

K1.2

EB-2009-0101

**IN THE MATTER OF** the *Ontario Energy Board Act, 1998*, S.O. 1998, c.15 (Schedule B);

**AND IN THE MATTER OF** an Application by Union Gas Limited for an order or orders amending or varying the rate or rates charged to customers as of July 1, 2009, in connection with the sharing of 2008 earnings under the incentive rate mechanism approved by the Ontario Energy Board on January 17, 2008.

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**Canadian Manufacturers & Exporters ("CME")  
Brief of Documents  
re: Settlement Agreement**

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Ontario Energy Board	
FILE No.	EB-2009-0101
EXHIBIT No.	K1.2
DATE	June 8/09
	Jd
08/99	



EB-2009-0101

**ONTARIO ENERGY BOARD**

**IN THE MATTER OF** the *Ontario Energy Board Act, 1998*, S.O. 1998, c.15 (Schedule. B);

**AND IN THE MATTER OF** an Application by Union Gas Limited for an order or orders amending or varying the rate or rates charged to customers as of July 1, 2009 in connection with the sharing of 2008 earnings under the incentive rate mechanism approved by the Ontario Energy Board on January 17, 2008

**SETTLEMENT AGREEMENT**

**June 4, 2009**

This Settlement Agreement (“Agreement”) is for the consideration of the Ontario Energy Board (“the Board”) in its determination, under Docket No. EB-2009-0101, of the disposition of Calendar 2008 earnings sharing under a settlement agreement approved by the Board on January 17, 2008 in EB-2007-0606 (the “IR Settlement Agreement”) for Union Gas Limited (“Union”). By Procedural Order No.1 dated April 28, 2009, the Board scheduled a Settlement Conference to commence May 27, 2009. The Settlement Conference was duly convened, in accordance with Procedural Order No. 1, with Mr. George Dominy as facilitator. The Settlement Conference proceeded until May 28, 2009.

The settlement presented in this Agreement is comprehensive in that the agreement that has been reached settles all issues in this proceeding.

The Agreement is supported by the evidence filed in the EB-2009-0101 proceeding.

The purpose of this proceeding was:

- (a) to provide Union’s calculation of its 2008 utility earnings for the purposes of earnings sharing pursuant to Section 10.1 of the IR Settlement Agreement. Section 10.1 of the IR Settlement Agreement provides:

*“If in any calendar year Union’s actual utility return on equity is more than 200 basis points over the amount calculated annually by the application of the Board’s ROE formula in any year of the IR plan, then such excess earnings will be shared 50/50 between Union and its customers. For the purposes of the earnings sharing mechanism, Union shall calculate its earnings using the regulatory rules prescribed by the Board from time to time, and shall not make any material changes in accounting practices that have the effect of reducing utility earnings. All revenues that would be included in revenues in a cost of service application shall be included in the earnings calculation and only those expenses (whether operating or capital) that would be allowable as deductions from earnings in a cost of service application shall be included in the earnings calculation.*”

*Parties acknowledge that the DSM related Shared Savings Mechanism (SSM) and Lost Revenue Adjustment Mechanism (LRAM) and storage related deferral accounts are outside of the earnings sharing mechanism identified above.”*

- (b) to consider Union's application pursuant to section 9.1 of the IR Settlement Agreement.

Section 9.1 provides:

*"The parties agree that if there is a 300 basis point or greater variance in weather normalized utility earnings above or below the amount calculated annually by the application of the Board's ROE formula in any year of the IR plan, Union will file an application to the Board, with appropriate supporting evidence, for a review of the price cap mechanism. During the course of that review, the Board may be asked to determine whether it is appropriate to continue the price cap mechanism for future years and, if so, with or without modifications. All parties including Union will be free to take such positions as they consider appropriate with respect to that application, including without limitation; a) proposing that a component of the IR Plan, including the X factor, be adjusted, b) proposing that IR plan be terminated, and c) taking any other positions as the party may consider relevant and the Board agrees to hear. Union shall file such application as soon as reasonably possible in the year following the year in which the over earnings threshold is met, unless all parties to this Agreement agree otherwise at that time."*

It is acknowledged and agreed that none of the provisions of this Agreement is severable. If the Board does not, prior to the commencement of the hearing of the evidence in EB-2009-0101, accept the Agreement in its entirety, there is no Agreement (unless the parties to the Agreement agree that any portion of the Agreement the Board does accept may continue as a valid agreement).

It is further acknowledged and agreed that parties to the Agreement will not withdraw from this Agreement under any circumstances except as provided under Rule 32.05 of the Board's Rules of Practice and Procedure.

The participants in the Settlement Conference agree that all positions, negotiations and discussion of any kind whatsoever which took place during the Settlement Conference and all documents exchanged during the conference which were prepared to facilitate settlement discussions are strictly confidential and without prejudice, and inadmissible unless relevant to the resolution of any ambiguity that subsequently arises with respect to the interpretation of any provision of this Agreement.

The role adopted by Board Staff in Settlement Conferences is set out on page 5 of the Board's Settlement Conference Guidelines. Although Board Staff is not a party to this Agreement, as noted in the Guidelines, "Board Staff who participate in the settlement conference are bound by the same confidentiality standards that apply to parties to the proceeding".

The evidence supporting the Agreement is set out in the Agreement. Abbreviations will be used when identifying exhibit references. For example, Exhibit B1, Tab 4, Schedule 1, Page 1 will be referred to as B1/T4/S1/p1. There are Appendices to the Agreement which provide further evidentiary support. The structure and presentation of the settled issues is consistent with settlement agreements which have been accepted by the Board in prior cases. The parties agree that this Agreement and the Appendices form part of the record in the proceeding.

In Procedural Order No. 1 in this proceeding, the Board granted intervenor status to all intervenors of record in EB-2007-0606 and EB-2008-0220. The following entities participated in the Settlement Conference:

- Building Owners and Managers Association of the Greater Toronto Area ("BOMA")
- Canadian Manufacturers & Exporters ("CME")
- Consumers Council of Canada ("CCC")
- Industrial Gas Users Association ("IGUA")
- City of Kitchener ("Kitchener")
- London Property Management Association ("LPMA")
- School Energy Coalition ("SEC")
- The City of Timmins ("Timmins")
- Union Gas Limited ("Union")
- Vulnerable Energy Consumers Coalition ("VECC")
- Wholesale Gas Services Purchasers Group ("WGSPG")
- Energy Probe ("EP")
- Federation of Rental-housing Providers of Ontario ("FRPO")

The parties to this Agreement include all of the above noted entities except IGUA (the "parties"). The parties to this Agreement represent major stakeholders and constituencies with an interest in Union's rates.

The parties to this settlement encourage the Board to accept this Agreement in its entirety. The parties to this Agreement also support finalization of the rate order in these proceedings to enable implementation of this Agreement in Union's July 1 QRAM.

### **1. Earnings Sharing Calculation and Off Ramp Amendments**

(Complete Settlement)

The parties agree that, upon approval of this Agreement by the Board, the IR Settlement Agreement shall, for the entire IR term, 2008 to 2012, be amended as follows (for the assistance of parties and the Board, the agreed upon amendments to the IR Settlement Agreement are blacklined below):

9.1 [Section 9.1 of the IR Settlement Agreement shall be deleted in its entirety.]

10.1 The parties agree that there will be an earnings sharing mechanism, based on actual utility earnings. If in any calendar year Union's actual utility return on equity is more than 200 basis points but not more than 300 basis points over the amount calculated annually by the application of the Board's ROE formula in any year of the IR plan, then such excess earnings will be shared 50/50 between Union and its customers. In addition to the above, if in any calendar year Union's actual utility return on equity is more than 300 basis points over the amount calculated annually by the application of the Board's ROE formula in any year of the IR plan, then such earnings in excess of 300 basis points will be shared 90/10 between customers and Union (i.e., customers will be credited 90% and Union will be credited 10%). For the purposes of the earnings sharing mechanism, Union shall calculate its earnings using the regulatory rules prescribed by the Board from time to time, and shall not make any material

changes in accounting practices that have the effect of reducing utility earnings. All revenues that would be included in revenues in a cost of service application shall be included in the earnings calculation and only those expenses (whether operating or capital) that would be allowable as deductions from earnings in a cost of service application shall be included in the earnings calculation. For greater clarity, Union's one time accounting adjustment in 2008 to true up an unbilled revenue accrual to reflect Union's current rate structure and billing cycles, in the amount of \$3.6 million, is an adjustment that is excluded from the calculation of actual utility earnings, whereas the use of actual unaccounted for gas volume is an expense that would be recorded in the calculation of actual utility earnings.

The parties believe that these amendments to the Board-approved IR Settlement Agreement are in the public interest. The amendments are intended to modify the IR formula so as to produce rates which are just and reasonable during the IR term. The Agreement:

1. clarifies possible ambiguities in the calculation of earning sharing in section 10.1 of the IR Settlement Agreement arising from the relationship between the use of actual utility earnings and the *proviso* in section 10.1 restricting any adjustments in the calculation of actual utility earnings to those adjustments to actual earnings that would be made in a cost of service filing. Intervenors took the position, for example, that none of the adjustments proposed by Union in the calculation of 2008 actual utility earnings were appropriate. Union took the position that all of its proposed adjustments were in accordance with the IR Settlement Agreement. This Agreement avoids the cost and uncertainty of litigation over these disputes, now and in the future, by resolving which adjustments to the calculation of actual utility earnings, for the purposes of earnings sharing, are appropriate;
2. provides additional potential benefits to customers during the term of the IR plan, 2008 to 2012, in circumstances where Union's actual utility income exceeds the amount

calculated by the application of the Board's ROE formula in any year of the IR plan by over 300 basis points, by crediting 90% of such earnings to customers.<sup>1</sup> The consumer protection afforded by the "off ramp" provision for review in section 9.1 of the IR Settlement Agreement has been replaced with crediting 90% of earnings over the 300 basis point threshold to customers, i.e., Union will have a modest incentive to pursue even greater productivity initiatives and customer bills will go down, all else equal, to the extent Union delivers earnings in excess of the 300 basis point threshold. The parties acknowledge that the elimination of the "off ramp" review in section 9.1 is without prejudice to all rights afforded under section 6.1 (Z Factors) of the IR Settlement Agreement;

3. provides greater certainty and incentive for Union to explore and make investments in productivity improvements during the term of the 2008 to 2012 IR plan;
4. continues to provide for annual reviews during the term of the IR plan during which intervenors will be able to carefully review the reasons and calculation of sharing for all earnings in excess of 200 basis points over the amount calculated annually by the application of the Board's ROE formula in any year of the IR plan.
5. avoids complex, lengthy and highly controversial and contested disputes over the potential for termination of the IR plan and the need for a new full cost of service proceeding. In this case, intervenors took the position, for example, that the proper calculation of weather normalized utility earnings in 2008 was materially in excess of the 300 basis point threshold which gave intervenors the right to seek a review of the IR plan, the consideration of adjustments to the components of the IR plan, including base rates, and the termination of the IR plan and a return to cost of service rates, just as Union would have had the right to take the same position had the company under-earned by an equivalent amount. Union took the position that the IR plan was working as contemplated and producing significant benefits for customers and that the termination of

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<sup>1</sup> Union does not currently forecast exceeding the 300 basis point threshold in 2009 or 2010.

incentive regulation after the first year of the five year plan was premature and inappropriate. Union will be applying in 2012 for 2013 cost of service rebasing in any event; and

6. avoids complex, lengthy and highly controversial and contested disputes over 2007 base rates and the potential for further adjustments to those base rates during the IR plan. For example, intervenors took the position that Union's 2007 normalized utility earnings were materially higher than the forecast available during the period in which the IR Settlement Agreement was negotiated and that adjustments to the IR plan, such as altering the size of the earnings sharing deadband, altering the level of earnings sharing, and adjustments to 2008 earnings sharing and/or to base rates during the IR term could be made to take account of this positive variance. Union took the position that such variances were not relevant to 2008 earnings sharing and that no adjustments to the IR plan or to base rates during the IR term, except those, such as Z factors, expressly contemplated by the IR Settlement Agreement, should be made. This issue involved a number of potentially controversial disputes, including disputes over the appropriate calculation methodology, the extent to which the likelihood of favourable variances, and the extent of those variances, was, or ought to have been, known to all parties when the IR Settlement Agreement was negotiated and whether base rate adjustments of this kind are appropriate during the IR term.

The financial consequences of this Agreement for the calculation of 2008 earnings sharing under the IR Settlement Agreement are set out in Appendix A attached to this Agreement. The adjustments in the Agreement to Union's original proposal are the result of compromise by the agreeing parties of their respective positions on the matters listed above. In all of the circumstances, the parties have agreed to increase the customer share of Union's 2008 earnings from the proposed \$15.2 million to \$34.2 million, as outlined in Appendix A.

