EB-2005-0551

**ONTARIO ENERGY BOARD**

**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 eligible customers) and whether the Board should refrain from regulating the rates for storage of gas.

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# COMPENDIUM OF DOCUMENTS
# IGUA/AMPCO ARGUMENT

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August 28, 2006

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## TABLE OF CONTENTS

| | |
|---|---|
| Estoppel:<br>▪ *Canadian Encyclopedic Digest - II - Estoppel in Pais* (by Conduct or Representation), s. 2<br>▪ *Canadian Encyclopedic Digest - II - Equitable or Promissory Estoppel*, s. 147<br>▪ *Canadian Encyclopedic Digest - II - Equitable or Promissory Estoppel*, s. 149 | 11 |
| ▪ excerpt of *Energy Regulation in Ontario*, David M. Brown, February 2006, p. 4-44.1 | 12 |
| ▪ OEB Decision in RP-2003-0203, November 1, 2004, cover page and pp. 45 and 46 | 13 |
| ▪ *AstraZeneca AB v. Apotex Inc.*, [2004] F.C.J. No. 54, 2004 FC 71 | 14 |
| ▪ *Domtar Inc. v. Quebec (Commission d'appel en matière de lesions professionnelles)*, [1993] 2 S.C.R. 756, [1993] S.C.J. No. 75 | 15 |
| Precedent Decisions:<br>▪ Attachment E to Mr. Reed's testimony (MHP) | 16 |
| GMi Undertaking Response re: Product Market<br>▪ letter dated July 27, 2006, and attachment from Lavery, de Billy | 17 |
| Discrimination Concerns:<br>▪ excerpt of Transcript Volume 14, July 20, 2006, Board examination of IGUA Panel, pp. 55-72 | 18 |
| Auctions:<br>▪ excerpt of Transcript Volume 14, July 20, 2006, Board examination of IGUA Panel, pp. 83-85 | 19 |

# TAB 1

Ontario Energy Board

Commission de l'Énergie de l'Ontario

Ontario

**EB-2006-0033**

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

**AND IN THE MATTER OF** an Application by Union Gas Limited, pursuant to section 36(1) of the *Ontario Energy Board Act, 1998,* for an order or orders approving or fixing just and reasonable rates and other charges for the sale, distribution, transmission, and storage of gas as of April 1, 2006;

**AND IN THE MATTER OF** the Quarterly Rate Adjustment Mechanism approved by the Ontario Energy Board in RP-2003-0063.

**BEFORE:** Bob Betts
Presiding Member

Cathy Spoel
Member

## DECISION AND ORDER

Union Gas Limited ("Union") filed an application (the "Application") dated February 24, 2006, with the Ontario Energy Board (the "Board") 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 April 1, 2006. The Application was made pursuant to Union's approved Quarterly Rate Adjustment Mechanism ("QRAM"). Union also provided the Application and evidence supporting the proposed changes to all parties of record in the RP-2003-0063 proceeding. Union's application was assigned Board file number EB-2006-0033.

On February 28, 2006, the Board issued a Notice of Written Hearing and Procedural Order No. 1 setting March 6, 2006 as the deadline for submissions on the Application and March 8, 2006 as the deadline for Union's reply submissions.

The Board has considered the evidence and finds that it is appropriate to adjust Union's rates effective April 1, 2006 to reflect the projected changes in gas costs and the prospective recovery of the projected twelve-month balances of the gas supply deferral accounts for the period ending March 31, 2007. The Board also finds that it is appropriate to adjust Union's reference prices to reflect the projected changes in gas costs.

**THE BOARD THEREFORE ORDERS THAT:**

1. The Alberta Border Reference Price used to set Union's rates and other charges be established at $9.173/GJ (34.5363 ¢/$m^3$). This represents a decrease in the Alberta Border Reference Price previously established through Board Decision and Order EB-2005-0531 ($10.859/GJ or 40.8950 ¢/$m^3$). The resulting rate changes set out in Appendix "A" and the rate schedules set out in Appendix "B" shall be effective April 1, 2006;

2. The rates pursuant to all contracts for interruptible service under Rates 16, 25, M5A, M7, and T1 be adjusted effective April 1, 2006, by the amounts set out in Appendix "C". The rates pursuant to contracts for interruptible service under Rate 25 shall be negotiated within the range as adjusted in Appendix "C";

3. The reference price for use in determining the amounts to be recorded in the North Purchased Gas Variance Account (Deferral Account No. 179-105) be set at the Alberta Border Reference Price of $9.173/GJ (34.5363 ¢/$m^3$) effective April 1, 2006;

4. The reference price for use in determining the amounts to be recorded in the South Purchased Gas Variance Account (Deferral Account No. 179-106) be set at the Ontario Landed Reference Price of $10.664/GJ (40.1500 ¢/$m^3$) effective April 1, 2006;

5. The South Portfolio Cost Differential be a credit of $0.008/GJ (0.0301 ¢/$m^3$) effective April 1, 2006;

6. The reference price for use in determining the amounts to be recorded in the Spot Gas Variance Account (Deferral Account No. 179-107) be set at the Ontario Landed Reference Price of $10.664/GJ (40.1500 ¢/$m^3$) effective April 1, 2006;

7. The reference price for use in determining the amounts to be recorded in the TCPL Tolls and Fuel - Northern and Eastern Operations Area deferral account (Deferral Account No. 179-100) with respect to fuel gas be set at the Alberta Border Reference Price of $9.173/GJ (34.5363 ¢/$m^3$) effective April 1, 2006;

8. The inventory revaluation credit resulting from changes in the reference price as of April 1, 2006, be recorded in the Inventory Revaluation Account (Deferral Account No. 179-109); and

9. The respective forms of the customer notices set out in Appendix "D" be given to all customers with the first bill or invoice reflecting the new rates.

DATED at Toronto, March 13, 2006

ONTARIO ENERGY BOARD

Peter H. O'Dell
Assistant Board Secretary

APPENDIX "A" TO

DECISION AND ORDER

BOARD FILE No. EB-2006-0033

DATED MARCH 13, 2006

APPENDIX "B" TO

DECISION AND ORDER

BOARD FILE No. EB-2006-0033

DATED MARCH 13, 2006

# RATE 20 – MEDIUM VOLUME FIRM SERVICE

## ELIGIBILITY

Any Customer in Union's Fort Frances, Western, Northern or Eastern Zones who is an end-user or who is authorized to serve an end-user of gas through one or more Company-owned meters at one location, and whose total maximum daily requirements for firm or combined firm and interruptible service is 14,000 $m^3$ or more.

## SERVICES AVAILABLE

The following services are available under this rate schedule:

(a) **Sales Service**

For continuous supply of natural gas by Union and associated transportation and storage services necessary to ensure deliverability in accordance with the Customer's needs. For this service, the Monthly, Delivery and Gas Supply Charges shall apply.

(b) **Transportation Service**

For continuous delivery on Union's distribution system from the Point of Receipt on TCPL's system to the Point of Consumption on the Customer's premises of natural gas owned by the Customer. The customer is responsible for obtaining the requisite regulatory approvals for the supply and transmission of such gas to Union's distribution system. For this service, the Monthly, Delivery, Transportation Account and Diversion Transaction Charges shall apply. Unless otherwise authorized by Union, customers who initiate a movement to Transportation Service from a Sales Service or Bundled Transportation Service must accept an assignment from Union of transportation capacity on upstream pipeline systems. Customers may reduce their assignment of transportation capacity in compliance with Union's Turnback Policy.

(c) **Bundled Transportation Service**

For continuous delivery by Union of gas owned by the Customer and for the associated transportation and storage services necessary to ensure deliverability in accordance with the Customer's needs. For this service the Monthly, Delivery, Gas Supply Demand and Commodity Transportation Charges shall apply.

(d) **Storage Service**

For load balancing purposes for Customers using Transportation Service on this rate schedule. If at the sole discretion of Union, adequate supplies exist, bundled and unbundled storage and delivery/redelivery services will be provided.

The charge for Bundled Storage Service will consist of the charges for Transportation Service plus the charges for Bundled Storage Service.

The charge for Unbundled Storage Service will consist of the charges for Transportation Service plus the charges for Unbundled Storage Service which must include charges for delivery/redelivery service to/from storage.

NOTE: Union has a short-term intermittent gas supply service under Rate 30 which customers may avail themselves of, if they qualify for use of the service.

## MONTHLY RATES AND CHARGES

APPLICABLE TO ALL SERVICES – ALL ZONES (1)

| | |
|---|---|
| MONTHLY CHARGE | $780.00 |
| DELIVERY CHARGES: (cents per month per $m^3$) | |
| Monthly Demand Charge for first 70,000 $m^3$ of Contracted Daily Demand | 18.9962 |
| Monthly Demand Charge for all units over 70,000 $m^3$ of Contracted Daily Demand | 11.4267 |
| Commodity Charge for first 852,000 $m^3$ of gas volumes delivered | 0.2647 |
| Commodity Charge for all units over 852,000 $m^3$ of gas volumes delivered | 0.2057 |

NOTE:
(1) Either the utility or a customer, or potential customer, may apply to the Ontario Energy Board to fix rates, charges and terms and conditions applicable thereto, different from the rates, charges and terms and conditions specified herein if changed rates, charges and terms and conditions are considered by either party to be necessary, desirable and in the public interest.

ADDITIONAL CHARGES FOR SALES SERVICE

| Zone | Fort Frances | Western | Northern | Eastern |
|---|---|---|---|---|
| Rate Schedule No. | 220 | 120 | 320 | 620 |
| Gas Supply Charges | cents per Month per $m^3$ of Daily Contract Demand | | | |
| Monthly Demand Charge for each unit of Contracted Daily Demand: | 24.8166 | 24.8176 | 40.9446 | 53.9116 |

Gas Supply Charge

The gas supply charge is comprised of charges for transportation and for commodity and fuel. The applicable rates are provided in Schedule "A".

Commodity Transportation

Charge 1 applies for all gas volumes delivered in the billing month up to the volume represented by the Contract Demand multiplied by the number of days in the billing month multiplied by 0.4.

Charge 2 applies for all additional gas volumes delivered in the billing month.

## HEAT CONTENT ADJUSTMENT

The gas supply commodity charges hereunder will be adjusted upwards or downwards as described below if the average total heating value of the gas per cubic metre ($m^3$) determined in accordance with Union's Terms and Conditions in any month falls above or below 37.89 MJ per $m^3$, respectively.

The adjustment shall be determined by multiplying the amount otherwise payable by a fraction, where the numerator is the monthly weighted average total heating value per cubic meter and the denominator 37.89.

**COMMISSIONING AND DECOMMISSIONING RATE**

The contract may provide that the Monthly Demand Charges specified above shall not apply on all or part of the daily contracted demand used by the customer either during the testing, commissioning and phasing in of gas using equipment or, alternatively, in the decommissioning and phasing out of gas using equipment being displaced by other gas using equipment, for a period not to exceed one year ("the transitional period"). To be eligible the new or displaced gas using equipment must be separately meterable. In such event, the contract will provide the following rates that such volume during the transitional period will be charged.

| Zone<br>Rate Schedule No. | Fort Frances<br>220 | Western<br>120 | Northern<br>320 | Eastern<br>620 |
|---|---|---|---|---|
| MONTHLY CHARGE | $780.00 | $780.00 | $780.00 | $780.00 |
| DELIVERY CHARGES<br>Commodity Charge for each unit of gas volumes delivered | cents per $m^3$<br>1.5138 | cents per $m^3$<br>1.5138 | cents per $m^3$<br>1.5138 | cents per $m^3$<br>1.5138 |
| GAS SUPPLY CHARGES:<br>Commodity Transportation Charge<br>Gas Commodity Charge – as per applicable rate provided in Appendix "A" | 3.2363 | 3.2352 | 4.6132 | 5.7171 |

ADDITIONAL CHARGES FOR TRANSPORTATION AND STORAGE SERVICES – ALL ZONES

MONTHLY TRANSPORTATION ACCOUNT CHARGE
For Customers that currently have installed or will require installing telemetering equipment: $220.00

BUNDLED (T-SERVICE) STORAGE SERVICE CHARGES:
Monthly Demand Charge for each unit of Contracted Daily Storage Withdrawal Entitlement: ($ per GJ per Month) $10.160

Commodity Charge for each unit of gas withdrawn from storage: ($ per GJ) $0.236

Authorized Overrun Commodity Charge on each additional unit of gas Union authorizes for withdrawal from storage: ($ per GJ) $0.570

The Authorized Overrun Commodity Charge is payable on all quantities on any Day in excess of the Customer's contractual rights, for which authorization has been received. Overrun will be authorized by Union at its sole discretion.

