what are transactional services" *does not lead to this conclusion*.
>
> …
>
> The Board finds that *Union's evidence* in the RP-2003-0063 / EB-2003-0087 proceeding, when taken as whole, *does not support the conclusion that the planned optimization of gas supply related assets would be considered a transactional service. The evidence* in the above noted proceeding *explicitly speaks to the fact that with a balanced gas supply portfolio there will be few, if any, firm assets available to support transactional services on a future planned basis. In the Board's view, this statement speaks to the fact that the portion of utility gas supply assets that is available to support transactional service activities is only the portion of those assets that is temporarily surplus to the gas supply plan as a result of factors beyond Union's control. Therefore, a clear distinction can be made between Union's transactional services (including exchanges) and Union's FT-RAM related activities*. [Emphasis added.]

[78] In my view, the Board's findings that monies generated by Union's 2011 FT-RAM activities were generated on a planned basis, and were thus distinguishable from upstream transportation optimization revenues that would have fallen within the eliminated deferral accounts, are findings of fact that were not subject to review on appeal to the Divisional Court.

[79] In the result, rather than being a departure from the IRM Agreement that had the effect of unwinding the IRM Agreement, the Board's decision was nothing more than a review of the nature of the revenues brought forward for sharing under the ESM and a determination that some of such revenues did not

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qualify for that treatment. Accordingly, in my view, the Board's decision cannot be seen as unreasonable on the basis that it was a departure from the IRM Agreement. Nor was its conclusion that the FT-RAM revenues did not qualify for sharing under the ESM unreasonable.

[80] Moreover, I am not convinced that the fact that the FT-RAM revenues were not segregated in a special deferral account relating specifically to gas supply cost reductions means that the Board engaged in impermissible retroactive ratemaking by reclassifying them as gas supply cost reductions. Rather, I conclude that the FT-RAM revenues brought forward by Union for disposition as part of the ESM proceeding were effectively "encumbered" and subject to further disposition by the Board.

[81] This issue requires a discussion of the principle against retroactive ratemaking.

[82] It is well established that an economic regulatory tribunal, such as the Board, operating under a positive approval scheme of ratemaking must exercise its rate-making authority on a prospective basis. Generally speaking, absent express statutory authorization, such a regulator may not exercise its rate-making authority retroactively or retrospectively.

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[83] As noted by the Divisional Court majority, the classic explanation for the general presumption against the retroactive operation of statutes is set out in *Young v. Adams*, [1898] A.C. 469, at p. 476:

> [I]t manifestly shocks one's sense of justice that an act legal at the time of doing it should be made unlawful by some new enactment.

[84] In *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722, ("*Bell Canada 1989*"), at p. 1749, Gonthier J. writing for the court, characterized retroactive ratemaking as ratemaking the purpose of which "is to remedy the imposition of rates approved in the past and found in the final analysis to be excessive."

[85] At p. 1759 of the same case, Gonthier J. explained that "the power to review its own previous final decision on the fairness and reasonableness of rates would threaten the stability of the regulated entity's financial situation."

[86] From the ratepayers' perspective, retroactive ratemaking may create unfairness because it "redistributes the cost of utility service by asking today's customers to pay for the expenses incurred by yesterday's customers": *Atco Gas and Pipelines Ltd. v. Alberta (Utilities Commission)*, 2014 ABCA 28, 566 A.R. 323, at para. 51.

[87] Nonetheless, courts have recognized qualifications on the principle against retroactive ratemaking.

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[88] In *Bell Canada 1989*, at pp. 1752-1761, the Supreme Court concluded that the power to make interim orders necessarily implies the power to modify, by final order, the rates created under an interim order.

[89] In *Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40, [2009] 2 S.C.R. 764, ("*Bell Aliant*"), the Supreme Court noted, at para. 54, that deferral accounts are "accepted regulatory tools" that "'enabl[e] a regulator to defer consideration of a particular item of expense or revenue that is incapable of being forecast with certainty for the test year'".

[90] Although *Bell Aliant* involved the disposition of funds in a deferral account, at paras. 61 and 63, Abella J. also used the term "encumbered" to explain why the disposition of funds in a deferral account for one-time credits to ratepayers did not constitute impermissible retroactive ratemaking. A key feature of her reasoning was that it was known from the beginning that funds accumulated in the deferral accounts at issue were subject to further disposition by the regulator in the form of credits to ratepayers. She said:

> [61] In my view, because this case concerns encumbered revenues in deferral accounts … we are not dealing with the variation of final rates. As Sharlow J.A. pointed out, [the principle from] *Bell Canada 1989* [that retroactive or retrospective ratesetting is impermissible] is inapplicable because *it was known from the outset in the case before us that Bell Canada would be obliged to use the balance of its deferral account in accordance with the CRTC's subsequent direction*.

…

> [63] In my view, the credits ordered out of the deferral accounts in the case before us are neither retroactive nor retrospective. They do not vary the original rate as approved, which included the deferral accounts, nor do they seek to remedy a deficiency in the rate order through later measures, since *these credits or reductions were contemplated as a possible disposition of the deferral account balances from the beginning. These funds can properly be characterized as encumbered revenues, because the rates always remained subject to the deferral accounts mechanism established in the Price Caps Decision*. The use of deferral accounts therefore precludes a finding of retroactivity or retrospectivity. Furthermore, using deferral accounts to account for the difference between forecast and actual costs and revenues has traditionally been held not to constitute retroactive rate-setting [Citations omitted and emphasis added.]

