Enbridge Gas Inc.
50 Keil Drive North
Chatham, Ontario, Canada
N7M 5M1

June 30, 2022

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

Dear Ms. Marconi:

Re: Enbridge Gas Inc.
Application for Renewal of Franchise Agreement
Municipality of Leamington

Attached is an Application by Enbridge Gas Inc. for Orders of the Ontario Energy Board with respect to a Franchise Agreement with the Municipality of Leamington pursuant to section 10 of the *Municipal Franchises Act*. There is a disagreement between Enbridge Gas Inc. and the Municipality of Leamington with regards to the terms and conditions of the proposed Franchise Agreement.

Should you have any questions on this application, please do not hesitate to contact me. I look forward to the receipt of your instructions.

Yours truly,

Patrick McMahon

Digitally signed by Patrick McMahon
Date: 2022.06.30 15:34:21 -04'00'

Patrick McMahon
Technical Manager
Regulatory Research and Records
patrick.mcmahon@enbridge.com
(519) 436-5325

Encl.

ONTARIO ENERGY BOARD

IN THE MATTER OF the *Municipal Franchises Act*, R.S.O. 1990, c.M.55, as amended;

AND IN THE MATTER OF an Application by Enbridge Gas Inc. for an Order approving the terms and conditions upon which, and the period for which, Enbridge Gas Inc. will be given the right to construct and operate works for the distribution, transmission and storage of natural gas and the right to extend and add to the works in the Municipality of Leamington;

AND IN THE MATTER OF an Application by Enbridge Gas Inc. for an Order directing and declaring that the assent of the municipal electors of the Municipality of Leamington to the franchise agreement is not necessary;

AND IN THE MATTER OF an Application by Enbridge Gas Inc. for an Order cancelling and superseding those parts of the existing Certificate of Public Convenience and Necessity held by Enbridge Gas Inc. for the former municipalities within the Municipality of Leamington and replacing them with a Certificate of Public Convenience and Necessity to construct works to supply natural gas in the Municipality of Leamington.

APPLICATION

1. Enbridge Gas Inc. (Enbridge Gas), a regulated public utility, is a corporation incorporated under the laws of the Province of Ontario, with its offices in the City of Toronto and the Municipality of Chatham-Kent.

2. The Corporation of the Municipality of Leamington (Municipality) is a municipal corporation incorporated under the laws of the Province of Ontario. Attached hereto and marked as Schedule "A" is a map showing the geographical location of the Municipality and a customer density representation of Enbridge Gas' service area. Enbridge Gas currently serves approximately 9,520 customers in the Municipality.

3. The Municipality of Leamington is a lower-tier municipality located in the County of Essex. The current Municipality was formed on January 1, 1999 with the amalgamation of the former Town of Leamington and the former Township of Mersea.

4. On January 20, 2023, the current franchise agreement between the Municipality of Leamington and the former Union Gas Limited (Franchise Agreement) will expire. A copy of the current By-Law No. 319-02 (passed on January 20, 2003) and the Franchise Agreement effective January 20, 2003 is attached hereto and marked as Schedule "B".

5. Enbridge Gas has a Certificate of Public Convenience and Necessity (FBC 259 dated March 17, 1959) that applies to several municipalities including the former Town of Leamington and the former Township of Mersea which is attached as Schedule "C". Enbridge Gas and its predecessors have been providing access to gas distribution services within the Municipality of Leamington since approximately 1889 in the former Township of Mersea and since approximately 1904 in the former Town of Leamington.

6. On January 31, 2022, Enbridge Gas notified the Municipality of Leamington that the Franchise Agreement was coming up for renewal and that the current 2000 Model Franchise Agreement is to be used as the model for such renewals. At that time, Enbridge Gas provided the Municipality with a draft bylaw, a draft resolution and the proposed Model Franchise Agreement to be used for the renewal process. The Municipality was also provided with a copy of the Gas Franchise Handbook as an explanatory supplement to the 2000 Model Franchise Agreement.

7. On June 8, 2022, Enbridge Gas met with the Municipality's Director of Legal and Legislative Services to discuss concerns that the Municipality had with the Model Franchise Agreement and to review the regulatory process associated with having a franchise agreement approved by the Ontario Energy Board. The Municipality was informed that Enbridge Gas currently has franchise agreements in place with 312 lower and single-tier municipalities and all are the current Model Franchise Agreement without amendments (except for one that contains a service area limitation).

8. On June 28, 2022, the Council of the Municipality voted not to approve the form of draft by-law and Model Franchise Agreement proposed by Enbridge Gas and instead requests that any order of the Ontario Energy Board renewing or extending the term of the rights within the Model Franchise Agreement include an order directing an amendment to section 12(d) of the Model Franchise Agreement as follows:

   The total relocation costs as calculated above shall be paid 35% by the Corporation and 65% by the Gas Company, except where the part of the gas system required to be moved is located in an unassumed road or in an unopened road allowance and the Corporation has not approved its location, or the relocation is required pursuant to the report of an engineer appointed under the Drainage Act, R.S.O. 1990, c. D.17 or the costs have been assessed pursuant to section 26 of the Drainage Act, R.S.O. 1990, c. D.17 in which case the Gas Company shall pay 100% of the relocation costs.

9. Enbridge Gas does not support the Municipality's proposed amendment to section 12(d) of the Model Franchise Agreement given the consistency of franchise agreements currently in place throughout Ontario and given a decision in 2018 by the Ontario Court of Appeal related to the specific *Drainage Act* issue being raised by the Municipality[1]. For reference, a copy of this decision is attached hereto as Schedule "D".

[1] Union Gas Limited v. Norwich Township, 2018 CarswellOnt 55 (C.A.)

10. In 2018, the Ontario Court of Appeal considered the terms of the Model Franchise Agreement in the context of section 26 of the *Drainage Act*. The matter came before the Court of Appeal as a result of the decision of a Superior Court judge based on an application by Union Gas Limited (Union Gas) in connection with the relocation of a pipeline in the Township of Norwich pursuant to an engineer's report for the provisions of drainage works. The Ontario Energy Board intervened in the Court of Appeal proceedings and provided submissions on the interpretation of the term "drainage works" in section 26 of the *Drainage Act* and the policy behind the cost sharing provisions of the Model Franchise Agreement.

11. The Ontario Energy Board submitted that the rationale for cost sharing in section 12(d) of the Model Franchise Agreement still applies in the case of drains in agricultural areas that are triggered by petition under the *Drainage Act*. A copy of the Ontario Energy Board factum is provided for reference and attached hereto as Schedule "E".

12. The Court of Appeal determined that neither the *Drainage Act* nor public policy prohibited a utility and a municipality coming to their own agreement regarding the sharing of costs related to a pipeline relocation (i.e., the Model Franchise Agreement). The Court of Appeal allowed the appeal by Union Gas and ordered the Township of Norwich to pay Union Gas 35% of the total costs to relocate the pipeline that was subject of the appeal pursuant to the provisions of the Model Franchise Agreement.

13. The Model Franchise Agreement outlines the terms that the Ontario Energy Board finds reasonable under the *Municipal Franchises Act*[2]. The Ontario Energy Board has previously advised natural gas distributors that they are expected to follow the form of the Model Franchise Agreement when filing applications for the approval of franchise agreements unless there is a compelling reason for deviation.[3]

14. Enbridge Gas proposes that the right to operate works for the distribution, transmission and storage of natural gas and to extend or add to the works within the Municipality of Leamington should be renewed for a period of twenty (20) years pursuant to the provisions of the Model Franchise Agreement without amendment attached hereto as Schedule "F".

15. Enbridge Gas has Model Franchise Agreements (without amendments) with and Certificates of Public Convenience and Necessity for the Municipality of Chatham-Kent, the Municipality of Lakeshore and the Town of Kingsville which are immediately adjacent to the Municipality. Enbridge Gas also has Model Franchise Agreements (without amendments) in place with all other lower-tier municipalities within the County of Essex (the Town of Amherstburg, the Town of Essex, the Town of LaSalle, and the Town of Tecumseh). There is no other natural gas distributor in the area.

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[2] Report of the Ontario Energy Board - Natural Gas Facilities Handbook - EB-2022-0081, March 31, 2022

[3] EB-2021-0269, Decision and Order, February 17, 2021

16. The address of the Municipality is as follows:

Municipality of Leamington
111 Erie Street
Leamington, ON N8H 2Z9
Attention: Brenda Percy, Municipal Clerk / Manager of Legislative Services
Telephone: (519) 326-5761 ext. 1104
Email: bpercy@leamington.ca

The address for Enbridge Gas' regional operations office is:

Enbridge Gas Inc.
109 Commissioners Road
London, ON N6A 4P1
Attention: Steven Jelich, Director, Southwest Region Operations
Telephone: (519) 667-4109
Email: steven.jelich@enbridge.com

17. The newspaper having the highest circulation in the Municipality of Leamington is the *Southpoint Sun.* This is the newspaper used by the Municipality for its notices.

18. Enbridge Gas now applies to the Ontario Energy Board for:

(a) an Order pursuant to s.10 approving the terms and conditions upon which, and the period for which, the Municipality of Leamington is, by by-law, to grant Enbridge Gas the right to construct and operate works for the distribution, transmission and storage of natural gas and the right to extend and add to the works; and

(b) an Order pursuant to s.9(4) directing and declaring that the assent of the municipal electors of the Municipality of Leamington is not necessary for the proposed franchise agreement by-law under the circumstances; and

(c) an Order pursuant to s.8 cancelling and superseding those parts of the existing Certificate of Public Convenience and Necessity held by Enbridge Gas Inc. for the former municipalities within the Municipality of Leamington and replacing them with a Certificate of Public Convenience and Necessity to construct works to supply natural gas in the Municipality of Leamington.

DATED at the Municipality of Chatham-Kent, in the Province of Ontario this 30th day of June, 2022.

ENBRIDGE GAS INC.

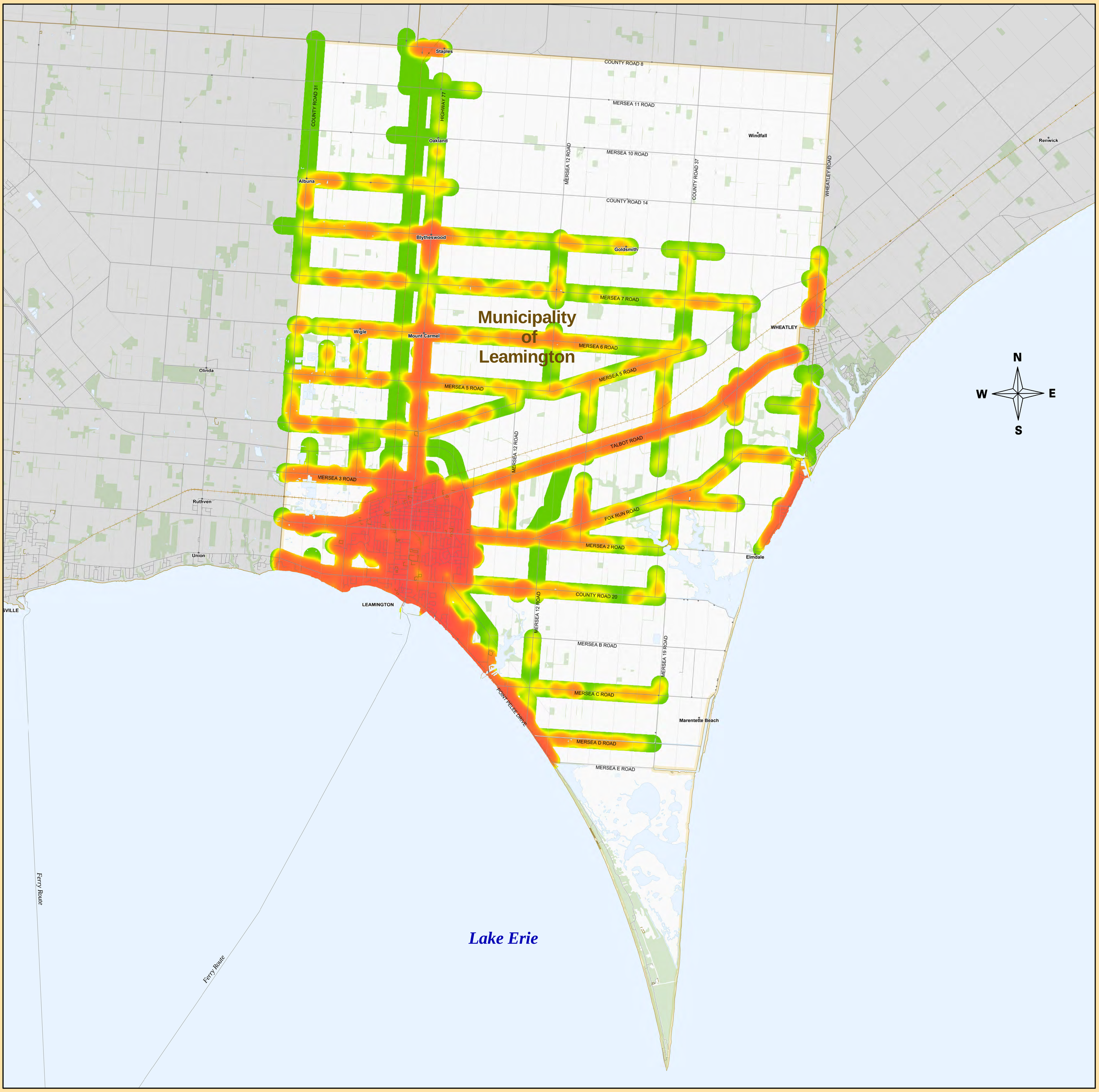
Patrick McMahon

Digitally signed by Patrick McMahon
Date: 2022.06.30 15:36:41 -04'00'