UNBUNDLED STORAGE SERVICE CHARGES:
Storage Space Charge:
Applied to Contracted Maximum Storage Balance: ($ per GJ per Month) $0.031
Fuel Ratio:
Applied to all gas injected and withdrawn from storage: (%) 0.631%
Commodity Charge:
Applied to all gas injected and withdrawn from storage: ($ per GJ) $0.013

UNBUNDLED STORAGE SERVICE AUTHORIZED OVERRUN CHARGES:
Fuel Ratio:
Applied to all gas injected and withdrawn from storage: (%) 1.05%
Commodity Charge:
Applied to all gas injected and withdrawn from storage: ($ per GJ) $0.065

The Authorized Overrun Commodity Charge is payable on all quantities on any Day in excess of the Customer's contractual rights, for which authorization has been received. Overrun will be authorized by Union at its sole discretion.

UNBUNDLED STORAGE SERVICE UNAUTHORIZED OVERRUN CHARGES:

If at any time, the Customer has gas in storage in excess of the contracted Maximum Storage Space or the gas storage balance for the account of the customer is less than zero or the customer has injected or withdrawn volumes from storage which exceeds their contractual rights, and which has not been authorized by Union or provided for under a short term storage/balancing service, such an event will constitute an occurrence of Unauthorized Overrun. The Unauthorized Overrun rate during the November 1 to April 15 period will be $50.00 per GJ. The Unauthorized Overrun rate during the April 16 to October 31 period will be $2.823 per GJ.

UNBUNDLED SERVICE NOMINATION VARIANCES:

The rate for unauthorized parking or drafting which results from nomination variances shall be equal to 50% of the "Daily Balancing Fee" rate as described under Article XXII of TransCanada PipeLines Transportation Tariff. No Daily Balancing Fee is payable on the portion of the nomination variance which is less than the greater of 4% of the nominated amount and 150 GJ.

| Zone<br>Rate Schedule No. | Fort Frances<br>201 | Western<br>101 | Northern<br>301 | Eastern<br>601 |
|---|---|---|---|---|
| Delivery service to Storage Facilities (1) | | | | |
| Demand Charge ($/GJ/month) | N/A | N/A | $9.351 | $0.935 |
| Commodity ($/GJ) | N/A | N/A | $0.062 | $0.017 |
| Redelivery Service from Storage Facilities | | | | |
| Demand Charge ($/GJ/month) | $3.763 | $3.763 | $3.763 | $10.313 |
| Commodity ($/GJ) | $0.046 | $0.046 | $0.046 | $0.076 |

Notes:

1. Delivery Service to Storage Facilities is not available to Northern Zone Customers in the Sault Ste. Marie Delivery Area (SSMDA).
2. Daily Firm injection and Withdrawal Rights shall be pursuant to the storage contract.
3. Storage Space, Withdrawal Rights and Injection Rights are not assignable to any other party without the prior written consent of Union and where necessary, approval from the Ontario Energy Board.

DIVERSION TRANSACTION CHARGE
Charge to a Customer Receiving Delivery of diverted gas each time such customer requests a diversion and Union provides the service: $10.00

**THE BILL**

The bill will equal the sum of the charges for all services selected plus the rates multiplied by the applicable gas quantities delivered or withdrawn for each service chosen plus all applicable taxes. If the Customer transports its own gas, the Gas Supply Charge under Sales Service will not apply. If the Customer selects Union's Sales Service which includes the Gas Supply Charge, no additional charges for Transportation and Storage Services will apply.

**MINIMUM BILL**

The minimum bill shall be the Monthly Charge, the Transportation Account Charge and the Demand Charges, as applicable.

## LATE PAYMENT CHARGE

When payment of the monthly bill has not been made in full 16 days after the bill has been issued, the unpaid balance including previous arrears shall be increased by 1.5%.

## SERVICE AGREEMENT

All Customers must enter into a Service Agreement with Union before receiving service under this rate schedule.

## TERMS AND CONDITIONS OF SERVICE

1. Service shall be for a minimum term of one year.

2. If multiple end-users are receiving service from a Customer under this rate, for billing purposes, the Monthly Charge, the Delivery Charge, the Transportation Account Charge and any other charge that is specific to the location of each end-user shall be used to develop a bill for each end-user at each location. Upon request, possibly for a fee, Union will combine the individual bills on a single invoice or statement for administrative convenience. However, Union will not combine the quantities or demands of several end-use locations so that eligibility to a different rate class will result. Further, Union will not combine the billing data of individual end-users to generate a single bill which is less than the sum of the bills of the individual end-users involved at each location.

3 Customers must enter into a Service Agreement with Union prior to the commencement of service.

4. For the purposes of qualifying for a rate class, the total quantities of gas consumed or expected to be consumed on the customer's contiguous property will be used, irrespective of the number of meters installed.

5. The identified rates (excluding gas supply charges, if applicable) represent maximum prices for service. These rates may change periodically. Multi-year prices may also be negotiated, which may be higher or lower than the identified rates.

# RATE 25 – LARGE VOLUME INTERRUPTIBLE SERVICE

## ELIGIBILITY

Any Customer in Union's Fort Frances, Western, Northern or Eastern Zones who is an end-user or who is authorized to serve an end-user of gas through one or more Company-owned meters at one location, and whose total maximum daily interruptible requirement is 14,000 $m^3$ or more or the interruptible portion of a maximum daily requirement for firm and interruptible service of 14,000 $m^3$ or more and whose operations, in the judgement of Union, can readily accept interruption and restoration of gas service.

## SERVICES AVAILABLE

The following services are available under this rate schedule:

(a) **Sales Service**

For interruptible supply of natural gas by Union and associated transportation services necessary to ensure its delivery in accordance with Customer's needs. For this service, the Monthly, Delivery and Gas Supply Charges shall apply.

(b) **Transportation Service**

For delivery of natural gas owned by the Customer on Union's distribution system from the Point of Receipt from TCPL's system to the Point of Consumption on the Customer's or end-user's premises, providing that, in the judgement of Union, acting reasonably, the Customer-owned gas does not displace service from Union under a Rate 20 or Rate 100 contract specific to that location. The customer is responsible for obtaining the requisite regulatory approvals for the supply and transmission of such gas to Union's distribution system. For this service, the Monthly, Delivery, Transportation Account and Diversion Transaction Charges shall apply.

NOTE: Union has a short-term intermittent gas supply service under Rate 30 which customers may avail themselves of, if they qualify for use of the service.

## MONTHLY RATES AND CHARGES

APPLICABLE TO ALL SERVICES – ALL ZONES (1)

| | |
|---|---|
| MONTHLY CHARGE: | $190.00 |
| DELIVERY CHARGES: | cents per $m^3$ |
| A Delivery Price for all volumes delivered to the Customer to be negotiated between Union and the Customer and the average price during the period in which these rates remain in effect shall not exceed: | 2.8255 |

NOTE:
(1) Either the utility or a customer, or potential customer, may apply to the Ontario Energy Board to fix rates, charges and terms and conditions applicable thereto, different from the rates, charges and terms and conditions specified herein if changed rates, charges and terms and conditions are considered by either party to be necessary, desirable and in the public interest.

ADDITIONAL CHARGES FOR SALES SERVICE

| Zone | Fort Frances | Western | Northern | Eastern |
|---|---|---|---|---|
| Rate Schedule No. | 225 | 125 | 325 | 625 |

Gas Supply Charge:
As per applicable rate provided in Schedule "A".

Interruptible Service: Applicable all year at a price agreed upon between Union and the Customer and the average price during the period in which these rates remain in effect.

**HEAT CONTENT ADJUSTMENT**

The gas supply commodity charges hereunder will be adjusted upwards or downwards as described below if the average total heating value of the gas per cubic metre ($m^3$) determined in accordance with Union's Terms and Conditions in any month falls above or below 37.89 MJ per $m^3$, respectively.

The adjustment shall be determined by multiplying the amount otherwise payable by a fraction, where the numerator is the monthly weighted average total heating value per cubic meter and the denominator 37.89.

ADDITIONAL CHARGES FOR TRANSPORATION – ALL ZONES

MONTHLY TRANSPORTATION ACCOUNT CHARGE: For Customers that currently have installed or will require installing telemetering equipment. $220.00

**THE BILL**

The bill will equal the sum of the monthly charges for all services selected plus the rates multiplied by the applicable gas volumes delivered or withdrawn for each service chosen plus all applicable taxes. If the Customer transports its own gas, the Gas Supply Charge under Sales Service will not apply. If the Customer selects Union's Sales Service which includes the Gas Supply Charge, no additional charges for Transportation will apply.

**MINIMUM BILL**

The minimum bill shall be the Monthly Charge and the Transportation Account Charge, if applicable.

**LATE PAYMENT CHARGE**

When payment of the monthly bill has not been made in full, 16 days after the bill has been issued, the unpaid balance including previous arrears shall be increased by 1.5%.

**SERVICE AGREEMENT**

All Customers must enter into a Service Agreement with Union before receiving service under this rate schedule.

## TERMS AND CONDITIONS OF SERVICE

1. Service shall be for a minimum term of one year.

2. If multiple end-users are receiving service from a Customer under this rate, for billing purposes, the Monthly Charge, the Delivery Charge, the Transportation Account Charge and any other charge that is specific to the location of each end-user shall be used to develop a monthly bill for each end-user at each location. Upon request, Union will combine the individual bills on a single invoice or statement for administrative convenience. However, Union will not combine the volumes or demands of several end-use locations so that eligibility to a different rate class will result. Further, Union will not combine the monthly billing data of individual end-users to generate a single bill which is less than the sum of the monthly bills of the individual end-users involved at each location.

3 Customers must enter into a Service Agreement with Union prior to the commencement of service.

4. For the purposes of qualifying for a rate class, the total volumes of gas consumed or expected to be consumed on the customer's contiguous property will be used, irrespective of the number of meters installed.

5. The identified rates (excluding gas supply charges, if applicable) represent maximum prices for service. These rates may change periodically. Multi-year prices may also be negotiated, which may be higher or lower than the identified rates.

# RATE 77 – WHOLESALE TRANSPORTATION SERVICE

## ELIGIBILITY

Any natural gas distributor in Union's Fort Frances, Western, Northern or Eastern Zones who uses Union's gas distribution facilities for the transportation of natural gas to customers outside Union's franchise area.

## SERVICES AVAILABLE

The following services are available under this rate schedule:

(a) **Transportation Service**

For the continuous delivery through Union's distribution system from the Point of Receipt on TCPL to the Point of Consumption at the Consumer's distribution system of natural gas owned by the Customer. The customer is responsible for obtaining the requisite regulatory approvals for the supply and transmission of such gas to Union's distribution system. For this service, the Monthly and Delivery Charges shall apply.

## MONTHLY RATES AND CHARGES – ALL ZONES

| | |
|---|---|
| MONTHLY CHARGE: ($ per month) | $145.00 |
| MONTHLY DELIVERY DEMAND CHARGE: (cents per $m^3$) | 28.2609 |

## THE BILL

The bill will equal the sum of the monthly charges plus all applicable taxes.

## LATE PAYMENT CHARGE

When payment of the monthly bill has not been made in full, 16 days after the bill has been issued, the unpaid balance including previous arrears shall be increased by 1.5%.

## SERVICE AGREEMENT

All Customers must enter into a Service Agreement with Union before receiving service under this rate schedule.

## TERMS AND CONDITIONS OF SERVICE

1. Service shall be for a minimum term of one year.
2. Customers must enter into a Service Agreement with Union prior to the commencement of service.
3 The identified rates (excluding gas supply charges, if applicable) represent maximum prices for service. These rates may change periodically. Multi-year prices may also be negotiated, which may be higher or lower than the identified rates.

# RATE 100 – LARGE VOLUME HIGH LOAD FACTOR FIRM SERVICE

## ELIGIBILITY

Any Customer in Union's Fort Frances, Western, Northern or Eastern Zones who is an end-user or who is authorized to serve an end-user of gas through one or more Company-owned meters at one location, and whose maximum daily requirement for firm service is 100,000 $m^3$ or more, and whose annual requirement for firm service is equal to or greater than its maximum daily requirement multiplied by 256.

## SERVICES AVAILABLE

The following services are available under this rate schedule:

(a) **Sales Service**

For continuous supply of natural gas by Union and associated transportation and storage services necessary to ensure deliverability in accordance with the Customer's needs. For this service, the Monthly, Delivery and Gas Supply Charges shall apply.

