Ontario Energy Board

Commission de l'énergie de l'Ontario

EB-2006-0034

IN THE MATTER OF the *Ontario Energy Board Act, 1998,* S.O. 1998, c.15

AND IN THE MATTER OF an Application by Enbridge Gas Distribution Inc. for an order or orders approving or fixing just and reasonable rates and other charges for the sale, distribution, transmission and storage of gas commencing January 1, 2007.

BEFORE: Gordon Kaiser
Presiding Member and Vice Chair

Paul Vlahos
Member

Ken Quesnelle
Member

DECISION - RATE AFFORDABILITY PROGRAMS

This is the decision of Board Member Vlahos and Board Member Quesnelle. The dissenting opinion with reasons of Vice Chair Kaiser follows the majority decision.

Enbridge Gas Distribution Inc. ("EGD") filed an application dated August 25, 2006 with the Ontario Energy Board under section 36 of the *Ontario Energy Board Act, 1998 ("*the *Act")*, requesting a rate increase effective January 1, 2007. On October 4, 2006, the Board issued Procedural Order No. 1 establishing an oral hearing on October 12, 2006 to hear submissions regarding the issues the Board should consider in this proceeding. This decision relates to one specific issue: rate affordability programs.

The Low-income Energy Network ("LIEN") proposes that the Board accept as an issue in this proceeding the following matter:

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

The inclusion of this issue in this proceeding was opposed by several parties, and no party, other than LIEN, supported its inclusion.

A number of parties questioned whether the Board had jurisdiction to hear this matter. The Board in its Decision of October 20, 2006 found that jurisdiction was a threshold issue and that before proceeding further the Board must satisfy itself that it had jurisdiction. The Board accordingly invited parties to file written submissions addressing the jurisdictional arguments made by LIEN.

A number of parties filed written arguments indicating that the Board does not have jurisdiction to hear LIEN's issue in this proceeding. On November 7, 2006, LIEN served a Notice of Constitutional Question providing the Attorney General of Ontario with an opportunity to respond to LIEN's arguments about the application of section 15 of the Charter of Rights and Freedoms to the interpretation of the Board's jurisdiction. The Board indicated that it would defer its Decision until the Attorney General had an opportunity to respond.

On November 27, 2006, counsel for the Attorney General of Ontario advised the Board that it did not intend to intervene at this jurisdictional stage of the proceeding. The Board then advised the parties that irrespective of the outcome of the jurisdiction hearing it would not consider the issue in this proceeding as it would delay the rate case unreasonably.

Positions of the Parties

The Industrial Gas Users Association ("IGUA"), the Consumers Council of Canada ("CCC"), Enbridge Gas Distribution Inc. ("EGD") and Union Gas Limited ("Union") all argued that the Board does not have jurisdiction to establish special rates for low-income consumers. Their arguments contain the common contention that the setting of

rates based on a criterion of income level is not captured within the meaning or the intent of the *Ontario Energy Board Act, 1998* (the "Act"). To various degrees, these Parties also provided argument on the implementation difficulties that would arise if such a program were put in place and in general, the appropriateness of the Board establishing rates in such a manner.

Board staff submitted that the Board's authority to fix or approve just and reasonable rates under section 36 of the Act can encompass authority to implement at least some forms of rate affordability assistance programs for low income consumers but absent a specific proposal, Board staff did not believe it was prudent to speculate just how far that authority might extend.

In its reply argument, LIEN reiterated its arguments that the Board does have the jurisdiction to order special rates for low income consumers.

Board Findings

Before the Board addresses the issue of its jurisdiction, the Board will comment on Board Staff's submission regarding the absence of a specific proposal.

In its submission, Board staff referred to the record noting that LIEN appeared to confirm that the program that it might propose were this issue added to the issues list was that filed in an earlier proceeding involving the rates of Union Gas Ltd., Ontario's other large gas distributor. Board staff also noted LIEN's position that the issue of the Board's authority is related to low income programs generally, and should not be tied to any specific proposal.

The Board notes that certain parties opposing jurisdiction, particularly CCC, referred extensively to the specifics of the program advanced by LIEN before this Board in the separate proceeding referenced above as well as before the Nova Scotia Public Utilities Board and LIEN did not argue in its reply submissions that such references were unjustified or non-relevant. In any event, the Board does not consider the absence of a specific proposal in this proceeding to be determinative of the Board's jurisdiction. In this case, the issue is whether the Board does or does not have jurisdiction to establish rates based on rate affordability for low income consumers.

The Board considers this matter to be one of clear importance and is of the view that clarity of its position on jurisdiction is required to instruct those who are advocating on behalf of a low-income constituency. This Decision therefore is predicated on the following understanding: That the proposal is to establish a rate group for low income consumers. The defining characteristic of the rate group would be income-level and the program would be funded by general rates. It is in this context that the Board has considered the question of jurisdiction.

The Board agrees with the Parties that argued that the Act does not provide the Board with the authority, either explicitly or implicitly, to approve rates using income level as a criterion. The implementation difficulties referred to by parties are not, in the Board's view, pivotal to the issue at hand. Concerns that may arise related to implementation of new processes or the need to expand Board expertise are not threshold considerations related to the determination of jurisdiction. Where jurisdiction is found to exist, the Board structures itself accordingly.

The Board exercises its jurisdiction within the legislative framework established by Government. The *Ontario Energy Board Act, 1998* provides the objectives that govern the Board in its activities. The objectives and the statute as a whole are the sole reference for the determination of jurisdiction. The Board also derives certain powers from other statutes, but none of these powers are relevant to this particular issue.

Economic regulation is rooted in the achievement of economic efficiencies, the establishment of fair returns for natural monopolies and the development of appropriate cost allocation methodologies. Also, when appropriately authorized, economic regulation can be utilized in the pursuit of broad social goals such as conserving natural resources or in the provision of incentives for certain behaviours that are seen by the legislature to be in the public interest. An example of this can be seen in the Government's direction to the Board, authorized by the statute to enable certain approaches to conservation and demand management.