Consistent with past practice, the customer portion of the amount calculated in Appendix A shall be allocated to rate classes in proportion to Board approved return on equity as set out in the allocation schedule in Appendix B attached to this Agreement. Of the \$34.2 million customer

share of earnings for 2008, approximately \$19.6 million will be allocated to small volume general service customers and approximately \$3.2 million will be allocated to large volume general service customers. Approximately \$4.7 million will be allocated to the large volume contract customers and approximately \$6.7 million to M12 shippers such as Enbridge Gas Distribution Inc. ("EGD"), Gaz Métropolitain inc. ("GMi"), and TransCanada PipeLines Limited ("TCPL"). Approving the settlement reflected in the Agreement, therefore, will benefit all customers but, in particular, will provide benefits to small volume general service customers.

Evidence References:

1. A/p.9-20, A/p.27-29, A/App. B/S.1, A/App. B/S.2, A/App. B/S.3, A/App. D/S.1, A/App. D/S.2
2. Technical Conference, pp. 19-28, 33-34
3. B/T1/S6, B/T2/S1, B/T2/S3, B/T4/S7, B/T4/S8, B/T5/S3
4. J1.1

UNION GAS LIMITED  
Earnings Sharing Calculation  
Year Ended December 31, 2008

Line No.	Particulars (\$000's)	2008 (a)	Non-Utility Storage (b)	Adjustments (c)	2008 Utility (d)=(a)-(b)+(c)
<b>Operating Revenues:</b>					
1	Operating revenue	\$ 1,869,283	\$ -	\$ (3,654) i	1,865,629
2	Storage & Transportation	243,317	78,230	-	165,087
3	Other	33,818	-	(7,530) ii	26,288
4		<u>2,146,418</u>	<u>78,230</u>	<u>(11,184)</u>	<u>2,057,004</u>
<b>Operating Expenses:</b>					
5	Cost of gas	1,171,320	8,082	-	1,163,238
6	Operating and maintenance expenses	335,115	12,028	(516) iii	322,571
7	Depreciation	185,219	4,966	-	180,253
8	Other financing	-	-	535 iv	535
9	Property and capital taxes	65,895	953	-	64,942
10		<u>1,757,549</u>	<u>26,029</u>	<u>19</u>	<u>1,731,539</u>
11	Earning Before Interest and Taxes	\$ <u>388,869</u>	\$ <u>52,201</u>	\$ <u>(11,203)</u>	\$ <u>325,465</u>
<b>Financial Expenses:</b>					
12	Long-term debt				143,546
13	Unfunded short-term debt				2,805
14					<u>146,351</u>
15	Utility income before income taxes				179,114
16	Income taxes				31,300
17	Preferred dividend requirements				5,088
18	Utility earnings				<u>142,726</u>
19	Long term storage premium subsidy (after tax)				10,676
20	Short term storage premium subsidy (after tax)				7,484
21					<u>18,160</u>
22	Earnings subject to sharing				\$ <u>160,886</u>
23	Common equity				1,205,196
24	Return on equity (line 22 / line 23)				13.35%
25	Benchmark return on equity				10.81%
26	50% Earnings sharing %				1.00%
27	90% Earnings sharing to ratepayer % (line 24 - line 25 - line 26)				1.54%
28	50% Earnings sharing \$ (line 26 x line 23 x 50%)				6,026
29	90% Earnings sharing to ratepayer \$ (line 27 x line 23 x 90%)				16,697
30	Total earnings sharing \$ (line 28 + line 29)				<u>22,723</u>
31	Pre-tax earnings sharing (line 30 / (1 minus tax rate))				\$ <u>34,170</u>

Notes:

i) Accounting adjustment

ii) Shared Savings Mechanism

iii) Donations (394)  
EB-2008-0304 costs (122)  
(516)

iv) Customer deposit interest

UNION GAS LIMITED  
Allocation of 2008 Earning Sharing to Rate Classes

Line No.	Particulars	Rate Class	C2007 Return on Equity Allocation (1) (\$000's) (a)	2008 Earning Sharing (\$000's) (b)
<u>Northern &amp; Eastern Operations Area</u>				
1	Small Volume General Firm Service	01	44,549	(5,867)
2	Large Volume General Firm Service	10	8,234	(1,084)
3	Medium Volume Firm Service	20	4,263	(561)
4	Large Volume High Load Factor Firm Service	100	5,641	(743)
5	Large Volume Interruptible Service	25	1,913	(252)
6	Wholesale Transportation Service	77	8	(1)
7	Total Northern & Eastern Operations Area		<u>64,608</u>	<u>(8,509)</u>
<u>Southern Operations Area</u>				
8	Small Volume General Service Rate	M1	104,130	(13,715)
9	Large Volume General Service Rate	M2	15,828	(2,085)
10	Firm Industrial and Commercial Contract Rate	M4	4,220	(556)
11	Interruptible Industrial & Commercial Contract Rate	M5A	2,587	(341)
12	Special Large Volume Industrial & Commercial Contract Rate	M7	2,617	(345)
13	Large Wholesale Service Rate	M9	219	(29)
14	Small Wholesale Service Rate	M10	10	(1)
15	S & T Rates for Contract Carriage Customers	T1	12,835	(1,691)
16	S & T Rates for Contract Carriage Customers	T3	1,546	(204)
<u>Storage and Transportation</u>				
17	Cross Franchise Transportation Rates	C1	186	(24)
18	Storage & Transportation Rates	M12	50,557	(6,659)
19	Transportation of Locally Produced Gas	M13	39	(5)
20	Storage & Transportation Services - Transportation Charges	M16	55	(7)
21	Total Southern Operations Area		<u>194,830</u>	<u>(25,661)</u>
22	Total		<u>259,438</u>	<u>(34,170) (2)</u>

Notes:

(1) Allocated costs per 2007 Decision in EB-2005-0520

(2) Earning Sharing balance for Disposition as per EB-2009-0101, Settlement Agreement, Appendix A



Ontario Energy  
Board

Commission de l'Énergie  
de l'Ontario



**RP-1999-0017**

IN THE MATTER OF AN APPLICATION BY

**UNION GAS LIMITED**

FOR RATES FOR FISCAL 2000 - 2004,  
PERFORMANCE BASED REGULATION, UNBUNDLING OF STORAGE  
AND UPSTREAM TRANSPORTATION SERVICES

**DECISION WITH REASONS** Volume 1

2001 July 21

term storage premium deferral account shall not be included in earnings to which the sharing mechanism is applied.

2.557 The Board recognizes that the actual revenues to which earnings sharing shall apply will have to be adjusted to remove the revenue effect of any rate riders which may exist from time to time in order to provide credit to customers related to over-collection in rates in past periods or to collect amounts due to the Company in respect of under-collection in past periods. Design of rate riders themselves, in the future after earnings sharing has been implemented, will have to take into account whether the over-collection or under-collection was subject to sharing; the rate rider should be based on the "net" amount. Details of these mechanisms will be worked out through the first few customer review processes and Board approvals.

2.558 Because no party has brought forward to the Board a specific mechanism for implementation of an ESM, the Board directs the Company to bring forward through the customer review process proposals for the mechanism for sharing excess earnings or recovering under earnings from year to year.

#### 2.7.6 Off-Ramp(s)

2.559 Union proposed that in the event that the Company suffers a serious decline in its financial position, its PBR plan should be automatically re-examined by the Board. This proposed off-ramp was only with respect to a shortfall in revenues. Union submitted that customers were sufficiently protected from the possibility of excess revenues.

#### *Positions of the Intervenors - Off-Ramps*

2.560 CAC argued that, in the absence of an earnings sharing mechanism, the plan should include an off-ramp that would be invoked in the event that Union's earnings significantly exceed the Board-approved ROE. CAC cited Mr. Johnson's discussion of symmetrical off-ramps, triggered if actual ROE is above or below approved ROE by 150 to 200 basis points.

2.566 VECC submitted that an off-ramp for excessive earnings be added to the plan. VECC also argued that unforeseen changes in the Company functions that impact significantly on the operation of the price cap should also trigger an off-ramp.

2.567 Alliance, AMO, Comsatec, Enbridge, Enron, Fullerton, GEC, HVAC, OAPPA, Pollution Probe, did not comment.

2.568 CENGAS supported Union's proposal.

*Union's Reply - Off-Ramps*

2.569 Union's view was that "the plan has well specified parameters based on a widely accepted theoretical framework" and it is not possible to get "an undesirable or bad outcome that would warrant earnings sharing." Union also noted that it is not unheard of or considered excessive under cost-of-service regulation for regulated utilities to achieve returns 200 basis points in excess of the approved ROE.

*Board Findings - Off-Ramps*

2.570 The Board agrees that Union should request relief in the event that the Company experiences serious financial difficulty. However, the Board expects that if the PBR mechanism incentives work as intended, Union would also achieve in some years earnings above the Board-approved target ROE. In this regard, the Board would be concerned if supernormal profits were achieved on a sustained basis because it might well indicate that the parameters of the PBR plan had not been appropriately set.

2.571 In the Board's view, a flexible approach with a balanced tolerance for variances in return is necessary at least during the initial PBR plan period and the ESM provides symmetric protection for the customer and the utility.

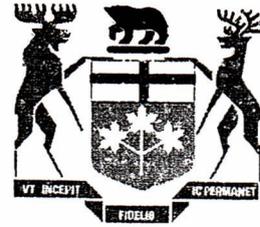
- 2.572 The Board accepts in principle that an off-ramp triggered in the event of serious financial difficulty is reasonable. The Board also agrees that if there is an off-ramp for under-earning there should also be an offsetting off-ramp for earnings unduly in excess of the Board-approved target ROE.
- 2.573 The Board will institute a symmetric off-ramp with an unspecified trigger should the Company, in the Board's view, experience a return unduly in excess of the Board-approved target ROE. The Board expects Union during the trial PBR plan period to notify the Board at the earliest possible opportunity when Union becomes aware of the potential for its earnings position in any given year to be outside of the deadband provided for in the ESM. Although the Board will monitor this situation, it is not the Board's intention that exceeding the deadband would automatically trigger an off-ramp.
- 2.574 The Board would be in a better position to establish a more definitive measurement of the trigger in a second generation PBR plan.

**2.8 SYSTEM EXPANSION AND SERVICE QUALITY INDICATORS**

**2.8.1 System Expansion Plans and Customer Connection Policies under PBR**

- 2.575 Union proposed no changes to existing policies with respect to system expansion and customer connection. Union indicated it would continue to ensure that the system expansion guidelines in EBO 188 were met: individual projects would have to attain a minimum profitability index of 0.8, and the total portfolio would have to maintain a profitability index of 1.0. Union asserted that it would not require a contribution in aid of construction that would raise any project's profitability index above 1.0.





Ontario

# **Natural Gas Regulation in Ontario: A Renewed Policy Framework**

**Report on the Ontario Energy Board  
Natural Gas Forum**

**March 30, 2005**

The Board is of the view that a plan should not be reopened during its term except for the most compelling reasons. Off-ramps are addressed below.

### **Off-Ramps, Z-Factors and Deferral or Variance Accounts**

Various mechanisms can be established as part of the overall ratemaking framework, but designed to operate outside the plan itself. An *off-ramp* is a pre-defined set of conditions under which the plan would be terminated before its end date, usually because of some unforeseen event. A *z-factor* provides for a non-routine rate adjustment intended to safeguard customers and the utility against unexpected events outside of management control. *Deferral accounts* are formalized accounts that track an amount that cannot be forecast. *Variance accounts* are formalized accounts that track a variance around a forecast. These mechanisms are often called risk-mitigation tools, as they create a regulatory “buffer” against unforeseen circumstances.

### **Stakeholders’ Views**

Most stakeholders advocated limits on the use of off-ramps, z-factors and deferral or variance accounts. In their view, these mechanisms inappropriately mitigate the utility’s risk in an incentive-based system. In general, customer groups would like to see utilities assume more risk by consenting to PBR agreements that eliminate deferral or variance accounts, as well as any side agreements that shelter the utility from unforeseen events. It is recognized that a balance exists between eliminating these mechanisms and allowing shareholders to reap the benefits of good performance. Striking this balance was viewed as more in keeping with the objectives of incentive-based ratemaking.

Union, on the other hand, argued that off-ramps are designed to protect both customers and the utility, and that customers benefit from being served by a financially viable utility. In Union’s trial PBR, off-ramps were restricted to a serious decline or significant improvement in Union’s financial position. Enbridge’s view was that deferral or variance accounts and z-factors provide justifiable regulatory relief from cost elements beyond the control of management.