(b) **Transportation Service**

For continuous delivery on Union's distribution system from the Point of Receipt on TCPL's system to the Point of Consumption on the Customer's premises of natural gas owned by the Customer. The customer is responsible for obtaining the requisite regulatory approvals for the supply and transmission of such gas to Union's distribution system. For this service, the Monthly, Delivery, Transportation Account and Diversion Transaction Charges shall apply. Unless otherwise authorized by Union, customers who initiate a movement to Transportation Service from a Sales Service or Bundled Transportation Service must accept an assignment from Union of transportation capacity on upstream pipeline systems. Customers may reduce their assignment of transportation capacity in compliance with Union's Turnback Policy.

(c) **Bundled Transportation Service**

For continuous delivery by Union of gas owned by the Customer and for the associated transportation and storage services necessary to ensure deliverability in accordance with the Customer's needs. For this service the Monthly, Delivery, Gas Supply Demand and Commodity Transportation Charges shall apply.

(d) **Storage Service**

For load balancing purposes for Customers using Transportation Service on this rate schedule. If at the sole discretion of Union, adequate supplies exist, bundled and unbundled storage and delivery/redelivery services will be provided.

The charge for Bundled Storage Service will consist of the charges for Transportation Service plus the charges for Bundled Storage Service.

The Charge for Unbundled Storage Service will consist of the charges for Transportation Service plus the charges for Unbundled Storage Service which must include charges for delivery/redelivery service to/from storage.

NOTE: Union has a short-term intermittent gas supply service under Rate 30 which customers may avail themselves of, if they qualify for use of the service.

## MONTHLY RATES AND CHARGES

APPLICABLE TO ALL SERVICES – ALL ZONES (1)

| | |
|---|---|
| MONTHLY CHARGE | $780.00 |
| DELIVERY CHARGES: (cents per Month per $m^3$ of Daily Contract Demand)<br>Monthly Demand Charge for each unit of Contracted Daily Demand: | 11.2304 |
| COMMODITY CHARGE for each unit of gas volumes delivered (cents per $m^3$) | 0.1983 |

NOTE:
(1) Either the utility or a customer, or potential customer, may apply to the Ontario Energy Board to fix rates, charges and terms and conditions applicable thereto, different from the rates, charges and terms and conditions specified herein if changed rates, charges and terms and conditions are considered by either party to be necessary, desirable and in the public interest.

ADDITIONAL CHARGES FOR SALES SERVICE

| Zone | Fort Frances | Western | Northern | Eastern |
|---|---|---|---|---|
| Rate Schedule No. | 2100 | 1100 | 3100 | 6100 |
| Gas Supply Charges | cents per Month per $m^3$ of Daily Contract Demand | | | |
| Monthly Demand Charge for each unit of Contracted Daily Demand | 41.1426 | 41.1436 | 59.9586 | 75.0866 |

Gas Commodity Charge – as per applicable rate provided in Schedule "A"

Commodity Transportation
Charge 1 applies for all gas volumes delivered in the billing month up to the volume represented by the Contract Demand multiplied by the number of days in the billing month multiplied by 0.3.

Charge 2 applies for all additional gas volumes delivered in the billing month.

## HEAT CONTENT ADJUSTMENT

The gas supply commodity charges hereunder will be adjusted upwards or downwards as described below if the average total heating value of the gas per cubic metre ($m^3$) determined in accordance with Union's Terms and Conditions in any month falls above or below 37.89 MJ per $m^3$, respectively.

The adjustment shall be determined by multiplying the amount otherwise payable by a fraction, where the numerator is the monthly weighted average total heating value per cubic meter and the denominator 37.89.

## COMMISSIONING AND DECOMMISSIONING RATE

The contract may provide that the Monthly Demand Charges specified above shall not apply on all or part of the daily contracted demand used by the customer either during the testing, commissioning and phasing in of gas using equipment or, alternatively, in the decommissioning and phasing out of gas using equipment being displaced by other gas using equipment, for a period not to exceed one year ("the transitional period"). To be eligible the new or displaced gas using equipment must be separately meterable. In such event, the contract will provide the following rates that such volume during the transitional period will be charged.

| Zone<br>Rate Schedule No. | Fort Frances<br>2100 | Western<br>1100 | Northern<br>3100 | Eastern<br>6100 |
|---|---|---|---|---|
| MONTHLY CHARGE | $780.00 | $780.00 | $780.00 | $780.00 |
| DELIVERY CHARGES<br>Commodity Charge for each unit of gas volumes delivered | cents per $m^3$<br>0.7258 | cents per $m^3$<br>0.7258 | cents per $m^3$<br>0.7258 | cents per $m^3$<br>0.7258 |
| GAS SUPPLY CHARGES:<br>Commodity Transportation Charge<br>Gas Commodity Charge – as per applicable rate provided in Schedule "A" | 3.7788 | 3.7755 | 4.8179 | 5.6593 |

ADDITIONAL CHARGES FOR TRANSPORTATION AND STORAGE SERVICES – ALL ZONES

MONTHLY TRANSPORTATION ACCOUNT CHARGE
For Customers that currently have installed or will require installing telemetering equipment: $220.00

BUNDLED (T-SERVICE) STORAGE SERVICE CHARGES:
Monthly Demand Charge for each unit of Contracted Daily Storage Withdrawal Entitlement: ($ per GJ per Month) $10.160

Commodity Charge for each unit of gas withdrawn from storage: ($ per GJ) $0.236

Authorized Overrun Commodity Charge on each additional unit of gas Union authorizes for withdrawal from storage: ($ per GJ) $0.570

The Authorized Overrun Commodity Charge is payable on all quantities on any Day in excess of the Customer's contractual rights, for which authorization has been received. Overrun will be authorized by Union at its sole discretion.

UNBUNDLED STORAGE SERVICE CHARGES:
Storage Space Charge:
Applied to Contracted Maximum Storage Balance: ($ per GJ per Month) $0.031
Fuel Ratio:
Applied to all gas injected and withdrawn from storage: (%) 0.631%
Commodity Charge:
Applied to all gas injected and withdrawn from storage: ($ per GJ) $0.013

UNBUNDLED STORAGE SERVICE AUTHORIZED OVERRUN CHARGES:
Fuel Ratio:
Applied to all gas injected and withdrawn from storage: (%) 1.05%
Commodity Charge:
Applied to all gas injected and withdrawn from storage: ($ per GJ) $0.065

The Authorized Overrun Commodity Charge is payable on all quantities on any Day is excess of the Customer's contractual rights, for which authorization has been received. Overrun will be authorized by Union at its sole discretion.

UNBUNDLED STORAGE SERVICE UNAUTHORIZED OVERRUN CHARGES:

If at any time, the Customer has gas in storage in excess of the contracted Maximum Storage Space or the gas storage balance for the account of the customer is less than zero or the customer has injected or withdrawn volumes from storage which exceeds their contractual rights, and which has not been authorized by Union or provided for under a short term storage/balancing service, such an event will constitute an occurrence of Unauthorized Overrun. The Unauthorized Overrun rate during the November 1 to April 15 period will be $50.00 per GJ. The Unauthorized Overrun rate during the April 16 to October 31 period will be $2.823 per GJ.

UNBUNDLED SERVICE NOMINATION VARIANCES:

The rate for unauthorized parking or drafting which results from nomination variances shall be equal to 50% of the "Daily Balancing Fee" rate as described under Article XXII of TransCanada PipeLines Transportation Tariff. No Daily Balancing Fee is payable on the portion of the nomination variance which is less than the greater of 4% of the nominated amount and 150 GJ.

| Zone<br>Rate Schedule No. | Fort Frances<br>201 | Western<br>101 | Northern<br>301 | Eastern<br>601 |
|---|---|---|---|---|
| Delivery service to Storage Facilities (1) | | | | |
| Demand Charge ($/GJ/month) | N/A | N/A | $9.351 | $0.935 |
| Commodity ($/GJ) | N/A | N/A | $0.062 | $0.017 |
| Redelivery Service from Storage Facilities | | | | |
| Demand Charge ($/GJ/month) | $3.763 | $3.763 | $3.763 | $10.313 |
| Commodity ($/GJ) | $0.046 | $0.046 | $0.046 | $0.076 |

Notes:

1. Delivery Service to Storage Facilities is not available to Northern Zone Customers in the Sault Ste. Marie Delivery Area (SSMDA).
2. Daily Firm Injection and Withdrawal Rights shall be pursuant to the storage contract.
3. Storage Space, Withdrawal Rights and Injection Rights are not assignable to any other party without the prior written consent of Union and where necessary, approval from the Ontario Energy Board.

DIVERSION TRANSACTION CHARGE
Charge to a Customer Receiving Delivery of diverted gas each time such customer requests a diversion and Union provides the service: $10.00

**THE BILL**

The bill will equal the sum of the charges for all services selected plus the rates multiplied by the applicable gas quantities delivered or withdrawn for each service chosen plus all applicable taxes. If the Customer transports its own gas, the Gas Supply Charge under Sales Service will not apply. If the Customer selects Union's Sales Service which includes the Gas Supply Charge, no additional charges for Transportation and Storage Services will apply.

**MINIMUM BILL**

The minimum bill shall be the Monthly Charge, the Transportation Account Charge and the Demand Charges, as applicable.

## LATE PAYMENT CHARGE

When payment of the monthly bill has not been made in full 16 days after the bill has been issued, the unpaid balance including previous arrears shall be increased by 1.5%.

## SERVICE AGREEMENT

All Customers must enter into a Service Agreement with Union before receiving service under this rate schedule.

## TERMS AND CONDITIONS OF SERVICE

1. Service shall be for a minimum term of one year.

2. If multiple end-users are receiving service from a Customer under this rate, for billing purposes, the Monthly Charge, the Delivery Charge, the Transportation Account Charge and any other charge that is specific to the location of each end-user shall be used to develop a monthly bill for each end-user at each location. Upon request, possibly for a fee, Union will combine the individual bills on a single invoice or statement for administrative convenience. However, Union will not combine the quantities or demands of several end-use locations so that eligibility to a different rate class will result. Further, Union will not combine the billing data of individual end-users to generate a single bill which is less than the sum of the bills of the individual end-users involved at each location.

3 Customers must enter into a Service Agreement with Union prior to the commencement of service.

4. For the purposes of qualifying for a rate class, the total quantities of gas consumed or expected to be consumed on the customer's contiguous property will be used, irrespective of the number of meters installed.

5. The identified rates (excluding gas supply charges, if applicable) represent maximum prices for service. These rates may change periodically. Multi-year prices may also be negotiated, which may be higher or lower than the identified rates.

# GENERAL SERVICE RATE

## (A) Availability

Available to customers in Union's Southern Delivery Zone.

## (B) Applicability

To residential and non-contract commercial and industrial customers.

## (C) Rates

The identified rates (excluding gas supply charges, if applicable) represent maximum prices for service. These rates may change periodically. Multi-year prices may also be negotiated which may be higher or lower than the identified rates.

a) Monthly Charge $ 14.00

b) Delivery Charge

| | | |
|---|---|---|
| First | 1 400 $m^3$ | 5.6287¢ per $m^3$ |
| Next | 4 600 $m^3$ | 4.0139¢ per $m^3$ |
| Next | 124 000 $m^3$ | 2.8218¢ per $m^3$ |
| Next | 270 000 $m^3$ | 2.0861¢ per $m^3$ |
| All Over | 400 000 $m^3$ | 1.9422¢ per $m^3$ |

c) Storage Charge (if applicable) 0.9544¢ per $m^3$

Applicable to all bundled customers (sales and bundled transportation service).

d) Gas Supply Charge (if applicable)

The gas supply charge is comprised of charges for transportation and for commodity and fuel.
The applicable rates are provided in Schedule "A".

During any month in which a customer terminates service or begins service, the fixed charge for the month will be prorated to such customer.

## (D) Supplemental Service to Commercial and Industrial Customers Under Group Meters

Combination of readings from several meters may be authorized by the Company and the Company will not reasonably withhold authorization in cases where meters are located on contiguous pieces of property of the same owner not divided by a public right-of-way. In such cases, an additional service charge shall be rendered each month in the amount of $15.00 per month for each additional meter so combined.

## (E) Delayed Payment

When payment of the monthly bill has not been made in full, 16 days after the bill has been issued, the unpaid balance including previous arrears shall be increased by 1.5%.