Through statute, governments authorize bodies such as the Ontario Energy Board to administer the economic regulation of specific sectors of society. At its core, the Board is an economic regulator, and that is where its expertise lies. The Board is engaged in many of the typical economic regulation activities mentioned above and makes determinations as to the appropriateness of the financial consequences of the regulated activities it authorizes.

The manner in which the Board makes its determinations is firmly grounded in the economic regulatory principles associated with rate setting. As submitted by Board Staff, while the term “economic regulator” is not precise, there is a widely accepted and practiced convention related to the setting of rates. Examples of these principles are more fully articulated later in this decision in the analysis of various submissions. The Government has a clear understanding of how the Board operates and the economic regulation principles that it utilizes as an economic regulator and has witnessed the Board’s practices in that regard.

The Board was created and made operational through legislation. The Board has a responsibility to operate to the full depth and breadth of the authority granted in its governing statute. The limits or boundaries of its authority need not, nor should, be a bright line. This would require near unachievable foresight by the legislators to consider all of the possible eventualities. The objectives provided in the Act are intended to be broad enough to allow the Board to operate with discretion in an ever changing environment and focused enough to ensure that the Board operates within the government’s policy framework. Determinations on jurisdiction should be guided solely by the question of what can reasonably be considered to have been intended by the legislators in the scoping and crafting of the Board’s mandate. There should be no pre-destining bias based on a desire by the regulator to include or exclude any particular issue.

As described by section 36(3) of the Act, the Board has broad authority to utilize whatever methods or techniques it deems appropriate to set just and reasonable rates. LIEN has argued that this be interpreted as the Board having authority to establish a low-income rate class, using income level as a determinant. The Board does not agree. Significant departure from its current practices and principles would be required to institute a rate making process based on income level. The Board considers LIEN’s proposal both in the intent and on the basis on which the transfer of benefits would take place to be a significant departure from the traditional rate setting principles applied currently by the Board. The Board’s rate setting activities that currently have the effect of transferring benefits do so to accommodate either regulatory efficiency, the removal of financial barriers in support of government policy initiatives or to support a mitigation policy to overcome cost differential such as in rural rate subsidies. None of these activities are based on an income level determinant. The Board also notes that to the extent that any of the current benefit transfers are material, such as in the rural rate

subsidy and conservation initiatives, they are supported by the objectives of the Act, specific sections of the Act or by Ministerial Directives under section 27 of the Act.

The use of income level as a determinate in establishing utility rates has broad public policy implications. The interplay that this type of income redistribution program would have with other income redistribution programs that would reside outside of the Board's purview could be significant. The consideration of income redistribution should not be done in isolation of the broader government policy environment. The management of the interplay would necessitate a prescriptive statute or directive.

Income redistribution policies are at the core of the work done by democratically elected governments. The Board is of the opinion that had the Government wanted the Board to engage in such a fundamentally important function it would have specifically stated as such.

The Board is of the view that there is no compelling evidence to suggest that the objectives contained in the Act encompass, explicitly or implicitly, any accommodation for such a fundamental departure from the manner in which the Board currently regulates. For these reasons and for the reasons stated below the Board finds that it does not have jurisdiction to develop a rate class with an income level determinant as depicted earlier in this decision.

Analysis of Submissions

The Board is a statutory tribunal. In the *ATCO Gas and Pipelines Ltd. v. Alberta* (*Energy and Utilities Board*), [2006] SCC 4 decision, the Supreme Court described the sources from which statutory tribunals obtain their powers:

> In the area of administrative law, tribunals and Boards obtain their jurisdiction under various statutes (express jurisdiction); and (2) the common law, by application of the doctrine of jurisdiction by necessary implication (implied powers).

A statutory Board has no powers other than those given to it by statute, either expressly or impliedly. If the Board's jurisdiction to order a low income affordability program cannot be found either expressly or impliedly in a statute, then it does not exist.

The question boils down to one of statutory interpretation. The courts have adopted what E.A. Driedger described as the modern approach to statutory interpretation:

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

The Ontario Energy Board Act

In support of its submission that the Board does have the requisite jurisdiction, LIEN pointed to section 36(2) and 36(3) of the *Ontario Energy Board Act, 1998* (the "Act").

> 36 (2) The Board may make orders approving or fixing just and reasonable rates for the sale of gas by gas transmitters, gas distributors and storage companies, and for the transmission, distribution and storage of gas.
>
> 36 (3) In approving or fixing just and reasonable rates, the Board may adopt any method or technique that it considers appropriate.

The panel is also guided by the Board's objectives as set out in section 2 of the Act, in particular objective 2:

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

In the panel's view, neither section 36 nor section 2 explicitly grants to the Board the jurisdiction to order the implementation of a low income affordability program. The panel also finds that the Board does not gain the requisite jurisdiction through the doctrine of necessary implication.

Explicit Powers

Section 36(2) contains the Board's just and reasonable rates powers with regard to natural gas utilities. It is not disputed that the Board's powers to determine just and reasonable rates are very broad. Several parties cited the *Union Gas v. Ontario (Energy Board)* (1983), 43 O.R. (2nd) 489 (Ont. Sup. Ct.) case, where the court noted:

> That in balancing these conflicting interests and determining rates that are just and reasonable, the OEB has wide discretion is not in doubt.

The Board is aware that its discretion is broad; however, in its consideration of the intent of its governing statutes, the Board must be reasonable in considering the larger public policy arena and the degree to which the legislators considered the Board's conventional ambit.

The Board is guided in the contemplation of its jurisdiction by the following. In *Re Multi Malls Inc. et al. v. Minister of Transportation and Communications et al,* 14O.R. (2d) 49, the Ontario Court of Appeal noted that the powers of regulatory tribunals "must be exercised reasonably and according to the law, and cannot be exercised for a collateral object or an extraneous and irrelevant purpose, however commendable."

In determining what is just and reasonable, the Board must be guided by its objectives and the overall purpose of the Act.

LIEN has focussed on the Board's objective number 2, which requires the Board to protect consumers with regard to prices and system reliability. In the context of the proposed low-income rate program a sub-set of consumers would be afforded protection at the expense of others. The sub-set would be identified on a level of income basis and based on ability to pay. The Board sees this as a fundamental departure from its current rate setting principles.