### **The Board's Conclusions**

The Board's view of off-ramps, z-factors and deferral or variable accounts is guided by the need for an appropriate balance of risks and rewards in the incentive regulation model. As stated earlier, the Board believes that it is appropriate for the utility's shareholders to retain all earnings during the plan's period. The Board believes that this is a very strong incentive. The Board also believes that, as a balancing factor, the utility should assume an appropriate level of business and financial risk.

*In the Board's view, an appropriate balance of risk and reward in an IR framework will result in reduced reliance on deferral or variance accounts, and reliance on off-ramps or z-factors in limited, well-defined and well-justified cases only.*

### **Service Quality Monitoring**

When a regulated utility seeks cost-saving (efficiency) initiatives under an incentive plan, there is a danger that the quality of service experienced by its customers will suffer. The Board has identified appropriate quality of service as one of its criteria for the ratemaking framework. Service quality indicators (SQIs) have been used in Ontario, but they have been limited to measures such as telephone response time, emergency response and pipeline corrosion surveys. The issue before the Board is how a service quality framework should be developed and regulated.

### **Stakeholders' Views**

Stakeholders generally agreed that quality of service is an important matter. Union suggested that SQIs should relate to those aspects of the utility's service that are important to customers, and that SQI targets should be derived from the historical performance levels of the utility. Enbridge also generally supported SQIs, noting that they provide assurance that operating efficiencies are not achieved at the expense of either customer service or the safe operation of the distribution system.

Union maintained that performance rewards and penalties would be inappropriate. In its view, SQIs are intended to ensure that minimum standards are maintained in an



Ontario Energy Board



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# Report of the Board

on 3<sup>rd</sup> Generation Incentive Regulation for  
Ontario's Electricity Distributors

July 14, 2008

**Distributors are expected to report events to the Board promptly and apply to the Board for any amounts claimed under Z-factor treatment with the next rate application.** This will permit the Board and any affected distributor to address extraordinary events in a timely manner. Subsequently, the Board may review and prospectively adjust the amounts claimed under Z-factor treatment.

The Board expects that any application for a Z-factor will be accompanied by a clear demonstration that the management of the distributor could not have been able to plan and budget for the event and that the harm caused by extraordinary events is genuinely incremental to their experience or reasonable expectations.

The Appendix outlines the detailed requirements as they apply to 3<sup>rd</sup> Generation IR.

## **2.7 Off-ramps**

An off-ramp is based on a pre-defined set of conditions under which the IR plan would be terminated or modified before its normal end-of-term date, usually because of extreme events that cannot be effectively addressed, or that should not be addressed, through Z-factor treatment or some other IR mechanism such as earnings sharing.

For the 2<sup>nd</sup> Generation IR mechanism, there are limited adjustments available to distributors. Therefore, an off-ramp is available where these adjustments proved insufficient for specific cost pressures (e.g., additional capital investment). Where this is the case, distributors are expected to file a comprehensive cost of service application and not to rely on the simplified filing requirements for the incentive mechanism.

### ***Issues and Options Raised in Consultation***

The Discussion Paper invited comment on a pre-defined off-ramp associated with excessive over or under earnings. At the May 6, 2008 stakeholder meeting, and in

response to participant comments received as summarized below, staff proposed a less prescriptive approach in which a review may be initiated on a case-by-case basis on application.

While some participants supported the pre-defined off-ramp associated with excessive over or under earnings, others expressed the view that the use of off-ramps should be determined on a case-by-case basis where a distributor brings forward an application.

Some distributors recommended that the use of off-ramps be determined on a case-by-case basis where a distributor brings forward an application that proposes modifications to the adjustment mechanism or where the distributor is seeking a cost of service rebasing. One participant representing a ratepayer group also suggested that the distributor, its ratepayers, or Board staff should be able to invoke an off-ramp, and that the goal of providing for the off-ramp application should be to ensure that the IR plan and the distributor's circumstances are reviewed, not necessarily changed. In response, another participant stated it could not support this proposal because intervenors do not have access to the timely and detailed information needed to determine if a distributor should be compelled to come before the Board and explain why the IR plan should be terminated or continued.

### ***Policy and Rationale***

The Board has determined that the 3<sup>rd</sup> Generation IR plan will include a trigger mechanism with an **annual ROE dead band of  $\pm 300$  basis points**. **When a distributor performs outside of this earnings dead band, a regulatory review may be initiated**. In support of this approach, a distributor will be required make a report to the Board no later than 60 days after the company's receipt of its annual audited financial statements, in the event that the distributor falls short of or exceeds its ROE by 300 basis points. The report will be reviewed to determine if further action by the Board is warranted. Any such review would be prospective and could result in modifications to the IR plan, a termination of the IR plan or the continuation of the IR plan.



# THE LAW OF CONTRACT IN CANADA

by

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### 3. Innocent misrepresentation

#### (a) At common law and in equity

Statements which mislead another contracting party may not be made with the kind of intent, previously described, that results in a finding of fraud. Such "innocent" misrepresentations may be made negligently or in circumstances which do not substantiate an allegation of negligence. So far as the law of contract is concerned, there is no reason for distinguishing between negligent and non-negligent misrepresentations, where fraud is absent. However, a negligently made misrepresentation may result in tort liability for damages. For present purposes, therefore, a distinction should be made between a negligent misrepresentation and what will be termed a "pure", *i.e.*, non-negligent, innocent misrepresentation. Two important features of non-negligent, innocent misrepresentation must be acknowledged. First of all, there is a clear distinction between statements which are intended to be, and are regarded as being terms of the contract, and statements which are not terms but merely inducements to the making of the contract. Second, there is a difference between the approach at common law and the attitude of equity towards innocent misrepresentation.

At common law an innocent, non-negligent misrepresentation would not, and still does not entitle the victim to any relief unless the statement concerned can be regarded as constituting a term of the contract. If the statement can be regarded as more than an assertion but as a definite part of the bargain, that is, as one of the promises made by one party to get the consent of the other, then it will be a term.<sup>77</sup> Its exact status is another matter, and one upon which the nature of the victim's remedy will depend. In such instances the contract is perfectly valid, though there may have been a breach which justified some sort of remedial action. The injured party may be able to repudiate the contract and claim damages for breach, or he may be restricted to a claim for damages, or to the return of his money on the basis of failure of consideration.<sup>78</sup> He cannot allege that the contract is bad and liable to be avoided on the ground of misrepresentation. At common law, it was and remains of crucial importance to determine the precise juridical nature of a statement, assertion, or representation made by one party to another. This is a matter of construction.<sup>79</sup> Nor is it an easy matter.<sup>80</sup> In one curious case, *Hurt v. Keroack*<sup>81</sup> a statement that there were no bed bugs in a rooming house that was being sold was held to be an innocent misrepresentation, not a term in the contract, even though it might have been thought that this was an essential part of the condition of the premises rather than a mere inducement to make the contract. The task of distinguishing one sort of statement from another is made imperative by the state of the law under which, as

77 *Heilbut, Symons & Co. v. Buckleton*, [1913] A.C. 30 (H.L.).

78 The passage from "... there is a clear distinction between statements which are intended to be" to here was quoted by Dawson J. in *Fitzpatrick v. Estevan Credit Union* (2003), 243 Sask. R. 54 at 68 (Sask. Q.B.).

79 Below, pp. 439-440.

80 See, *e.g.*, the different ways in which the various courts interpreted the same set of facts in *Franz v. Hansen*, [1917] 3 W.W.R. 77 (Alta. C.A.); reversed [1918] 2 W.W.R. 40 (S.C.C.); leave to appeal to Privy Council refused (1918), 57 S.C.R. vii (S.C.C.).

81 [1943] 1 W.W.R. 715 (Man. C.A.).

was pointed out in *Paproski v. Neuman*,<sup>82</sup> it is only where the innocent misrepresentation does not constitute a term of the contract that the representee is limited to an action to avoid the contract.

Here is the vital point. Where what has been made is a "pure" innocent misrepresentation, that is, a non-negligent misrepresentation, then, in equity, the victim is entitled to rescind the contract, in other words to repudiate his original and apparent consent.<sup>83</sup> For example, in *Northwest Territories (Commissioner) v. Portz*,<sup>84</sup> the failure of the government to disclose facts relating to a certain loan to a company, which led to the plaintiff's giving surety on a guarantee of the loan, was an innocent misrepresentation. Therefore, the plaintiff was able to avoid liability on the guarantee for the loan. The victim of such a misrepresentation may also be allowed something by way of an indemnity to restore him to the position in which he was prior to the making of the contract,<sup>85</sup> including the restitution of benefits obtained through the contract.<sup>86</sup> He will not be allowed to claim damages in respect of any loss he may allege has resulted from the deception.<sup>87</sup> For damages to be awarded, the representation must be fraudulent, or it must constitute a term, or there must be negligence constituting a breach of duty, and resulting in tort liability.<sup>88</sup>

### (b) Operative innocent misrepresentation and its effects

For an innocent misrepresentation to be operative in this way, as was explained in *Alberta North West Lumber Co. v. Lewis*,<sup>89</sup> following the leading English case of

82 (1956), 20 W.W.R. 294 at 299 (Sask. C.A.). See e.g., *Walton v. Landstock Invs. Ltd.* (1976), 72 D.L.R. (3d) 195 (Ont. C.A.).

83 On the correct use of "rescission", see *Andronyk v. Williams* (1986), 21 D.L.R. (4th) 557 at 564-565 (Man. C.A.) per O'Sullivan J.A.; leave to appeal to S.C.C. refused (1986), 42 Man. R. (2d) 242n (S.C.C.). Note the effect of affirmation. Partial rescission cannot be ordered: *Kingu v. Walmar Ventures Ltd.* (1986), 38 C.C.L.T. 51 at 57-58 (B.C.C.A.), where the requirements for rescission for innocent misrepresentation are set out.

84 [1996] 3 W.W.R. 94 (N.W.T.S.C.).

85 *Fleischhaker v. Fort Garry Agencies Ltd.* (1957), 23 W.W.R. 390 (Man. C.A.).

86 *Walters v. Capron* (1964), 50 W.W.R. 444 (B.C.S.C.).

87 *Kooiman v. Nichols* (1991), 75 Man. R. (2d) 298 (Man. C.A.); compare *Irvine v. Thornhill* (1987), 49 M.V.R. 270 (Ont. Prov. Ct.). But see the suggestion to the contrary in *Gill v. Kittler* (1983), 21 B.L.R. 108 (Alta. Q.B.).

88 *Walter Cabott Const. Ltd. v. R.* (1974), 44 D.L.R. (3d) 82 (Fed. T.D.); reversed in part (1975), 69 D.L.R. (3d) 542 (Fed. C.A.); *Congiusti v. Guriel* (1989), 34 O.A.C. 306 (Ont. C.A.); *TWT Enterprises Ltd. v. Westgreen Devs. (North) Ltd.* (1991), 78 Alta. L.R. (2d) 62 (Alta. Q.B.); affirmed (1992), 3 Alta. L.R. (3d) 124 (Alta. C.A.); *Lafferty v. Gurylo* (1991), 17 R.P.R. (2d) 250 (Ont. Gen. Div.); *Roussel v. Saunders* (1990), 85 Nfld. & P.E.I.R. 228 (Nfld. T.D.); *Pizzo v. Crory* (1986), 71 N.S.R. (2d) 419 (N.S.T.D.); *Kingu v. Walmar Ventures Ltd.*, above, note 80.

Another possibility is that the statement can be treated as a "collateral warranty", on which see, below, pp. 448-451. For examples, see *Cancarp Const. Ltd. v. P.D.I. Structures (1982) Inc.* (1987), 62 O.R. (2d) 161 (Ont. H.C.); *Bresson v. Ward* (1987), 79 N.S.R. (2d) 156 (N.S. Co. Ct.); *Jetaway Investments Ltd. v. Salah* (1986), 73 N.S.R. (2d) 12 (N.S.T.D.); *Dellelce Const. & Equipment v. Portec Inc.* (1990), 73 O.R. (2d) 396 (Ont. H.C.); additional reasons at (1990), 73 O.R. (2d) 396 at 440 (Ont. H.C.). Note also the possibility of an action in equity based upon breach of a fiduciary duty: see *Canson Enterprises Ltd. v. Boughton & Co.* (1992), 85 D.L.R. (4th) 129 (S.C.C.), discussing the appropriate measure of damages in such a case.

89 [1917] 3 W.W.R. 1007 (B.C.C.A.).