Patrick McMahon
Technical Manager
Regulatory Research and Records

Comments respecting this Application should be directed to:

Mr. Patrick McMahon
Technical Manager, Regulatory Research and Records
Enbridge Gas Inc.
50 Keil Drive North
Chatham, ON N7M 5M1
patrick.mcmahon@enbridge.com
Telephone: (519) 436-5325



Municipality of Leamington

Legend

- Enbridge Gas Pipeline Coverage Area
- Municipality of Leamington
- Roads
- Railways
- Municipal and Township Boundaries
- First Nation Boundaries

Customer Density

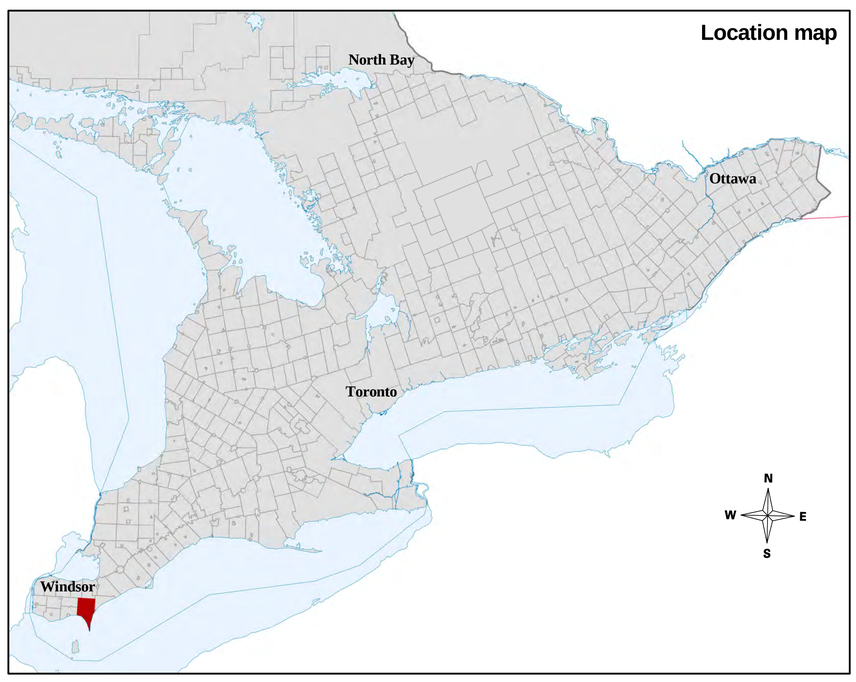
Low — High

0 1 2 3 4 5

Kilometers

Disclaimer:
The map is provided with no warranty express or Implied and is subject to change at any time. Any Person using the Density Map shall do so at its own Risk and the Density Map is not intended in any way As a tool to locate underground infrastructure for the purposes of excavation

ENBRIDGE®



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MUNICIPALITY OF LEAMINGTON

BY-LAW 319-02

Being a by-law to authorize a Franchise Agreement between The Corporation of the Municipality of Leamington and Union Gas Limited.

WHEREAS the Council of The Corporation of the Municipality of Leamington deems it expedient to enter into the attached franchise agreement (the "Franchise Agreement") with Union Gas Limited;

AND WHEREAS the Ontario Energy Board by its Order issued pursuant to The Municipal Franchises Act on the 8th day of January, 2003, has approved the terms and conditions upon which and the period for which the franchise provided in the Franchise Agreement is proposed to be granted, and has declared and directed that the assent of the municipal electors in respect of this By-Law is not necessary:

NOW THEREFORE The Council of the Corporation of the Municipality of Leamington enacts as follows:

1. That the Franchise Agreement between The Corporation of the Municipality of Leamington and Union Gas Limited, attached hereto and forming part of this by-law, is hereby authorized and the franchise provided for therein is hereby granted.

2. That the Mayor and Clerk be and they are hereby authorized and instructed on behalf of The Corporation of the Municipality of Leamington to enter into and execute under its corporate seal and deliver the Franchise Agreement, which is hereby incorporated into and forming part of this By-Law.

3. THAT the following by-law be and the same are hereby repealed:

   By-law #108-99 of the Corporation of the Municipality of Leamington, passed in Council on the 24th day of July, 2000.

4. THAT this by-law shall come into force and take effect as of the final passing thereof.

READ A FIRST AND SECOND TIME THE 18TH DAY OF FEBRUARY, 2002.

THE CORPORATION OF THE MUNICIPALITY OF LEAMINGTON

[Original Signed By Dave Wilkinson]

Mayor

[Original Signed By Brian Sweet]

Municipal Clerk

READ A THIRD TIME AND FINALLY ENACTED THE 20TH DAY OF JANUARY, 2003.

[Original Signed By Dave Wilkinson]

Mayor

[Original Signed By Brian Sweet]

Municipal Clerk

2000 Model Franchise Agreement

THIS AGREEMENT effective this 20 day of JANUARY , 2003.

BETWEEN:

THE CORPORATION OF THE MUNICIPALITY OF LEAMINGTON

hereinafter called the "Corporation"

- and -

LIMITED

hereinafter called the "Gas Company"

WHEREAS the Gas Company desires to distribute, store and transmit gas in the Municipality upon the terms and conditions of this Agreement;

AND WHEREAS by by-law passed by the Council of the Corporation (the "By-law"), the duly authorized officers have been authorized and directed to execute this Agreement on behalf of the Corporation;

THEREFORE the Corporation and the Gas Company agree as follows:

Part I - Definitions

1. **In this Agreement**

(a) "decommissioned" and "decommissions" when used in connection with parts of the gas system, mean any parts of the gas system taken out of active use and purged in accordance with the applicable CSA standards and in no way affects the use of the term 'abandoned' pipeline for the purposes of the *Assessment Act*;

(b) "Engineer/Road Superintendent" means the most senior individual employed by the Corporation with responsibilities for highways within the Municipality or the person designated by such senior employee or such other person as may from time to time be designated by the Council of the Corporation;

(c) "gas" means natural gas, manufactured gas, synthetic natural gas, liquefied petroleum gas or propane-air gas, or a mixture of any of them, but does not include a liquefied petroleum gas that is distributed by means other than a pipeline;

(d) "gas system" means such mains, plants, pipes, conduits, services, valves, regulators, curb boxes, stations, drips or such other equipment as the Gas Company may require or deem desirable for the distribution, storage and transmission of gas in or through the Municipality;

(e) "highway" means all common and public highways and shall include any bridge, viaduct or structure forming part of a highway, and any public square, road allowance or walkway and shall include not only the travelled portion of such highway, but also ditches, driveways, sidewalks, and sodded areas forming part of the road allowance now or at any time during the term hereof under the jurisdiction of the Corporation;

(f) "Model Franchise Agreement" means the form of agreement which the Ontario Energy Board uses as a standard when considering applications under the *Municipal Franchises Act*. The Model Franchise Agreement may be changed from time to time by the Ontario Energy Board;

(g) "Municipality" means the territorial limits of the Corporation on the date when this Agreement takes effect, and any territory which may thereafter be brought within the jurisdiction of the Corporation;

(h) "Plan" means the plan described in Paragraph 5 of this Agreement required to be filed by the Gas Company with the Engineer/Road Superintendent prior to commencement of work on the gas system; and

(i) whenever the singular, masculine or feminine is used in this Agreement, it shall be considered as if the plural, feminine or masculine has been used where the context of the Agreement so requires.

Part II - Rights Granted

2. **To provide gas service**

The consent of the Corporation is hereby given and granted to the Gas Company to distribute, store and transmit gas in and through the Municipality to the Corporation and to the inhabitants of the Municipality.

3. **To Use Highways**

Subject to the terms and conditions of this Agreement the consent of the Corporation is hereby given and granted to the Gas Company to enter upon all highways now or at any time hereafter under the jurisdiction of the Corporation and to lay, construct, maintain, replace, remove, operate and repair a gas system for the distribution, storage and transmission of gas in and through the Municipality.

4. **Duration of Agreement and Renewal Procedures**

(a) If the Corporation has not previously received gas distribution services, the rights hereby given and granted shall be for a term of 20 years from the date of final passing of the By-law.

or

(b) If the Corporation has previously received gas distribution services, the rights hereby given and granted shall be for a term of 20 years from the date of final passing of the By-law provided that, if during the 20 year term of this Agreement, the Model Franchise Agreement is changed, then on the 7th anniversary and on the 14th anniversary of the date of the passing of the By-law, this Agreement shall be deemed to be amended to incorporate any changes in the Model Franchise Agreement in effect on such anniversary dates. Such deemed amendments shall not apply to alter the 20 year term.

(c) At any time within two years prior to the expiration of this Agreement, either party may give notice to the other that it desires to enter into negotiations for a renewed franchise upon such terms and conditions as may be agreed upon. Until such renewal has been settled, the terms and conditions of this Agreement shall continue, notwithstanding the expiration of this Agreement. This shall not preclude either party from applying to the Ontario Energy Board for a renewal of the Agreement pursuant to section 10 of the *Municipal Franchises Act.*

Part III – Conditions

5. Approval of Construction

(a) The Gas Company shall not undertake any excavation, opening or work which will disturb or interfere with the surface of the travelled portion of any highway unless a permit therefore has first been obtained from the Engineer/Road Superintendent and all work done by the Gas Company shall be to his satisfaction.

(b) Prior to the commencement of work on the gas system, or any extensions or changes to it (except service laterals which do not interfere with municipal works in the highway), the Gas Company shall file with the Engineer/Road Superintendent a Plan, satisfactory to the Engineer/Road Superintendent, drawn to scale and of sufficient detail considering the complexity of the specific locations involved, showing the highways in which it proposes to lay its gas system and the particular parts thereof it proposes to occupy.

(c) The Plan filed by the Gas Company shall include geodetic information for a particular location:

(i) where circumstances are complex, in order to facilitate known projects, including projects which are reasonably anticipated by the Engineer/Road Superintendent, or

(ii) when requested, where the Corporation has geodetic information for its own services and all others at the same location.

(d) The Engineer/Road Superintendent may require sections of the gas system to be laid at greater depth than required by the latest CSA standard for gas pipeline systems to facilitate known projects or to correct known highway deficiencies.

(e) Prior to the commencement of work on the gas system, the Engineer/Road Superintendent must approve the location of the work as shown on the Plan filed by the Gas Company, the timing of the work and any terms and conditions relating to the installation of the work.

(f) In addition to the requirements of this Agreement, if the Gas Company proposes to affix any part of the gas system to a bridge, viaduct or other structure, if the Engineer/Road Superintendent approves this proposal, he may require the Gas Company to comply with special conditions or to enter into a separate agreement as a condition of the approval of this part of the construction of the gas system.

(g) Where the gas system may affect a municipal drain, the Gas Company shall also file a copy of the Plan with the Corporation's Drainage Superintendent for purposes of the *Drainage Act*, or such other person designated by the Corporation as responsible for the drain.

(h) The Gas Company shall not deviate from the approved location for any part of the gas system unless the prior approval of the Engineer/Road Superintendent to do so is received.

(i) The Engineer/Road Superintendent's approval, where required throughout this Paragraph, shall not be unreasonably withheld.

(j) The approval of the Engineer/Road Superintendent is not a representation or warranty as to the state of repair of the highway or the suitability of the highway for the gas system.