LIEN also pointed to a number of cases in support of its contention that one of the Board's responsibilities is to keep prices low. For example, LIEN quoted *Union v. Ontario (Energy Board)* as follows:

> Put another way, it is the function of the OEB to balance the interest of the appellants in earning the highest possible return on the operation of its enterprise, a monopoly, with the conflicting interest of its consumers to be served as cheaply as possible.

In LIEN's submission, this case stands for the proposition that "just and reasonable" requires that the consumer be served as cheaply as possible. In the Board's view, LEIN's submission misconstrues the thrust of the court's pronouncement, which in fact requires that the Board balance the utility's interest in earning a return with the consumer's interest in being served cheaply. The court did not give preference to one group of consumers' interest over that of another.

In summary, the panel can find no explicit grant of jurisdiction to order the creation of a rate class based on income, as depicted earlier in this decision, in the *Ontario Energy Board Act.*

Implicit Powers

ATCO described the doctrine of jurisdiction by necessary implication as follows:

> […] the powers conferred by an enabling statute are considered to include not only those expressly granted but also, by implication, all powers which are practically necessary for the accomplishment of the object intended to be secured by the statutory regime created by the legislature.

In the panel's view, the power to order the implementation of low income affordability programs is not a practical necessity for the Board to accomplish its statutory objectives.

In fixing just and reasonable rates, Section 36(3) of the Act does allow the Board "to adopt any method or technique it considers appropriate." However, in the panel's view, "any method or technique" cannot reasonably be stretched to mean a fundamental replacement of the rate making process based on cost causality with one based on income level as a rate grouping determinant. This particular section replaced section 19 of the old *Ontario Energy Board Act*, R.S.O. 1980, which required a traditional cost of service analysis in quite prescriptive terms:

> 19(2) In approving or fixing rates and other charges under subsection (1), the Board shall determine a rate base for the transmitter, distributor, or storage company, and shall determine whether the return on the rate base produced or to be produced by such rates and other charges is reasonable.
> (3) The rate base to be determined by the Board under subsection (2) shall be the total of,
> (a) a reasonable allowance for the cost of the property that is used or useful in serving the public, less an amount considered adequate by the Board for depreciation, amortization and depletion;
> (b) a reasonable allowance for working capital; and
> (c) such other amounts as, in the opinion of the Board, ought to be included.
> […]

The change to section 36(3), which allows the Board to "adopt any method or technique it considers appropriate" was deliberately made by the legislature and should accordingly be given meaning. It gives the Board the flexibility to employ other methods of ratemaking in fixing just and reasonable rates, such as incentive ratemaking, rather than the traditional cost of service regulation specified in section 19 of the old Act. The change in the legislation was coincident with the addition of the regulation of the electricity sector to the Board's mandate. The granting of the authority to use methods other than cost of service to set rates for the gas sector was an alignment with the non-prescriptive authority to set rates for the electricity sector. The Board is of the view that if the intent of the legislature by the new language was to include ratemaking considering income level as a rate class determinant, the new Act would have made this provision explicit given the opportunity at the time of the update of the Act and the resultant departure from the Board's past practice.

The Board approves subsidies to rural and remote consumers through the Rural and Remote Rate assistance program. The Board is given the explicit authority to do so under section 79 of the Act. Some Parties have pointed to the fact that the legislature chose to specifically enumerate these instances where some ratepayers will subsidize others suggests that it did not intend to grant this power generally. LIEN submits that section 79 demonstrates that the Act contemplates the Board acting to protect economically disadvantaged groups when approving or fixing just and reasonable rates.

The Board considers the fact that section 79 of the Act exists as an indication that the Government has been explicit on issues that it considers warranting special treatment. It should be noted that rural rate assistance predates the Act and the inclusion of section 79 ensured the maintenance of the subsidy. Therefore less can be inferred regarding the significance of section 79 being included in the Act. The Board notes that the underpinning rationale for the rural rate assistance is fundamentally different from the rationale supporting the proposed low-income rate class. Rural rate assistance does not consider income level as an eligibility determinate nor is their any indication that its genesis is rooted in a belief that civil and human rights legislation has historically failed to protect agricultural workers as a group as was submitted by LIEN. The eligibility is based on location and the inherent higher costs of service that are related to density levels. The assistance has the effect of mitigating a cost differential related to geography and is conferred on all customers irrespective of their income level.

A common and long standing feature of rate-making is the application of the same charges to all customers in a given customer classification. There is admittedly a degree of subsidization in such rate making as not all customers in a given rate classification impose precisely the same costs to a utility. However, this practice is necessary in order to avoid the complexities and costs of having to determine the individual costs of millions of customers and the existence of millions of rate classifications. Whatever subsidies may exist in such method, it is done for the general benefit and not to favour or target a specific customer group over another on the basis of income level.

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

Both Board Staff and LIEN submitted that the Board's allowance of contributions to an emergency financial relief program known as Winter Warmth is an indication of the Board's recognition of low-income customers as a group that can be recognized for special treatment. It was also submitted that the fact that these contributions are funded by rates is an indication that authority exists in fixing or approving just and reasonable rates for intra and interclass subsidies. The Board does not agree with this reasoning. The program is designed to trigger assistance upon approval of an application for financial assistance by a customer in a financial crisis situation. The relief is very situation and occurrence specific. Therefore the recipients of this assistance do not constitute a rate class or a sub-class. The program is funded by all customers, therefore the Board does not agree with the assertion that it demonstrates authority for intra and interclass subsidies. The Board is of the view that it would be extremely disproportional to draw on the charity objectives of this modest program to support a determination that the legislators envisioned the possibility of a rate setting determinate of income level.

The Board's treatment of similar requests

The Board has in fact considered similar requests in the past for special (lower) rates. In EBRO 493, as one example, the Ontario Native Alliance ("ONA") asked the Board to order a utility to evaluate the establishment of a rate class for the purpose of providing redress for aboriginal peoples. The Board rejected this request and stated:

> The Board is required by its legislation to "fix just and reasonable rates", and in doing so it attempts to ensure that no undue discrimination occurs between rate classes, and that the principles of cost causality are followed in allocating the underlying rates. While the Board recognizes ONA's concerns, the Board finds that the establishment of a special rate class to provide redress for aboriginal consumers of Centra does not meet the above criteria and it is not prepared to order the studies requested by ONA.
>
> (*Decision with Reasons*, EBRO 493, pp. 314 and 317)

Although this decision did not explicitly state that the Board has no jurisdiction to consider special rates for disadvantaged groups, it is a clear expression from the Board on its view of its mandate. It is this Board's view that if the legislature had intended to grant the Board the power to order the implementation of low income assistance programs, it would have stated so expressly.