*Kennedy v. Royal Mail Co. of Panama*,<sup>90</sup> there must be, generally speaking, a substantial difference between what the victim bargained for and what he obtained, such as to constitute a failure of consideration.<sup>91</sup> Hence in *Komarniski v. Marien*<sup>92</sup> rescission was not obtained. The land purchased was represented as covering 4.8 acres. In fact it was only 2.6 acres. The misrepresentation was innocent, not fraudulent. The purchaser had not obtained something different from what he had bargained for in the contract. The difference related to the *size* of the land, not the land itself.<sup>93</sup> The party alleging innocent misrepresentation, producing a mistake, must have been seriously inconvenienced by the mistake in question.<sup>94</sup> Another way of expressing this is to speak in terms of material inducement that makes a mistake or misapprehension affecting the expectation of the party.<sup>95</sup> In such instances the injured party is entitled, in equity, to be restored to the position he would have been in had he not been affected by the innocent misrepresentation.<sup>96</sup> *Restitutio in integrum* must be possible.<sup>97</sup> However, it was said by Dysart J. in *Hines v. McCallum*<sup>98</sup> in 1925, that the tendency of modern cases was to relax the strictness of the notion of *restitutio in integrum*, such that as long as substantial restitution is possible it should be granted

90 (1867), L.R. 2 Q.B. 580; compare above, p. 267.

- 91 *Caldwell v. Cockshutt Plow Co.* (1913), 18 D.L.R. 722 at 734 (Ont. C.A.); *Northey Mfg. Co. v. Sanders* (1899), 31 O.R. 475 at 478 (Ont. Div. Ct.). See also the judgment of Sinclair J.A. in *Alessio v. Jovica* (1974), 42 D.L.R. (3d) 242 at 256-257 (Alta. C.A.), which refers to the doctrine of *error in substantialibus*; the judgment of Lieberman J. in *Northern & Central Gas Corp. v. Hillcrest Collieries*; *Byron Creek Collieries Ltd. v. Coleman Collieries Ltd.*, [1976] 1 W.W.R. 481 at 553-554 (Alta. T.D.); *Gronau v. Schlamp Invs. Ltd.*, [1975] W.W.D. 47 (Man. Q.B.). Note that in the *Alessio* case there was a difference of opinion between the majority and Allen J.A. (dissenting) as to whether the lack of sewage facilities made the land sufficiently different to warrant rescission, even though the land was zoned as it had been stated to be by the vendor and his agent. But see below, as to the doctrine of *error in substantialibus*. Reference to this sentence was made by Bensler J. in *Lastiwka v. Ocom Systems Ltd.* (2000), 264 A.R. 112 (Alta. Q.B.). It was quoted by Dawson J. in *Fitzpatrick v. Estevan Credit Union* (2003), 243 Sask. R. 54 at 69 (Sask. Q.B.).
- 92 [1979] 4 W.W.R. 267 (Sask. Q.B.); compare *John Bosworth Ltd. v. Pro. Syndicated Devs. Ltd.* (1979), 24 O.R. (2d) 97 (Ont. H.C.).
- 93 But how does this equate with the doctrine of *error in substantialibus*? See, e.g., *Hyrsky v. Smith* (1969), 5 D.L.R. (3d) 385 (Ont. H.C.); compare, below, pp. 299-301.
- 94 *Field v. Zien*, [1963] S.C.R. 632 (S.C.C.).
- 95 *449576 Ont. Ltd. v. Bogojewski* (1984), 9 D.L.R. (4th) 109 (Ont. H.C.); see, e.g., *C.I.B.C. v. Kennedy* (1988), 50 R.P.R. (2d) 298 (B.C.S.C.).
- 96 *Newbigging v. Adam* (1886), 34 Ch. D. 582 at 592-593 (C.A.) *per* Bowen L.J.; affirmed (1888), 13 App. Cas. 308 (H.L.); *Corbeil v. Appell*, [1950] 1 D.L.R. 159 (B.C.S.C.). Or to refuse to perform: *W.W. Distributors & Co. v. Thorsteinsson* (1960), 33 W.W.R. 669 (Man. C.A.). But rescission will be refused if there has been undue delay: *Terri-Grant Enterprises Inc. v. 82506 Can. Ltd.* (1986), 47 Sask. R. 63 (Sask. Q.B.).
- 97 There was no problem about a guarantor's rescission of a guarantee resulting from such a misrepresentation: *C.I.B.C. v. Larsen*, [1983] 5 W.W.R. 179 (B.C.C.A.). But rescission was not available where the plaintiff could not return benefits he had received: *Terri-Grant Enterprises Inc. v. 82506 Can. Ltd.*, above, note 96. See also *Samardziya v. Judd* (1986), 40 Man. R. (2d) 253 (Man. Q.B.).
- 98 [1925] 1 W.W.R. 838 (Man. K.B.). Is this still true today? Compare *Brown & Root Services Corp. v. Aerotech Herman Nelson Inc.* (2004), 238 D.L.R. (4th) 594 (Man. C.A.). In *Vadasz v. Pioneer Concrete (S.A.) Pty Ltd.* (1995), 130 A.L.R. 570 (Aust. H.C.), the High Court of Australia said that to obtain rescission it must be possible to restore the parties to the *status quo ante*, unless it can be shown that the plaintiff would not have entered into the transaction if he had known the truth (which was not the case here, so rescission was denied): contrast *Cockerill v. Westpac Banking Corp.* (1996), 142 A.L.R. 227 (Aust. Fed. Ct.).

even if strict *restitutio* cannot be made.<sup>99</sup> What must be done, so far as possible, is to indemnify the injured party against obligations or liabilities resulting from the contract which has been rescinded and set aside as a consequence of the innocent misrepresentation. Damages for resultant loss may *not* be awarded.<sup>100</sup> While this may still involve the injured party in some loss, for example, of expected profit, which might be recoverable if he were bringing an action for breach of contract or for fraud, or, possibly, in modern times, for negligence, the maker of a misrepresentation who is guiltless of fraud or the breach of a term of the contract is not to be compelled to make good all loss and so be held responsible in the same way as one who would be liable at common law. The equitable relief is based on freeing the victim from the unfortunate consequences of another's innocent error, not in punishing that innocent party. Hence, the limitations on the kind of relief available.<sup>101</sup>

Limitations have been placed upon the extent to which the victim of an innocent misrepresentation can avoid the contract.<sup>102</sup> It was held by the Supreme Court of Canada,<sup>103</sup> in *Redican v. Nesbitt*,<sup>104</sup> that once a contract was executed, the fact that it was induced by an innocent misrepresentation would not entitle the victim to rescind, if the contract was concerned with real property. This much criticized doctrine may apply only to conveyances of real property<sup>105</sup> and does not apply where the contract concerns a chattel or other personal property.<sup>106</sup> In such instances, at least as long as the claim for rescission is brought within a reasonable time, even if there has been "acceptance" of goods within the meaning of the Sale of Goods Act, there may still be rescission,<sup>107</sup> but no claim for damages.<sup>108</sup> Furthermore, there are

99 The question is what is substantial? See *Thurston v. Streilen*, [1951] 4 D.L.R. 724 (Man. K.B.).

100 *Comeller v. Billinkoff* (1953), 11 W.W.R. 279 (Man. Q.B.); compare the English case of *Whittington v. Seale-Hayne* (1900), 82 LT. 49.

101 But the remedy is not limited by any neglect on the part of the victim. As with fraud, his failure to take care of himself will not deprive him of an otherwise available remedy: *Comeller v. Billinkoff*, above; *Bevan v. Anderson & Peace River Gravel Co.* (1957), 23 W.W.R. 508 (Alta. S.C.); *Gill v. Kittler* (1983), 21 B.L.R. 108 (Alta. Q.B.). However, the right to rescind for innocent misrepresentation may be lost by affirmation of the contract by the victim: *Panzer v. Zeifman* (1978), 88 D.L.R. (3d) 131 (Ont. C.A.). Or by undue delay: above, note 96.

102 In England, the law was changed by the Misrepresentation Act, 1967 (U.K.), c. 7.

103 Following the English decisions of *Seddon v. North Eastern Salt Co.*, [1905] 1 Ch. 326; *Angel v. Jay*, [1911] 1 K.B. 666; see now the Misrepresentation Act, 1967 (U.K.), c. 7, s. 1(b).

104 [1924] S.C.R. 135 (S.C.C.), reaffirmed by Judson J. in *Shortt v. MacLennan*, [1959] S.C.R. 3 (S.C.C.). Compare *Panzer v. Zeifman*, above, note 101. See also *Abraham v. Wingate Properties Ltd.* (1984), 30 Man. R. (2d) 309 (Man. Q.B.); varied [1986] 1 W.W.R. 568 (Man. C.A.); varied on reconsideration [1986] 2 W.W.R. 568 (Man. C.A.).

105 And may be explained by the doctrine of "merger": on which see below, p. 574.

106 Bridge, "Misrepresentation and Merger: Sale of Land Principles and Sale of Goods Contracts", (1986), 20 U.B.C. L. Rev. 53.

107 See, e.g., *Ennis v. Klassen* (1990), 70 D.L.R. (4th) 321 (Man. C.A.). But not after two years and driving the vehicle for 30,000 kilometres after the discovery that the odometer had been tampered with: *Vargek v. Okun* (1996), 108 Man. R. (2d) 284 (Man. Q.B.); additional reasons at (1996), 108 Man. R. (2d) 284 at 288 (Man. Q.B.); reversed (1997), 118 Man. R. (2d) 35 (Man. C.A.).

108 There may be a claim for damages even after a contract is executed or performed, since execution or performance is a relevant but not decisive factor to be taken into account, according to Cumming J.A. in *S-244 Holdings Ltd. v. Seymour Building Systems Ltd.*, [1994] 8 W.W.R. 185 at 188-190 (B.C.C.A.), where the plaintiff obtained rescission and an award based on *quantum meruit* for work done (not damages).

cases in Canada, going back to the Supreme Court's decision in 1898 in *Cole v. Pope*,<sup>109</sup> which hold that even where the contract is a conveyance and has been executed, if the victim gets nothing of what he bargained for in the contract, and there has been a total failure of consideration, he may still rescind. The rationale for not applying the doctrine adopted by the Supreme Court of Canada in *Redican v. Nesbitt* is the idea of *error in substantialibus*.<sup>110</sup> As it was put in *Adams v. Canadian Co-Operative Implements Ltd.*,<sup>111</sup> ". . . rescission is a remedy available for innocent misrepresentation even in the case of an executed contract, where the resulting error is an error in substantialibus, that is, an error as to substantial matters." In that case the plaintiff, a farmer, bought a new haystacker from the defendants, who represented that it would work with the 54 r.p.m. power take-off on the plaintiff's own tractor. In fact the haystacker would only operate on a 1000 r.p.m. power take-off. Hence, it was useless for the plaintiff. It was held that the contract could be rescinded for innocent misrepresentation and the purchase price could be recovered. However, the problem in all such cases is whether the error in question is sufficiently material to render what the plaintiff obtained under the contract substantially different in nature from what he believed he was going to obtain. In *Komarniski v. Marien*,<sup>112</sup> for instance, the difference in area of the purchased land did not amount to such a substantial difference as to permit the invocation of the notion of *error in substantialibus*. To the contrary was the earlier decision of Lief J. in *Hyrsky v. Smith*.<sup>113</sup>

The notion of *error in substantialibus*, as developed by Canadian courts, seems in conflict with classical ideas of fundamental mistake in two ways.<sup>114</sup> First of all, it appears that sometimes even where there is only a partial failure of consideration, rescission may be permitted on this basis (or some modification of the original contract), where, under common-law ideas of mistake this should not be possible in the absence of fraud. Second, the kind of mistake induced by the relevant innocent misrepresentation may relate only to the quality of the subject-matter of the contract, not its identity or existence. Again to permit such errors to support rescission is contrary to the common-law doctrine of fundamental mistake.<sup>115</sup> *Error in substantialibus* as a ground for upsetting a completed transaction may be acceptable, however, despite its incursion upon basic conceptions of mistake, because it does provide a means of escaping from the unfortunate consequences of the doctrine about executed contracts and because it does not *per se* determine the contract, but only allows

109 (1898), 29 S.C.R. 291 (S.C.C.); see also *Ruscheinsky v. A. Spencer Co.*, [1948] 2 W.W.R. 392 (B.C.S.C.). Compare *O'Flaherty v. McKinlay*, [1953] 2 D.L.R. 514 (Nfld. C.A.); *O'Connor v. Sturgeon Lake Lbr. Co.* (1914), 17 D.L.R. 316 (Sask. S.C.); affirmed (1914), 7 W.W.R. 64 (Sask. C.A.).

110 On which see Fridman "Error in Substantialibus: A Canadian Comedy of Errors" (1978), 65 Can. Bar Rev. 603; compare the comments of Huband J.A. and Twaddle J.A., dissenting, in *Emmis v. Klassen*, above, note 107, at 331-332, 339.

111 (1980), 20 A.R. 533 at 537 (Alta. Q.B.) *per* McFadyen J.

112 Above, note 92. The same was held in *Kingsglen Developments Inc. v. Vitti* (1994), 38 R.P.R. (2d) 247 (Ont. Gen. Div.). The mistake about the lot to be sold did not go to the root of the contract.

