

EB-2006-0322

EB-2006-0338

EB-2006-0340

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

AND IN THE MATTER OF Rules 42, 44.01 and 45.01 of the Board's *Rules of Practice and Procedure*.

FACTUM OF THE INDEPENDENT ELECTRICITY SYSTEM OPERATOR

PART I – NATURE OF THE MOTIONS

1. The moving parties have filed motions under rule 45.01 of the *Rules of Practice and Procedure* of the Ontario Energy Board ("Board") seeking an Order, *inter alia*, directing a review of the merits of its Decision with Reasons dated November 7, 2006 (the "Decision") in the Natural Gas Electricity Interface Review proceeding, EB-2005-0551 ("NGEIR").
2. The submissions of the Independent Electricity System Operator (the "IESO"), an intervenor in the NGEIR proceeding, are limited to the narrow issue of what is the appropriate the standard of review that is to be applied on the threshold question of whether to undertake a review. On that issue, the IESO

submits that ordering a review or rehearing of a prior decision or order is an extraordinary remedy that should only be undertaken in unusual circumstances. The moving parties must demonstrate that new evidence has arisen, that the original panel made an error in law or principle that would justify reversal, or that clarification of the original decision is required to properly implement it. The Board should respect the finality of the original decision and not embark on what constitutes a rehearing simply because a party is dissatisfied with the result.

3. The IESO takes no position on whether the specific motions for review of the NGEIR Decision brought by the City of Kitchener, the Association of Power Producers of Ontario ("APPrO"), and jointly by the Industrial Gas Users' Association, the Vulnerable Energy Consumers Coalition and the Consumers Council of Canada (the "Consumer Groups") meet the applicable threshold under rule 45.01.

PART II – FACTS

4. The Board has received three Notices of Motion to review separate aspects of the Decision from Kitchener, APPrO and the Consumer Groups respectively.

5. On January 27, 2007, the Board issued a Notice of Hearing and Procedural Order No. 1 asking the parties to address: (i) the threshold questions that the Board should apply in determining whether to review the Decision; and (ii) whether the Kitchener, APPrO and the Consumer Groups have met the applicable standard under rule 45.01.

PART III – LAW AND ANALYSIS

A. The Board’s Power to Review

6. When considering a request to review its own decision or order, an administrative tribunal must act in deference to the policy of finality of proceedings. The Supreme Court of Canada has confirmed that when a tribunal renders a final decision the doctrine of *functus officio* will apply:

There is a social policy reason for recognizing the finality of proceedings before administrative tribunals. As a general rule, once such a tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change in circumstances. It can only do so if authorized by statute or if there has been a slip or error . . .

Chandler v. Alberta Association of Architects, [1989] 2 S.C.R. 848 at para. 20. Tab 1 of the Book of Authorities of the Independent Electricity System Operator (the “IESO Authorities”).

Zutter v. British Columbia (Council of Human Rights), [1995] B.C.J. No. 626 at para. 31 (C.A.). Tab 2 of the IESO Authorities.

7. In this case, the Board’s authority to conduct a review originates from section 21.2(1) of the *Statutory Powers Procedure Act* and must be exercised within the constraints articulated in that provision:

21.2 (1) A tribunal may, *if it considers it advisable and if its rules made under section 25.1 deal with the matter*, review all or part of its own decision or order, and may confirm, vary, suspend or cancel the decision or order.

[Emphasis added.]

Statutory Powers Procedure Act, R.S.O. 1990, c. S.22, s. 21.2.

8. The Divisional Court considered this provision in *Toronto Housing Co. v. Sabrie* and held that a tribunal could deny a rehearing in accordance with an

internal policy so long as the policy was not applied inflexibly. In its decision, the Divisional Court recognized the importance of finality in the fair allocation of scarce public resources and stated that it would be “wrong to open the floodgates to repeated reconsideration requests.”

Toronto Housing Co. v. Sabrie, [2003] O.J. No. 652, at para 31 (Div. Ct.). Tab 3 of the IESO Authorities.