A very similar jurisdictional issue was recently before the Nova Scotia Court of Appeal. In this case, the Nova Scotia Utility and Review Board's ("NSURB") decision that it did not have jurisdiction to order low income affordability programs was appealed to the Court of Appeal. The Court upheld the NSURB's finding that it did not have jurisdiction. Speaking for the majority, Fichaud J.A. stated: "[t]he statute does not endow the Board with discretion to consider the social justice of reduced rates for low income consumers. […] It is for the Legislature to decide whether to expand the Board's purview…"[1]

The Charter

LIEN has submitted that, in making its determination on jurisdiction, the Board should be guided by the Canadian Charter of Rights and Freedoms (the "Charter"). In LIEN's view, where there is ambiguity in the interpretation of a statute, a tribunal should be

[1] *Dalhousie Legal Aid Service v. Nova Scotia Power Inc*" [2006] N.S.J. No. 243 (C.A.)

guided by Charter principles. In support of this position, LIEN cited the Supreme Court decision in *R. v. Rogers* [2006] 1 SCR 554:

> "It has long been accepted that courts should apply and develop common law rules in accordance with the values and principles enshrined in the Charter: *RWDSU v. Dolphin Delivery Ltd.,* [1986] 2 S.C.R. 573, at p. 603; *Cloutier v. Langlois*, [1990] 1 S.C.R. 158, at p. 184; *R. v. Salituro*, [1991] 3 S.C.R. 654, at p. 675; *R. v. Golden*, [2001] 3 S.C.R. 679, 2001 SCC 83, at para. 86; *R. v. Mann,* [2004] 3 S.C.R. 59, 2004 SCC 52, at paras. 17-19. However, it is equally well settled that, in the interpretation of a statute, Charter values as an interpretative tool can only play a role where there is a genuine ambiguity in the legislation. In other words, where the legislation permits two different, yet equally plausible, interpretations, each of which is equally consistent with the apparent purpose of the statute, it is appropriate to prefer the interpretation that accords with Charter principles."

While the Board does not dispute the sentiments expressed in this passage, this decision does not apply to the case at hand. The Court was clear that Charter values are to be applied as an interpretive tool "where there is a genuine ambiguity in the legislation." In this case, we find no such ambiguity. The Board simply has not been given the powers that LIEN seeks to ascribe to it.

Conclusion

It is therefore the majority's finding that the Board does not have the jurisdiction to order the implementation of a rate class based on an income level determinant as described above.

DATED at Toronto, April 26, 2007

Original signed by

Paul Vlahos
Member

Original signed by

Ken Quesnelle
Member

DISSENTING DECISION

The issue in this Motion is whether the Board has the jurisdiction to order special rates for low-income consumers. For the reasons set out below, I respectfully disagree with the majority and find that the Board has jurisdiction.

This is not the first time this matter has come before the Board. The Applicant in this case, the Low Income Energy Network (LIEN), raised an identical issue in the Union rate case last year. That Panel did not reject the matter on the basis of jurisdiction but deferred it on the grounds that it would be best to consider the matter in a different forum. LIEN argued before us that there had been little progress and accordingly wished to have the matter heard in the Enbridge rate case. This Panel ruled that before deciding the issue it wished to have detailed submissions on whether the Board had jurisdiction. This section addresses that issue.

The Industrial Gas Users Association (IGUA), the Consumers Council of Canada (CCC"), Enbridge Gas Distribution Inc. (EGD) and Union Gas Limited (Union) all argue that the Board does not have the jurisdiction to establish special rates for low-income consumers.

Board staff argued that the Board did have jurisdiction to implement some form of rate affordability assistance programs for low-income consumers but stated, "absent a specific proposal Board staff does not believe it is prudent to speculate just how far that authority might extend."

For the reasons outlined below, I find that the Board has jurisdiction to approve special rates for low-income consumers in appropriate cases. No decision is being made as to whether the Board should exercise that jurisdiction however. There is no specific proposal before us. A decision whether to exercise jurisdiction should be deferred to a proceeding that faces a definitive proposal.

A number of parties also argued that if there were a proceeding to consider low-income rates, it should be a generic proceeding. That, in fact, was the Board's decision the last time this Board considered this issue.[1] I agree with that decision.

[1] *Union Gas Limited*, EB-2005-0520 (O.E.B.), Transcript, Vol. 01, May 23, 2006 at 86-87 [hereinafter referred to as *Union*].

The case that LIEN makes for rate affordability programs is best summarized in paragraphs 1 and 2 of its written submissions:

> "1. Unaffordable gas and electricity rates cause great hardship to poor consumers in Ontario. Sometimes they are forced to choose between heating or eating; sometimes their supply is disconnected. The Ontario Energy Board's ("Board") statutory objective to protect the interests of consumers with respect to prices and the reliability and quality of gas service is not being met by the current rate fixing system. The interests of low-income consumers are not protected and de facto the service to them is unreliable and inadequate.
>
> 2. The Board's self-acknowledged and judicially acknowledged mandate is to regulate the province's electricity and natural gas sectors in the public interest. Low-income consumers form a substantial proportion of Ontario's population: approximately 18% of households spread throughout the province. Gas rates and service that disadvantage such a substantial segment of the public, whether directly through rate structure or indirectly through terms and conditions, are not in the public interest."

Jurisdiction

Any Tribunal only has the powers stated in its governing statute or those, which arise by "necessary implication" from the wording of the statute, its structure and its purpose.[2] This Board's jurisdiction to fix "just and reasonable" rates is found in section 36(2) of the *Ontario Energy Board Act,* 1998:

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

One of the Board's statutory objectives as set out in section 2 of the Act is to "protect the interests of consumers with respect to prices and the reliability and quality of gas service." LIEN argues that without a rate affordability program, the interests of low-income consumers are not protected.