**(F) Direct Purchase**

Unless otherwise authorized by Union, customers who are delivering gas to Union under direct purchase arrangements must obligate to deliver at a point(s) specified by Union, and must acquire and maintain firm transportation on all upstream pipeline systems. Customers initiating direct purchase arrangements, who previously received Gas Supply service, must also accept, unless otherwise authorized by Union, an assignment from Union of transportation capacity on upstream pipeline systems.

**(G) Overrun Charge**

In the event that a direct purchase customer fails to deliver its contracted volumes to Union, and Union has the capability to continue to supply the customer, Union will do so. The customer may pay 6.5831¢ per $m^3$ for the delivery and the total gas supply charge for utility sales provided in Schedule "A" per $m^3$, plus 7¢ per $m^3$.

**(H) Bundled Direct Purchase Delivery**

Where a customer elects transportation service under this rate schedule, the customer must enter into a Bundled T Gas Contract with Union for delivery of gas to Union. Bundled T Gas Contract Rates and Gas Purchase Contract Rates are described in rate schedule R1.

**(I) Company Policy Relating to Terms of Service**

a. Customers who temporarily discontinue service during any twelve consecutive months without payment of the monthly fixed charge for the months in which the gas is temporarily disconnected shall pay for disconnection and reconnection.

b. When gas is delivered at an absolute pressure in excess of 101.325 kilopascals, then for purposes of measurement, hereunder, such volume of gas shall be corrected to an absolute pressure of 101.325 kilopascals. Atmospheric pressure is assumed to be the levels shown below in kilopascals (absolute) regardless of the actual atmospheric pressure at which the gas is measured and delivered.

| Zone | Assumed Atmospheric Pressure kPa |
|---|---|
| 1 | 100.148 |
| 2 | 99.494 |
| 3 | 98.874 |
| 4 | 98.564 |
| 5 | 98.185 |
| 6 | 97.754 |
| 7 | 97.582 |
| 8 | 97.065 |
| 9 | 96.721 |
| 10 | 100.561 |
| 11 | 99.321 |
| 12 | 98.883 |

FIRM INDUSTRIAL AND COMMERCIAL CONTRACT RATE

**(A) Availability**

Available to customers in Union's Southern Delivery Zone.

**(B) Applicability**

To a customer who enters into a contract for the purchase or transportation of gas for a minimum term of one year that specifies a daily contracted demand between 4 800 $m^3$ and 140 870 $m^3$.

**(C) Rates**

The identified rates (excluding gas supply charges, if applicable) represent maximum prices for service. These rates may change periodically. Multi-year prices may also be negotiated which may be higher or lower than the identified rates.

1. Bills will be rendered monthly and shall be the total of:

(i) A Monthly Demand Charge

| | | |
|---|---|---|
| First | 8 450 $m^3$ of daily contracted demand | 46.9922¢ per $m^3$ |
| Next | 19 700 $m^3$ of daily contracted demand | 17.5809¢ per $m^3$ |
| All Over | 28 150 $m^3$ of daily contracted demand | 13.8932¢ per $m^3$ |

(ii) A Monthly Delivery Commodity Charge

| | |
|---|---|
| First 422 250 $m^3$ delivered per month | 0.7677¢ per $m^3$ |
| Next volume equal to 15 days use of daily contracted demand | 0.7677¢ per $m^3$ |
| For remainder of volumes delivered in the month | 0.3646¢ per $m^3$ |

(iii) Gas Supply Charge (if applicable)

The gas supply charge is comprised of charges for transportation and for commodity and fuel. The applicable rates are provided in Schedule "A"

2. Overrun Charge

Authorized overrun gas is available provided that it is authorized by Union in advance. Union will not unreasonably withhold authorization. Overrun means gas taken on any day in excess of 103% of contracted daily demand. Authorized overrun will be available April 1 through October 31 and will be paid for at a Delivery Rate of 2.3126¢ per $m^3$ and, if applicable, the total gas supply charge for utility sales provided in Schedule " A " per $m^3$ for all volumes purchased.

Unauthorized overrun gas taken in any month shall be paid for at the rate of 6.5831¢ per $m^3$ for the delivery and the total gas supply charge for utility sales provided in Schedule "A" per $m^3$ for all gas supply volumes purchased.

3. Minimum Annual Charge

In each contract year, the customer shall purchase from Union or pay for a minimum volume of gas or transportation services equivalent to 146 days use of contracted demand. Overrun gas volumes will not contribute to the minimum volume. In the event that the customer shall not take such minimum volume the customer shall pay an amount equal to the deficiency from the minimum volume times a Delivery Charge of 1.0158¢ per $m^3$ and, if applicable a gas supply commodity charge provided in Schedule "A".

In the event that the contract period exceeds one year the annual minimum volume will be prorated for any part year.

SPECIAL LARGE VOLUME
INDUSTRIAL AND COMMERCIAL CONTRACT RATE

**(A) Availability**

Available to customers in Union's Southern Delivery Zone.

**(B) Applicability**

To a Customer

a) who enters into a contract for the purchase or transportation of gas for a minimum term of one year that specifies a combined maximum daily requirement for firm, interruptible and seasonal service of at least 140 870 $m^3$, and a qualifying annual volume of at least 28 327 840 $m^3$; and

b) who has site specific energy measuring equipment installed at each Point of Consumption that will be used in determining energy balances.

**(C) Rates**

The identified rates (excluding gas supply charges, if applicable) represent maximum prices for service. These rates may change periodically. Multi-year prices may also be negotiated which may be higher or lower than the identified rates.

1. Bills will be rendered monthly and shall be the total of:

(i) A Monthly Demand Charge

A negotiated Monthly Demand Charge of up to 24.8644¢ per $m^3$ for each $m^3$ of daily contracted firm demand.

(ii) A Monthly Delivery Commodity Charge

(1) A Monthly Firm Delivery Commodity Charge for all firm volumes of 0.2835¢ per $m^3$ for each $m^3$.

(2) A Monthly Interruptible Delivery Commodity Charge for all interruptible volumes to be negotiated between Union and the customer not to exceed an annual average of 2.6191¢ per $m^3$.

(3) A Monthly Seasonal Delivery Commodity Charge for all seasonal volumes to be negotiated between Union and the customer not to exceed an annual average of 2.3750¢ per $m^3$.

(iii) Gas Supply Charge (if applicable)

The gas supply charge is comprised of charges for transportation and for commodity and fuel.
The applicable rates are provided in Schedule "A".

(iv) Overrun Gas

Overrun gas is available without penalty provided that it is authorized by Union in advance. Union will not unreasonably withhold authorization.

Unauthorized overrun gas taken in any month shall be paid for at the M2 rate in effect at the time the overrun occurs, plus, if applicable the total gas supply charge for utility sales provided in Schedule "A" per $m^3$ for all the gas supply volumes purchased.

2. In negotiating the Monthly Interruptible and Seasonal Commodity Charges, the matters to be considered include:

   a) The volume of gas for which the customer is willing to contract,

   b) The load factor of the customer's anticipated gas consumption, the pattern of annual use, and the minimum annual quantity of gas which the customer is willing to contract to take or in any event pay for,

   c) Interruptible or curtailment provisions, and

   d) Competition.

3. In each contract year, the customer shall take delivery from Union, or in any event, pay for if available and not accepted by the customer, a minimum volume of gas as specified in the contract between the parties. Overrun gas volumes will not contribute to the minimum volume.

4. The contract may provide that the Monthly Demand Charge specified in Rate Section 1 above shall not apply on all or part of the daily contracted firm demand used by the customer during the testing, commissioning, phasing in, decommissioning and phasing out of gas-using equipment for a period not to exceed one year (the "transition period"). In such event, the contract will provide for a Monthly Delivery Commodity Charge to be applied on such volume during the transition of 1.6409¢ per $m^3$ and the total gas supply charge for utility sales provided in Schedule "A" per $m^3$, if applicable.

5. Either the utility or a customer, or potential customer, may apply to the Ontario Energy Board to fix rates and other charges different from the rates and other charges specified herein if the changed rates and other charges are considered by either party to be necessary, desirable and in the public interest.

**(D) Delayed Payment**

When payment of the monthly bill has not been made in full 16 days after the bill has been issued, the unpaid balance including previous arrears shall be increased by 1.5%.

**(E) Direct Purchase**

Unless otherwise authorized by Union, customers who are delivering gas to Union under direct purchase arrangements must obligate to deliver at a point(s) specified by Union, and must acquire and maintain firm transportation on all upstream pipeline systems. Customers initiating direct purchase arrangements, who previously received Gas Supply service, must also accept, unless otherwise authorized by Union, an assignment from Union of transportation capacity on upstream pipeline systems.

**(F) Bundled Direct Purchase Delivery and Short Term Supplemental Services**

Where a customer elects transportation service and/or a short term supplemental service under this rate schedule, the customer must enter into a Contract under rate schedule R1.

# LARGE WHOLESALE SERVICE RATE

## (A) Availability

Available to customers in Union's Southern Delivery Zone.

## (B) Applicability

To a distributor who enters into a contract to purchase and/or receive delivery of a firm supply of gas for distribution to its customers and who agrees to take or pay for an annual quantity of at least two million cubic metres.

## (C) Rates

The identified rates (excluding gas supply charges, if applicable) represent maximum prices for service. These rates may change periodically. Multi-year prices may also be negotiated which may be higher or lower than the identified rates.

1. (i) A Monthly Demand Charge of 17.2858¢ per $m^3$ of established daily demand determined in accordance with the service contract, such demand charge to be computed on a calendar month basis and a prorata charge to be made for the fraction of a calendar month which will occur if the day of first regular delivery does not fall on the first day of a month,

   (ii) A Delivery Commodity Charge of 0.4824¢ per $m^3$ for gas delivered and, if applicable,

   (iii) Gas Supply Charge (if applicable)

   The gas supply charge is comprised of charges for transportation and for commodity and fuel.
   The applicable rates are provided in Schedule "A".

## (D) Delayed Payment

When payment of the monthly bill has not been made in full 16 days after the bill has been issued, the unpaid balance including previous arrears shall be increased by 1.5%.

## (E) Direct Purchase

Unless otherwise authorized by Union, customers who are delivering gas to Union under direct purchase arrangements must obligate to deliver at a point(s) specified by Union, and must acquire and maintain firm transportation on all upstream pipeline systems. Customers initiating direct purchase arrangements, who previously received Gas Supply service, must also accept, unless otherwise authorized by Union, an assignment from Union of transportation capacity on upstream pipeline systems.

## (F) Overrun Charge

Authorized:

For all quantities on any day in excess of 103% of the Customer's contractual rights, for which authorization has been received, the Customer will be charged 1.0507¢ per $m^3$. Overrun will be authorized by Union at its sole discretion.

Unauthorized:

For all quantities on any day in excess of 103% of the Customer's contractual rights, for which authorization has not been received, the Customer will be charged 36.0¢ per $m^3$.

**(G) Bundled Direct Purchase Delivery**

Where a customer elects transportation service under this rate schedule the customer must enter into a Bundled T Gas Contract with Union for delivery of gas to Union.

Bundled T Gas Contract Rates and Gas Purchase Contract Rates are described in rate schedule R1.

STORAGE AND TRANSPORTATION RATES
FOR CONTRACT CARRIAGE CUSTOMERS

**(A) Availability**

Available to customers in Union's Southern Delivery Zone.

**(B) Applicability**

To a Customer

a) whose combined firm and interruptible service minimum annual transportation of natural gas is 5 000 000 $m^3$ or greater; and

b) who enters into a Carriage Service Contract with Union for the transportation or the storage and transportation of Gas for use at facilities located within Union's gas franchise area; and

c) who has meters with electronic recording at each Point of Consumption; and

d) who has site specific energy measuring equipment installed at each Point of Consumption that will be used in determining energy balances; and

e) for whom Union has determined transportation and/or storage capacity is available.

For the purposes of qualifying for a rate class, the total quantities of gas consumed or expected to be consumed on the customer's contiguous property will be used, irrespective of the number of meters installed.

**(C) Rates**

The following rates shall be charged for all quantities contracted or handled as appropriate. The identified rates represent maximum prices for service. These rates may change periodically. Multi-year prices may also be negotiated, which may be higher or lower than the identified rates.