9. The Board’s power to review under section 21.2 of the *Statutory Powers Procedure Act* is distinguishable from the broad review jurisdiction of the Ontario Municipal Board articulated in *Russell v. Toronto (City)*. The court in *Russell* held that wide plenary review power in section 43 of the *Ontario Municipal Board Act* could not be limited by the tribunal’s self-imposed directive. By contrast, section 21.2 *expressly* contemplates that a tribunal’s review power is subject to such constraints. Therefore, the Board should look to its own jurisprudence and rules of practice and procedure to determine the appropriate standard of review on the threshold question.

Russell v. Toronto (City) (2000), 52 O.R. (3d) 9 (C.A.), (leave to appeal to the SCC refused August 9, 2001) Tab 4 of the IESO Authorities.

Ontario Municipal Board Act, R.S.O. 1990, c. O.28, s. 43.

Statutory Powers Procedure Act, R.S.O. 1990, c. S.22, s. 21.2.

10. Similarly, the standard of review for the threshold question is not dictated by section 4.6 of the *Statutory Powers Procedure Act*. Section 4.6 concerns the dismissal of a proceeding without a hearing, not the review of a decision or order that has already been the subject of a hearing, and is therefore not relevant to the determination of the threshold question. In any event, section 4.6 would not apply in this case because the Board’s procedural order directs a hearing on the threshold question before the Board.

B. Standard of Review on the Threshold Question

11. Under rule 42.01 of the Board's *Rules of Practice and Procedure*, any party may request the Board review a decision or order by serving and filing a notice of motion within 20 days of the date of the decision or order. A moving party's notice of motion is required by rule 44.01 to set out the grounds for the review, which include:

- (a) error in fact;
- (b) change in circumstances;
- (c) new facts that have arisen; and
- (d) acts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time.

Rules of Practice and Procedure of the Ontario Energy Board, rr. 42.01 and 44.01.

12. Rule 45.01 allows the Board to determine, with or without a hearing on the threshold question of whether a motion to review should proceed to a review on its merits:

45.01 In respect of a motion brought under Rule 42.01, the Board may determine, with or without a hearing, a threshold question of whether the matter should be reviewed before conducting any review on the merits.

Rules of Practice and Procedure of the Ontario Energy Board, r. 45.01.

13. A motion to review or vary a decision or order is not an application *de novo* and therefore the Board's assessment of the threshold question should be guided by the factors listed in rule 42.01. The IESO submits that on the

threshold question, the moving parties need to present new evidence or demonstrate that the original panel made an error in law or principle that would justify the reversal of the original decision or order, or that clarification of the original decision is required in order to implement the original decision. This approach would be consistent with the conduct of the Board in its decision on a motion for a rehearing and variance of the decision of the Board in RP-2004-0167/EB-2005-0188.

Decision of the Ontario Energy Board on a Motion for Review and Re-Hearing dated October 6, 2005, RP-2004-0167/EB-2005-0188, at p. 7. Tab 5 of the IESO Authorities.

14. When considering the threshold question in past cases, the Board has had regard for “regulatory efficiency” and demonstrated deference to the policy of finality of proceedings. On a motion to review in RP-1999-0001, the Board stated “ordering a review or rehearing is an extraordinary remedy [that] should not be undertaken lightly” and, based on the record before it, denied the request for a review. Likewise, the Board recognized in E.B.O. 179-14 and E.B.O. 179-15 that a party’s dissatisfaction with the result was not sufficient to warrant a rehearing:

Decision of the Ontario Energy Board on a Motion for Review and Variance dated June 29, 2000, RP-1999-0001, at p. 16, Tab 6 of the IESO Authorities.

The Board’s attention was drawn to a number of cases in which the courts have considered powers of administrative tribunals to reconsider matters that have been the subject of their decisions. Having reviewed the cases and heard submissions by the parties, the Board is of the view that *the Board should not rehear matters simply because one of the parties to the original application was dissatisfied with the result or otherwise no matter might ever be finally determined.*

[Emphasis added.]

OEB Ruling on Motion by Enbridge Consumers Gas dated August 17, 1999, E.B.O. 179-14 and E.B.O. 179-15, at p.3. Tab 7 of the IESO Authorities.

15. Another formulation of this principle was enunciated by the Board on a motion to review in RP-2003-0063/EB-2004-0480, where it stated that a review or variance of a prior decision or order was only warranted in “unusual circumstances”.