It is generally accepted that the Board's jurisdiction is very broad. In *Union Gas Ltd.* v. *Township of Dawn*, the Ontario Divisional Court in 1977 stated:

---

[2] *ACTO Gas and Pipelines Ltd.* v. *Alberta (Energy and Utilities Board*, [2006] 1 S.C.R. 140, [2006] 2.C.J. 400 at para. 38. See also *Bell Canada* v. *Canada (Canadian Radio-Television and Telecommunications Commission*, [1989] 1 S.C.R. 1722.

> "this statute makes it crystal clear that all matters relating to or incidental to the production, distribution, transmission or storage of natural gas, including the setting of rates, location of lines and appurtenances, expropriation of necessary lands and easements, are under the exclusive jurisdiction of the Ontario Energy Board and are not subject to legislative authority by municipal courts under the *Planning Act*.
>
> These are all matters that are to be considered in light of the general public interest and not local or parochial interests. The words "in the public interest" which appear, for example, in s. 40(8), s. 41(3) and s. 43(3), which I have quoted, would seem to leave no room for doubt that it is broad public interest that must be served.[3]

The same Court in 2005 issued two important decisions. The Court stated in the *NRG* case:

> "The Board's mandate to fix just and reasonable rates under section 36(3) of the *Ontario Energy Board Act, 1998* is unconditioned by directed criteria and is broad; the Board is expressly allowed to adopt any method it considers appropriate."[4]

The ruling in the Enbridge case decided that the Board in fixing just and reasonable rates can consider matters of "broad public policy:"

> "the expertise of the tribunal in regulatory matters is unquestioned. This is a highly specialized and technical area of expertise. It is also recognized that the legislation involves economic regulation of energy resources, including setting prices for energy which are fair to the distributors and the suppliers, while at the same time are a reasonable cost for the consumer to pay. This will frequently engage the balancing of competing interests, as well as consideration of broad public policy."[5]

This legal principle must be considered in the context of the fact situation before us. The supply of natural gas can be considered a necessity that is available from a single source with prices set by an agent of the Crown. The Divisional Court has said that the Board is entitled in setting rates to consider "broad public policy". This suggests that in appropriate circumstances the Board can consider ability to pay in setting rates if it is necessary to meet broad public policy concerns. Access to an essential service may be such a concern.

---

[3] (1977), 15 O.R. (2d) 722, [1977] O.J. No. 2223 at paras. 28 and 29.

[4] *Natural Resource Gas Ltd.* v. *Ontario Energy Board*, [2005] O.J. No. 1520 (Div. Ct.) at para 13.

[5] *Enbridge Gas Distribution Inc.* v. *Ontario Energy Board* (2005), 75 O.R. (3d) 72, [2005] O.J. No. 756 at para. 24.

Those arguing a lack of jurisdiction on the part of the Ontario Board point to section 79 of the Act, which specifically authorizes the Board to provide rate protection for rural or remote customers of an electricity distributor. They argue that if the legislature had intended special rates for low-income consumers, the legislature would specifically have inserted a provision similar to section 79.

With respect, the correct reading of the legislative history of that section does not bear this interpretation. The section was introduced when the Board first obtained the jurisdiction to regulate electricity distributors. Prior to that, electricity distributors in the Province were regulated by Ontario Hydro, a Crown corporation. The Government through its Crown corporation had established the policy of setting special rates in remote and rural areas of the province. This section was introduced in 1999 when the authority to set rates was transferred to the Ontario Energy Board to indicate to the Board that this policy should continue.[6] I do not accept that this section represents an attempt by the Government to circumscribe the jurisdiction of the Board. That is contrary to the clear wording of section 36(3) which specifically applies to gas distributors.[7]

The Ability to Pay

Those arguing that the Board does not have jurisdiction to enact special rates for low-income customers often do so on the basis that rate-setting would depart from standard regulatory principles and morph into social engineering. They argue that the Board should not consider ability to pay in setting rates, relying to some degree on the decision of the Alberta Board, which rejected lifeline rates on the basis, that "life-line rates are rates based not on economic principles of regulation such as cost of service but on a social principle of the customer's ability to pay."[8]

---

[6] Ontario Regulation 442/01 – *Rural or Remote Electricity Rate Protection* (made under the *Ontario Energy Board Act, 1998*) requires the OEB to determine the annual amount to be collected and distributed for rural or remote electricity rate protection. Prior to the Board being granted authority over electricity rate regulation in 1999, rural rate protection was provided through section 108 of the *Power Corporation Act*, R.S.O. 1990, c. P. 18. That section required that the weighted average bill for the first 1000 kws of consumption by rural residential customer be 115% of the weighted average bill for the first 1000 kws of consumption by a municipal residential customer. Funding of this subsidy was provided by municipal commissions and any other person supplied power by Ontario Hydro.

[7] Section 36(3) of the *Ontario Energy Board Act, 1998* states that "In approving or fixing and just and reasonable rates, the Board may adopt any method or technique that it considers appropriate."

[8] *EPCOR Distribution Inc.* (August 13, 2004), Decision 2004-067 (A.E.U.B.) at 184 [hereinafter referred to as *EPCOR*].

LIEN argues to the contrary, stating that the Board is required to set just and reasonable rates, and in this regard, should have regard to its objects, one of which is "to protect the interest of consumers with respect to price". They argue, "how can the Board protect consumers with respect to price if it cannot consider the ability to pay."

Most energy regulators in Canada, including the Ontario Energy Board, agree that the cost of serving customers is a major determinate of rates. But, this is not the only determinate. Another variant of this argument is that the Board is an "economic regulator" and as such, jurisdiction is circumscribed. This principle is relied upon by the majority in this case.

With respect, there is no basis for this position in the statute. This very argument in, substantially similar circumstances, was recently rejected by the Federal Court of Appeal in *Allstream Corp.* v. *Bell Canada*.[9] There, Bell Canada had filed tariffs for optical fiber services in different areas. In some areas, Bell priced the service below the floor price previously established by the CRTC. The Commission approved these rates despite the objection of Allstream, a competitor, that the rates would reduce competition and were beyond the Commissions jurisdiction as an "economic regulator".