**STORAGE SERVICE:**

| | Demand Charge Rate/GJ/mo | Commodity Charge Rate/GJ | For Customers Providing Their Own Compressor Fuel: Fuel Ratio | For Customers Providing Their Own Compressor Fuel: Commodity Charge Rate/GJ |
|---|---|---|---|---|
| a) Annual Firm Storage Space: Applied to contracted Maximum Annual Storage Space | $0.010 | | | |
| b) Annual Firm Injection/Withdrawal Right: Applied to the contracted Maximum Annual Firm Injection/Withdrawal Right | | | | |
| Union provides deliverability Inventory | $1.966 | | | |
| Customer provides deliverability Inventory (4) | $1.023 | | | |
| c) Incremental Firm Injection Right: Applied to the contracted Maximum Incremental Firm Injection Right | $1.023 | | | |
| d) Annual Interruptible Withdrawal Right: Applied to the contracted Maximum Annual Interruptible Withdrawal Right | $1.023 | | | |

| | Demand Charge Rate/GJ/mo | Commodity Charge Rate/GJ | For Customers Providing Their Own Compressor Fuel: Fuel Ratio | For Customers Providing Their Own Compressor Fuel: Commodity Charge Rate/GJ |
|---|---|---|---|---|
| e) Withdrawal Commodity: Paid on all quantities withdrawn from storage up to the Maximum Daily Storage Withdrawal Quantity | | $0.056 | 0.631% | $0.004 |
| f) Injection Commodity: Paid on all quantities injected into storage up to the Maximum Daily Storage Injection Quantity | | $0.056 | 0.631% | $0.004 |
| g) Short Term Storage / Balancing Service Maximum | | $3.000 | | |

Notes:

1. Demand charges for Annual Services are paid monthly during the term of the contract for not less than one year unless Union, in its sole discretion, accepts a term of less than one year. Demand charges apply whether Union or the customer provides the fuel.

2. Annual Firm Injection Rights are equal to 100% of their respective Annual Firm Withdrawal Rights. Injection Rights in excess of the Annual Firm Injection Rights will be charged at the Incremental Firm Injection Right.

3. Storage Space and Withdrawal Rights are not assignable to any other party without the prior written consent of Union. Storage and withdrawal rights are for the exclusive purpose of meeting the requirements of the specific locations included in each contract.

4. Deliverability Inventory being defined as 20% of annual storage space.

5. Short Term Storage / Balancing Service is:
   i) a combined space and interruptible deliverability service for short-term or off-peak storage in Union's storage facilities, OR
   ii) short-term firm deliverability, OR
   iii) a component of an operational balancing service offered.

   In negotiating the rate to be charged for service, the matters that are to be considered include:
   i) The minimum amount of storage service to which a customer is willing to commit,
   ii) Whether the customer is contracting for firm or interruptible service during Union's peak or non-peak periods,
   iii) Utilization of facilities, and
   iv) Competition

**TRANSPORTATION CHARGES:**

| | Demand Charge Rate/$m^3$/mo | Commodity Charge Rate/$m^3$ | For Customers Providing Their Own Compressor Fuel: Fuel Ratio | For Customers Providing Their Own Compressor Fuel: Commodity Charge Rate/$m^3$ |
|---|---|---|---|---|
| a) Annual Firm Transportation Demand: Applied to the Firm Daily Contract Demand | | | | |
| First 140,870 $m^3$ per month | 16.9379 | | | |
| All over 140,870 $m^3$ per month | 12.2359 | | | |
| b) Firm Transportation Commodity: Paid on all firm quantities redelivered to the Customer's Point(s) of Consumption | | | | |
| First 2,360,653 $m^3$ per month | | 0.3151 | 0.584% | 0.1336 |
| All over 2,360,653 $m^3$ per month | | 0.2598 | 0.584% | 0.0783 |
| c) Interruptible Transportation Commodity: Paid on all interruptible quantities redelivered to the Customer's Point(s) of Consumption | | | | |
| Maximum | | 2.6191¢ | 0.584% | 2.5638¢ |

Notes:

1. All demand charges are paid monthly during the term of the contract for not less than one year unless Union, at its sole discretion, accepts a term of less than one year. Demand charges apply whether Union or the customer provides the fuel.

2. In negotiating the rate to be charged for the transportation of gas under Interruptible Transportation, the matters that are to be considered include:
   a) The amount of the interruptible transportation for which Customer is willing to contract,
   b) The anticipated load factor for the interruptible transportation quantities,
   c) Interruptible or curtailment provisions, and
   d) Competition.

3. In each contract year, the Customer shall pay for a Minimum Interruptible Transportation Activity level as specified in the Contract. Overrun activity will not contribute to the minimum activity level.

4. Either Union or a customer, or potential customer, may apply to the Ontario Energy Board to fix rates and other charges different from the rates and other charges specified herein if the changed rates and other charges are considered by either party to be necessary, desirable and in the public interest.

**SUPPLEMENTAL CHARGES:**

Rates for supplemental services are provided in Schedule "A".

Notes:

1. All demand charges are paid monthly during the term of the contract for not less than one year unless Union, in its sole discretion, accepts a term of less than one year.

**OVERRUN SERVICE:**

1. **Annual Storage Space:**

Authorized:

Authorized Overrun is provided as Storage/Balancing Service. It is payable on all quantities on any Day in excess of the Customer's contracted Maximum Storage Space. Overrun will be authorized by Union at is sole discretion. Storage Space Overrun equal to the Customer's firm deliveries from TCPL: less the customer's Firm Daily Contract Demand, all multiplied by the Days of Interruption called during the period of November 1 to March 31, will be automatically authorized until the following July 1.

Unauthorized:

If at any time, the Customer has gas in storage in excess of the contracted Maximum Storage Space, and which has not been authorized by Union or provided for under a short term supplemental storage service, such an event will constitute an occurrence of Unauthorized Overrun. The Unauthorized Overrun rate will be $1.748 per GJ applied to the greatest excess for each occurrence.

If on any Day the gas storage balance for the account of the Customer is less than zero, the Unauthorized Overrun charge will apply for each GJ of gas below a zero inventory level and this amount of gas shall be deemed not to have been withdrawn from storage. The gas shall be deemed to have been sold to Customer at the highest spot price at Dawn in the month of occurrence and the month following occurrence as identified in the Canadian Gas Price Reporter. If Customer has contracted to provide its own deliverability inventory, the zero inventory level shall be deemed to mean twenty percent (20%) of the Annual Firm Storage Space.

2. **Injection, Withdrawals and Transportation:**

Authorized:

The following Overrun rates are applied to any quantities transported, injected or withdrawn in excess of 103% of the Contract parameters. Overrun will be authorized by Union at its sole discretion.

Automatic authorization of Injection Overrun will be given during all Days a Customer has been interrupted.

| | Union Providing Fuel | For Customers Providing Their Own Compressor Fuel Firm or Interruptible Service | |
|---|---|---|---|
| | Firm or Interruptible Service | Fuel Ratio | Commodity Charge |
| Storage Injections: | $0.155/GJ | 1.05% | $0.069/GJ |
| Storage Withdrawals: | $0.155/GJ | 1.05% | $0.069/GJ |
| Transportation | 0.8719 ¢/m³ | 0.584% | 0.6905 ¢/m³ |

Unauthorized:

For all quantities on any Day in excess of 103% of the Customer's contractual rights, for which authorization has not been received, the Customer will be charged 6.5831¢ per m³ or $1.748 per GJ, as appropriate.

3. **Storage / Balancing Service**

Authorized:

The following Overrun rates are applied to any quantities stored in excess of the Contract parameters. Overrun will be authorized by Union Gas at its sole discretion.

| | Firm Service Rate/GJ |
|---|---|
| Space | $0.937 |
| Injection / Withdrawal Maximum | $3.000 |

**OTHER SERVICES & CHARGES:**

1. **Monthly Charge**

In addition to the rates and charges described previously for each Point of Consumption, a Monthly Charge shall be applied as follows:

| | |
|---|---|
| Monthly Charge | $1 800 |

2. **Diversion of Gas**

The availability of the right to divert gas will be based on Union's ability to accommodate the diversion. The price to be charged for the right to divert shall be determined through negotiation.

3. Unless otherwise authorized by Union, customers who are delivering gas to Union under direct purchase arrangements must obligate to deliver at a point(s) specified by Union and must acquire and maintain firm transportation on all upstream pipeline systems. Customers initiating direct purchase arrangements, who previously received Gas Supply service, must also accept, unless otherwise authorized by Union, an assignment from Union of transportation capacity on upstream pipeline systems.

(D) **Delayed Payment**

When payment of the monthly bill has not been made in full 16 days after the bill has been issued, the unpaid balance including previous arrears shall be increased by 1.5%.

STORAGE RATES FOR
UNBUNDLED CUSTOMERS

**(A) Availability**

Available to customers in Union's Southern Delivery Zone.

**(B) Applicability**

To a Customer, or an agent, who is authorized to service residential and non-contract commercial and industrial end-users paying for the Monthly Fixed Charge and Delivery charge under Rate M2:

a) who enters into an Unbundled Service Contract with Union for the storage of Gas for use at facilities located within Union's gas franchise area;

b) who contracts for Standard Peaking Service (SPS) with Union unless the Customer can demonstrate that it has a replacement to the deliverability available in the SPS physically tied into Union's system and an OEB approved rate to provide the SPS replacement service;

c) who accepts daily estimates of consumption at Points of Consumption as prepared by Union so that they may nominate an equivalent amount from storage, upstream transportation, or Ontario Producers authorized to sell to third parties;

d) who nominates injections and withdrawals from storage and deliveries on upstream pipeline systems daily or Ontario Producers authorized to sell to third parties;

e) for whom Union has determined storage capacity is available; and

f) who accepts a monthly bill as prepared by Union.

**(C) Rates**

The following rates shall be charged for all volumes contracted or handled as appropriate. The identified rates represent maximum prices for service. These rates may change periodically. Multi-year prices may also be negotiated, which may be higher or lower than the identified rates.

**STORAGE SERVICE:**

| | Demand Charge Rate/GJ/mo | Fuel Ratio | Commodity Charge Rate/GJ |
|---|---|---|---|
| i) Standard Storage Service (SSS): | | | |
| a) Combined Storage Space & Deliverability: Applied to contracted Maximum Storage Space | $0.022 | | |
| b) Injection Commodity: | | 0.631% | $0.013 |
| c) Withdrawal Commodity: | | 0.631% | $0.013 |
| ii) Standard Peaking Service (SPS): | | | |
| a) Combined Storage Space & Deliverability: Applied to contracted Maximum Storage Space | $0.103 | | |
| b) Injection Commodity: | | 0.631% | $0.013 |
| c) Withdrawal Commodity: | | 1.05% | $0.013 |

| | Demand Charge Rate/GJ/mo | Fuel Ratio | Commodity Charge Rate/GJ |
|---|---|---|---|
| iii) Supplemental Service: | | | |
| a) Incremental Firm Injection Right: (5) Applied to the contracted Maximum Incremental Firm Injection Right | $0.929 | | |
| b) Incremental Firm Withdrawal Right: (5) Applied to the contracted Maximum Incremental Firm Withdrawal Right | $0.929 | | |
| c) Short Term Storage / Balancing Service - Maximum | | | $3.000 |

Notes:

1. Demand charges for Annual Services are paid monthly during the term of the Contract, which shall not be less than one year, unless Union, in its sole discretion, accepts a term of less than one year.

2. Daily Firm Injection and Withdrawal Rights shall be pursuant to the Storage Contract.

3. Storage Space, Withdrawal Rights, and Injection Rights are not assignable to any other party without the prior written consent of Union and where necessary, approval from the Ontario Energy Board.

4. Short Term Storage / Balancing service (less than 2 years) is:
   i) a combined space and interruptible deliverability service for short-term or off-peak storage in Union's storage facilities, OR
   ii) short-term incremental firm deliverability, OR
   iii) a component of an operational balancing service offered.

   In negotiating the rate to be charged for service, the matters that are to be considered include:
   i) The minimum amount of storage service to which a customer is willing to commit,
   ii) Whether the customer is contracting for firm or interruptible service during Union's peak or non-peak periods,
   iii) Utilization of facilities,
   iv) Competition, and
   v) Term.

5. Union's ability to offer incremental injection and withdrawal rights is subject to annual asset availability.

**OVERRUN SERVICE:**

1. **Injection and Withdrawal:**

Authorized:

| | Fuel Ratio | Commodity Charge Rate/GJ |
|---|---|---|
| Injection | 1.05% | $0.044 |
| Withdrawal | 1.05% | $0.044 |

The Authorized Overrun rate is payable on all quantities on any Day in excess of the Customer's contractual rights, for which authorization has been received. Overrun will be authorized by Union at its sole discretion.