113 (1969), 5 D.L.R. (3d) 385 (Ont. H.C.); criticized in Fridman, *loc. cit.*, above, note 110, pp. 616-620.

114 Compare above, p. 249.

115 Above, pp. 244-248.

a court to exercise its equitable discretion to rescind (or modify the terms of the contract) in appropriate circumstances.

The recognition and development of the doctrine of *error in substantialibus*, however, does emphasize the questionable nature of the original limitation of the operation of the equitable notion of rescission for innocent misrepresentation in cases of executed contracts relating to real property.

There is no greater reason for protecting a completed transaction concerning realty than one dealing with personalty. Moreover, once exceptions are permitted the rule is subject to such restriction that it loses much of its force. Indeed, Riley J. of the Supreme Court of Alberta refused to accept and follow the doctrine in *Bevan v. Anderson & Peace River Sand & Gravel Co.*<sup>116</sup> There an innocent misrepresentation was made as to the condition of certain equipment and the prospects of the enterprise about which the parties were contracting. The defendant was entitled to repudiate, that is, to claim rescission, notwithstanding that the contract was executed. This approach, it is suggested, is by far the more logical and acceptable one bearing in mind that rescission, as an equitable remedy, is discretionary, and the protection of innocent third parties who may have acquired rights in the meanwhile, and may be refused if it is impracticable or inequitable in the circumstances. Hence, there is, or should be, no danger that injustice will result to either party or to a stranger from the granting of rescission. To agree with this, however, is not also to agree with the application of the doctrine of *error in substantialibus* to achieve this result. As indicated in an Ontario decision,<sup>117</sup> *error in substantialibus* may not, and perhaps should not be employed over-generously. It would appear to be far better and less harmful a principle to allow the rescission of an executed contract, whatever the nature of the subject-matter, in suitable instances of contracts entered into in consequence of an innocent misrepresentation. That would mean the possibility of rescission unless: (a) *restitutio* was impossible; (b) third parties had acquired legitimate rights; or (c) damages would be a sufficient remedy for the injured party.

#### 4. Non-disclosure

The situations so far discussed have been those in which a positive misstatement has been made. The question has also arisen whether a failure to disclose, without any accompanying misstatement, can ever suffice to found a case of fraudulent or innocent misrepresentation.

A distinction must be made between a failure to disclose which in effect renders what has been stated a misrepresentation,<sup>118</sup> and a failure to disclose which leaves anything said or written as true, but results in some misconceptions since the whole truth has not been told. The former kind of non-disclosure if fraudulent is fraudulent misrepresentation.<sup>119</sup> For this to occur there must be "some active misstatement of

<sup>116</sup> (1957), 23 W.W.R. 508 (Alta. S.C.).

<sup>117</sup> *John Bosworth Ltd. v. Pro. Syndicated Devs. Ltd.* (1979), 24 O.R. (2d) 97 (Ont. H.C.).

<sup>118</sup> As in *Xerex Exploration Ltd. v. Petro-Canada* (2005), 256 D.L.R. (4th) 218 (Alta. C.A.), in which the party concealing the truth owed a duty to disclose. See also *Opron Construction Co. v. Alberta* (1994), 151 A.R. 241 (Alta. Q.B.).

<sup>119</sup> Partial non-disclosure can also be misrepresentation: *Petro Canada v. 366084 Ontario Ltd.* (1995), 25 B.L.R. (2d) 19 at 33 (Ont. Gen. Div.).

fact or, at all events, such a partial and fragmentary statement of fact as that the withholding of that which is not stated makes that which is stated absolutely false."<sup>120</sup> So, too, if the statement was true when made, but subsequently became untrue through a change which was known to the maker of the statement but not revealed by him to the representee, a dishonest failure to report the change may amount to fraud.<sup>121</sup> This is what occurred in the English case of *With v. O'Flanagan*<sup>122</sup> in which the value of a medical practice which was being sold dwindled through the vendor's illness between the statement of its estimated value at the date of the contract and the subsequent date for completion. In such circumstances there were grounds for rescission. Another illustration of failure to disclose the whole truth is provided by *Graham v. Legault*,<sup>123</sup> in which on the sale of some premises, the basement suite of which was rented, the vendor did not disclose that the renting in question was illegal, as no permit had been obtained as required in the circumstances. This was held to be a fraudulent misrepresentation of fact (not of law), and grounds for rescission.<sup>124</sup>

As contrasted with such instances of telling a half-truth or failing to correct a statement which has become untrue are cases in which there is complete silence not affecting in any comparable way something which previously or concurrently has been said. Such silence will not amount to misrepresentation (whether fraudulent or innocent) unless it relates to some material fact which there is a duty on the silent party to disclose to the other.<sup>125</sup>

<sup>120</sup> *Peek v. Gurney* (1873), L.R. 6 H.L. 377 at 403 (U.K.H.L.) per Lord Cairns. See, e.g., *Desautels v. Zeemal Enterprises Ltd.* (1981), 8 Man. R. (2d) 91 (Man. Q.B.); *Renaissance Resources v. Metalore Resources* (1984), 53 A.R. 289 (Alta. Q.B.); *Frawley v. Buckley* (1988), 93 N.B.R. (2d) 139 (N.B.Q.B.). Contrast cases in which no misrepresentation occurred: *Ens v. de Vries* (1986), 75 A.R. 227 (Alta. Q.B.); *Daeyoo Enterprises Co. v. Long* (1986), 75 A.R. 47 (Alta. Q.B.). Compare *Olson v. New Home Certification Program of Alta.* (1986), 44 Alta. L.R. (2d) 207 (Alta. Q.B.); *Reidy v. Bramalea Ltd.* (1988), 73 Sask. R. 22 (Sask. Q.B.).

Not all non-disclosure will be fraud, though non-disclosure may involve a breach of duty: *Williamson Bros. Const. Ltd. v. British Columbia* (1990), 41 C.L.R. 192 (B.C.S.C.); *Xerex Exploration Ltd. v. Petro-Canada*, above.

<sup>121</sup> *Brownlie v. Campbell* (1880), 5 App. Cas. 925 at 950 (H.L.) per Lord Blackburn; see *K.R.M. Const. Ltd. v. B.C. Railway* (1982), 40 B.C.L.R. 1 (B.C.C.A.); *Rainbow Industrial Caterers Ltd. v. Can. National Railway Co.* (1988), 54 D.L.R. (4th) 43 at 64, 78 (B.C.C.A.). There is an obligation to speak when a statement is made with honest belief in its truth and the maker subsequently discovers the statement is false; *Xerex Exploration Ltd. v. Petro-Canada*, above, at 236.

<sup>122</sup> [1936] Ch. 575 (C.A.).

<sup>123</sup> [1951] 3 D.L.R. 423 (B.C.S.C.); compare *Atomic Interprov. Transport (Eastern) Ltd. v. Paul Geiger Trucking Ltd.* (1987), 47 Man. R. (2d) 42 (Man. Q.B.); misrepresentation by omission, which rendered a surcharge clause in an insurance contract inoperative. On appeal, the decision was affirmed on other grounds: (1988), 45 D.L.R. (4th) 312.

<sup>124</sup> This passage, commencing with "So, too, if the statement was true when made", was quoted in *Mun. Enterprises Ltd. v. Defence Const. (1951) Ltd.* (1985), 71 N.S.R. (2d) 59 at 67 (N.S.C.A.).

<sup>125</sup> *Bank of N.S. v. Boehm*, [1973] 3 W.W.R. 757 (B.C.S.C.). Hence, if there is no duty to disclose there can be no misrepresentation by silence: *Robb v. Yukon Territory* (1987), 2 Y.R. 224 (Y.T.C.A.); additional reasons at (1987), 3 Y.R. 43 (Y.T.C.A.); *Petro Canada v. 366084 Ontario Ltd.* (1995), 25 B.L.R. (2d) 19 at 33 (Ont. Gen. Div.) per Cumming J. Such a duty arose between the negotiating parties in *B.G. Preeco I (Pacific Coast) Ltd. v. Bon Street Holdings Ltd.* (1989), 60 D.L.R. (4th) 30 (B.C.C.A.). Here it did not matter whether the defendant's agents made an explicit misrepresentation or simply omitted to tell the plaintiff what the circumstances called for, namely the true identity of the offering company: *ibid.*, at 34 per Seaton J.A., quoting the trial judge, Paris J. On the issue of identity, see also *Curtis v. Dupuis* (1991), 112 N.B.R. (2d) 361 (N.B.Q.B.), where

The issue of duty has been raised frequently in the context of the sale of real property. One question is whether the vendor is obliged to reveal to the purchaser latent defects rendering the premises unfit for habitation? Where the premises are not new, but have been lived in by the vendor for some time prior to the sale, there is authority for the propositions that the vendor must disclose such defects if they are known to him, and that the vendor will be liable if he was guilty of concealment or reckless disregard of the truth or falsity of any representation made by him respecting the premises.<sup>126</sup> There would also appear to be a duty on the vendor to disclose a defect that renders the premises dangerous in themselves, or that the circumstances are such as to disclose the likelihood of such danger.<sup>127</sup> This duty, and the liability which flows therefrom, are not based upon negligence, but on fraud.<sup>128</sup> For example, in *Rowley v. Isley*,<sup>129</sup> after completion, it was discovered that the house being sold was infested by cockroaches, rendering it uninhabitable. Non-disclosure of that defect was held to amount to fraudulent misrepresentation. However, Weatherston J.A., in *McGrath v. MacLean*,<sup>130</sup> was not prepared to hold that there could be rescission of a completed transaction concerning realty where the non-disclosure did not amount to fraud. There had to be active concealment, that is, fraudulent behaviour, not simply a failure to disclose. In *Hansen v. Twin City Construction Co.*,<sup>131</sup> Feehan J. appears to have accepted that the failure to disclose the known existence of a latent defect could be fraud, and suggested that showing a purchaser what appeared to be a genuine fireplace, complete with ashes, without disclosing that it was an artificial fireplace, could possibly be a fraudulent misrepresentation. The claim in that case arose from the fact that, because the fireplace was not genuine, a fire started in the house, causing considerable damage; however, the learned judge did not determine the case on this ground, to some extent, because fraud had not been pleaded, and the plaintiff had not claimed rescission.

The duty to disclose, and not remain silent, arises in contracts *uberrimae fidei*, that is, where the parties must show the utmost good faith towards each other.<sup>132</sup>

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the manager's silence about his status was not a misrepresentation. There must be reliance on the silence if the misrepresentation is to have any legal effect: *Hoy v. Lozanovski* (1987), 43 R.P.R. 296 (Ont. Dist. Ct.).

126 *McGrath v. MacLean* (1979), 95 D.L.R. (3d) 144 (Ont. C.A.); *Sevidal v. Chopra* (1987), 64 O.R. (2d) 169 (Ont. H.C.); *Jung v. Ip* (1988), 47 R.P.R. 113 (Ont. Dist. Ct.); additional reasons at (1988), 50 R.P.R. 180 (Ont. Dist. Ct.).

127 E.g., radioactivity: *McGrath v. MacLean*, above, note 126, at 152 per Dubin J.A.; compare *Heighington v. Ontario* (1987), 60 O.R. (2d) 641 (Ont. H.C.); additional reasons at (1987), 60 O.R. (2d) 641 at 655 (Ont. H.C.); affirmed (1989), 61 D.L.R. (4th) 190 (Ont. C.A.); *Sevidal v. Chopra*, above, note 126.

128 Compare *Sevidal v. Chopra*, above, note 126, at 183-189 per Oyen J.

129 [1951] 3 D.L.R. 766 (B.C.S.C.). See also *Danforth Heights Ltd. v. McDermid Bros.* (1922), 52 O.L.R. 412 (Ont. C.A.).

130 Above, note 126, at 155-157.

131 (1982), 136 D.L.R. (3d) 111 at 113-114 (Alta. Q.B.).

132 Contrast *Can. Farm Implement Co. v. Alta. Foundry & Machine Co.*, [1927] 1 W.W.R. 1025 (Alta. S.C.), and *Young v. Cross & Co.*, [1927] 2 D.L.R. 373 at 379 (B.C.C.A.) per Macdonald J.A.; compare *Reidy v. Bramalea Ltd.*, above, note 120. Silence where there is a duty to speak may amount to misrepresentation and if the silence is deliberate or is the product of dishonesty or recklessness it may amount to a fraudulent misrepresentation: *HIH Casualty & General Insurance Ltd. v. Chase Manhattan Bank*, [2003] 2 Lloyd's Rep. 61 at 69 (U.K.H.L.) per Lord Bingham.