All of the Members of the Commission agreed that the proposed rates did not comply with existing criteria because they fell below the applicable floor price. A majority of the Commission, however, ruled that there were "exceptional" circumstances in five cases as the services were necessary to serve schools in the area. Two dissenting Members of the Commission were highly critical of the majority. One Commissioner stated that "with the advent of competition, the Commission has undertaken twelve years in a continuing painstaking process of wringing out the cross subsidization between the various classes of ratepayers and that, to step back from cost based rates and reintroduce hidden cross subsidization was a retrograde and chilling step."[10]

The Federal Court of Appeal in reviewing the Commission's decision considered the sections of the *Telecommunications Act* that governed the Commission's jurisdiction. Section 27(1) of the Act provided that "every rate charged by a Canadian carrier for telecommunications service shall be just and reasonable." Section 27(5) of the Act provided that "in determining whether a rate is just and reasonable, the Commission

[9] [2005] F.C.J. No. 1237.

[10] *Ibid*. at para. 9.

may adopt any method or technique that it considers appropriate, whether based on a carrier's return on its rate base or otherwise." Those sections are identical to Ontario legislation at play in this proceeding. In upholding the Commission's decision, the Federal Court of Appeal, stated:

> The appellant highlights the fact that the courts have historically deferred to utilities commissions in deciding which factors are relevant in determining a just and reasonable rate. However, such factors have typically been economic considerations of the rates themselves. Examples from the jurisprudence sanction reliance on a utility's costs, investments, reserves, and allowances for necessary working capital; a rate of return on the utility's investment; the recovery of fair and reasonable expenses; costs of debt and equity; and general economic conditions. The factors relied on in this case are not economic considerations relative to the rates themselves and therefore, the appellant argues, the Court should not defer to the Commission….
>
> The Commission as a whole has experience in rate setting. The variety of opinions and concerns expressed in the decision under appeal is an indication that different members held different views on the industry, the market, the services to be provided, the policy objectives and their application in these circumstances. It is apparent that the Commission was greatly concerned and the dislocation of complex equipment and facility configurations at a significant cost to the detriment of school boards and municipalities in the relevant areas and that such concerns outweighed, in its view, Bell's failure to seek prior approval of these rates. These are considerations that a specialized board can entertain and weigh relative to other considerations. It is true that these considerations are not purely economic in the sense referred to by the appellant such as costs, investment, allowance for necessary working capital, rate of return, etc. These considerations, however, are part of the Commission's wide mandate under section 7, a mandate it alone possesses and are quite distinct from the grant of a rebate under paragraph 27(6)(b) of the Act, a power the Commission did not invoke.
>
> The Commission's choice of "exceptional circumstances" was not patently unreasonable. I therefore cannot find that they were irrelevant considerations which would amount to an error of law or jurisdiction. I would dismiss this appeal with costs.[11]

There is no specific proposal before the Ontario Energy Board at this point. This is strictly a question whether the Board has jurisdiction to set special rates for low-income consumers. It may be that there must be "exceptional circumstances" for the Board to exercise that jurisdiction and depart from standard rate making principles, but in my view, the Board has that jurisdiction in the appropriate circumstances.

[11] *Ibid* at paras. 22 and 34-36.

A finding that the Board has jurisdiction to consider ability to pay in setting rates, does not mean, as the majority suggests, that there will be a "fundamental change" in rate-making principles across the board. I accept that cost causality is the basic principle. I also accept the Federal Court's view that there should be exceptional circumstances. But, I also believe that in the appropriate circumstances the Board has the authority to enact those programs.

It is important in this context to recognize that section 36(3) of the Act provides that the Board in fixing just and reasonable rates can adopt "any method or technique that it considers appropriate". The majority finds that this language does not allow the Board to consider ability to pay in setting rates. They conclude that if this was the legislative intent, this authority would have been specifically included. With respect, I disagree. This is an extremely broad power. Given the language it is difficult to understand why the legislature would reference one specific rate-making technique or factor. The majority also finds that this provision was intended to allow the Board to move from standard rate-based rate-of-return regulation to incentive regulation. I see nothing in the language of this statute that leads to that restriction.

The majority relies on the decision of the Nova Scotia Court of Appeal upholding the decision of the Nova Scotia regulator, where the Board found that it did not have jurisdiction to order low-income affordability programs. With respect, that decision has no application to the situation before us. That decision was clearly founded on section 67(1) of the *Public Utilities Act* of Nova Scotia[12] which required that rates shall "always be charged equally to all persons under the same rate in substantially similar circumstances and conditions irrespective of service of the same description."

This section is not in the Ontario Act. Rather, what is in the Ontario Act (and not in the Nova Scotia Act) is section 36(3) which authorizes the Board in setting just and reasonable rates to adopt "any method or technique it considers appropriate". The statutory scheme and the regulatory authority granted to the Ontario and Nova Scotia Boards is materially different.

This Board has jurisdiction to set just and reasonable rates, to act in public interest, and to use any rate-making technique considered appropriate. Moreover, Ontario

[12] Section 67(1) of the *Public Utilities Act*, R.S.N.S. 1989, c. 380, provides that "All tolls, rates and charges shall always, under substantially similar circumstances and conditions in respect of service of the same description, be charged equally to all persons and at the same rate, and the Board may by regulation declare what shall constitute substantially similar circumstances and conditions."

courts in numerous decisions have confirmed the Board's broad rate-making authority and that the Board can consider matters of public policy. The fact that the Board may be considered an "economic regulator" does not limit that jurisdiction.

Put simply, just and reasonable rates do not result from the application of a purely mechanical process of rate review and design. A Board can, and should, take into account a variety of considerations beyond costs in determining rates. It is not unusual for energy regulators, including the Ontario Board, to reduce a rate increase because of "rate shock" and spread the increase over a number of years. Such a determination, as LIEN argues, is driven by considerations of the "ability to pay".