Unauthorized:

If at any time, the Customer has gas in storage in excess of the contracted Maximum Storage Space or the gas storage balance for the account of the customer is less than zero or the customer has injected or withdrawn volumes from storage which exceeds their contractual rights, and which has not been authorized by Union or provided for under a short term storage/balancing service, such an event will constitute an occurrence of Unauthorized Overrun. The Unauthorized Overrun rate during the November 1 to April 15 period will be $50.00 per GJ. The Unauthorized Overrun rate during the April 16 to October 31 period will be $1.748 per GJ.

**OTHER SERVICES & CHARGES:**

1. Unless otherwise authorized by Union, customers who are delivering gas to Union under direct purchase arrangements must commit to provide a call at Parkway, throughout the winter period, for a specified number of days. Customers initiating direct purchase arrangements, who previously received Gas Supply service, must also accept, unless otherwise authorized by Union, an assignment from Union of transportation capacity on upstream pipeline systems.

**(D) Delayed Payment**

When payment of the monthly bill has not been made in full 16 days after the bill has been issued, the unpaid balance including previous arrears shall be increased by 1.5%.

STORAGE AND DELIVERY RATES
FOR UNBUNDLED CUSTOMERS

**(A) Availability**

Available to customers in Union's Southern Delivery Zone.

**(B) Applicability**

To a Customer:

a) whose combined firm and interruptible service minimum annual delivery of natural gas is 5 000 000 $m^3$ or greater;

b) who enters into an Unbundled Service Contract with Union for the delivery or the storage and delivery of Gas for use at facilities located within Union's gas franchise area;

c) who has meters with electronic recording at each Point of Consumption;

d) who nominates injections and withdrawals from storage, deliveries on upstream pipeline systems daily, or Ontario Producers authorized to sell to third parties;

e) for whom Union has determined delivery and/or storage capacity is available; and

f) who has site specific energy measuring equipment installed at each Point of Consumption that will be used in determining energy balances.

For the purposes of qualifying for a rate class, the total quantities of gas consumed or expected to be consumed on the customer's property will be used, irrespective of the number of meters installed.

**(C) Rates**

The following rates shall be charged for all volumes contracted or handled as appropriate. The identified rates represent maximum prices for service. These rates may change periodically. Multi-year prices may also be negotiated, which may be higher or lower than the identified rates.

**STORAGE SERVICE:**

| | Demand Charge Rate/GJ/mo | Fuel Ratio | Commodity Charge Rate/GJ |
|---|---|---|---|
| i) Standard Storage Service (SSS): | | | |
| a) Combined Storage Space & Deliverability: Applied to contracted Maximum Storage Space | $0.022 | | |
| b) Injection Commodity: | | 0.631% | $0.013 |
| c) Withdrawal Commodity: | | 0.631% | $0.013 |
| ii) Supplemental Service: | | | |
| a) Incremental Firm Injection Right: (5) Applied to the contracted Maximum Incremental Firm Injection Right | $0.929 | | |
| b) Incremental Firm Withdrawal Right: (5) Applied to the contracted Maximum Incremental Firm Withdrawal Right | $0.929 | | |
| c) Short Term Storage / Balancing Service - Maximum | | | $3.000 |

Notes:

1. Demand charges for Annual Services are paid monthly during the term of the Contract, which shall not be less than one year, unless Union, in its sole discretion, accepts a term of less than one year.

2. Daily Firm Injection and Withdrawal Rights shall be pursuant to the Storage Contract.

3. Storage Space, Withdrawal Rights, and Injection Rights are not assignable to any other party without the prior written consent of Union and where necessary, approval from the Ontario Energy Board.

4. Short Term Storage / Balancing Service (less than 2 years) is:
   i) a combined space and interruptible deliverability service for short-term or off-peak storage in Union's storage facilities, OR
   ii) short-term incremental firm deliverability, OR
   iii) a component of an operational balancing service offered.

   In negotiating the rate to be charged for service, the matters that are to be considered include:
   i) The minimum amount of storage service to which a customer is willing to commit,
   ii) Whether the customer is contracting for firm or interruptible service during Union's peak or non-peak periods,
   iii) Utilization of facilities,
   iv) Competition, and
   v) Term.

5. Union's ability to offer incremental injection and withdrawal rights is subject to annual asset availability.

**DELIVERY SERVICE:**

| | Demand Charge Rate/$m^3$/mo | Fuel Ratio | Commodity Charge Rate/ $m^3$ |
|---|---|---|---|
| a) Annual Firm Delivery Demand: | | | |
| Applied to the Firm Daily Contracted Demand | | | |
| First 140,870 $m^3$ per month | 16.9379¢ | | |
| All over 140,870 $m^3$ per month | 12.2359¢ | | |
| b) Firm Delivery Commodity: | | | |
| Paid on all firm volumes redelivered to the Customer's Point(s) of Consumption | | | |
| First 2,360,653 $m^3$ per month | | 0.584% | 0.1336 |
| All over 2,360,653 $m^3$ per month | | 0.584% | 0.0783 |
| c) Interruptible Delivery Commodity: | | | |
| Paid on all interruptible volumes redelivered to the Customer's Point of Consumption – Maximum | | 0.584% | 2.5638¢ |

Notes:

1. All demand charges are paid monthly during the term of the Contract, which shall not be less than one year unless Union, at its sole discretion, accepts a term of less than one year.

2. In negotiating the rate to be charged for the delivery of gas under interruptible Delivery, the matters that are to be considered include:

   a) The amount of the Interruptible Delivery for which Customer is willing to contract,

   b) The anticipated load factor for the Interruptible Delivery volumes,

   c) Interruptible or curtailment provisions, and

   d) Competition.

3. In each contract year, Customer shall pay for a Minimum Interruptible Delivery Activity level as specified in the Contract. Overrun activity will not contribute to the minimum activity level.

**OVERRUN SERVICE:**

**1. Injection and Withdrawal:**

Authorized:

| | Fuel Ratio | Commodity Charge Rate/GJ |
|---|---|---|
| Injection | 1.05% | $0.044 |
| Withdrawal | 1.05% | $0.044 |

The Authorized Overrun rate is payable on all quantities on any Day in excess of the Customer's contractual rights, for which authorization has been received. Overrun will be authorized by Union at its sole discretion.

Unauthorized:

If at any time, the Customer has gas in storage in excess of the contracted Maximum Storage Space or the gas storage balance for the account of the customer is less than zero or the customer has injected or withdrawn volumes from storage which exceeds their contractual rights, and which has not been authorized by Union or provided for under a short term storage/balancing service, such an event will constitute an occurrence of Unauthorized Overrun. The Unauthorized Overrun rate during the November 1 to April 15 period will be $50.00 per GJ. The Unauthorized Overrun rate during the April 16 to October 31 period will be $1.748 per GJ.

**2. Delivery:**

Authorized:

The following Authorized Overrun rates are applied to any volumes transported in excess of 103% of the Contract parameters. Overrun will be authorized by Union at its sole discretion.

| | Fuel Ratio | Commodity Charge Rate/ $m^3$ |
|---|---|---|
| Delivery | .584% | .6905¢ |

Unauthorized:

For all volumes on any Day in excess of 103% of the Customer's contractual rights, for which authorization has not been received, the Customer will be charged a rate of 6.5831¢ per $m^3$.

**OTHER SERVICES & CHARGES:**

1. **Monthly Charge**

In addition to the rates and charges described previously for each Point of Consumption, a Monthly Charge shall be applied as follows:

| | |
|---|---|
| Monthly Charge | $1 800 per month |

2. Unless otherwise authorized by Union, customers who are delivering gas to Union under direct purchase arrangements must commit to provide a call at Parkway, throughout the winter period, for a specified number of days. Customers initiating direct purchase arrangements, who previously received Gas Supply service, must also accept, unless otherwise authorized by Union, an assignment from Union of transportation capacity on upstream pipeline systems.

3. **Nomination Variances**

The rate for unauthorized parking or drafting which results from nomination variances shall be equal to 50% of the "Daily Balancing Fee" rate as described under Article XXII of TransCanada PipeLines Transportation Tariff. During the period September 1 to November 30, and February 1 to April 30, no Daily Balancing Fee is payable on the portion of the nomination variance which is less than the greater of 4% of the nominated amount and 150 GJ's. For the remainder of the year, no Daily Balancing Fee is payable on the portion of the nomination variance which is less than the greater of 8% of the nominated amount and 302 GJ's.

**(D) Delayed Payment**

When payment of the monthly bill has not been made in full 16 days after the bill has been issued, the unpaid balance including previous arrears shall be increased by 1.5%.

# TAB 2

Ontario Energy Board

Commission de l'Énergie de l'Ontario

Ontario

**EB-2006-0035**

**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 Enbridge Gas Distribution Inc, pursuant to section 36(1) of the *Ontario Energy Board Act, 1998,* for an order or orders approving or fixing just and reasonable rates and other charges for the sale, distribution, transmission, and storage of gas as of April 1, 2006;

**AND IN THE MATTER OF** the Quarterly Rate Adjustment Mechanism approved by the Ontario Energy Board in RP-2000-0040 and in RP-2002-0133.

**BEFORE:** Ken Quesnelle
Presiding Member

## DECISION AND ORDER

Enbridge Gas Distribution Inc. ("EGDI" or the "Company") filed an application with the Ontario Energy Board dated March 3, 2006, for an order approving or fixing rates for the sale, distribution, transmission, and storage of gas effective April 1, 2006 (the "Application"). The Board has assigned file number EB-2006-0035 to the Application.

EGDI indicated that the Application was prepared in accordance with the Quarterly Rate Adjustment Mechanism ("QRAM") approved by the Board in RP-2000-0040 and described in Issue 2.2 of the Settlement Proposal for RP-2000-0040. The mechanism was subsequently modified and approved by the Board in RP-2002-0133 as described under Issue 4.2 of that Settlement Proposal and under issue 15.11 of the RP-2003-0203 Settlement Proposal.

On March 13, 2006, the Company submitted a revised application following recalculation of its reference price resulting in changes to revenue requirement and customer rates.

The Application (corrected) included the following information:

(i) EGDI's recalculated utility price for the second quarter of Test Year 2006 is $399.582/10^3m^3$ ($10.602/GJ @ 37.69 $MJ/m^3$) compared to the current utility price of $484.195/10^3m^3$ ($12.847/GJ @ 37.69 $MJ/m^3$)) for the first quarter of Test Year 2006. The new price as compared to the current price exceeds the 0.5 ¢/$m^3$ price variance implementation threshold. EGDI therefore requested that the recalculated utility price should be the new utility price effective April 1, 2006.

(ii) The estimated balance in the Purchased Gas Variance Account ("PGVA"), as of December 31, 2006, is a customer credit of $41.58 million reflecting the recalculated utility price. The PGVA equates to 1.6354 ¢/$m^3$ credit for residential customers which will be in effect from April 1, 2006 to December 31, 2006 and is greater than the 0.5 ¢/$m^3$ threshold.

(iii) The Gas Supply Charge would decrease from 43.1228¢/$m^3$ to 35.3960¢/$m^3$ for residential Rate 1 system gas supply customers. For Rate 6 commercial/ industrial customers, the Gas Supply Charge would decrease from 43.2323¢/$m^3$ to 35.5383 ¢/$m^3$.

(iv) For a typical residential customer on system gas with an annual consumption of 3,064 $m^3$, the reduction in Gas Supply Charges amounts to an annual bill decrease of $249.83 or 13.2% (from $1,895.29 to $1,645.46). A typical residential customer on direct purchase will see their total annual bill decrease by $13.08 or 2.3%.

The Application and supporting written evidence was provided to Interested Parties including the Intervenors of record in the EB-2005-0001/EB-2005-0437 proceeding. The Application also set out the dates for filing comments and the Company's reply to those comments.

The Industrial Gas Users Association ("IGUA") was the only intervenor that submitted comments. They expressed satisfaction with the revised materials filed on March 13, 2006 and recommended that the Board approve EGDI's proposed rates effective April 1, 2006.

Pursuant to the *Ontario Energy Board Act, 1998*, section 36(4.1), the Board has considered all deferral account balances related to the commodity cost of gas and is adjusting rates, as set out below, to dispose of the forecasted balance for the PGVA account.

The Board finds that the Company's rate proposal is appropriate.