Transactions between persons in a fiduciary relationship with one another fall within this principle.<sup>133</sup> Such a relationship refers to a relation of confidence or authority of such a nature that the law recognizes a duty on the part of him in whom the confidence is reposed or the authority is vested to use his position for the benefit of the other party and not to abuse it for his own.<sup>134</sup> Confidence means any form of trust or reliance; authority means any form of power, control, dominion or personal influence. Good examples of this are: trustee and beneficiary, principal and agent, companies and directors, solicitors and their clients, partners, doctors and their patients. The doctrine of *uberrima fides* also applies to all contracts of insurance in which everything must be disclosed which would affect the judgment of the insurer in deciding whether or not to accept the risk proposed by the intended assured.<sup>135</sup> The foregoing list may not be exclusive. It is always open to the courts to declare that some new relationship or new situation should give rise to this high obligation.<sup>136</sup>

In this regard it is interesting to observe that in *S. v. H.*<sup>137</sup> neither the Ontario High Court General Division nor the Court of Appeal were willing to invoke the doctrine in a case concerning a separation agreement between spouses. The husband claimed that the wife had been guilty of fraud in not disclosing an extra-marital affair and its consequences, *i.e.*, that a child was possibly not a child of the husband. It was held that the wife was under no duty to the husband to make such a disclosure, whether after the parties separated or on entering into the separation agreement. That agreement was not a contract *uberrima fides*. Therefore, the wife's silence did not amount to misrepresentation that would entitle the husband to avoid the agreement. Such a decision is consistent with the fact that no presumption of undue influence arises as between husband and wife.<sup>138</sup> In other words, the relationship of husband and wife does not give rise to any special treatment of the parties with respect to contracts made between them.

133 *Revell v. O'Brien Financial Corp.* (1988), 30 B.C.L.R. (2d) 330 (B.C.C.A.); affirmed (1991), 62 B.C.L.R. (2d) 314 (B.C.C.A.). On the issue of damages in such a case, see *Canson Enterprises Ltd. v. Boughton & Co.* (1992), 85 D.L.R. (4th) 129 (S.C.C.), which discusses how damages in equity should be calculated *viz.*, by analogy with contract or tort, or distinctly.

134 Hence, the attempt to bring a contract for personal services as a football player within this category failed in *Re Gabriel and Hamilton Tiger-Cat Football Club Ltd.* (1975), 8 O.R. (2d) 285 (Ont. H.C.). But in *Can. Kawasaki Motors Ltd. v. McKenzie* (1981), 126 D.L.R. (3d) 253 (Ont. Co. Ct.) a County Court Judge in Ontario suggested that such a relationship might exist between a manufacturer arranging to grant a franchise and the guarantors of the prospective franchise.

135 See, *e.g.*, *Case Existological Laboratories Ltd. v. Foremost Ins. Co. of Can.* (1982), 133 D.L.R. (3d) 727 (B.C.C.A.), where non-disclosure was not established; compare *Hoffart v. Paul Revere Life Insurance Co.* (1995), [1996] 1 W.W.R. 636 (Sask. Q.B.).

136 See *Can. Kawasaki Motors Ltd. v. McKenzie*, above, note 134.

137 (1994), 120 D.L.R. (4th) 432 (Ont. Gen. Div.); affirmed (1996), 133 D.L.R. (4th) 767 (Ont. C.A.).

138 Below, p. 316.

goods sold to a buyer are defective and the buyer rejects them,<sup>167</sup> his conduct is not to be looked upon as involving rescission of the contract.<sup>168</sup>

## (b) Equitable rescission

### (i) *In general*

In contrast with the common-law idea of rescission, it is sometimes possible for a party to seek the equitable remedy of rescission, by applying to a court for relief from a transaction in respect of which it would be inequitable to hold the applicant bound.<sup>169</sup> Rescission is a remedy, not a cause of action. Moreover it is an all or nothing remedy.<sup>170</sup>

The jurisdiction of the courts to grant rescission of a contract on equitable grounds, which involves a restoration of the parties to their original rights and property,<sup>171</sup> extends beyond the situations and circumstances in which, at common law, a party, acting unilaterally, can treat the contract as a legal nullity, and then pursue such common-law remedies as may be available. Although there is a degree of overlap between the common-law right to rescind for fraud, and the equitable jurisdiction of the court to grant rescission of a contract which has been entered into as a consequence of a false representation or some other fraud,<sup>172</sup> the equitable power to order rescission is wider in scope. Indeed, the limits of this jurisdiction have not been fixed. Wherever a court considers, on general equitable grounds, that a contract should not be allowed to stand, and that the request by one party that it be annulled

<sup>167</sup> *Nyuli v. Hill*, [1942] 1 W.W.R. 85 (Sask. C.A.); compare *Sumner v. Squires*, [1923] 2 W.W.R. 243 (Sask. C.A.); *Dobson v. Barr*, [1923] 2 W.W.R. 260 (Sask. C.A.); *Royal Bank v. Frank*, [1924] 2 W.W.R. 949 (Sask. C.A.). Breach of a fundamental term would seem to be necessary: *Valmada Ltée v. Boulay* (1981), 34 N.B.R. (2d) 74 (N.B.Q.B.); *Bridgesoft Systems Corp. v. British Columbia*, [2000] 5 W.W.R. 518 (B.C.C.A.); leave to appeal refused (2001), 268 N.R. 194 (note) (S.C.C.), with stark contrast *Walker v. Allstate Insurance Co.* (2002), 59 O.R. (3d) 636 (Ont. C.A.). For a case where the plaintiff's (seller's) conduct was *not* rescission but an attempt to mitigate his damages see *Conary v. Harvey Hooper Lobsters Ltd.* (1982), 38 N.B.R. (2d) 670 (N.B.Q.B.).

<sup>168</sup> Compare *Ivey v. Oakrun Farm Bakery Ltd.* (2002), 27 B.L.R. (3d) 143 (Ont. S.C.J.); additional reasons at (2002), 2002 CarswellOnt 2520 (Ont. S.C.J.); further additional reasons at (2002), 2002 CarswellOnt 2521 (Ont. S.C.J.); further further additional reasons at (2002), 2002 CarswellOnt 2523 (Ont. S.C.J.); *Sacks v. Canada Mortgage & Housing Corp.* (2002), 48 R.P.R. (3d) 51 (B.C.S.C.); *Kelly v. Low* (2000), 257 A.R. 279 (Alta. Q.B.); *Guarantee Co. of North America v. Gordon Capital Corp.* (1999), 178 D.L.R. (4th) 1 at 15 (S.C.C.).

<sup>169</sup> See, e.g., *Lamers v. Lamers* (1978), 6 R.F.L. (2d) 283 (Ont. H.C.); *Iwaskow v. Kondruk* (1982), 36 A.R. 168 (Alta. Q.B.); *E. & R. Distributors v. Atlas Drywall* (1980), 118 D.L.R. (3d) 339 (B.C.C.A.).

<sup>170</sup> *Alberta Treasury Branches v. Ghermezian* (1999), 249 A.R. 240 at 247 (Alta. Q.B.) *per* Moore C.J.Q.B.; reversed in part (2000), 266 A.R. 170 (Alta. C.A.); additional reasons at 2000 ABCA 280 (Alta. C.A.). A party who seeks rescission of a contract terminates it: *475878 Alberta Ltd. v. Help-U-Sell Inc.* (2002), 322 A.R. 250 (Alta. Q.B.); additional reasons at (2003), 322 A.R. 191 (Alta. Q.B.); affirmed (2004), 348 A.R. 182 (Alta. C.A.).

<sup>171</sup> *Fleming v. Mair* (1921), 58 D.L.R. 318 at 321 (Sask. C.A.) *per* Lamont J.A.

<sup>172</sup> Compare *Albert v. Legere* (1978), 88 D.L.R. (3d) 62 at 67 (N.B.C.A.) *per* Hughes C.J., referring to rescission for fraud, mutual mistake of a fundamental nature, or unilateral mistake induced by fraud.

and avoided should be granted, the court has the power to do so.<sup>173</sup> A court of equity can do what is "practically just".<sup>174</sup> For example, although it has been noted that damages are not recoverable for failure to sell land when the failure is due to the vendor's lack of title, unless the vendor was guilty of fraud,<sup>175</sup> the court can grant rescission of the contract at the suit of the purchaser, and the recovery of any purchase money which may have been paid over to the vendor.<sup>176</sup> Even if there has been no warranty given by the vendor and no innocent misrepresentation has occurred, the court is not powerless to relieve the purchaser from a contract which might be to his disadvantage, albeit that he might be bound at common law. In *Morang & Co. v. LeSueur*,<sup>177</sup> the court could rescind a contract under which a publishing company was to publish a particular work, when the company refused to publish the completed manuscript, and could then order the return of the manuscript to the author, despite the passage of title from one party to the other. The conduct of the company being inequitable, the court could provide the author with a suitable remedy.

These are exceptional, and unusual cases. More frequently the jurisdiction of the court to rescind a contract on equitable grounds is invoked in three main instances. The first is where the contract resulted from some fraud, which induced a mistake on the part of the defrauded party.<sup>178</sup> The second is where the mistake in question was the result of an innocent, non-fraudulent misrepresentation.<sup>179</sup> The third, which comprehends a somewhat mixed variety of instances, though sharing a general underlying character, is where the contract was procured, without fraud in the common-law sense, but as a consequence of what in equity is regarded as fraud, that is, by the use of undue influence, or some unconscionable conduct which renders the bargain questionable on equitable grounds, even though it may be perfectly valid at common law.<sup>180</sup>

Rescission may be granted even where the contract is not susceptible of attack at common law.<sup>181</sup> When it is, the purpose of the court is to produce *restitutio in integrum*.<sup>182</sup> This has two major consequences. In the first place, there cannot be

173 This sentence was quoted by Creaghan J. in *Poirier v. Goguen* (1989), 99 N.B.R. (2d) 91 at 105 (N.B.Q.B.).

174 *O'Sullivan v. Management Agency & Music Ltd.*, [1985] 1 Q.B. 428 at 458 per Dunn L.J., 466 per Fox L.J., 471 per Waller L.J. (C.A.); *Vadasz v. Pioneer Concrete (SA) Pty Ltd.* (1995), 130 A.L.R. 570 at 577 (Aust. H.C.).

175 *Bain v. Fothergill* (1874), L.R. 7 H.L. 158 (H.L.); see above, pp. 738-739.

176 *Reeve v. Mullen* (1913), 5 W.W.R. 128 (Alta. C.A.).

177 (1911), 45 S.C.R. 95 (S.C.C.); compare *Lindsey v. Le Sueur* (1913), 29 O.L.R. 648 (Ont. C.A.); above, p. 802.

178 Above, pp. 287-295.

179 But perhaps only if there has been a total failure of consideration: see *Komarniski v. Marien*, [1979] 4 W.W.R. 267 (Sask. Q.B.). The passage from "More frequently" to here was quoted by Menzies J. in *Trippel v. Parker* (2002), 164 Man. R. (2d) 104 at 112 (Man. Q.B.); additional reasons at (2003), 175 Man. R. (2d) 4 (Man. Q.B.); affirmed (2004), 318 Man. R. (2d) 231 (Man. C.A.); varied (2004), 318 Man. R. (2d) 231 (Man. C.A.).

180 Above, pp. 314-331. This paragraph, from "More frequently" to the end, was quoted by Bayda J.A. in *Carlson v. Big Bud Tractors of Can. Ltd.* (1981), 7 Sask. R. 337 at 356 (Sask. C.A.).

181 *Ivanochko v. Sych* (1967), 58 W.W.R. 633 (Sask. C.A.).

182 *Stephenson v. Bromley*, [1928] 4 D.L.R. 737 at 742 (Man. C.A.) per Fullarton J.A., citing *Clough v. London & North Western Ry.* (1871), L.R. 7 Ex. 26.

rescission of part of a contract: all of it must be rescinded, or else none.<sup>183</sup> Second, there may have to be, and the court has the power to order adjustments, perhaps involving monetary payments by way of compensation for use of property, or reimbursement of expenses, so as to ensure that, so far as is within the capability of the court, the parties are restored to their original situations, before the contract was ever concluded between them.<sup>184</sup>

Rescission is only possible where to grant such remedy would not operate to the prejudice of a third and innocent party, who was not implicated in the original contract and so ought not to be affected adversely by the subsequent, later avoidance of that transaction.<sup>185</sup> If granting rescission would have such an effect, a court of equity will refuse that remedy, leaving the plaintiff to his common-law remedy, that is, damages, if it is available in the circumstances.<sup>186</sup> Nor will rescission be granted if the plaintiff's contract is inequitable or he has been guilty of delay, or *laches*.<sup>187</sup> A party seeking equity must do equity.<sup>188</sup>

(ii) *Fraud*<sup>189</sup>

Wherever a party can successfully allege that he was induced to enter into a contract by reason of the fraudulent conduct of the other party (or the other party's agent),<sup>190</sup> the contract in question may be rescinded by the court.<sup>191</sup> This will be the

183 *Fleming v. Mair*, [1921] 2 W.W.R. 421 (Sask. C.A.); *Kingu v. Walmar Ventures Ltd.* (1986), 10 B.C.L.R. (2d) 15 (B.C.C.A.).