I also agree with Board Counsel that the Board has crossed this bridge. This Board in the past has considered ability to pay in different cases. Both Enbridge and Union Gas make annual contributions to the Winter Warmth program, which provides funds to certain low-income consumers to ensure they can heat their homes during winter months.[13]

The majority finds that this program constitutes a "charity" or emergency program and does not reflect principles of rate making. With respect, these long-standing programs provide a subsidy to low-income consumers to allow them to purchase gas. If this Board has jurisdiction to order utilities to pay subsidies to low income customers, it has jurisdiction to order utilities to provide special rates.

Interestingly, we find another example in this very case. In this proceeding, Enbridge is asking the Board to approve fuel-switching programs to enable consumers to shift from electric-water heaters to gas-water heaters, to increase utility sales and promote conservation given the greater efficiency of the gas-water heater.

What's interesting is that the utility is proposing two programs, one for low-income consumers and one for other consumers. The programs are identical and there are roughly the same number of participants in each program. The difference is that the subsidy for the low-income group is $800 per participant while the subsidy for other consumers is only $600. None of the parties of this proceeding objected. No one has argued that the Board does not have jurisdiction to approve different subsidies based on income levels.[14]

[13] See *Union*, EB-2005-0520 (O.E.B.).

[14] *Enbridge Gas Distribution Inc.*, EB-2006-0034 (O.E.B.), Exhibit 1, Tab 1, Schedule 25, at 3.

Unjust Discrimination

Enbridge argues that enacting special rates for low-income consumers would violate the common law principle against unjust discrimination by public utilities as set out in *St. Lawrence Rendering Company Ltd.* v. *the City of Cornwall*.[15]

> "That a public utility was at common law compelled to treat all consumers alike, to charge one no more than the other and to supply the utility as a matter of duty and not as a result of a contract, seems clear."

There is no question that this common law principle has been enshrined in public utility statutes for decades. Section 321 of the *Railway Act* for over 100 years prohibited unjust discrimination or undue preference by telecommunication companies as well as railroads.[16] Most public utilities statutes in Canada contain similar provisions prohibiting unjust discrimination.[17] The *Ontario Act* is unique in that respect, because it does not contain this provision. That does not mean the principle does not apply. It is well founded in the Common Law. However, the common law principle does not stand for no discrimination. The prohibition is against unjust discrimination or undue preference.

Low-income rates do not necessarily offend the general principle of unjust discrimination or undue preference. That judgment will turn upon the exact nature of the program, something that is not before this panel. In short, the common law principle prohibits unjust discrimination, not any discrimination. It is not a bar to the Board exercising its jurisdiction in the appropriate circumstances.

On the contrary, this principle may require special rates. The prohibition against unjust discrimination has often been used to ensure access to a monopoly utility's facilities[18] and arguably relates to the services as well.

---

[15] *St. Lawrence Rendering Company Ltd.* v. *the City of Cornwall*, [1951] O.R. 669 at 683. See also *Canada (Attorney General* v. *Toronto (City* (1893, 23 S.C.R. 514.

[16] *Railway Act*, R.S.C. 1970, c. R2, s. 321, as amended. See also the *Telecommunications Act*, S.C., 1993, c. 38, s. 27(2). This section is similar to sections 201 and 202 of the *Communications Act 1934*, 47 USCA (1962) which governs US telecommunications companies. See also *EPCOR*, supra note 12 at 184.

[17] See the *Public Utilities Act*, R.S.N.L. 1990, c. P-47, ss. 82, 84 and 87; the *Electric Power Act*, R.S.P.E.I. 1988, c. E-4, ss. 28-30; the *Public Utilities Board Act*, R.S.A. 2000, c. P-45, ss. 80 and 100; and the *Utilities Commission Act*, R.S.B.C. 1996, c. 473, ss. 58-60.

[18] *Otter Trail Power Co.* v. *United States*, 410 U.S. 366 (1973); *Specialized Common Carrier*, 29 F.C.C. 2d 870 (1971), modified 33 F.C.C. 2d 408 (1972), aff'd sub nom. *Washington Util. & Transp. Comm'n* v. *F.C.C.*, 513 F. 2d 1142 (9th Cir. 19750, cert. denied 423 U.S. 836 (1975); See also *CNCP Telecommunications, Interconnection with Bell Canada,*

Charter of Rights and Freedoms

Section 32.2 of the Act, provides that the Board may make orders approving or fixing "just and reasonable rates" for the sale of gas. LIEN argues that in the absence of clear statutory provisions, the requirement for a "just and reasonable rate" must be interpreted to comply with section 15 of the Canadian Charter of Rights and Freedoms. Section 15 states:

> "15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

There is no question that the Charter applies to provincial legislation,[19] and the Supreme Court of Canada in *R.* v. *Rogers* held that the Charter, can be used as an interpretative tool:

> "[I]t is equally well settled that, in interpretation of a statute, *Charter* values as an interpretative tool can only play a role where there is a genuine ambiguity in the legislation. In other words, where the legislation permits two different, yet equally plausible, interpretations, each of which is equally consistent with the apparent purpose of the statute, it is appropriate to prefer the interpretation that accords with *Charter* principles."[20]

The majority believes that it is clear that jurisdiction does not exist. As a result, they conclude that the required ambiguity is not present and the Charter cannot be used as an interpretive tool. I have concluded that the Act clearly grants the Board the necessary jurisdiction. Given the lack of ambiguity, the Charter would not be available for purposes of interpretation.

This, with respect, makes little sense. The Charter is the supreme law of the land. No legislation can be contrary to the Charter and no Board can issue an Order contrary to the Charter. To be fair to LIEN, a split decision suggests ambiguity. All parties agree, as the majority states, that there is no explicit authority in the Statute. The

---

Telecom. Decision CRTC 79-11, 113 Can. Gazette PT, I, supplement to No. 29, 5 C.R.T. 177 (17 May 1979) aff'd P.C. 1979-2036 at 274.

[19] *Retail, Wholesale and Department Store Union, Local 580 [R.W.D.S.U.]* v. *Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573.

[20] *R.* v. *Rogers*, [2006] 1 SCR 554, [2006] S.C.J. No. 15 at para. 18; See also *Bell ExpressVu Limited Partnership* v. *Rex*, [2002] 2 S.C.R. 559, [2002] S.C.J. No. 43 at para. 62.

question is whether there is implicit authority. In the circumstances of this case, I find the Charter can be used as an interpretative tool.