[91] More recently in *Atco Gas,* the Alberta Court of Appeal explained that "[s]lavish adherence to the use of interim rates and deferral accounts should not prohibit adjustments" in a proper case: at para. 62. Moreover, "[s]imply because a ratemaking decision has an impact on a past rate does not mean it is an impermissible retroactive decision": at para. 56. Rather, "[t]he critical factor for determining whether the regulator is engaging in retroactive ratemaking is the parties' knowledge [that the rates were subject to change]": at para. 56.

[92] In that case, the regulator directed Atco to remove certain surplus assets from its rate base and revenue requirement, and backdated the effective date of the removal to an earlier date. The earlier date was the day after the Alberta

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Court of Appeal issued a decision indicating that Atco did not require the regulator's consent to remove the asset from its rate base. Removal of the assets from the rate base and revenue requirement caused a decrease in rates, and since the regulator backdated the effective date of the removal, rates were decreased after the fact.

[93] On appeal to the Alberta Court of Appeal, Atco argued that the regulator could only change the rates by using an interim order or deferral account. The Alberta Court of Appeal rejected that argument. The court found, at para. 53, that "the utility must also be taken to know that the rates will be subject to change as a result of the non-inclusion of those assets in the rate base."

[94] In this case, Union does not dispute that, under the terms of the IRM Agreement, following its year-end, it was obliged to bring forward for the Board's review and approval amounts it classified as utility earnings that were subject to sharing under the ESM. Union also knew, from the outset of the IRM Agreement, that the Board's ESM determination would impact rates. The ESM determination under the IRM Agreement was thus inherently retrospective – and Union always knew that.

[95] Further, on the Board's findings, the manner in which Union generated its 2011 FT-RAM revenues and its classification of those revenues as utility earnings was inconsistent with the IRM Agreement and violated the regulatory

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principle inherent in the IRM Agreement that the cost of upstream transportation is a pass-through item and that a utility "cannot profit from the procurement of gas supply for its customers."

[96] Although Union argued that its 2011 FT-RAM activities were no different than its previous upstream optimization activities, the Board made a specific finding that "a clear distinction can be made between Union's [unplanned] transactional services … and Union's [planned] FT-RAM activities."

[97] Significantly, prior to the 2012 hearings, the fact that the 2011 FT-RAM revenues were generated on a planned basis – and thus in a fashion inconsistent with regulatory principle and the IRM Agreement – was uniquely within Union's knowledge.

[98] In this regard, the Board found that Union had an obligation to "be mindful of the information asymmetry that exists between it and [its] ratepayers" and "to disclose departures or potential departures that it intends to make from regulatory principle inherent in the IRM Framework."

[99] In circumstances where Union knew that it was generating its 2011 FT-RAM revenues on a planned basis, Union must be fixed with knowledge, as of the date it generated those revenues, that the Board would be obliged to characterize them as a Y factor, or pass-through item, under the IRM Agreement.

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[100] Although the Board had permitted profit-taking on optimization activities in the past, on the Board's findings, the prior optimization activities involved disposing of unplanned surpluses of firm transportation. The 2011 FT-RAM activities were qualitatively different because they involved disposing of planned surpluses of firm transportation. Prior to the 2012 hearings, Union was the only party in a position to know that – and must also be taken to have known that – its actions were inconsistent with the regulatory principle inherent in the IRM Agreement.

[101] In these circumstances, where the ESM determination was inherently retrospective, and where Union failed to disclose in advance the true nature of its intended 2011 FT-RAM activities, it was not unreasonable for the Board to treat Union's 2011 FT-RAM revenues as encumbered and therefore subject to further disposition by the Board in the form of a credit to ratepayers.

[102] Union argues that the Board never made an express finding that Union was acquiring excess firm transportation during 2011. While the Board may not have said so expressly, on a fair reading of their decision on the preliminary issue in combination with their decision on the 2012 cost of service proceeding, in my view, that message is very clear.

[103] Having regard to all the circumstances, I am not persuaded that the majority of the Divisional Court erred in characterizing the 2011 FT-RAM

revenues that Union brought forward in its 2012 application as encumbered or that the Board's decision to reclassify those revenues as gas supply cost reductions was unreasonable.

E. DISPOSITION

[104] Based on the foregoing reasons, the appeal is dismissed.

[105] Neither party requested costs and none are awarded.

Released:

"AH"
"JUN 22 2015"

"Janet Simmons J.A."
"I agree Alexandra Hoy A.C.J.O."
"I agree M. Tulloch J.A."

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Appendix "A"

Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Sch. B.

19. (2) The Board shall make any determination in a proceeding by order.

33. (1) An appeal lies to the Divisional Court from,

(a) an order of the Board …

(2) An appeal may be made only upon a question of law or jurisdiction and must be commenced not later than 30 days after the making of the order or rule or the issuance of the code.

36. (1) No gas transmitter, gas distributor or storage company shall sell gas or charge for the transmission, distribution or storage of gas except in accordance with an order of the Board, which is not bound by the terms of any contract.

…(2) The Board may make orders approving or fixing just and reasonable rates for the sale of gas by gas transmitters, gas distributors and storage companies, and for the transmission, distribution and storage of gas.

(3) In approving or fixing just and reasonable rates, the Board may adopt any method or technique that it considers appropriate.

…

(4.1) If a gas distributor has a deferral or variance account that relates to the commodity of gas, the Board shall, at least once every three months, make an order under this section that determines whether and how amounts recorded in the account shall be reflected in rates.

(4.2) If a gas distributor has a deferral or variance account that does not relate to the commodity of gas, the Board shall, at least once every 12 months, or such shorter period as is prescribed by the regulations, make an order under this section that determines whether and how amounts recorded in the account shall be reflected in rates.