6. **As Built Drawings**

The Gas Company shall, within six months of completing the installation of any part of the gas system, provide two copies of "as built" drawings to the Engineer/Road Superintendent. These drawings must be sufficient to accurately establish the location, depth (measurement between the top of the gas system and the ground surface at the time of installation) and distance of the gas system. The "as built" drawings shall be of the same quality as the Plan and, if the approved pre-construction plan included elevations that were geodetically referenced, the "as built" drawings shall similarly include elevations that are geodetically referenced. Upon the request of the Engineer/Road Superintendent, the Gas Company shall provide one copy of the drawings in an electronic format and one copy as a hard copy drawing.

7. **Emergencies**

In the event of an emergency involving the gas system, the Gas Company shall proceed with the work required to deal with the emergency, and in any instance where prior approval of the Engineer/Road Superintendent is normally required for the work, the Gas Company shall use its best efforts to immediately notify the Engineer/Road Superintendent of the location and nature of the emergency and the work being done and, if it deems appropriate, notify the police force, fire or other emergency services having jurisdiction. The Gas Company shall provide the Engineer/Road Superintendent with at least one 24 hour emergency contact for the Gas Company and shall ensure the contacts are current.

8. **Restoration**

The Gas Company shall well and sufficiently restore, to the reasonable satisfaction of the Engineer/Road Superintendent, all highways, municipal works or improvements which it may excavate or interfere with in the course of laying, constructing, repairing or removing its gas system, and shall make good any settling or subsidence thereafter caused by such excavation or interference. If the Gas Company fails at any time to do any work required by this Paragraph within a reasonable period of time, the Corporation may do or cause such work to be done and the Gas Company shall, on demand, pay the Corporation's reasonably incurred costs, as certified by the Engineer/Road Superintendent.

9. **Indemnification**

The Gas Company shall, at all times, indemnify and save harmless the Corporation from and against all claims, including costs related thereto, for all damages or injuries including death to any person or persons and for damage to any property, arising out of the Gas Company operating, constructing, and maintaining its gas system in the Municipality, or utilizing its gas system for the carriage of gas owned by others. Provided that the Gas Company shall not be required to indemnify or save harmless the Corporation from and against claims, including costs related thereto, which it may incur by reason of damages or injuries including death to any person or persons and for damage to any property, resulting from the negligence or wrongful act of the Corporation, its servants, agents or employees.

10. **Insurance**

(a) The Gas Company shall maintain Comprehensive General Liability Insurance in sufficient amount and description as shall protect the Gas Company and the Corporation from claims for which the Gas Company is obliged to indemnify the Corporation under Paragraph 9. The insurance policy shall identify the Corporation as an additional named insured, but only with respect to the operation of the named insured (the Gas Company). The insurance policy shall not lapse or be cancelled without sixty (60) days' prior written notice to the Corporation by the Gas Company.

(b) The issuance of an insurance policy as provided in this Paragraph shall not be construed as relieving the Gas Company of liability not covered by such insurance or in excess of the policy limits of such insurance.

(c) Upon request by the Corporation, the Gas Company shall confirm that premiums for such insurance have been paid and that such insurance is in full force and effect.

11. **Alternative Easement**

The Corporation agrees, in the event of the proposed sale or closing of any highway or any part of a highway where there is a gas line in existence, to give the Gas Company reasonable notice of such proposed sale or closing and, if it is feasible, to provide the Gas Company with easements over that part of the highway proposed to be sold or closed sufficient to allow the Gas Company to preserve any part of the gas system in its then existing location. In the event that such easements cannot be provided, the Corporation and the Gas Company shall share the cost of relocating or altering the gas system to facilitate continuity of gas service, as provided for in Paragraph 12 of this Agreement.

12. **Pipeline Relocation**

(a) If in the course of constructing, reconstructing, changing, altering or improving any highway or any municipal works, the Corporation deems that it is necessary to take up, remove or change the location of any part of the gas system, the Gas Company shall, upon notice to do so, remove and/or relocate within a reasonable period of time such part of the gas system to a location approved by the Engineer/Road Superintendent.

(b) Where any part of the gas system relocated in accordance with this Paragraph is located on a bridge, viaduct or structure, the Gas Company shall alter or relocate that part of the gas system at its sole expense.

(c) Where any part of the gas system relocated in accordance with this Paragraph is located other than on a bridge, viaduct or structure, the costs of relocation shall be shared between the Corporation and the Gas Company on the basis of the total relocation costs, excluding the value of any upgrading of the gas system, and deducting any contribution paid to the Gas Company by others in respect to such relocation; and for these purposes, the total relocation costs shall be the aggregate of the following:

(i) the amount paid to Gas Company employees up to and including field supervisors for the hours worked on the project plus the current cost of fringe benefits for these employees,

(ii) the amount paid for rental equipment while in use on the project and an amount, charged at the unit rate, for Gas Company equipment while in use on the project,

(iii) the amount paid by the Gas Company to contractors for work related to the project,

(iv) the cost to the Gas Company for materials used in connection with the project, and

(v) a reasonable amount for project engineering and project administrative costs which shall be 22.5% of the aggregate of the amounts determined in items (i), (ii), (iii) and (iv) above.

(d) The total relocation costs as calculated above shall be paid 35% by the Corporation and 65% by the Gas Company, except where the part of the gas system required to be moved is located in an unassumed road or in an unopened road allowance and the Corporation has not approved its location, in which case the Gas Company shall pay 100% of the relocation costs.

Part IV - Procedural And Other Matters

13. Municipal By-laws of General Application

The Agreement is subject to the provisions of all regulating statutes and all municipal by-laws of general application, except by-laws which have the effect of amending this Agreement.

14. Giving Notice

Notices may be delivered to, sent by facsimile or mailed by prepaid registered post to the Gas Company at its head office or to the authorized officers of the Corporation at its municipal offices, as the case may be.

15. Disposition of Gas System

(a) If the Gas Company decommissions part of its gas system affixed to a bridge, viaduct or structure, the Gas Company shall, at its sole expense, remove the part of its gas system affixed to the bridge, viaduct or structure.

(b) If the Gas Company decommissions any other part of its gas system, it shall have the right, but is not required, to remove that part of its gas system. It may exercise its right to remove the decommissioned parts of its gas system by giving notice of its intention to do so by filing a Plan as required by Paragraph 5 of this Agreement for approval by the Engineer/Road Superintendent. If the Gas Company does not remove the part of the gas system it has decommissioned and the Corporation requires the removal of all or any part of the decommissioned gas system for the purpose of altering or improving a highway or in order to facilitate the construction of utility or other works in any highway, the Corporation may remove and dispose of so much of the decommissioned gas system as the Corporation may require for such purposes and neither party shall have recourse against the other for any

loss, cost, expense or damage occasioned thereby. If the Gas Company has not removed the part of the gas system it has decommissioned and the Corporation requires the removal of all or any part of the decommissioned gas system for the purpose of altering or improving a highway or in order to facilitate the construction of utility or other works in a highway, the Gas Company may elect to relocate the decommissioned gas system and in that event Paragraph 12 applies to the cost of relocation.

16. **Use of Decommissioned Gas System**

(a) The Gas Company shall provide promptly to the Corporation, to the extent such information is known:

(i) the names and addresses of all third parties who use decommissioned parts of the gas system for purposes other than the transmission or distribution of gas; and

(ii) the location of all proposed and existing decommissioned parts of the gas system used for purposes other than the transmission or distribution of gas.

(b) The Gas Company may allow a third party to use a decommissioned part of the gas system for purposes other than the transmission or distribution of gas and may charge a fee for that third party use, provided

(i) the third party has entered into a municipal access agreement with the Corporation; and

(ii) the Gas Company does not charge a fee for the third party's right of access to the highways.

(c) Decommissioned parts of the gas system used for purposes other than the transmission or distribution of gas are not subject to the provisions of this Agreement. For decommissioned parts of the gas system used for purposes other than the transmission and distribution of gas, issues such as relocation costs will be governed by the relevant municipal access agreement.

17. **Franchise Handbook**

The Parties acknowledge that operating decisions sometimes require a greater level of detail than that which is appropriately included in this Agreement. The Parties agree to look for guidance on such matters to the Franchise Handbook prepared by the Association of Municipalities of Ontario and the gas utility companies, as may be amended from time to time.

18. **Other Conditions**

Notwithstanding the cost sharing arrangements described in Paragraph 12, if any part of the gas system altered or relocated in accordance with Paragraph 12 was constructed or installed prior to January 1, 1981, the Gas Company shall alter or relocate, at its sole expense, such part of the gas system at the point specified, to a location satisfactory to the Engineer/Road Superintendent.

19. **Agreement Binding Parties**

This Agreement shall extend to, benefit and bind the parties thereto, their successors and assigns, respectively.

IN WITNESS WHEREOF the parties have executed this Agreement effective from the date written above.

THE CORPORATION OF THE MUNICIPALITY OF LEAMINGTON

Per: *[Original Signed By]*

Dave Wilkinson, Mayor

Per: *[Original Signed By]*

Brian R. Sweet, Clerk

UNION GAS LIMITED

Per: *[Original Signed By]*

Vice President

[Original Signed By]

Assistant Secretary

F.B.C. 259

ONTARIO FUEL BOARD

IN THE MATTER OF The Municipal Franchises Act, R.S.O. 1950, Chapter 249, as amended;

AND IN THE MATTER OF an Application by Union Gas Company of Canada, Limited to the Ontario Fuel Board for approval of the Board to construct works to supply and/or to supply gas in the under-mentioned Municipalities.

B E F O R E:

A. R. Crozier, Esquire, Chairman, and
D. M. Treadgold, Esquire, Q.C., and
J. J. Wingfelder, Esquire, Commissioners

) Tuesday, the 10th day of June, A.D. 1958.

B E T W E E N:

UNION GAS COMPANY OF CANADA, LIMITED

- and -

City of Brantford,
City of Galt,
City of St. Thomas,
City of Woodstock,
Town of Delhi,
Town of Dunnville,
Town of Hespeler,
Town of Ingersoll,
Town of Kingsville,
Town of Leamington,
Town of Paris,
Town of Port Dover,
Town of Preston,
Town of Simcoe,
Town of Tillsonburg,
Village of Caledonia,
Village of Cayuga,
Village of Cottam,
Village of Dorchester,
Village of Dutton,
Village of Fingal,
Village of Hagersville,
Village of Highgate,
Village of Jarvis,
Village of Lambeth,
Village of Port Rowan,
Village of Port Stanley,
Village of Rodney,
Village of Shedden,
Village of Waterford,
Village of West Lorne,
Village of Wheatley,
Township of Aldborough,
Township of Ancaster,
Township of Barton,
Township of Bayham,
Township of Binbrook,
Township of Brantford,
Township of Burford,
Township of Canboro,
Township of Charlotteville,
Township of Dereham,
Township of Dunn,
Township of Dunwich,
Township of East Oxford,
Township of Glanford,
Township of Gosfield North,
Township of Gosfield South,
Township of Houghton,
Township of Mersea,
Township of Middleton,
Township of Moulton,
Township of North Cayuga,
Township of North Dorchester,
Township of North Dumfries,
Township of North Walsingham,
Township of Oneida,
Township of Onondaga,
Township of Orford,
Township of Rainham,
Township of Seneca,
Township of Sherbrooke,
Township of South Cayuga,
Township of South Dumfries,
Township of South Walsingham,
Township of Southwold,
Township of Townsend,
Township of Walpole,
Township of Westminster,
Township of West Oxford,
Township of Windham,
Township of Woodhouse,
Township of Yarmouth,
County of Brant,
County of Elgin,
County of Haldimand,
County of Middlesex,
County of Norfolk,
County of Oxford,
County of Waterloo,
County of Wentworth.

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

UPON Application of Union Gas Company of Canada, Limited

to the Ontario Fuel Board pursuant to Section 8 of The Municipal Franchises Act, R.S.O. 1950, Chapter 249, as amended, for approval of the said Board to construct works to supply and to supply gas in each of the Municipalities above mentioned; upon the hearing of such Application by the Board at its Offices, 4 Richmond Street East, in the City of Toronto and Province of Ontario on the 10th day of June, 1958, after due Notice of such hearing had been given as directed by the Board; in the presence of Counsel for the Applicant, Counsel for Central Pipeline Company Limited and United Development Company Limited, Counsel for the City of Galt, Counsel for the Town of Kingsville and the Townships of Gosfield South and Mersea and Counsel for S. J. Putman, Esquire of Kingsville; upon hearing the evidence adduced, the exhibits filed and Counsel aforesaid;

THIS BOARD DOTH CERTIFY, pursuant to Section 8 of The Municipal Franchises Act, R.S.O. 1950, Chapter 249, as amended, that public convenience and necessity appear to require that approval of the Ontario Fuel Board shall be and the same is hereby given to Union Gas Company of Canada, Limited to construct works to supply and to supply gas in each and all of the Municipalities above named, except in those certain areas and to those certain persons more particularly set forth in Schedule "A" hereto.