Counsel ... stated that the Board should only vary or cancel an Order of a previous Panel in unusual circumstances. In the Enbridge decision of October 10, 2003, RP-2003-0048, the Board stated:

“The Board agrees with the submissions made by the CAC that regulatory agencies should not review and vary their decisions except in unusual circumstances.”

Decision of the Ontario Energy Board on a Notice of Motion of Union Gas Limited dated March 18, 2005, RP-2003-0063/EB-2004-0480. Tab 8 of the IESO Authorities.

16. The standard for the threshold test advocated by the IESO is also consistent with the practice of the Ontario Labour Relations Board when considering requests for reconsideration under section 21.2 of the *Statutory Powers Procedure Act*:

Generally, the Board will not reconsider a decision unless a party proposes to adduce new evidence that could not have been obtained earlier through the exercise of reasonable diligence or the party wishes to make representations not already considered by the Board that the party did not have an opportunity to raise. The Board may also reconsider a decision that contains an obvious error or which raises important policy decisions which have not been addressed.

Caton v. Employer Headgear Inc., 2005 CanLII 25501 (ON L.R.B.) at para 3, Tab 9 of the IESO Authorities.

[The reconsideration power] is not intended to provide an opportunity for a party to re-argue its case, either *de novo* or as some for of appeal.

Can-Way Supplies v. Panagiotakopoulos, 2004 CanLII 22616 (ON L.R.B.), at para. 6. Tab 10 of the IESO Authorities.

PART IV – REQUEST FOR RELIEF

17. It is submitted that the Board should articulate a standard of review for the threshold question under rule 45.01 that is consistent with its own *Rules of Practice and Procedure* and its past decisions and those of other tribunals on such motions. A review or rehearing is an extraordinary remedy which should only be undertaken in unusual circumstances. To do otherwise is to undermine regulatory efficiency and the finality of proceedings.

ALL OF WHICH IS RESPECTFULLY SUBMITTED



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Counsel for the IESO

SCHEDULE A – STATUTORY REFERENCES

1. *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, s. 21.2:

Power to Review

21.2 (1) A tribunal may, if it considers it advisable and if its rules made under section 25.1 deal with the matter, review all or part of its own decision or order, and may confirm, vary, suspend or cancel the decision or order.

2. *Ontario Municipal Board Act*, R.S.O. 1990, c. O.28, s. 43:

Power to rehear, review, etc.

43. The Board may rehear any application before deciding it or may review, rescind, change, alter or vary any decision, approval or order made by it.

3. *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sched. B, s. 32(1):

Stated case

32. (1) The Board may, at the request of the Lieutenant Governor in Council or of its own motion or upon the motion of any party to proceedings before the Board and upon such security being given as it directs, state a case in writing for the opinion of the Divisional Court upon any question that is a question of law within the jurisdiction of the Board.

Same

(2) The Divisional Court shall hear and determine the stated case and remit it to the Board with its opinion.

SCHEDULE B – AUTHORITIES CITED

Tab	
1.	<i>Chandler v. Alberta Association of Architects</i> , [1989] 2 S.C.R. 848.
2.	<i>Zutter v. British Columbia (Council of Human Rights)</i> , [1995] B.C.J. No. 626 (C.A.).
3.	<i>Toronto Housing Co. v. Sabrie</i> , [2003] O.J. No. 652 (Div. Ct.).
4.	<i>Russell v. Toronto (City)</i> (2000), 52 O.R. (3d) 9 (C.A.).
5.	Decision of the Ontario Energy Board on a Motion for Review and Re-Hearing dated October 6, 2005, RP-2004-0167/EB-2005-0188.
6.	Decision of the Ontario Energy Board on a Motion for Review and Variance dated June 29, 2000, RP-1999-0001.
7.	OEB Ruling on Motion by Enbridge Consumers Gas dated August 17, 1999, E.B.O. 179-14 and E.B.O. 179-15.
8.	Decision of the Ontario Energy Board on a Notice of Motion of Union Gas Limited dated March 18, 2005, RP-2003-0063/EB-2004-0480.
9.	<i>Caton v. Employer Headgear Inc.</i> , 2005 CanLII 25501 (ON L.R.B.).
10.	<i>Can-Way Supplies v. Panagiotakopoulos</i> , 2004 CanLII 22616 (ON L.R.B.).