**THE BOARD THEREFORE ORDERS THAT:**

1. The rates for Enbridge Gas Distribution Inc. pertaining to EB-2005-0001/EB-2005-0437 which are to be effective on April 1, 2006 shall be superseded by the rates as provided in the Company's Rate Handbook for EB-2006-0035 and contained in Appendix "A" attached to this Rate Order. The rates shall be effective April 1, 2006 and shall be implemented in the Company's first billing cycle in April 2006.

2. Effective April 1, 2006, the utility price used in determining amounts to be recorded in the Test Year 2006 Purchased Gas Variance Account shall be $\$399.582/10^3m^3$.

3. The appropriate form of customer notice as set out in Appendix "B" shall accompany each customer's first bill following the implementation of this Rate Order.

4. The parties for service shall be those on the List of Interested Parties attached as Appendix "C".

ISSUED at Toronto, March 27, 2006

ONTARIO ENERGY BOARD

*Original signed by*

Peter H. O'Dell
Assistant Board Secretary

**APPENDIX "A" TO**

**DECISION AND ORDER**

**BOARD FILE NO. EB-2006-0035**

**DATED MARCH 27, 2006**

**Sample Rate 1 and Rate 6 Handbook of Enbridge is attached at the end of the order**

| RATE NUMBER: 100 | FIRM CONTRACT SERVICE |
|---|---|

***APPLICABILITY:***

To any Applicant who enters into a Service Contract with the Company to use the Company's natural gas distribution network for the transportation, to a single terminal location ("Terminal Location"), of a specified annual volume of natural gas of not less than 340,000 cubic metres to be delivered at a specified maximum daily rate.

***CHARACTER OF SERVICE:***

Service shall be continuous (firm) except for events as specified in the Service Contract including force majeure.

***RATE:***

Rates per cubic metre assume an energy content of 37.69 MJ/m³.

| | Billing Month<br>January<br>to<br>December |
|---|---|
| **Monthly Customer Charge** | **$100.00** |
| **Delivery Charge** | |
| For the first 14,000 m³ per month | **5.1033 ¢/m³** |
| For the next 28,000 m³ per month | **3.7443 ¢/m³** |
| For all over 42,000 m³ per month | **3.1853 ¢/m³** |
| **Gas Supply Load Balancing Charge** | **4.9856 ¢/m³** |
| **System Sales Gas Supply Charge per cubic metre** (If applicable) | **35.3266 ¢/m³** |
| **Buy/Sell Sales Gas Supply Charge per cubic metre** (If applicable) | **35.3086 ¢/m³** |

The rates quoted above shall be subject to the Gas Inventory Adjustment contained in Rider "C" and the Revenue Adjustment Rider contained in Rider "E". In addition, meter readings will be adjusted by the Atmospheric Pressure Factor relevant to the customer's location as shown in Rider "F". The Gas Supply Charge is applicable if the Applicant is not providing its own supply of natural gas for transportation.

***DIRECT PURCHASE ARRANGEMENTS:***

Rider "A" or Rider "B" shall be applicable to Applicants who enter into Direct Purchase Arrangements under this Rate Schedule.

***UNAUTHORIZED OVERRUN GAS RATE:***

When the Applicant takes Unauthorized Supply Overrun Gas, the Applicant shall purchase such gas at a rate of 150% of the average price on each day on which an overrun occurred for the calendar month as published in the Gas Daily for the Niagara and Iroquois export points for the CDA and EDA respectively, and adjust the Contract Demand, effective on the next day, to the actual maximum daily taken.

RATE NUMBER: **100**

***MINIMUM BILL:***

Per cubic metre of Annual Volume Deficiency
(See Terms and Conditions of Service):

**9.9913 ¢/m³**

***TERMS AND CONDITIONS OF SERVICE:***

The provisions of PARTS III and IV of the Company's **HANDBOOK OF RATES AND DISTRIBUTION SERVICES** apply, as contemplated therein, to service under this Rate Schedule.

***EFFECTIVE DATE:***

To apply to bills rendered for gas consumed by customers on and after April 1, 2006 under Sales Service, including Buy/Sell Arrangements, and Transportation Service. This rate schedule is effective April 1, 2006 and replaces the identically numbered rate schedule that specifies, as the Effective Date, January 1, 2006 and that indicates, as the Board Order, Final EB-2005-0001.

| RATE NUMBER: 110 | LARGE VOLUME LOAD FACTOR SERVICE |
|---|---|

***APPLICABILITY:***

To any Applicant who enters into a Service Contract with the Company to use the Company's natural gas distribution network for the transportation, to a single terminal location ("Terminal Location"), of an annual supply of natural gas of not less than 183 times a specified maximum daily volume of not less than 1,865 cubic metres.

***CHARACTER OF SERVICE:***

Service shall be continuous (firm) except for events as specified in the Service Contract including force majeure.

***RATE:***

Rates per cubic metre assume an energy content of 37.69 MJ/m³.

| | Billing Month<br>January<br>to<br>December |
|---|---|
| **Monthly Customer Charge** | **$500.00** |
| **Delivery Charge** | |
| Per cubic metre of Contract Demand | **20.0000 ¢/m³** |
| Per cubic metre of gas delivered | |
| For the first 1,000,000 m³ per month | **0.4632 ¢/m³** |
| For all over 1,000,000 m³ per month | **0.3132 ¢/m³** |
| **Gas Supply Load Balancing Charge** | **4.2564 ¢/m³** |
| **System Sales Gas Supply Charge per cubic metre** (If applicable) | **35.2597 ¢/m³** |
| **Buy/Sell Sales Gas Supply Charge per cubic metre** (If applicable) | **35.2418 ¢/m³** |

The rates quoted above shall be subject to the Gas Inventory Adjustment contained in Rider "C" and the Revenue Adjustment Rider contained in Rider "E". In addition, meter readings will be adjusted by the Atmospheric Pressure Factor relevant to the customer's location as shown in Rider "F". The Gas Supply Charge is applicable if the Applicant is not providing its own supply of natural gas for transportation.

***DIRECT PURCHASE ARRANGEMENTS:***

Rider "A" or Rider "B" shall be applicable to Applicants who enter into Direct Purchase Arrangements under this Rate Schedule.

***UNAUTHORIZED OVERRUN GAS RATE:***

When the Applicant takes Unauthorized Supply Overrun Gas, the Applicant shall purchase such gas at a rate of 150% of the average price on each day on which an overrun occurred for the calendar month as published in the Gas Daily for the Niagara and Iroquois export points for the CDA and EDA respectively.

On the second and subsequent occasion in a contract year when the Applicant takes Unauthorized Demand Overrun Gas, the Contract Demand shall be adjusted to the actual maximum daily volume taken and the Demand Charges stated above shall apply for the whole contract year, including retroactively if necessary.

RATE NUMBER: **110**

***MINIMUM BILL:***

Per cubic metre of Annual Volume Deficiency
(See Terms and Conditions of Service):

**4.6221 ¢/m³**

In determining the Annual Volume Deficiency, the minimum bill multiplier shall not be less than 183.

***TERMS AND CONDITIONS OF SERVICE:***

The provisions of PARTS III and IV of the Company's **HANDBOOK OF RATES AND DISTRIBUTION SERVICES** apply, as contemplated therein, to service under this Rate Schedule.

***EFFECTIVE DATE:***

To apply to bills rendered for gas consumed by customers on and after April 1, 2006 under Sales Service, including Buy/Sell Arrangements, and Transportation Service. This rate schedule is effective April 1, 2006 and replaces the identically numbered rate schedule that specifies, as the Effective Date, January 1, 2006 and that indicates, as the Board Order, Final EB-2005-0001.

| RATE NUMBER: 115 | LARGE VOLUME LOAD FACTOR SERVICE |
|---|---|

***APPLICABILITY:***

To any Applicant who enters into a Service Contract with the Company to use the Company's natural gas distribution network for the transportation, to a single terminal location ("Terminal Location"), of an annual supply of natural gas of not less than 292 times a specified maximum daily volume of not less than 1,165 cubic metres.

***CHARACTER OF SERVICE:***

Service shall be continuous (firm) except for events as specified in the Service Contract including force majeure.

***RATE:***

Rates per cubic metre assume an energy content of 37.69 MJ/m³.

| | Billing Month<br>January<br>to<br>December |
|---|---|
| **Monthly Customer Charge** | **$500.00** |
| **Delivery Charge** | |
| Per cubic metre of Contract Demand | **20.0000 ¢/m³** |
| Per cubic metre of gas delivered | |
| For the first 1,000,000 m³ per month | **0.2408 ¢/m³** |
| For all over 1,000,000 m³ per month | **0.1408 ¢/m³** |
| **Gas Supply Load Balancing Charge** | **3.3614 ¢/m³** |
| **System Sales Gas Supply Charge per cubic metre** (If applicable) | **35.2597 ¢/m³** |
| **Buy/Sell Sales Gas Supply Charge per cubic metre** (If applicable) | **35.2418 ¢/m³** |

The rates quoted above shall be subject to the Gas Inventory Adjustment contained in Rider "C" and the Revenue Adjustment Rider contained in Rider "E". In addition, meter readings will be adjusted by the Atmospheric Pressure Factor relevant to the customer's location as shown in Rider "F". The Gas Supply Charge is applicable if the Applicant is not providing its own supply of natural gas for transportation.

***DIRECT PURCHASE ARRANGEMENTS:***

Rider "A" or Rider "B" shall be applicable to Applicants who enter into Direct Purchase Arrangements under this Rate Schedule.

***UNAUTHORIZED OVERRUN GAS RATE:***

When the Applicant takes Unauthorized Supply Overrun Gas, the Applicant shall purchase such gas at a rate of 150% of the average price on each day on which an overrun occurred for the calendar month as published in the Gas Daily for the Niagara and Iroquois export points for the CDA and EDA respectively.

On the second and subsequent occasion in a contract year when the Applicant takes Unauthorized Demand Overrun Gas, the Contract Demand shall be adjusted to the actual maximum daily volume taken and the Demand Charges stated above shall apply for the whole contract year, including retroactively if necessary.

RATE NUMBER: **115**

***MINIMUM BILL:***

Per cubic metre of Annual Volume Deficiency
(See Terms and Conditions of Service):

**3.5047 ¢/m³**

In determining the Annual Volume Deficiency the minimum bill multiplier shall not be less than 292.

***TERMS AND CONDITIONS OF SERVICE:***

The provisions of PARTS III and IV of the Company's **HANDBOOK OF RATES AND DISTRIBUTION SERVICES** apply, as contemplated therein, to service under this Rate Schedule.

***EFFECTIVE DATE:***

To apply to bills rendered for gas consumed by customers on and after April 1, 2006 under Sales Service, including Buy/Sell Arrangements, and Transportation Service. This rate schedule is effective April 1, 2006 and replaces the identically numbered rate schedule that specifies, as the Effective Date, January 1, 2006 and that indicates, as the Board Order, Final EB-2005-0001.

| RATE NUMBER 125 | EXTRA LARGE FIRM TRANSPORTATION SERVICE |
|---|---|

***APPLICABILITY:***

To any Applicant who enters into a Service Contract with the Company to use the Company's natural gas distribution network for the transportation, to a single terminal location ("Terminal Location"), of a specified maximum daily volume (Contract Demand) of natural gas of not less than 600,000 cubic metres.

***CHARACTER OF SERVICE:***

Service shall be firm except for events as specified in the Service Contract including force majeure. The Applicant shall not take a volume of gas at the Terminal Location that varies, in any day, by more than two percent (2%) from the Delivered Volume. The Contract Demand shall be 24 times the Hourly Demand, and the Applicant shall not exceed the Hourly Demand.

***RATE:***

The following rates and charges, as applicable, shall apply for deliveries to the Terminal Location.

**Demand Charge**

| | |
|---|---|
| Per cubic metre of Contract Demand per month | **8.3768 ¢/m³** |
| **Direct Purchase Administration Charge** | **$50.00** |
| **Forecast Unaccounted For Gas Percentage** | **0.3%** |

***AUTHORIZED DEMAND OVERRUN:***

The following Authorized Demand Overrun Rate is applied to any quantities of gas transported in excess of the Contract Demand. Overrun will be authorized by the Company at its sole discretion.

Automatic authorization of transportation overrun will be given in the case of dedicated Service to the Terminal Location provided that pipeline capacity is available and subject to a maximum volume as specified in the Service Contract.

| | |
|---|---|
| Authorized Demand Overrun Rate | **0.28 ¢/m³** |

The Authorized Demand Overrun Rate may be applied to commissioning volumes at the Company's sole discretion, for a contractual period of not more than one year, as specified in the Service Contract.