AND THIS BOARD DOTH FURTHER ORDER that the costs of this Application fixed at the sum of $250.00 be paid forthwith to the Board by the Applicant.

DATED at Toronto, Ontario, this 17th day of March, A.D. 1959.

ONTARIO FUEL BOARD

"A. R. Crozier"
Chairman

"D. M. Treadgold"
Commissioner

"J. J. Wingfelder"
Commissioner

THIS IS SCHEDULE "A" TO THE WITHIN CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY DATED THE DAY OF , 1959.

A. TOWNSHIP OF WESTMINSTER -

(i) All of Lot 1 in Concession B.
(ii) The north half of Lot 1 in Concession 1.
(iii) Those persons in the south half of Lot 1 in Concession 1 and in the north half of Lot 1 in Concession 2 receiving natural gas from any person other than Union Gas Company of Canada, Limited on the date of this Certificate.
(iv) The south half of Lot 1 in Concession 2.
(v) All of Lots 1, 2 and 3 in Concessions 3, 4, 5 and 6.
(vi) All of Lots 1, 2, 3, 4 and 5 in Concession 7.
(vii) All of Lots 3, 4 and 5 in Concession 8.

B. TOWNSHIP OF NORTH DORCHESTER -

(i) All of Lot 24 in Concession A.
(ii) The north half of Lot 24 in Concession B.
(iii) Those persons in the south half of Lot 24 in Concession B and in the north half of Lot 24 in Concession 1 receiving natural gas from any other person than Union Gas Company of Canada, Limited on the date of this Certificate.
(iv) The south halves of Lots 21, 22, 23 and 24 in Concession 1.
(v) All of Lots 21, 22, 23 and 24 in Concessions 2, 3, 4,5 and 6.
(vi) Those persons in the south halves of Lots 8 and 9 in Concession B and in the north halves of Lots 8 and 9 in Concession 1 receiving natural gas from any other person than Union Gas Company of Canada, Limited on the date of this Certificate.
(vii) The south halves of Lots 6, 7, 8, 9 and 10 in Concession 1.
(viii) All of Lots 6, 7, 8, 9 and 10 in Concessions 2, 3, 4, 5 and 6.

C. TOWNSHIP OF YARMOUTH -

(i) All of Lots 14, 15, 16 and 17 in Concession 15.
(ii) All of Lots 13, 14, 15, 16 and 17 in Concession 14.
(iii) All of Lots 19, 20, 21, 22, 23 and 24 in Concession 10, in Range II North of Edgeware Road, in Range I North of Edgeware Road and in Range I South of Edgeware Road.

(iv) All of Lots 67, 68, 69, 70, 71, 72 and 73 in Concession 9 (North Talbot Road) and in Concession 8 (South Talbot Road).
(v) All of Lots 22, 23, 24, 25, 26, 27 and 28 in Concessions 7, 6 and 5.
(vi) All of Lots 21, 22, 23, 24, 25, 26, 27 and 28 in Concessions 4, 3, 2 and 1.

D. TOWNSHIP OF DEREHAM - (i) All of Lots 15 to 24 both inclusive in Concession 1.
(ii) All of Lots 15 to 28 both inclusive in Concessions 2 to 12 both inclusive.

E. TOWNSHIP OF BAYHAM - All of the Municipality except,
(i) All of Lots 15, 16, 17, 18, 19, 20 and 21 in Concession 11.
(ii) All of Lots 20, 21, 22, 23, 24 and 25 in Concession 10.
(iii) All of Lots 20, 21, 22, 23, 24, 25, 26, 27 and 28 in Concession 9.
(iv) The north half of Lot 20 in Concession 8.
(v) All that part of Lot 21 in Concession 8 lying north of the most southerly point of intersection of The Canadian Pacific Railway right-of-way with King's Highway No. 19.
(vi) All that part of Lot 21 in Concession 8 lying between the southerly limit of King's Highway No. 19 and the location on the date of this Certificate of a 4" gas main of Union Gas Company of Canada, Limited which runs in a general easterly direction from King's Highway No. 19 to the easterly limit of such Lot.
(vii) All those parts of Lots 22, 23, and 24 in Concession 8 lying north of the road which runs in a general easterly and westerly direction through such Lots.
(viii) The south halves of Lots 22, 23 and 24 and the south six-tenths of Lots 25 and 26, all in Concession 8 but reserving however to any other person supplying natural gas therein on the date of this Certificate the right to continue to supply to the consumers receiving such gas on the date of this Certificate.
(ix) All of Lot 28 in Concession 8.

F. TOWNSHIP OF HOUGHTON - All of the Municipality except,
(i) All of Gore Lot "A".
(ii) The north half of Gore Lot "B".

G. TOWNSHIP OF MIDDLETON -

(i) The south quarters of Lots 1 and 2 in Concession 1, North Talbot Road.
(ii) All of Lots 1 and 2 in Concessions 1 and 2, South Talbot Road.

H. TOWNSHIP OF NORTH WALSINGHAM -

(i) All of Lots 1 in Concessions 13 and 14.
(ii) All of Lots 1 to 5 both inclusive in Concessions 7 and 8.

I. TOWNSHIP OF SOUTH WALSINGHAM -

(i) Marsh Lot in front of Gore Lot A in Range B.
(ii) Gore Lot A in Range B.
(iii) Gore Lot B in Range A.
(iv) Gore Lot C in Concession 1.
(v) Gore Lot D in Concession 2.
(vi) Gore Lot E in Concession 3.
(vii) Marsh Lots 1, 2, 3, 4 and 5 in front of Lots 1, 2, 3, 4 and 5 respectively in Range B.
(viii) Lots 1 to 5 both inclusive in each of Ranges A and B.
(ix) Lots 1 to 5 both inclusive in Concessions 1 to 6 both inclusive.

COURT OF APPEAL FOR ONTARIO

CITATION: Union Gas Limited v. Norwich (Township), 2018 ONCA 11
DATE: 20180110
DOCKET: C62779

LaForme, Pepall and van Rensburg JJ.A.

BETWEEN

Union Gas Limited

Applicant
(Appellant in Appeal)

and

The Corporation of the Township of Norwich

Respondent
(Respondent in Appeal)

Crawford Smith and Emily Sherkey, for the appellant

Roberto Aburto and Jacob Polowin, for the respondent

Philip Tunley, for the intervener, Ontario Energy Board

Heard: August 14, 2017

On appeal from the order of Justice M.A. Garson of the Superior Court of Justice, dated September 7, 2016.

van Rensburg J.A.:

OVERVIEW

[1] This appeal concerns a dispute between a utility and a rural municipality over the sharing of the utility's costs to relocate parts of a gas pipeline as a result of the rural municipality's construction of certain drainage works. The disposition of the appeal requires the court to consider the terms of a franchise agreement dated September 28, 2004 between the parties (the "Franchise Agreement") and provisions of the *Drainage Act*, R.S.O. 1990, c. D.17 (the "Act").

[2] Union Gas Limited ("Union") asserts that The Corporation of the Township of Norwich ("Norwich") is required to pay Union 35% of its costs to relocate a gas pipeline necessitated by certain drainage works, in accordance with the Franchise Agreement. Norwich argues that Union should assume the full cost of relocation, as its engineer directed, under s. 26 of the Act.

[3] The application judge held that the cost to relocate gas works when a drain is constructed under the Act is an increase in the cost of "drainage works", and therefore subject to s. 26 of the Act, which provides for the utility to assume the entirety of the increased cost of drainage works caused by the existence of the public utility's works. He held that the cost-sharing provisions of the Franchise Agreement did not "trump and hold priority over" s. 26 of the Act.

[4] Union appeals, arguing that the application judge erred: (1) in interpreting s. 26 of the Act to apply to the cost of relocating gas works; and (2) in concluding that the Act overrides the cost-sharing provisions of the Franchise Agreement.

[5] The Ontario Energy Board (the "OEB") intervened, taking no position on the facts of the appeal, but to provide submissions on the interpretation of the term "drainage works" in the Act and the policy behind the cost-sharing provisions of the Franchise Agreement.

[6] For the reasons that follow, I would allow the appeal. It is unnecessary to determine in this appeal the full scope of s. 26, and in particular whether the reference to the increased cost of "drainage works" could include a utility's cost to relocate gas works. The cost-sharing provisions of the Franchise Agreement apply to the parties' dispute. The application judge erred in law when he refused to give effect to the parties' agreement on the basis that it could not "oust or override" the provisions of the Act.

FACTS

[7] Under s. 4 of the Act a landowner may petition a municipality to undertake drainage works. Where the municipality's council decides to proceed with the construction of drainage works, it appoints an engineer under s. 8 to plan the works, including to assess their cost. The engineer is required to submit a report

to the municipality. If the council proceeds based on the report, it passes a by-law adopting the report and authorizing the drainage works.

[8] The engineer's report is required to assess landowners and utilities for benefit, outlet liability, injury liability and special benefits (ss. 21 to 24). Section 26 allows all of the increase in the cost of drainage works due to the presence of public utilities to be assessed by the engineer against those utilities. The section provides as follows:

> In addition to all other sums lawfully assessed against the property of a public utility or road authority under this Act, and despite the fact that the public utility or road authority is not otherwise assessable under this Act, the public utility or road authority shall be assessed for and shall pay all the increase of cost of such drainage works caused by the existence of the works of the public utility or road authority.

[9] Section 48(1) provides for a right of appeal by a landowner or public utility from an engineer's report, to the Agriculture, Food and Rural Affairs Appeal Tribunal.

[10] In April 2012, a landowner petitioned Norwich regarding two improvements to the Otter Creek Municipal Drain. Norwich's council appointed an engineer. The engineer prepared one report for both projects, and assessed Union $1,180 under s. 26 of the Act for costs relating to boring steel pipes across the gas main. This assessment was not disputed.

[11] The report also identified a conflict between a Union gas pipeline and the proposed drainage work that would require the gas pipeline to be moved. The report stated that if any utilities required relocation "the extra costs incurred shall be borne by the utility involved in accordance with the provisions of section 26 of the [Act]." In February 2014, the Norwich council adopted a by-law approving the engineer's report.

[12] Union did not appeal the engineer's report. Instead, with respect to the gas pipeline that required relocation, it issued an invoice to Norwich seeking a 35% contribution, relying on a cost-sharing mechanism in the Franchise Agreement.

[13] The Franchise Agreement is based on a model franchise agreement, whose terms were approved by the OEB in accordance with the *Municipal Franchise Act*, R.S.O. 1990, c. M.55. The Franchise Agreement allows Union to operate its gas infrastructure within Norwich's territorial boundaries.

[14] Section 12 of the Franchise Agreement permits Norwich to request Union to relocate any part of the gas system where such relocation is necessary to alter or improve any highway or municipal work, and provides for cost-sharing. The applicable paragraphs are as follows:

> (a) If in the course of constructing, reconstructing, changing, altering or improving any highway or any municipal works, [Norwich] deems that it is necessary to take up, remove or change the location of any part of the gas system, [Union] shall, upon notice to do so, remove and/or relocate within a reasonable period of time such

> part of the gas system to a location approved by the Engineer/Road Superintendent.
>
> (d) The total relocation costs as calculated above [described in detail in paragraph (c)] shall be paid 35% by [Norwich] and 65% by [Union] except [an exception follows that does not apply here.]

[15] Section 13 of the Franchise Agreement provides:

> The Agreement is subject to the provisions of all regulating statutes and all municipal by-laws of general application, except by-laws which have the effect of amending this Agreement.

[16] Norwich did not pay Union's invoice. The work proceeded, and Union brought an application to the Superior Court to determine the rights of the parties.

DECISION OF THE APPLICATION JUDGE

[17] The application judge characterized the issue as whether Union's gas pipeline relocation costs fell within the scope of the Franchise Agreement or s. 26 of the Act.