184 See e.g., *Stephenson v. Bromley*, above, note 182; *Lambert v. Slack*, [1926] 2 D.L.R. 166 at 172 (Sask. C.A.) per Lamont J.A.; *Int. Casualty Co. v. Thomson* (1913), 48 S.C.R. 167 (S.C.C.); *Stearns v. Neys*, [1929] 3 W.W.R. 177 (Alta. S.C.); *Fleischhaker v. Fort Garry Agencies Ltd.* (1957), 11 D.L.R. (2d) 599 (Man. C.A.); *Bell v. Robotka* (1966), 55 D.L.R. (2d) 436 (Alta. C.A.); *Jarvis v. Maguire* (1961), 35 W.W.R. 289 (B.C.C.A.); *Walters v. Capron* (1964), 50 W.W.R. 444 (B.C.S.C.); *Kupchak v. Dayson Holding Ltd.*; *Dayson Holding Ltd. v. Palms Motel Ltd.* (1965), 53 D.L.R. (2d) 482 at 487-488 (B.C.C.A.) per Davey J.A.

185 *Consol. Invs. Ltd. v. Acres*, [1917] 1 W.W.R. 1426 (Alta. C.A.); *Barry v. Stoney Point Canning Co.* (1917), 55 S.C.R. 51 at 66 (S.C.C.) per Idington J. See, however, *Stewart v. Complex 329 Ltd.*, below, note 191, where the fact that a third party had acquired an interest in the business that was the subject-matter of the contract to be rescinded did not prevent rescission.

186 Compare the language of Lamont J.A. in *Fleming v. Mair*, [1921] 2 W.W.R. 421 (Sask. C.A.) and that of MacFarlane J. in *Guest v. Beecroft* (1957), 22 W.W.R. 481 at 486 (B.C.S.C.).

187 Compare what is said in respect of specific performance and injunctions, above, p. 798. See also below, p. 821.

188 *Vadasz v. Pioneer Concrete (SA) Pty Ltd.* (1995), 130 A.L.R. 570 (Aust. H.C.).

189 Compare above, pp. 287-295.

190 *Hitchcock v. Sykes* (1914), 49 S.C.R. 403 (S.C.C.); compare as to fiduciaries, *Gunning v. Lusby*, [1925] 1 D.L.R. 101 (P.C.). Lack of diligence on the part of the plaintiff will not be a defence: *Stewart v. Complex 329 Ltd.*, below, note 191.

191 *Kupchak v. Dayson Holding Ltd.*; *Dayson Holding Ltd. v. Palms Motel Ltd.*, above, note 160; *Krahnbiel v. Dondaneau* (1955), 17 W.W.R. 436 (B.C.S.C.); *Nesbitt, Thomson & Co. v. Pigott*, [1941] S.C.R. 520 (S.C.C.); *Keatley v. Churchman* (1921), 62 D.L.R. 139 (Alta. S.C.); affirmed [1922] 2 W.W.R. 993 (Alta. C.A.); *Muise v. Whalen* (1990), 96 N.S.R. (2d) 298 (N.S.T.D.); *Stewart v. Complex 329 Ltd.* (1990), 109 N.B.R. (2d) 115 (N.B.Q.B.); *TWT Enterprises Ltd. v. Westgreen Devs. (North) Ltd.*, [1991] 3 W.W.R. 80 (Alta. Q.B.); affirmed [1992] 5 W.W.R. 341 (Alta. C.A.). Or the defrauded party can plead *non est factum*: *Brown v. Prairie Leaseholds Ltd.* (1953), 9 W.W.R. (N.S.) 577 (Man. Q.B.); affirmed (1954), 12 W.W.R. 464 (Man. C.A.); on *non est factum* see above, pp. 272-283.

misrepresentation.<sup>201</sup> It can never free the guilty party from an action for damages, or a suit for rescission, in respect of any fraudulent representation.<sup>202</sup>

(iii) *Innocent misrepresentation*<sup>203</sup>

If fraud is not established, it may still be possible to obtain rescission of the contract on the ground that the plaintiff was induced to enter into it as a result of a misrepresentation that was innocently, that is, non-fraudulently, made.<sup>204</sup> In such a case, however, the court cannot order the payment of damages to the plaintiff, in addition to granting rescission. However, with a view to restoring the plaintiff to the position in which he was before the making of the contract, the court can award some kind of indemnity to compensate the plaintiff for the losses which he has incurred as a consequence of the misrepresentation.<sup>205</sup> This would also involve the possibility of making the plaintiff pay the defendant for any benefits the former may have received in the interim, for example, by the use of the chattel that was the subject-matter of the contract.<sup>206</sup> The purpose of an indemnity is to ensure that the party claiming rescission is no worse off than if he had never entered into the contract. It is not to compensate that party in respect of consequential loss emerging from the failure of the contract. Hence the distinction is drawn between restitution to the *status quo ante* and the recovery of foreseeable loss. It may sometimes be difficult to draw the appropriate line between a loss which stems from the rescinded contract, and justifies indemnification, and one that is a consequential economic loss that might support an action for damages, if the contract were treated as broken instead of rescinded. However, it is important to maintain the distinction between loss of anticipated benefits and recoupment of legitimate expenses or similar losses. These stem from the discharge of obligations created by the contract, not from obligations entered into under the contract.<sup>207</sup>

201 Compare *Carman Const. Ltd. v. C.P.R.* (1982), 136 D.L.R. (3d) 193 (S.C.C.).

202 *Ballard v. Gaskill*, [1955] 2 D.L.R. 219 (B.C.C.A.); compare *Pearson & Son Ltd. v. Dublin Corp.*, [1907] A.C. 351 (H.L.); *Campbell v. Hamill*, [1925] 3 W.W.R. 628 (Sask. C.A.).

203 Above, pp. 297-301.

204 *Corbeil v. Appell*, [1950] 1 D.L.R. 159 (B.C.S.C.); *Wiley v. Fortin*, [1946] 2 W.W.R. 93 (B.C.S.C.). There must, of course, be a representation: *Thuenken v. Schweer* (1987), 83 N.B.R. (2d) 44 especially at 249-250 (N.B.C.A.) per Rice J.A.: it must be a *misrepresentation*: *447927 Ont. Inc. v. Pizza Pizza Ltd.* (1987), 44 D.L.R. (3d) 366 (Ont. H.C.); affirmed (1990), 69 D.L.R. (4th) 160 (Ont. C.A.).

205 *Fleischhaker v. Fort Garry Agencies Ltd.* (1957), 65 Man. R. 339 (Man. C.A.). As in *S-244 Holdings Ltd. v. Seymour Building Systems Ltd.*, [1994] 8 W.W.R. 185 (B.C.C.A.), where the defendant was granted rescission of the contract for unilateral mistake induced by the plaintiff's innocent misrepresentation and could recover the value of work done under the contract on the basis of *quantum meruit*. The passage from "If fraud is not established" to here was quoted by Huband J.A. in *Ennis v. Klassen* (1990), 70 D.L.R. (4th) 321 at 326 (Man. C.A.).

206 *Walters v. Capron* (1964), 50 W.W.R. 444 (B.C.S.C.); compare *Stephenson v. Bromley*, [1928] 3 W.W.R. 370 (Man. C.A.). Or for work done: *S-244 Holdings Ltd. v. Seymour Building Systems Ltd.*, above.

207 See the English decisions in *Whittington v. Seale-Hayne* (1900), 82 L.T. 49 and *Newbigging v. Adam* (1886), 34 Ch. D. 582 (C.A.) (the point did not arise in the House of Lords: *Adam v. Newbigging* (1888), 13 App. Cas. 308 (H.L.)).

Rescission for innocent misrepresentation may be obtained when the representation in question induced the plaintiff to enter into the contract. Such was the case when the misrepresentation related to the amount of oil a well would produce and the price at which the oil could be sold, in consequence of which the plaintiff purchased the well,<sup>208</sup> and where it related to the rate of interest on a mortgage.<sup>209</sup> But in *Leggett v. Taylor*<sup>210</sup> the misrepresentation as to the type of engine in the machine the plaintiff was buying did not justify rescission of the contract. On the other hand a serious discrepancy in the amount of timber on some land was a ground for rescission of a contract for the purchase and sale of a timber licence, in *Fukukawa and Queen Charlotte Timber Holding Co. v. American Timber Holding Co.*; *American Timber Holding Co. v. Fukukawa*.<sup>211</sup> In *Ennis v. Klassen*<sup>212</sup> the misdescription of the car that was being sold as a BMW 733i, when in fact it was a different model substantially inferior to the car the plaintiff believed he was buying, was sufficient to justify rescission. In other words equity will not relieve a party from the consequences of a mistaken bargain, unless the party requesting such relief has been seriously inconvenienced or prejudiced by the mistake in question, and that mistake was the product of an innocent misrepresentation by the other party.<sup>213</sup> Hence in the Australian case of *Vadasz v. Pioneer Concrete (SA) Pty Ltd.*,<sup>214</sup> rescission was not granted because there was no proof that the defendant would not have entered into a guarantee of a company's debts arising in the future (as the defendant alleged in defence of an action on the guarantee) if he had known the true position.

There appears to be a limitation on the extent to which rescission may be obtained where there has been no fraud. If the contract involves land and it has been executed, for example, by conveyance of the property, it will be too late for the plaintiff who contracted under a mistake to obtain rescission. This has been established by a number of Canadian cases, commencing with the decision of the Supreme Court of Canada in 1899 in *Cole v. Pope*.<sup>215</sup> The fact that the contract has been executed may not be a barrier to rescission if the contract concerned chattels.<sup>216</sup> But

208 *Eisenschiml v. Western Drilling Co.*, [1943] 1 W.W.R. 605 (Alta. C.A.); compare *Shortt v. MacLennan*, [1959] S.C.R. 3 (S.C.C.).

209 *Comeller v. Billinkoff* (1953), 11 W.W.R. 279 (Man. Q.B.).

210 (1965), 50 D.L.R. (2d) 516 (B.C.S.C.). See also *Rasch v. Horne*, [1930] 3 D.L.R. 647 (Man. C.A.); *Freeman v. Kaltio* (1963), 39 D.L.R. (2d) 496 (B.C.S.C.); *Cancarp Const. Ltd. v. P.D.I. Structures (1982) Inc.* (1987), 62 O.R. (2d) 161 (Ont. H.C.). But contrast the idea that a misrepresentation must be material, rather than go to "the root of the contract": *George v. Dominick Corp. of Can.*, [1973] S.C.R. 97 (S.C.C.).

211 [1928] 2 W.W.R. 37 (B.C.S.C.).

212 (1990), 70 D.L.R. (4th) 321 (Man. C.A.).

213 Compare *Field v. Zien*, [1963] S.C.R. 632 (S.C.C.).

214 (1995), 130 A.L.R. 570 (High Ct. of Aust.).

215 (1898), 29 S.C.R. 291 (S.C.C.). See also *Redican v. Nesbitt*, [1924] S.C.R. 135 (S.C.C.); *Shortt v. MacLennan*, [1959] S.C.R. 3 (S.C.C.); *Schonekess v. Bach* (1968), 62 W.W.R. 673 (B.C.S.C.); *Kingu v. Walmar Ventures Ltd.* (1986), 10 B.C.L.R. (2d) 15 at 21 (B.C.C.A.). See also above, pp. 299-301.

216 See, e.g., *Geggie v. Kerr Motors Ltd.*, [1922] 2 W.W.R. 1256 (Alta. C.A.); *McKinnon v. Brockinton*, [1921] 2 W.W.R. 437 (Man. C.A.); *Fleischhaker v. Fort Garry Agencies Ltd.*, above, note 206; *Bevan v. Anderson* (1957), 23 W.W.R. 508 (Alta. S.C.); *Ennis v. Klassen*, above, note 213. Contrast *Diamond v. B.C. Thoroughbred Breeders' Society* (1965), 52 W.W.R. 385 (B.C.S.C.). Compare a

a contract of sale of land is treated differently; so much so that, even if an express warranty of quality was given by the vendor, there can be no rescission on its breach.<sup>217</sup> However, apart from fraud, there is one situation in which an executed contract for the sale of land may be rescinded. This is where there has been a failure of consideration, and the purchaser has, in fact, obtained something very different from that for which he bargained,<sup>218</sup> for example, a smaller quantity of land,<sup>219</sup> or a different kind of tenancy.<sup>220</sup> Sometimes this is referred to as *error in substantialibus*.<sup>221</sup> In essence, however, what is involved is a significant variation from the contract as it was believed to be, and the contract as, in fact, it is.<sup>222</sup>

(iv) *Unconscionable bargains*

The equitable remedy of rescission may also be invoked where the contract is open to attack on the ground of being brought about by undue influence or unconscionable conduct.<sup>223</sup> The original power of courts of equity was in respect of contracts produced by the exercise of undue influence by one party against the other.<sup>224</sup> In modern times a broader equitable doctrine enables the court to intervene and rescind a contract which is made between parties of unequal bargaining power, where the conduct of one party is viewed as being unconscionable with respect to the other, even though the situation is not one strictly within the equitable doctrine

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recent Australian case: *Leason Pty. v. Prince Farm Pty. Ltd.*, [1983] 2 N.S.W.L.R. 381 (Aust.). See also the dissenting judgement of Twaddle J.A. in *Ennis v. Klassen*, above, note 212.