It is important to remember that the Charter can also be used by disadvantaged groups to set aside Board decisions refusing to set aside special rates, if that refusal amounted to discrimination within the language of section 15.

The Charter specifically empowers Courts to provide a remedy to anyone whose rights or freedom has been infringed or denied by Government action. Its reach extends not just to laws but the decisions taken pursuant to those laws. The Supreme Court of Canada held in *Slaight*[21] that no public official could be authorized by statute to breach the Charter and therefore all statutory grants of discretion had to be read down only to authorize decision making which is consistent with Charter rights and guarantees. As Professor Hogg has stated:

> "Action taken under statutory authority is valid only if it is within the scope of that authority. Since neither Parliament nor a Legislature can itself pass a law in breach of the Charter, neither body can authorized action which would be in breach of the Charter. Thus, the limitations on statutory authority which are imposed by the Charter will flow down the chain of statutory authority and apply to regulations, by-laws, orders, decisions and all other action (whether legislative, administrative or judicial) which depends for its validity on statutory authority."[22]

In Baker,[23] the Court clearly stated that discretion must be exercised not only in accordance with the boundaries of the statute and the principles of administrative law, but in a manner consistent with the "principles of the Charter" and the "fundamental values of Canadian society".

Applicants under s. 15 must however, show they have been subjected to discrimination or denied a legal benefit or protection. They must also show that the denial of the benefit or protection is on an enumerated or analogous ground.[24] In order to determine whether the Charter applies here, it is necessary to answer two questions. First, is poverty or low income an analogous ground? Second, has there

---

[21] *Slaight Communications Inc.* v. *Davidson*, [1989] 1 S.C.R. 1038.

[22] P.W. Hogg, *Constitutional Law of Canada*, looseleaf (Toronto: Carswell, 1997) at para. 34-11.

[23] *Baker* v. *Canada (Minister of Citizenship and Immigration*), [1999] 2 S.C.R. 817 at para. 25.

[24] *Law Society of British Columbia* v. *Andrews*, [1989] 1 S.C.R. 143.

been discrimination or a disadvantage as a result of the failure to enact low income rates?

In the past, courts have been reluctant to define poverty and low income as an analogous ground.[25] More recent cases however, offer broader interpretations. The Ontario Court of Appeal in Falkiner[26] found that there was discrimination contrary to section 15 of the Charter against individuals who were subjected to differential treatment on the analogous ground of "receipt of social assistance". The Nova Scotia Court of Appeal in *Sparks*[27] found that sections of the *Residential Tenancies Act* were unconstitutional because of discrimination contrary to Section 15 of the Charter against "tenants of public housing". The Nova Scotia Court stated in part:

> Low income, in most cases verging on or below poverty, is undeniably a characteristic shared by all residents of public housing; the principle criteria of eligibility for public housing are to have a low income and a need for better housing….
> Section 15(1) of the Charter requires all individuals to have equal benefit of the law without discrimination. Public housing tenants have been excluded from certain benefits private sector tenants have as provided to them in the Act. The effect of ss. 25(2) and s. 10(8)(d) of the Act has been to discriminate against public housing tenants who are a disadvantaged group analogous to the historically recognized groups enumerated in s. 15(1).[28]

The Ontario Court of Appeal in *Falkiner* came to a similar conclusion:

> I consider that the respondents have been subjected to differential treatment on the analogous ground of receipt of social assistance. Recognizing receipt of social assistance as an analogous ground of discrimination is controversial primarily because of concerns about singling out the economically disadvantaged for Charter protection, about immutability and about lack of homogeneity…
>
> [T]he main question in deciding whether a ground of discrimination should be recognized as analogous is whether its recognition would further the purpose of s. 15, the protection of human dignity …The

[25] *Dunmore v. Ontario (Attorney General)* (1997), 37 O.R. (3d) 287. See also *Alcorn v. Canada (Commissioner of Corrections)* (1999), 163 F.T.R. 1 (T.D.).

[26] *Falkiner* v. *Ontario (Ministry of Community and Social Services)* (2002), 59 O.R. (3d) 481, [2002] O.J. No. 1771 {C.A.} [hereinafter referred to as Falkiner].

[27] *Dartmouth/Halifax County Regional Housing Authority* v. *Sparks*, [1993] N.S.J. No. 97 (C.A.)

[28] *Ibid*. at pp. 8 and 9 of 11.

> nature of the group and Canadian society's treatment of that group must be considered. Relevant factors arguing for recognition include the group's historical disadvantage, lack of political power and vulnerability to having its interests disregarded…
>
> [A]lthough the receipt of social assistance reflects economic disadvantage, which alone does not justify protection under s. 15, economic disadvantage often co-exists with other forms of disadvantage. That is the case here.[29]

There is no specific plan before the Board at this point. However, we do know that existing utility programs, that subsidize low income groups rely on existing social welfare legislation to define which individuals are "low income". Accordingly, it is possible that those qualified for the low-income rate programs might be those in "receipt of social assistance".

The more difficult question is whether this group is being disadvantaged by a failure to enact low-income rates. Enbridge says that there is no discrimination because everyone gets the same rate. LIEN argues that the requirement of a single rate regardless of income discriminates those who cannot afford the service.

It is important to recognize the nature of the service at issue. The supply of gas can be considered an essential commodity. And, there is only once source of this commodity, a regulated utility. And, the price is set by the Ontario Engergy Board, an agent of the Crown.

For the reasons expressed above, I believe that the Charter may provide a remedy to disadvantaged groups, in the appropriate circumstances to require Boards to set special rates for supply of an essential commodity from a single regulated source. I also find that the Charter principles of section 15 apply to a determination of jurisdiction and, the Charter supports a conclusion that the Board has jurisdiction. However, even if the Charter does not apply, I believe the Act gives the Ontario Energy Board broad powers and discretion to consider issues of public policy and the necessary jurisdiction to enact low-income rates.

DATED at Toronto, April 26, 2007

Original signed by

Gordon Kaiser
Presiding Member and Vice Chair

[29] *Falkiner, supra* note 27 at paras. 84, 85 and 88.