[18] The application judge characterized the Act as "a complete and comprehensive code" dealing with drainage works. He considered the definition of "drainage works" as including "a drain constructed by any means" and he interpreted the Act as allowing either municipalities or utilities to reconstruct portions of existing gas pipelines. He concluded that moving gas pipelines would fall within the broad definition of "drainage works", and that this cost would accordingly be subject to the cost-sharing mechanism of s. 26 of the Act. He

considered that it was the intent of the Act to defer to the engineer's report regarding cost allocation, and that Union was subject to the assessment, which it had not appealed.

[19] The application judge concluded that the Franchise Agreement did not "oust or override" the provisions of the Act. He referred to *Seidel v. Telus Communications Inc.*, 2011 SCC 15, [2011] 1 S.C.R. 531, at para. 91, citing *Brand v. National Life Assurance Co. of Canada* (1918), 44 D.L.R. 412 (Man. K.B.), at para.15, as authority that "no mere contract *inter partes* can take away that which the law has conferred."

[20] The application judge stated that the cost-sharing provisions of the Franchise Agreement did not apply to all costs associated with drains. "Municipal works" is not defined in the Franchise Agreement. Moreover, the Gas Franchise Handbook, to which the Franchise Agreement refers, states that the cost-sharing mechanism will apply "in most circumstances", suggesting it will not always apply. He noted that the Franchise Agreement provides that it is subject to "the provisions of all regulating statutes", which includes the Act.

[21] The application judge ordered Union to pay the full cost of the gas pipeline relocation. The clear and unambiguous language of the engineer's report was that Union would bear the full cost of any utility relocation, and Union did not appeal the report despite a right to do so under s. 48 of the Act.

DISCUSSION AND ANALYSIS

[22] In my view the application judge erred in his analysis and in the result. First, I address his conclusion that the Act overrides the provisions of the Franchise Agreement.

[23] The foundation of this conclusion is the application judge's interpretation of *Seidel* as standing for a general principle that "no mere contract *inter partes* can take away that which the law has conferred". There is no such general principle, and the application judge was not correct in his interpretation of what was said, or quoted from, in *Seidel*.

[24] In *Seidel* the court considered whether a provision in a cell phone service agreement requiring arbitration of claims was enforceable when B.C. consumer protection legislation expressly prohibited contracting out of its terms. In the course of the minority judgment, and before turning to the modern approach to arbitration, LeBel and Deschamps JJ. described the courts' traditional hostility towards arbitration, as contrary to public policy, because it was seen to challenge the jurisdiction of the courts. It was in this context that they quoted a passage from the 1918 decision in *Brand* which stated in part:

> The true ground for holding that the jurisdiction of the courts cannot be ousted by an agreement between parties is that the courts derive their jurisdiction either from the statute or common law, and no mere contract inter partes can take away that which the law has conferred.

[25] The traditional view that parties could not, by contracting for arbitration, "oust" the jurisdiction of the courts, has been overtaken by modern authorities, including *Seidel* itself, recognizing that arbitration clauses will be enforced absent legislative language to the contrary (at para. 42).

[26] The application judge took a part of the quotation noted above out of context as authority that parties cannot contract out of statutory provisions. As discussed below, the law is to the contrary.

[27] In *Ontario (Human Rights Commission) v. Etobicoke (Borough)*, [1982] 1 S.C.R. 202, at para. 19, the Supreme Court endorsed the principle that parties can contract out of benefits conferred by statute, unless it would be contrary to public policy or prohibited by the statute itself. In that case, a provision of a collective agreement that was contrary to the *Ontario Human Rights Code*, R.S.O. 1970, c. 318, s. 4(6), was unenforceable. Similarly, in *Seidel* a provision requiring the arbitration of disputes was unenforceable against consumers because of the relevant B.C. consumer protection legislation. See also *Fleming v. Massey*, 2016 ONCA 70, 128 O.R. (3d) 401, leave to appeal to SCC refused, 2016 CarswellOnt 9353, in which this court stated that courts should exercise "extreme caution in interfering with the freedom to contract on the grounds of public policy" before concluding that employers and workers could not contract out of the workers' compensation regime absent a contrary legislative indication (at para. 34).

[28] Second, the application judge, informed by his first error, did not go on to consider whether the Franchise Agreement cost-sharing provisions applied to the parties' dispute.

[29] The correct approach therefore is: first, to consider whether the Act would prohibit contracting out of s. 26, and whether it would be contrary to public policy to recognize an agreement that does so; and second, to interpret the Franchise Agreement itself, to determine whether there is anything in the contract that would take the parties out of the cost-sharing mechanism to which they have agreed, in the case of drainage works undertaken under the Act.

[30] The first issue, whether the Act prohibits contracting out of s. 26, can be addressed in short course. The application judge characterized the Act as a "complete and comprehensive code with regard to who does what and who pays for what", in support of his conclusion that the provisions of the Act override the parties' agreement. The issue here however is whether the Act expressly, or by necessary implication, would prohibit a utility and a municipality from arriving at their own agreement respecting the sharing of costs, where the construction of the drainage works requires the relocation of a pipeline. I see nothing in the legislative scheme that would preclude such a cost-sharing agreement in circumstances where the utility is required by the municipality to alter its pipeline to accommodate drainage works. Enforcement of the parties' contractual cost-sharing agreement would not undermine the detailed procedures set out in the Act, for the proposal,

planning and approval of drainage works, and the sharing of the municipality's own costs. Indeed, as the application judge noted, referring to a 1986 OEB report, the cost-sharing mechanism in s. 12 was developed by the OEB as a disincentive to municipalities to require gas pipeline relocation.

[31] And there is nothing in the legislative scheme to suggest that the ability to contract for the allocation of relocation costs between a municipality and a utility is contrary to public policy. In approving this specific Franchise Agreement, the OEB explicitly found that the agreement was "in the public interest" in a Decision and Order dated September 16, 2004. The Act is not a public policy statute, a point that was acknowledged in argument by the respondent.

[32] Once it is determined that the Act does not prohibit contracting out of its cost-allocation provisions, and that contracting out would not be contrary to public policy, the question is whether the Franchise Agreement applies to the current dispute.

[33] The Franchise Agreement provides for the sharing of the utility's costs occasioned by municipal works. "Municipal works," which is not defined in the Franchise Agreement, is a broad term that, given its ordinary meaning, would include drainage works undertaken by a municipality. Municipal drainage works are approved, constructed, repaired and maintained by a municipality (see ss. 4, 5, 8, 58 and 74 of the Act). Section 5(g) of the Franchise Agreement specifically

refers to gas systems affecting a "municipal drain", and accordingly contemplates that drainage works are part of the municipal works covered by the agreement. There is nothing in the Franchise Agreement that would exclude drainage works from "municipal works", or that would remove from its cost-sharing provisions the drainage works undertaken by Norwich in this case.

[34] The Franchise Agreement describes the cost-sharing mechanism in clear language and it unambiguously applies when a municipality requests relocation of a gas system to accommodate *any* municipal works. Section 13 does not assist Norwich in its argument that the Act, and not the Franchise Agreement, would apply to this dispute. That section provides that the Franchise Agreement is subject to the provisions of all "regulating statutes" and municipal by-laws of "general application," but specifically excludes "by-laws which have the effect of amending [the] Agreement." The appellant says, without relying on any authority, that the Act is a regulating statute to which the Franchise Agreement is subject, and therefore overrides the provisions of the agreement. I disagree. I would interpret "regulating statute" in the context of this agreement, as referring to health and safety, environmental and other like statutes that would regulate the construction of and work on a gas system by the utility within the regional municipality. Section 13 does not exempt the parties from the cost-allocation provisions to which they have agreed. As for by-laws, the intention is clear (and the respondent acknowledges) that any by-law (including the one passed in this case approving the engineer's

report), would be unenforceable if it sought to impose an assessment of costs other than that to which the parties agreed. As such, the Franchise Agreement would override Norwich's by-law approving the engineer's report to the extent it purported to assess Union for the entire cost of relocating its pipeline.

CONCLUSION AND DISPOSITION

[35] The appellant argued forcefully that s. 26 would apply to the increased cost of the drainage works to the municipality, but not to the relocation of a gas system required as a result of drainage works, which work could only by statute be performed by the utility. It is not necessary for the disposition of this appeal to determine this issue. The cost-sharing mechanism in the Franchise Agreement prevails over any assessment that was or could have been made under the Act, against the utility, as a result of the relocation of its pipeline to accommodate the municipal work undertaken here.

[36] For these reasons I would allow the appeal, and substitute for the application judge's order an order declaring that Norwich is required to pay Union 35% of the total costs to relocate Union's gas system; declaring that Union is not subject to an assessment under s. 26 of the Act for such costs; and directing Norwich to pay Union $26,808.39 plus prejudgment and post-judgment interest in accordance with ss. 128 and 129 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. I would set aside the application judge's order for costs in favour of Norwich, and substitute

an order requiring Norwich to pay Union the costs of the application in the sum of $18,000 inclusive of HST and disbursements. I would order costs of the appeal to Union, to be paid by Norwich, in the agreed sum of $23,000, also inclusive of HST and disbursements, with no costs sought by or awarded to the OEB.

K. van Rumsey J.A.

I agree. M. Lepall J.A.

Released: JAN 10 2018

Schedule E

Court File No. C62779

COURT OF APPEAL FOR ONTARIO

B E T W E E N :

UNION GAS LIMITED

Applicant (Appellant)

- and -

THE CORPORATION OF THE TOWNSHIP OF NORWICH

Respondent (Respondent)

- and -

THE ONTARIO ENERGY BOARD

Intervenor

FACTUM OF THE INTERVENOR, THE ONTARIO ENERGY BOARD

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INDEX

Court File No. C62779

COURT OF APPEAL FOR ONTARIO

B E T W E E N :

UNION GAS LIMITED

Applicant (Appellant)

- and -

THE CORPORATION OF THE TOWNSHIP OF NORWICH

Respondent (Respondent)

- and -

THE ONTARIO ENERGY BOARD

Intervenor

FACTUM OF THE INTERVENOR,
THE ONTARIO ENERGY BOARD

PART I - OVERVIEW

1. The Ontario Energy Board ("**Board**") intervenes in this matter, pursuant to the Order of Chief Justice Strathy dated January 17, 2017[1], to offer submissions related to the question of statutory interpretation at the heart of this appeal: whether the definition of "drainage works" in the *Drainage Act,* R.S.O. 1990, c. D.17 ("***Drainage Act***") includes works relating to the relocation of gas pipelines due to the construction of drainage works.

2. If the answer to this question is "no", then the costs of relocating a gas pipeline in most cases would be shared as between the municipality (35%) and the utility (65%). This reflects the terms and conditions of the municipal franchise agreement signed by the parties and approved by

1 A copy of that Order is enclosed at Tab C of this factum.

the Board, pursuant to its exclusive jurisdiction under the *Municipal Franchises Act*[2] (the "**MF Act**") and the *Ontario Energy Board Act, 1998* (the "**OEB Act**").[3]

3. The municipal franchise agreement in the current case – like almost all such agreements between municipalities and natural gas companies in Ontario – reflects the terms of the Model Franchise Agreement ("**MFA**") approved by the Board. The current MFA is the product of two rounds of lengthy hearings by the Board, where municipalities, gas utilities and other stakeholders provided detailed input on how they believed gas pipeline costs should be allocated. The Board ultimately concluded that the MFA should provide for pipeline relocation costs to be split between municipalities and gas utilities in order to incentivize municipalities to consider alternatives to pipeline relocation where appropriate. Such an outcome advances the public interest and the Board's consumer protection mandate by protecting ratepayers from potentially unnecessary increases in costs.

4. But if "drainage works" are instead interpreted to include works relating to the relocation of gas pipelines due to drainage works (as the Application Judge found), then the cost of gas pipeline relocation may be determined by an engineer's assessment under the *Drainage Act*, rather than under the cost-sharing provisions of the MFA.[4] The undesirable consequences of that interpretation are a relevant consideration for this Court. In particular, the Board is concerned that ignoring or undermining the cost-sharing provisions of the MFA may lead to consumer rate increases, as a result of utilities bearing the full costs of pipeline relocations that could have been avoided. Given that almost every franchise agreement since 2001 reflects the cost-sharing provisions of the MFA, the interests of a significant number of gas consumers are at stake.

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2 R.S.O. 1990, c. M.55, ss. 9, 10

3 S.O. 1998, c. 15, Sched. B, s. 19(6)

4 This assumes that parties cannot "contract out" of the *Drainage Act* by agreeing to terms under the MFA. The Appellant's address this argument in their factum at ¶72 – ¶79. The Board takes no position on this issue.