- 217 *Franz v. Hansen*, [1917] 3 W.W.R. 77 (Alta. C.A.); reversed on other grounds [1918] 2 W.W.R. 40 (S.C.C.); leave to appeal to the Privy Council refused (1918), 57 S.C.R. vii (S.C.C.).
- 218 *Cole v. Pope*, above, note 215; *F. & B. Tpt. Ltd. v. White Truck Sales Man. Ltd.* (1965), 51 W.W.R. 124 (Man. C.A.).
- 219 *Fukukawa and Queen Charlotte Timber Hldg. Co. v. Amer. Timber Holding Co.; Amer. Timber Hldg. Co. v. Fukukawa*, [1928] 2 W.W.R. 37 (B.C.S.C.); compare *Thurston v. Streilen*, [1951] 4 D.L.R. 724 (Man. K.B.), where rescission was refused on other grounds. Contrast *Aberg v. Rafuse* (1979), 8 R.P.R. 216 (N.S.T.D.); *Komarniski v. Marien*, [1979] 4 W.W.R. 267 (Sask. Q.B.); *John Bosworth Ltd. v. Pro. Syndicated Devs. Ltd.* (1979), 24 O.R. (2d) 97 (Ont. H.C.).
- 220 *Ruscheinsky v. A. Spencer Co.*, [1948] 2 W.W.R. 392 (B.C.S.C.).
- 221 *Redican v. Nesbitt*, above, note 215, at 146-147 per Duff J.; compare *Alessio v. Jovica* (1974), 42 D.L.R. (3d) 243 at 256-257 (Alta. C.A.) per Sinclair J.A.; *Nor. & Central Gas Const. Co. v. Hillcrest Collieries; Byron Creek Collieries Ltd. v. Coleman Collieries Ltd.*, [1976] 1 W.W.R. 481 at 553-554 (Alta. T.D.) per Lieberman J.; Fridman, "Error in Substantialibus: A Canadian Comedy of Errors" (1978), 56 Can. Bar Rev. 603; above, pp. 299-301.
- 222 Note also the denial of rescission in cases of undue delay or where restitution of benefits obtained by the plaintiff is impossible: *Terri-Grant Enterprises Inc. v. 82506 Can. Ltd.* (1986), 47 Sask. R. 63 (Sask. Q.B.); and where the contract is affirmed by the plaintiff (unless such affirmation is not effective, e.g., by reason of estoppel: *Revell v. O'Brian Financial Corp.* (1988), 30 B.C.L.R. (2d) 330 (B.C.S.C.); affirmed (1991), 62 B.C.L.R. (2d) 314 (B.C.C.A.)); below, pp. 821-823.
- 223 Compare the refusal to grant decrees of specific performance, or an injunction, on the same ground: *Hnatuk v. Chretien* (1960), 31 W.W.R. 130 (B.C.S.C.); *Clifford Davis Mgmt. Ltd. v. W.E.A. Records*, [1975] 1 All E.R. 237 (C.A.). Compare as to rectification, *Longley v. Barbrick* (1962), 36 D.L.R. (2d) 672 (N.S.S.C.).
- 224 *Burriss v. Rhind* (1899), 29 S.C.R. 498 (S.C.C.); *McKay v. Clow*, [1941] S.C.R. 643 (S.C.C.); compare above, pp. 314-315.



Schedule 1

UNION GAS LIMITED  
Calculation of Revenue Deficiency/(Sufficiency)  
Calendar Year Ending December 31, 2007

Line No.	Particulars (\$000's)	2007 Board Approved		2007 Utility 9+3F (c)	Utility Difference (d)=(c)-(b)
		Total (a)	Utility (b)		
1	Operating revenue	\$ 2,008,912	\$ 1,948,549	\$ 2,006,544	\$ 57,995
2	Cost of service	1,738,390	1,710,467	1,756,180	45,713
3	Utility income	270,522	238,082	250,364	12,282
4	Requested return	287,920	259,487	259,487	-
5	Revenue deficiency/(sufficiency) after tax	(2,601)	21,405	9,123	(12,282)
6	Provision for income taxes on deficiency/(sufficiency)	(1,471)	12,103	5,158	(6,985)
7	Total revenue deficiency/(sufficiency)	\$ (4,072)	\$ 33,508	\$ 14,281	\$ (19,227)

Actual

weather is  
\$2.187 million  
unfavorable  
(after tax)

3.4 million  
pro tax

Table 1  
 Calculation of Revenue Deficiency/(Sufficiency) from Utility Operations  
 For the Year Ended December 31, 2008  
 (\$millions)

Line No.	Particulars	Board Approved 2007	Actual 2007	Increase/(Decrease)	Normalized Actual 2007	Increase/(Decrease)
1	Gas sales and distribution revenue	1,796.8	1,811.1		1,818.9	
2	Cost of sales	1,134.3	1,148.0		1,148.0	
3	Gas distribution margin	662.5	663.1	0.6	670.9	8.4
4	Transportation	127.4	126.3	(1.1)	126.3	(1.1)
5	Other revenue	24.4	29.8	5.4	29.8	5.4
6	Expenses	567.4	551.6	(15.8)	551.6	(15.8)
7	Income taxes	8.7	20.3	11.6	23.1	14.4
8	Utility income	238.1	247.3	9.2	252.3	14.2
9	Cost of capital	259.5	251.9	(7.6)	251.9	(7.6)
10	Revenue deficiency/(sufficiency) after tax	21.4	4.6	(16.8)	(0.4)	(21.8)
11	Provision for income taxes on deficiency/(sufficiency)	12.1	2.6	(9.5)	(0.2)	(12.3)
12	Distribution revenue deficiency/(sufficiency)	33.5	7.2	(26.3)	(0.6)	(34.1)
13	Storage premium adjustment	33.5	33.5	0.0	33.5	0.0
14	Total revenue deficiency/(sufficiency)	0.0	(26.3)	(26.3)	(34.1)	(34.1)



**Thompson, Peter C. P.**

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**From:** Donna Campbell [Donna.Campbell@oeb.gov.on.ca]**Sent:** June 5, 2009 4:28 PM

**To:** mredford@uniongas.com; barbara.reuber@opg.com; andrea.gibbs@directenergy.com; basil.alexander@klippensteins.ca; bkillen@ecng.com; bwilliams@opsba.org; EGDRegulatoryProceedings@enbridge.com; cripley@uniongas.com; cstradling@bomatoronto.org; David.Butters@appro.org; DavidMacIntosh@nextcity.com; dpoch@eelaw.ca; cramer@sitheglobal.com; drquinn@rogers.com; elisabeth.demarco@macleoddixon.com; fcass@airdberlis.com; regulatory@hydroone.com; ian.mondrow@macleoddixon.com; jaryder@rwbh.ca; jgibbons@pollutionprobe.org; jharbell@stikeman.com; jim\_bartlett@transcanada.com; jim.gruenbauer@kitchener.ca; jwightman@econanalysis.ca; jfstacey@interlog.com; jay.shepherd@shibleyrighton.com; jennifer\_scott@transcanada.com; jwolnik@era-inc.ca; john.devellis@shibleyrighton.com; spracket@pwu.ca; jkwik@era-inc.ca; jgirvan@ca.inter.net; kai@web.net; margaret\_kuntz@transcanada.com; msims@millerthomson.com; mbuonaguro@piac.ca; mpenny@torys.com; murray.klippenstein@klippensteins.ca; mnewton@igua.ca; murray\_ross@transcanada.com; nadine\_berge@transcanada.com; nick@sixnatgas.com; nicki.pellegrini@tor.macleoddixon.com; nruzycski@energysavings.com; EGDRegulatoryProceedings@enbridge.com; pduffy@stikeman.com; paul.clipsham@cme-mec.ca; paul.kerr@shell.com; pscully67@hotmail.com; Thompson, Peter C. P.; Pete\_Serafini@transalta.com; rachel.chen@ieai.ca; raiken@xcelco.on.ca; renee\_marx@transalta.com; ric.forster@directenergy.com; rking@ogilvyrenault.com; richard.stephenson@paliareroland.com; Rob\_Findlay@transalta.com; rhiggin@econanalysis.ca; smillar@nrgas.on.ca; travis.braithwaite@enbridge.com; vyoung@aegent.ca; vbrescia@frpo.org; DeRose, Vincent J.; Robert Warren

**Cc:** Richard Battista**Subject:** EB-2009-0101 Union Gas Limited

Contained in this email are a list of questions that Board staff asks the parties to address in their submissions to the Panel on Monday.

Given the number of intervenors who will be attending, Board staff is of the view that a more efficient manner of proceeding is to have the parties address the issues raised by staff's questions when the parties' submissions are made to the Panel. The questions will be filed with the Panel at the opening of the hearing.

Board staff does not intend to make submissions.

## STAFF QUESTIONS FOR UNION AND THE INTERVENORS

1. Union Gas, the intervenors and the Board invested much time and many resources to develop and, ultimately, implement the IR Plan which was approved by the Board in January 2008. Each element of the IR Plan was thoroughly and extensively canvassed by all of the parties before its acceptance. The purpose was to put into place an agreed upon mechanism that would set the rules or parameters to be followed in the annual setting of rates for five years.

The IR Plan has been in place for one of the five years. Is it premature to make changes to the IR Plan now? If not, why not?

2. Given that any changes made to the IR plan will be in place for the full term of the plan, is it appropriate to institute such changes without a full hearing? If so, why?

3. The proposed elimination of section 9.1:

- Removes the review mechanism which requires Union to file an application for review;
- Removes from the parties the option to propose that the IR Plan is not working and to ask the Board to return to a cost of service model; and
- Removes from the parties the option to seek adjustments to the IR Plan.

The proposed amendments to section 10.1 do not include any of the items listed above.

a) How can the Board or the parties question the continued soundness of the IR mechanism in the future without a review provision (triggered when earnings are in excess of 300 basis points) in the IR plan?

b) If a party is of the view that the IR Plan is no longer working, and wants to seek a return to a cost of service model, how will they do so in the absence of s. 9.1?

c) if a party wants to seek adjustments to the IR Plan going forward, how can they do so in the absence of section 9.1?

4. The Settlement Proposal states that the IR Settlement Agreement shall be amended for the entire IR term including 2008 as well as the balance of the IR Plan's term to 2012. Typically regulators do not engage in retroactive rate making. Why should they do so now?

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June 5, 2009

Ms. Kirsten Walli, Board Secretary  
**ONTARIO ENERGY BOARD**  
2300 Yonge Street, 27th Floor  
Toronto, ON M4P 1E4

Dear Ms. Walli:

**Re: EB-2009-0101: Union Gas Limited 2008 Earning Sharing and Incentive Regulation Review.**

**IGUA's Position on the Settlement Agreement.**

The Board will be aware from review of the Settlement Agreement filed by Union herein that IGUA does not agree with the settlement reached by the balance of the parties who participated in the settlement conference. This letter is submitted to advise the Hearing Panel that IGUA does not intend to litigate the matter, and will be offering no further submissions.

The Union IRM settlement, as endorsed by the Board, provides that in the event that Union's return on equity surpasses 300 basis points above the ROE resulting from application of the Board's cost of capital formula, Union is required to bring application for review of the IRM. The settlement reached by the other parties in this case removes this review trigger mechanism for the balance of the IRM term. IGUA recognizes that the settlement proposes a greater share for ratepayers of any over earnings above 300 basis, which affords ratepayers some protection. However, IGUA remains concerned that removal of the trigger mechanism in effect provides Union with a "licence" to continue to over earn in excess of 300 basis points under the IRM plan without review of the reasons therefore and the reasonableness of continuing with the plan as set.

We would appreciate it if you could put this letter before the Hearing Panel in this application, for their information.

Yours truly,  
MACLEOD DIXON LLP

  
Ian Mondrow

- c. Murray Newton, IGUA  
Michael Penney, TORYS, Counsel for Union Gas  
Donna Campbell, Board Staff Counsel  
Intervenors of Record

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