PART II - FACTS

5. The Board takes no position on the facts of this appeal.

PART III - ISSUES

6. The Board's submissions focus on the issue of whether the term "drainage works" in the *Drainage Act* ought to be interpreted in a way that undermines the purpose of, and policy rationales behind, the cost-sharing provisions in the MFA.

PART IV - ARGUMENT

A. The cost-sharing provision in the MFA was carefully considered, and reflects the Board's statutory objectives

7. The Board has devoted considerable attention to the question of who should pay for gas pipeline relocation costs. It has repeatedly concluded that those costs should be fixed and shared as between utilities and municipalities, in order to best achieve the Board's statutory objectives.

8. The question of cost-sharing for gas pipeline relocation is discussed at length in the Board's 1986 "Report on the Review of Franchise Agreements and Certificates of Public Convenience and Necessity" (the "**Report**"), where some 30 pages are spent addressing the issue.[5] The Report was the result of a public hearing process involving a variety of stakeholders, including municipalities and gas utilities.[6] The cost-sharing issue was important to these stakeholders. As the Report puts it:

> The question of appropriate sharing for the costs of relocating existing gas pipelines was one of the most contentious issues raised at the hearing and it has been one of the most vexing problems between the municipalities and the gas distributors arising out of the franchise agreements.[7]

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5 **Report**, Appeal Book and Compendium ("ABC"), Tab 7 at pp. 115-146 (¶5.1 – ¶5.75)

6 *Ibid.* at pp. 47-51 (¶1.19 – ¶1.25)

7 *Ibid.* at p. 115 (¶5.1). See also p. 86 (¶4.3): "A further major issue, the question of the sharing of gas line relocations, is discussed in Chapter 5."

9. After considering a number of different alternatives for how gas pipeline relocation costs should be borne, the Report concludes that a "simple, clear and fair" cost allocation method is required. To this end, the Report sets out a number of guidelines for cost-sharing, including:

- **There should be a monetary incentive to encourage the municipality to consider alternatives to gas-line relocation**;
- Relocation costs should be shared by the gas utility and the municipality, with the major portion of costs being borne by the gas utility; and
- The cost sharing method should be simple, preferably a fixed percentage of the total relocation costs, exclusive of any upgrading costs, to each party.[8]

10. The Report establishes a Municipal Franchise Agreement Committee ("**Committee**") comprised of representatives from municipalities, gas utilities and the Board[9], and tasks the Committee with developing the particulars of how relocation costs should be shared.[10] The Report also requests that the Committee "develop a 'model' agreement based on the Board's policy and containing the usual provisions to be included in a franchise agreement", while making it clear that it will remain open to municipalities or utilities to "argue that the Board's policy or model agreement should not apply in [a] particular case." [11] Benefits of a model agreement include the fact that "the municipalities' main concern regarding unequal bargaining power in negotiations should be alleviated once basic clauses that represent a fairer balance between the parties have been developed."[12]

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8 *Ibid.* at pp. 142-143 (¶5.71) (emphasis added).
9 *Ibid.* at p. 190 (¶8.2)
10 *Ibid.* at pp .143 (¶5.72), 191 (¶8.4)
11 *Ibid.* at p. 187 (¶7.63)
12 *Ibid.* at p. 188 (¶7.64)

11. The Committee's work led to the 1987 model franchise agreement. That agreement was revisited by a Panel of the Board in a 2001 report, following another hearing and a further round of input from stakeholders, including gas utilities and municipalities.[13]

12. As reflected in the Panel's "Report to the Board in the Matter of the *Municipal Franchises Act* and the Matter of the 2000 Model Franchise Agreement" (the "**2001 Report**"), the issue of cost-sharing for gas pipeline relocation was squarely raised during the hearing, with utilities and municipalities once again taking different views on the proper approach.[14]

13. The 2001 Report recommends "that the provisions of the 1987 MFA with respect to relocation costs should not be altered" (subject to one narrow exception involving unassumed roads or unopened road allowances) and, more specifically, that the new MFA states:

> The total relocation costs as calculated above shall be paid 35% by the Corporation and 65% by the Gas Company, except where the part of the gas system required to be moved is located in an unassumed road or in an unopened road allowance and the Corporation has not approved its location, in which case the Gas Company shall pay 100% of the relocation costs.[15]

14. The Board accepted this recommendation, and so the same language appears in section 12(d) of the final MFA.[16]

15. Thus, on at least two different occasions over the past 30 years[17], the Board has affirmed that pipeline relocation costs should be shared as between utilities and municipalities. This

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13 **2001 Report**, ABC, Tab 8 at pp. 267-273 (¶1.1.1, ¶1.1.11, ¶2.1.1)

14 *Ibid.* at pp. 290-291 (¶3.1.1 - ¶3.1.5)

15 *Ibid.* at pp. 291-292 (¶3.1.7)

16 **MFA**, ABC, Tab 9 at p. 329 (section 12(d))

17 In 2016, the Board held a generic proceeding addressing a framework for the expansion of natural gas service to communities in Ontario not currently served. One of the issues raised in that proceeding was whether changes should be made to the MFA. In its decision, the Board concluded that "no changes are required to the existing MFA as it has been developed after negotiations between municipalities and gas distributors and has worked well for both parties over the years.": see EB-2016-004, Appellant's Book of Authorities, Tab 31 at p. 27 and Appendix B

conclusion best reflects and furthers the Board's objectives, which include "protect[ing] the interest of consumers with respect to prices and the reliability and quality of gas service."[18]

16. By creating "a monetary incentive to encourage the municipality to consider alternatives to gas-line relocation" (as per the Report), the cost-sharing provisions of the MFA protect ratepayers from potentially unnecessary increases in rates. If municipalities do not bear any of the financial burden for pipeline relocation, there is the danger that utilities may be required to shoulder the full costs of pipeline relocation, even where a less expensive or more efficient overall solution – one that does not involve pipeline relocation at all – might be available. These unnecessary costs are likely to impact ratepayers, since the Board is generally required to allow utilities to recover all of their prudently incurred costs through the rates they charge to consumers.[19]

17. Section 12(d) of the MFA reduces the risk that municipalities will require unnecessary pipeline relocation projects that increase costs for consumers. In this way, the provision directly engages – and advances – the Board's objective to protect the interests of consumers with respect to prices. The Board must be particularly attuned to this aspect of its public interest mandate, since "[u]nlike some other provinces, Ontario has no designated utility consumer advocate".[20]

18. Even in the case of gas pipeline relocations that are truly necessary, ignoring the cost-sharing formula in section 12(d) of the MFA will increase the share of costs to be borne by the utility, with the likely result that these costs will be passed on to ratepayers.

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18 OEB Act, s. 2

19 OEB Act, s. 36; *Union Gas Limited v Ontario Energy Board,* 2015 ONCA 453, OEB Appeal Book and Compendium ("OEB BOA), Tab 1 at ¶25

20 *Ontario (Energy Board) v Ontario Power Generation Inc*, [2015] 3 SCR 147, OEB BOA, Tab 2 at ¶60

B. The cost-sharing provision in the MFA covers gas pipeline relocation due to drains

19. The Board submits that the cost of relocating gas pipelines due to drainage works is included within the scope of section 12(d) of the MFA.

20. The Application Judge did not definitively decide the issue, stating only that "[i]t may well be that the proposed drainage works also fall within the meaning of "municipal works" under s. 12(a) of the franchise agreement."[21] Section 12(a) of the MFA states:

> **If in the course of constructing, reconstructing, changing, altering or improving** any highway or **any municipal works**, the [Municipal] Corporation deems that it is necessary to take up, remove or change the location of any part of the gas system, the Gas Company shall, upon notice to do so, remove and/or relocate within a reasonable period of time such part of the gas system to a location approved by the Engineer/Road Superintendent.[22]

21. Although the MFA does not explicitly define the term "municipal works", the usage of the term elsewhere in the MFA suggests that it is broad enough to include drainage works. Clause 8 requires that the utility restore "all highways, municipal works or improvements which it may excavate or interfere with in the course of laying, constructive, repairing or removing its gas system".[23] This obligation would logically extend to drains and other drainage works (which are neither 'highways', nor 'improvements'), as a subset of municipal works.

22. The Report offers further support for the conclusion that the term "municipal works" in section 12(a) of the MFA includes drainage works.[24] Indeed, the Report demonstrates that the Board was alive to the specific issue of gas pipeline relocations due to drainage works. In the subsection immediately preceding the discussion on cost-sharing, for example, the Report

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21 **Application Judge's Endorsement**, ABC, Tab 3 at p. 17 (¶59)

22 Emphasis added

23 **MFA**, ABC, Tab 9 at p. 327

24 The Application Judge correctly found that the Report is part of the "broader context and surrounding circumstances" to be considered when interpreting the MFA: see **Application Judge's Endorsement**, ABC, Tab 3 at p. 16 (¶49 - ¶53)

recognizes that "[g]as lines occasionally interfere with the deepening of open ditches or conflict with drain lines."[25] And at the outset of the section on cost-sharing, the Report states:

> In upper-tier municipalities the relocation of gas lines invariably results from roadwork. **In local municipalities, other works involving sewers, water lines, drain systems**, as well as roadwork and redevelopment of down-town core areas **can necessitate the relocation of gas lines**.
>
> **Who should pay for this gas line relocation?** The basic position of the gas distributors is that the municipality should share with the company the cost of labour of any gas line relocation required by roadwork, and bear the entire cost of relocations caused by non-road-work. The municipalities contend that the gas distributor should bear the entire cost of relocation of gas pipelines caused by **any municipal works** except during the first five years following construction or relocation. During that time the entire cost would be borne by the municipalities.[26]

23. Near the end of this passage, the Report uses the short-hand of "municipal works" to reference the variety of different works cited near the beginning of the passage (*i.e.* "other works involving sewers, water lines, drain systems…"). Moreover, the passage makes plain that the Board's discussion on cost-sharing is aimed at answering the question of "who should pay for… gas line relocation" in the case of municipal works such as sewers, water lines and drain systems.

24. The Application Judge drew a distinction between "a municipal drain or a component of a municipal storm sewer system undertaken at ratepayers' expense" and "an agricultural drain for the benefit or and at the partial expense of the petitioning landowner."[27] This distinction has no basis in the MFA, the Report or the 2001 Report. In fact, the Report explicitly acknowledges

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25 **Report**, ABC, Tab 7at p. 113 (¶4.72)
26 *Ibid.* at p. 116 (¶5.2)
26 *Ibid.* at p. 116 (¶5.2 - ¶5.3) (emphasis added)
27 **Application Judge's Endorsement**, ABC, Tab 3 at p. 17 (¶44)

the existence of drains in agricultural areas, without in any way exempting them from the cost-sharing provisions.[28]

25. Most fundamentally, the rationale for clause 12(d) of the MFA – that is, to incentivize municipalities to consider alternatives to gas pipeline relocation, in order to minimize the risk of utilities passing on unnecessary expenses to their ratepayers – still applies in the case of drains in agricultural areas that are triggered by petition under the *Drainage Act*.[29] In such circumstances, municipalities retain the power to decide whether to appoint an engineer to produce a report[30], whether to proceed with the construction of the drainage works outlined in the report[31] and, more broadly, whether to consider other projects that might obviate the need for a drain.

C. *Drainage Act* should be interpreted so as to avoid undesirable consequences

26. This Court should consider the unreasonable and undesirable consequences[32] that may flow from the Application Judge's conclusion that "drainage works" under the *Drainage Act* include gas pipeline relocations that are subject to the cost-sharing provisions of the MFA.[33]

27. Those undesirable consequences include a real risk of consumer rate increases as a result of utilities bearing the costs of gas pipeline relocations that could have been avoided had municipalities been incentivized – through the cost-sharing mechanism in the MFA – to consider alternative options.

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28 **2001 Report**, ABC, Tab 8 at pp. 112-113 (¶4.72): "In agricultural areas there are extensive public and private drainage projects draining farm land and these projects are often located in the road allowance. Gas lines occasionally interfere with the deepening of open ditches or conflict with drain lines."

29 See sections 4 and 78 of the *Drainage Act*

30 Section 8 of the *Drainage Act*

31 Section 41(1) of the *Drainage Act*

32 Sullivan on Statutes (6th ed), OEB BOA, Tab 3 at pp 328-333

33 **Application Judge's Endorsement**, ABC, Tab 3 at p. 17 (¶41)

28. As outlined above, such a result is inconsistent with the purpose of section 12(d) in the MFA, and undermines the Board's objective of protecting consumer interests with respect to the prices of gas service. Simply put, it would not be in the public interest.

29. These negative consequences extend well beyond the particular franchise agreement at issue in this appeal. Almost all of the franchise agreements approved by the Board since the 2001 Report are in the same form as the MFA and are set for a term of 20 years.[34] In approving these franchise agreements in the public interest, the Board intended that the cost-sharing provision in section 12(d) would apply to "any municipal work" – a broad term that includes drainage works commenced by petition under the *Drainage Act.* If this Court upholds the Application Judge's broad reading of "drainage works" in the *Drainage Act*, it would undercut the balance the Board sought to achieve when approving these franchise agreements.

30. Whatever this Court decides, the interests of a significant number of gas consumers in the province stand to be affected.

PART V - RELIEF REQUESTED

31. The Board requests that its submissions be taken into consideration in the disposition of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 31st day of January 2017.

M. Philip Tunley / Justin Safayeni
Stockwoods LLP
awyers for the Board

34 For examples of those decisions, see OEB BOA, Tab 4

SCHEDULE "A"
LIST OF AUTHORITIES

TAB	CASE
1.	*Union Gas Limited v Ontario Energy Board,* 2015 ONCA 453
2.	*Ontario (Energy Board) v Ontario Power Generation Inc*, [2015] 3 SCR 147
	TEXTS
3.	Sullivan on Statutes (6th ed) (excerpts)
	TRIBUNAL DECISIONS
4.	Various OEB franchise agreement approval decisions

SCHEDULE "B"
RELEVANT STATUTES

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

Board objectives, gas

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

1. To facilitate competition in the sale of gas to users.
2. To protect the interests of consumers with respect to prices and the reliability and quality of gas service.
3. To facilitate rational expansion of transmission and distribution systems.
4. To facilitate rational development and safe operation of gas storage.
5. To promote energy conservation and energy efficiency in accordance with the policies of the Government of Ontario, including having regard to the consumer's economic circumstances.

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

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

...

Board's powers, general

Power to determine law and fact

19. (1) The Board has in all matters within its jurisdiction authority to hear and determine all questions of law and of fact.

Order

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

Reference

(3) If a proceeding before the Board is commenced by a reference to the Board by the Minister of Natural Resources, the Board shall proceed in accordance with the reference.

Additional powers and duties

(4) The Board of its own motion may, and if so directed by the Minister under section 28 or otherwise shall, determine any matter that under this Act or the regulations it may upon an application determine and in so doing the Board has and may exercise the same powers as upon an application.

Exception

(5) Unless specifically provided otherwise, subsection (4) does not apply to any application under the *Electricity Act, 1998* or any other Act.

Jurisdiction exclusive

(6) The Board has exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it by this or any other Act.

Powers, procedures applicable to all matters

20. Subject to any provision to the contrary in this or any other Act, the powers and procedures of the Board set out in this Part apply to all matters before the Board under this or any other Act.

...

Order of Board required

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.

...

Order re: rates

(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.

Power of Board

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

...

Fixing other rates

(5) Upon an application for an order approving or fixing rates, the Board may, if it is not satisfied that the rates applied for are just and reasonable, fix such other rates as it finds to be just and reasonable.

Burden of proof

(6) Subject to subsection (7), in an application with respect to rates for the sale, transmission, distribution or storage of gas, the burden of proof is on the applicant.

Municipal Franchises Act,
R.S.O. 1990, c. M.55

Approval for construction of gas works or supply of gas in municipality

8. (1) Despite any other provision in this Act or any other general or special Act, no person shall construct any works to supply,

(a) natural gas in any municipality in which such person was not on the 1st day of April, 1933, supplying gas; or

(b) gas in any municipality in which such person was not on the 1st day of April, 1933, supplying gas and in which gas was then being supplied,

without the approval of the Ontario Energy Board, and such approval shall not be given unless public convenience and necessity appear to require that such approval be given.

Form of approval

(2) The approval of the Ontario Energy Board shall be in the form of a certificate.

Jurisdiction of Energy Board

(3) The Ontario Energy Board has and may exercise jurisdiction and power necessary for the purposes of this section and to grant or refuse to grant any certificate of public convenience and necessity, but no such certificate shall be granted or refused until after the Board has held a public hearing to deal with the matter upon application made to it therefor, and of which hearing such notice shall be given to such persons and municipalities as the Board may consider to be interested or affected and otherwise as the Board may direct.

Gas franchise by-law to be approved by Energy Board

9. (1) No by-law granting,

(a) the right to construct or operate works for the distribution of gas;

(b) Repealed: 1998, c. 15, Sched. E, s. 21 (5).

(c) the right to extend or add to the works mentioned in clause (a); or

(d) a renewal of or an extension of the term of any right mentioned in clause (a),

shall be submitted to the municipal electors for their assent unless the terms and conditions upon which and the period for which such right is to be granted, renewed or extended have first been approved by the Ontario Energy Board.

Jurisdiction of Energy Board

(2) The Ontario Energy Board has and may exercise jurisdiction and power necessary for the purposes of this section and may give or refuse its approval.

Hearing to be held

(3) The Ontario Energy Board shall not make an order granting its approval under this section until after the Board has held a public hearing to deal with the matter upon application therefor and of which hearing such notice shall be given in such manner and to such persons and municipalities as the Board may direct.

Electors' assent may be dispensed with

(4) The Board, after holding a public hearing upon such notice as the Board may direct and if satisfied that the assent of the municipal electors can properly under all the circumstances be dispensed with, may in any order made under this section declare and direct that the assent of the electors is not necessary.

Application to Energy Board for renewal, etc., of gas franchise

10.(1) Where the term of a right referred to in clause 6 (1) (a), (b) or (c) that is related to gas or of a right to operate works for the distribution of gas has expired or will expire within one year, either the municipality or the party having the right may apply to the Ontario Energy Board for an order for a renewal of or an extension of the term of the right.

Powers of Energy Board

(2) The Ontario Energy Board has and may exercise jurisdiction and power necessary for the purposes of this section and, if public convenience and necessity appear to require it, may make an order renewing or extending the term of the right for such period of time and upon such terms and conditions as may be prescribed by the Board, or if public convenience and necessity do not appear to require a renewal or extension of the term of the right, may make an order refusing a renewal or extension of the right.

Hearing

(3) The Board shall not make an order under subsection (2) until after the Board has held a public hearing upon application therefor and of which hearing such notice shall be given in such manner and to such persons and municipalities as the Board may direct.

Interim order

(4) Despite subsection (3), where an application has been made under subsection (1) and the term of the right has expired or is likely to expire before the Board disposes of the application, the Board, on the written request of the applicant, and without holding a public hearing, may make such order as may be necessary to continue the right until an order is made under subsection (2).

Order deemed by-law assented to by electors

(5) An order of the Board heretofore or hereafter made under subsection (2) renewing or extending the term of the right or an order of the Board under subsection (4) shall be deemed to be a valid by-law of the municipality concerned assented to by the municipal electors for the purposes of this Act and of section 58 of the *Public Utilities Act*.

Right expired before commencement of section

(6) An application may not be made under this section in respect of a right that has expired before the 2nd day of December, 1969.

SCHEDULE "C"

Court of Appeal File No. C62779 (M47394

COURT OF APPEAL FOR ONTARIO

THE HONOURABLE	)	TUESDAY, THE 17th
	)	
CHIEF JUSTICE OF ONTARIO	)	DAY OF JANUARY, 2017

B E T W E E N :

UNION GAS LIMITED

Applicant (Appellant)

- and -

THE CORPORATION OF THE TOWNSHIP OF NORWICH

Respondent (Respondent)

O R D E R

THIS MOTION, made by the Proposed Intervenor/Moving Party the Ontario Energy Board (the "**Board**"), for leave to intervene in this appeal, was heard in writing on this day at Osgoode Hall, 130 Queen Street West, Toronto, Ontario.

ON READING the Motion Record, Factum and Book of Authorities of the Moving Party, on being advised that the Appellant consents to this Order, and on being advised that the Respondent takes no position on the motion provided that any order granting leave is on the terms set out below (or substantially similar terms):

1. THIS COURT ORDERS that the Board is granted leave to intervene in this appeal, on the following terms:

(a) The Board shall not supplement or expand the factual record;

(b) The Board shall not raise new issues that go beyond the scope of the proposed submissions set out in its material on the motion for leave to intervene;

(c) The Board may file a factum of up to 10 pages within 14 days of the date of this Order;

(d) The Board may make oral submissions of up to 10 minutes at the hearing of the appeal, subject to the discretion of the panel;

(e) The Board shall make reasonable efforts not to duplicate written or oral submissions made by the parties;

(f) The Board shall not seek costs and shall not be liable for costs; and

(g) The Respondent's material on the appeal shall be delivered within 14 days of receiving the Board's material.

D. MURPHY
REGISTRAR
COURT OF APPEAL FOR ONTARIO

ENTERED AT / INSCRIPT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

JAN 1 8 2017

PER / PAR:

UNION GAS LIMITED Applicant (Appellant)	and	CORPORATION OF THE TOWNSHIP OF NORWICH Respondent (Respondent)	Court of Appeal File No. C62779 (M_____)

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at TORONTO

ORDER

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UNION GAS LIMITED
Applicant (Appellant)

and

THE CORPORATION OF THE TOWNSHIP OF NORWICH
Respondent (Respondent)

Court File No. C62779

COURT OF APPEAL FOR ONTARIO
Proceeding commenced at Toronto

FACTUM OF THE INTERVENOR, THE ONTARIO ENERGY BOARD

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Lawyers for the Intervenor

2000 Model Franchise Agreement

THIS AGREEMENT effective this day of , 2022

BETWEEN:

THE CORPORATION OF THE MUNICIPALITY OF LEAMINGTON

hereinafter called the "Corporation"

- and -

ENBRIDGE GAS INC.

hereinafter called the "Gas Company"

WHEREAS the Gas Company desires to distribute, store and transmit gas in the Municipality upon the terms and conditions of this Agreement;

AND WHEREAS by by-law passed by the Council of the Corporation (the "By-law"), the duly authorized officers have been authorized and directed to execute this Agreement on behalf of the Corporation;

THEREFORE the Corporation and the Gas Company agree as follows:

Part I - Definitions

1. **In this Agreement**

(a) “decommissioned" and "decommissions" when used in connection with parts of the gas system, mean any parts of the gas system taken out of active use and purged in accordance with the applicable CSA standards and in no way affects the use of the term 'abandoned' pipeline for the purposes of the *Assessment Act*;

(b) “Engineer/Road Superintendent" means the most senior individual employed by the Corporation with responsibilities for highways within the Municipality or the person designated by such senior employee or such other person as may from time to time be designated by the Council of the Corporation;

(c) "gas" means natural gas, manufactured gas, synthetic natural gas, liquefied petroleum gas or propane-air gas, or a mixture of any of them, but does not include a liquefied petroleum gas that is distributed by means other than a pipeline;

(d) "gas system" means such mains, plants, pipes, conduits, services, valves, regulators, curb boxes, stations, drips or such other equipment as the Gas Company may require or deem desirable for the distribution, storage and transmission of gas in or through the Municipality;

(e) "highway" means all common and public highways and shall include any bridge, viaduct or structure forming part of a highway, and any public square, road allowance or walkway and shall include not only the travelled portion of such highway, but also ditches, driveways, sidewalks, and sodded areas forming part of the road allowance now or at any time during the term hereof under the jurisdiction of the Corporation;

(f) "Model Franchise Agreement" means the form of agreement which the Ontario Energy Board uses as a standard when considering applications under the *Municipal Franchises Act*. The Model Franchise Agreement may be changed from time to time by the Ontario Energy Board;

(g) "Municipality" means the territorial limits of the Corporation on the date when this Agreement takes effect, and any territory which may thereafter be brought within the jurisdiction of the Corporation;

(h) "Plan" means the plan described in Paragraph 5 of this Agreement required to be filed by the Gas Company with the Engineer/Road Superintendent prior to commencement of work on the gas system; and

(i) whenever the singular, masculine or feminine is used in this Agreement, it shall be considered as if the plural, feminine or masculine has been used where the context of the Agreement so requires.

Part II - Rights Granted

2. **To provide gas service**

The consent of the Corporation is hereby given and granted to the Gas Company to distribute, store and transmit gas in and through the Municipality to the Corporation and to the inhabitants of the Municipality.

3. **To Use Highways**

Subject to the terms and conditions of this Agreement the consent of the Corporation is hereby given and granted to the Gas Company to enter upon all highways now or at any time hereafter under the jurisdiction of the Corporation and to lay, construct, maintain, replace, remove, operate and repair a gas system for the distribution, storage and transmission of gas in and through the Municipality.

4. **Duration of Agreement and Renewal Procedures**

(a) If the Corporation has not previously received gas distribution services, the rights hereby given and granted shall be for a term of 20 years from the date of final passing of the By-law.

or

(b) If the Corporation has previously received gas distribution services, the rights hereby given and granted shall be for a term of 20 years from the date of final passing of the By-law provided that, if during the 20 year term of this Agreement, the Model Franchise Agreement is changed, then on the 7th anniversary and on the 14th anniversary of the date of the passing of the By-law, this Agreement shall be deemed to be amended to incorporate any changes in the Model Franchise Agreement in effect on such anniversary dates. Such deemed amendments shall not apply to alter the 20 year term.

(c) At any time within two years prior to the expiration of this Agreement, either party may give notice to the other that it desires to enter into negotiations for a renewed franchise upon such terms and conditions as may be agreed upon. Until such renewal has been settled, the terms and conditions of this Agreement shall continue, notwithstanding the expiration of this Agreement. This shall not preclude either party from applying to the Ontario Energy Board for a renewal of the Agreement pursuant to section 10 of the *Municipal Franchises Act*.

Part III – Conditions

5. **Approval of Construction**

(a) The Gas Company shall not undertake any excavation, opening or work which will disturb or interfere with the surface of the travelled portion of any highway unless a permit therefor has first been obtained from the Engineer/Road Superintendent and all work done by the Gas Company shall be to his satisfaction.

(b) Prior to the commencement of work on the gas system, or any extensions or changes to it (except service laterals which do not interfere with municipal works in the highway), the Gas Company shall file with the Engineer/Road Superintendent a Plan, satisfactory to the Engineer/Road Superintendent, drawn to scale and of sufficient detail considering the complexity of the specific locations involved, showing the highways in which it proposes to lay its gas system and the particular parts thereof it proposes to occupy.

(c) The Plan filed by the Gas Company shall include geodetic information for a particular location:

(i) where circumstances are complex, in order to facilitate known projects, including projects which are reasonably anticipated by the Engineer/Road Superintendent, or

(ii) when requested, where the Corporation has geodetic information for its own services and all others at the same location.

(d) The Engineer/Road Superintendent may require sections of the gas system to be laid at greater depth than required by the latest CSA standard for gas pipeline systems to facilitate known projects or to correct known highway deficiencies.

(e) Prior to the commencement of work on the gas system, the Engineer/Road Superintendent must approve the location of the work as shown on the Plan filed by the Gas Company, the timing of the work and any terms and conditions relating to the installation of the work.

(f) In addition to the requirements of this Agreement, if the Gas Company proposes to affix any part of the gas system to a bridge, viaduct or other structure, if the Engineer/Road Superintendent approves this proposal, he may require the Gas Company to comply with special conditions or to enter into a separate agreement as a condition of the approval of this part of the construction of the gas system.

(g) Where the gas system may affect a municipal drain, the Gas Company shall also file a copy of the Plan with the Corporation's Drainage Superintendent for purposes of the *Drainage Act*, or such other person designated by the Corporation as responsible for the drain.

(h) The Gas Company shall not deviate from the approved location for any part of the gas system unless the prior approval of the Engineer/Road Superintendent to do so is received.

(i) The Engineer/Road Superintendent's approval, where required throughout this Paragraph, shall not be unreasonably withheld.

(j) The approval of the Engineer/Road Superintendent is not a representation or warranty as to the state of repair of the highway or the suitability of the highway for the gas system.

6. **As Built Drawings**

The Gas Company shall, within six months of completing the installation of any part of the gas system, provide two copies of "as built" drawings to the Engineer/Road Superintendent. These drawings must be sufficient to accurately establish the location, depth (measurement between the top of the gas system and the ground surface at the time of installation) and distance of the gas system. The "as built" drawings shall be of the same quality as the Plan and, if the approved pre-construction plan included elevations that were geodetically referenced, the "as built" drawings shall similarly include elevations that are geodetically referenced. Upon the request of the Engineer/Road Superintendent, the Gas Company shall provide one copy of the drawings in an electronic format and one copy as a hard copy drawing.

7. **Emergencies**

In the event of an emergency involving the gas system, the Gas Company shall proceed with the work required to deal with the emergency, and in any instance where prior approval of the Engineer/Road Superintendent is normally required for the work, the Gas Company shall use its best efforts to immediately notify the Engineer/Road Superintendent of the location and nature of the emergency and the work being done and, if it deems appropriate, notify the police force, fire or other emergency services having jurisdiction. The Gas Company shall provide the Engineer/Road Superintendent with at least one 24 hour emergency contact for the Gas Company and shall ensure the contacts are current.

8. **Restoration**

The Gas Company shall well and sufficiently restore, to the reasonable satisfaction of the Engineer/Road Superintendent, all highways, municipal works or improvements which it may excavate or interfere with in the course of laying, constructing, repairing or removing its gas system, and shall make good any settling or subsidence thereafter caused by such excavation or interference. If the Gas Company fails at any time to do any work required by this Paragraph within a reasonable period of time, the Corporation may do or cause such work to be done and the Gas Company shall, on demand, pay the Corporation's reasonably incurred costs, as certified by the Engineer/Road Superintendent.

9. **Indemnification**

The Gas Company shall, at all times, indemnify and save harmless the Corporation from and against all claims, including costs related thereto, for all damages or injuries including death to any person or persons and for damage to any property, arising out of the Gas Company operating, constructing, and maintaining its gas system in the Municipality, or utilizing its gas system for the carriage of gas owned by others. Provided that the Gas Company shall not be required to indemnify or save harmless the Corporation from and against claims, including costs related thereto, which it may incur by reason of damages or injuries including death to any person or persons and for damage to any property, resulting from the negligence or wrongful act of the Corporation, its servants, agents or employees.

10. **Insurance**

(a) The Gas Company shall maintain Comprehensive General Liability Insurance in sufficient amount and description as shall protect the Gas Company and the Corporation from claims for which the Gas Company is obliged to indemnify the Corporation under Paragraph 9. The insurance policy shall identify the Corporation as an additional named insured, but only with respect to the operation of the named insured (the Gas Company). The insurance policy shall not lapse or be cancelled without sixty (60) days' prior written notice to the Corporation by the Gas Company.

(b) The issuance of an insurance policy as provided in this Paragraph shall not be construed as relieving the Gas Company of liability not covered by such insurance or in excess of the policy limits of such insurance.

(c) Upon request by the Corporation, the Gas Company shall confirm that premiums for such insurance have been paid and that such insurance is in full force and effect.

11. **Alternative Easement**

The Corporation agrees, in the event of the proposed sale or closing of any highway or any part of a highway where there is a gas line in existence, to give the Gas Company reasonable notice of such proposed sale or closing and, if it is feasible, to provide the Gas Company with easements over that part of the highway proposed to be sold or closed sufficient to allow the Gas Company to preserve any part of the gas system in its then existing location. In the event that such easements cannot be provided, the Corporation and the Gas Company shall share the cost of relocating or altering the gas system to facilitate continuity of gas service, as provided for in Paragraph 12 of this Agreement.

12. **Pipeline Relocation**

(a) If in the course of constructing, reconstructing, changing, altering or improving any highway or any municipal works, the Corporation deems that it is necessary to take up, remove or change the location of any part of the gas system, the Gas Company shall, upon notice to do so, remove and/or relocate within a reasonable period of time such part of the gas system to a location approved by the Engineer/Road Superintendent.

(b) Where any part of the gas system relocated in accordance with this Paragraph is located on a bridge, viaduct or structure, the Gas Company shall alter or relocate that part of the gas system at its sole expense.

(c) Where any part of the gas system relocated in accordance with this Paragraph is located other than on a bridge, viaduct or structure, the costs of relocation shall be shared between the Corporation and the Gas Company on the basis of the total relocation costs, excluding the value of any upgrading of the gas system, and deducting any contribution paid to the Gas Company by others in respect to such relocation; and for these purposes, the total relocation costs shall be the aggregate of the following:

(i) the amount paid to Gas Company employees up to and including field supervisors for the hours worked on the project plus the current cost of fringe benefits for these employees,

(ii) the amount paid for rental equipment while in use on the project and an amount, charged at the unit rate, for Gas Company equipment while in use on the project,

(iii) the amount paid by the Gas Company to contractors for work related to the project,

(iv) the cost to the Gas Company for materials used in connection with the project, and

(v) a reasonable amount for project engineering and project administrative costs which shall be 22.5% of the aggregate of the amounts determined in items (i), (ii), (iii) and (iv) above.

(d) The total relocation costs as calculated above shall be paid 35% by the Corporation and 65% by the Gas Company, except where the part of the gas system required to be moved is located in an unassumed road or in an unopened road allowance and the Corporation has not approved its location, in which case the Gas Company shall pay 100% of the relocation costs.

Part IV - Procedural And Other Matters

13. Municipal By-laws of General Application

The Agreement is subject to the provisions of all regulating statutes and all municipal by-laws of general application, except by-laws which have the effect of amending this Agreement.

14. Giving Notice

Notices may be delivered to, sent by facsimile or mailed by prepaid registered post to the Gas Company at its head office or to the authorized officers of the Corporation at its municipal offices, as the case may be.

15. Disposition of Gas System

(a) If the Gas Company decommissions part of its gas system affixed to a bridge, viaduct or structure, the Gas Company shall, at its sole expense, remove the part of its gas system affixed to the bridge, viaduct or structure.

(b) If the Gas Company decommissions any other part of its gas system, it shall have the right, but is not required, to remove that part of its gas system. It may exercise its right to remove the decommissioned parts of its gas system by giving notice of its intention to do so by filing a Plan as required by Paragraph 5 of this Agreement for approval by the Engineer/Road Superintendent. If the Gas Company does not remove the part of the gas system it has decommissioned and the Corporation requires the removal of all or any part of the decommissioned gas system for the purpose of altering or improving a highway or in order to facilitate the construction of utility or other works in any highway, the Corporation

may remove and dispose of so much of the decommissioned gas system as the Corporation may require for such purposes and neither party shall have recourse against the other for any loss, cost, expense or damage occasioned thereby. If the Gas Company has not removed the part of the gas system it has decommissioned and the Corporation requires the removal of all or any part of the decommissioned gas system for the purpose of altering or improving a highway or in order to facilitate the construction of utility or other works in a highway, the Gas Company may elect to relocate the decommissioned gas system and in that event Paragraph 12 applies to the cost of relocation.

16. **Use of Decommissioned Gas System**

(a) The Gas Company shall provide promptly to the Corporation, to the extent such information is known:

(i) the names and addresses of all third parties who use decommissioned parts of the gas system for purposes other than the transmission or distribution of gas; and

(ii) the location of all proposed and existing decommissioned parts of the gas system used for purposes other than the transmission or distribution of gas.

(b) The Gas Company may allow a third party to use a decommissioned part of the gas system for purposes other than the transmission or distribution of gas and may charge a fee for that third party use, provided

(i) the third party has entered into a municipal access agreement with the Corporation; and

(ii) the Gas Company does not charge a fee for the third party's right of access to the highways.

(c) Decommissioned parts of the gas system used for purposes other than the transmission or distribution of gas are not subject to the provisions of this Agreement. For decommissioned parts of the gas system used for purposes other than the transmission and distribution of gas, issues such as relocation costs will be governed by the relevant municipal access agreement.

17. **Franchise Handbook**

The Parties acknowledge that operating decisions sometimes require a greater level of detail than that which is appropriately included in this Agreement. The Parties agree to look for guidance on such matters to the Franchise Handbook prepared by the Association of Municipalities of Ontario and the gas utility companies, as may be amended from time to time.

18. **Other Conditions**

Notwithstanding the cost sharing arrangements described in Paragraph 12, if any part of the gas system altered or relocated in accordance with Paragraph 12 was constructed or installed prior to January 1, 1981, the Gas Company shall alter or relocate, at its sole expense, such part of the gas system at the point specified, to a location satisfactory to the Engineer/Road Superintendent.

19. **Agreement Binding Parties**

This Agreement shall extend to, benefit and bind the parties thereto, their successors and assigns, respectively.

IN WITNESS WHEREOF the parties have executed this Agreement effective from the date written above.

THE CORPORATION OF THE MUNICIPALITY OF LEAMINGTON

Per:

_____

Hilda MacDonald, Mayor

Per:

_____

Brenda M. Percy, Clerk

ENBRIDGE GAS INC.

Per:

_____

Mark Kitchen, Director
Regulatory Affairs

Per:

_____

Steven Jelich, Director,
Southwest Region Operations