***MINIMUM BILL:*** **See Terms and Conditions of Service**

***TERMS AND CONDITIONS OF SERVICE:***

1. The provisions of PARTS III and IV of the Company's **HANDBOOK OF RATES AND DISTRIBUTION SERVICE** apply, as contemplated therein, to service under this Rate Schedule.
2. The Applicant is required to deliver to the Company on a daily basis the sum of: (a) the volume of gas to be delivered to the Applicant's Terminal Location; and (b) a volume of gas equal to the forecast unaccounted for gas percentage as stated above multiplied by (a). In the case of a Dedicated Service, the Unaccounted for Gas volume requirement is not applicable.
3. a) Any volume of gas taken by the Applicant on a day at the Terminal Location which exceeds the sum of:
   i. any applicable Load Balancing Demand pursuant to Rate 310 and/or any applicable Storage Demand pursuant to Rate 315, plus

ii. the volume of gas delivered by the Applicant on that day shall constitute as Supply Overrun Gas.

Supply Overrun Gas up to a maximum of two percent (2%) of the volume delivered by the Applicant shall be debited to the Applicant's Banked Gas Account. Any remaining excess shall be classified as Unauthorized Supply Overrun Gas. In any instance of Unauthorized Supply Overrun, the customer shall purchase such gas at a price $P_e$, which is equal to 150% of the highest price, in effect for that day as defined below*.

b) Any volume of gas taken by the Applicant on a day at the Terminal Location which exceeds the Contract Demand shall be classified as Demand Overrun Gas.

In any instance in a contract year when the Applicant takes Unauthorized Demand Overrun Gas, the Applicant must adjust the Contract Demand to the actual maximum daily volume taken and the Demand Charges stated above shall apply for the whole contract year, including retroactively if necessary.

4. Any volume of gas delivered by the Applicant on any day in excess of the sum of:

i. any applicable Load Balancing Demand pursuant to Rate 310 and/or applicable Storage Demand pursuant to Rate 315, plus

ii. the volume of gas taken by the Applicant at the Terminal Location on that day shall be classified as Supply Underrun Gas.

Supply Underrun Gas up to a maximum of two percent (2%) of the volume delivered by the Applicant on that day shall be credited to the Applicant's Banked Gas Account. The Company would order the Applicant to dispose of any remaining excess of the Unauthorized Supply Underrun Gas. Failing such action by the Applicant , the Company would purchase the portion of Unauthorized Supply Underrun Gas in excess of 2% at a price $P_u$ which is equal to fifty percent (50%) of the lowest price in effect on that day as defined below**.

* where the price, $P_e$, expressed in cents / cubic metre is defined as follows:

$P_e = (P_m * E_r * 100 * 0.03769 / 1.054615) * 1.5$

$P_m$ = highest daily price in U.S. $/mmBtu published in the Gas Daily, a Platts Publication, for that day under the column "Absolute", for the Niagara export point if the terminal location is in the CDA delivery area, and the Iroquois export point if the terminal location is in the EDA delivery area.

$E_r$ = Noon day spot exchange rate expressed in Canadian dollars per U.S. dollar for such day quoted by the Bank of Canada in the following days Globe & Mail Publication.

1.054615 = Conversion factor from mmBtu to GJ.

0.03769 = Conversion factor from GJ to cubic metres.

** where the price $P_u$ expressed in cents / cubic metre is defined as follows:

$P_u = (P_l * E_r * 100 * 0.03769 / 1.054615) * 0.5$

$P_l$ = lowest daily price in U.S. $/mmBtu published in the Gas Daily, a Platts Publication, for that day under the column "Absolute", for the Niagara export point if the terminal location is in the CDA delivery area, and the Iroquois export point if the terminal location is in the EDA delivery area.

***EFFECTIVE DATE:***

To apply to bills rendered for gas delivered on and after April 1, 2006. This rate schedule is effective April 1, 2006 and replaces the identically numbered rate schedule that specifies, as the Effective Date, January 1, 2006 and that indicates, as the Board Order, Final EB-2005-0001.

| RATE NUMBER: 145 | INTERRUPTIBLE SERVICE |
|---|---|

***APPLICABILITY:***

To any Applicant who enters into a Service Contract with the Company to use the Company's natural gas distribution network for the transportation of a specified maximum daily volume of natural gas to a single terminal location ("Terminal Location") which can accommodate the total interruption of gas service as ordered by the Company exercising its sole discretion. Any Applicant for service under this rate schedule must agree to transport a minimum annual volume of 340,000 cubic metres.

***CHARACTER OF SERVICE:***

In addition to events as specified in the Service Contract including force majeure, service shall be subject to curtailment or discontinuance upon the Company issuing a notice not less than 72 hours prior to the time at which such curtailment or discontinuance is to commence. An Applicant may, by contract, agree to accept a shorter notice period ( see Capacity Repurchase Rate).

***RATE:***

Rates per cubic metre assume an energy content of 37.69 MJ/m³.

| | Billing Month January to December |
|---|---|
| **Monthly Customer Charge** | **$100.00** |
| **Delivery Charge** | |
| For the first 14,000 m³ per month | **3.3317 ¢/m³** |
| For the next 28,000 m³ per month | **1.9727 ¢/m³** |
| For all over 42,000 m³ per month | **1.4137 ¢/m³** |
| **Gas Supply Load Balancing Charge** | **4.4914 ¢/m³** |
| **System Sales Gas Supply Charge per cubic metre** (If applicable) | **35.3849 ¢/m³** |
| **Buy/Sell Sales Gas Supply Charge per cubic metre** (If applicable) | **35.3670 ¢/m³** |

The rates quoted above shall be subject to the Gas Inventory Adjustment contained in Rider "C" and the Revenue Adjustment Rider contained in Rider "E". In addition, meter readings will be adjusted by the Atmospheric Pressure Factor relevant to the customer's location as shown in Rider "F". The Gas Supply Charge is applicable if the Applicant is not providing its own supply of natural gas for transportation.

***DIRECT PURCHASE ARRANGEMENTS:***

Rider "A" or Rider "B" shall be applicable to Applicants who enter into Direct Purchase Arrangements under this Rate Schedule.

***CURTAILMENT CREDIT:***

| | | |
|---|---|---|
| Rate for 16 hours of notice per cubic metre of Mean Daily Volume from December to March | **$** | **0.50 /m³** |
| Rate for 72 hours of notice per cubic metre of Mean Daily Volume from December to March | **$** | **0.11 /m³** |

In addition, if the Applicant is supplying its own gas requirements, the gas delivered by the Applicant during the period of curtailment shall be purchased by the Company for the Company's use. The purchase price for such gas will be equal to the price that is reported for the month, in the first issue of the Natural Gas *Market Report* published by Canadian Enerdata Ltd. during the month, as the "current" "Avg." (i.e., average) "Alberta One-Month Firm Spot Price" for "AECO 'C' and Nova Inventory Transfer" in the table entitled "Domestic spot gas prices", adjusted for AECO to Empress transportation tolls and compressor fuel costs.

For the areas specified in Appendix A to this Rate Schedule, the Company's gas distribution network does not have sufficient physical capacity under current operating conditions to accommodate the provision of firm service to existing interruptible locations. For any location presently served or any new Applicant for service pursuant to this Rate Schedule in these areas, the Company shall purchase the rights to take service hereunder at 1.25 ¢/m³ per unit of Daily Capacity Repurchase Quantity.

***UNAUTHORIZED OVERRUN GAS RATE:***

When the Applicant takes Unauthorized Supply Overrun Gas, the Applicant shall purchase such gas at a rate of 150% of the average price on each day on which an overrun occurred for the calendar month as published in the Gas Daily for the Niagara and Iroquois export points for the CDA and EDA respectively, and adjust the Contract Demand, effective on the next day, to the actual maximum daily taken.

The third instance of such failure in any contract year may result in the Applicant forfeiting the right to be served under this Rate Schedule. In such case service hereunder would cease, notwithstanding any Service Contract between the Company and the Applicant. Gas supply and/or transportation service would continue to be available to the Applicant pursuant to the provisions of the Company's Rate 6 until a Service Contract pursuant to another applicable Rate Schedule was executed.

***MINIMUM BILL:***

Per cubic metre of Annual Volume Deficiency
(See Terms and Conditions of Service): **7.7255 ¢/m³**

***TERMS AND CONDITIONS OF SERVICE:***

The provisions of PARTS III and IV of the Company's **HANDBOOK OF RATES AND DISTRIBUTION SERVICES** apply, as contemplated therein, to service under this Rate Schedule.

***EFFECTIVE DATE:***

To apply to bills rendered for gas consumed by customers on and after April 1, 2006 under Sales Service, including Buy/Sell Arrangements, and Transportation Service. This rate schedule is effective April 1, 2006 and replaces the identically numbered rate schedule that specifies, as the Effective Date, January 1, 2006 and that indicates, as the Board Order, Final EB-2005-0001.

| RATE NUMBER: 170 | LARGE INTERRUPTIBLE SERVICE |
|---|---|

***APPLICABILITY:***

To any Applicant who enters into a Service Contract with the Company to use the Company's natural gas distribution network for the transportation of a specified maximum daily volume of natural gas of not less than 30,000 cubic metres and a minimum annual volume of 5,000,000 cubic metres to a single terminal location ("Terminal Location") which can accommodate the total interruption of gas service when required by the Company. The Company, exercising its sole discretion, may order interruption of gas service upon not less than four (4) hours notice.

***CHARACTER OF SERVICE:***

In addition to events as specified in the Service Contract including force majeure, service shall be subject to curtailment or discontinuance upon the Company issuing a notice not less than 4 hours prior to the time at which such curtailment or discontinuance is to commence.

***RATE:***

Rates per cubic metre assume an energy content of 37.69 MJ/m³.

| | Billing Month<br>January<br>to<br>December |
|---|---|
| **Monthly Customer Charge** | **$200.00** |
| **Delivery Charge** | |
| Per cubic metre of Contract Demand | **3.0000 ¢/m³** |
| Per cubic metre of gas delivered | |
| For the first 1,000,000 m³ per month | **0.4090 ¢/m³** |
| For all over 1,000,000 m³ per month | **0.2090 ¢/m³** |
| **Gas Supply Load Balancing Charge** | **3.7316 ¢/m³** |
| **System Sales Gas Supply Charge per cubic metre** (If applicable) | **35.2597 ¢/m³** |
| **Buy/Sell Sales Gas Supply Charge per cubic metre** (If applicable) | **35.2418 ¢/m³** |

The rates quoted above shall be subject to the Gas Inventory Adjustment contained in Rider "C" and the Revenue Adjustment Rider contained in Rider "E". In addition, meter readings will be adjusted by the Atmospheric Pressure Factor relevant to the customer's location as shown in Rider "F". The Gas Supply Charge is applicable if the Applicant is not providing its own supply of natural gas for transportation.

***DIRECT PURCHASE ARRANGEMENTS:***

Rider "A" or Rider "B" shall be applicable to Applicants who enter into Direct Purchase Arrangements under this Rate Schedule.

***CURTAILMENT CREDIT:***

Rate for 4 hours of notice per cubic metre of Mean Daily Volume from December to March **$ 1.10 /m³**

In addition, if the Applicant is supplying its own gas requirements, the gas delivered by the Applicant during the period of curtailment shall be purchased by the Company for the Company's use. The purchase price for such gas will be equal to the price that is reported for the month, in the first issue of the Natural Gas *Market Report* published by Canadian Enerdata Ltd. during the month, as the "current" "Avg." (i.e., average) "Alberta One-Month Firm Spot Price" for "AECO 'C' and Nova Inventory Transfer" in the table entitled "Domestic spot gas prices", adjusted for AECO to Empress transportation tolls and compressor fuel costs.

For the areas specified in Appendix A to this Rate Schedule, the Company's gas distribution network does not have sufficient physical capacity under current operating conditions to accommodate the provision of firm service to existing interruptible locations. For any location presently served or any new Applicant for service pursuant to this Rate Schedule in these areas, the Company shall purchase the rights to take service hereunder at 1.25 ¢/m³ per unit of Daily Capacity Repurchase Quantity.

***UNAUTHORIZED OVERRUN GAS RATE:***

When the Applicant takes Unauthorized Supply Overrun Gas, the Applicant shall purchase such gas at a rate of 150% of the average price on each day on which an overrun occurred for the calendar month as published in the Gas Daily for the Niagara and Iroquois export points for the CDA and EDA respectively.

On the second and subsequent occasions in a contract year when the Applicant takes Unauthorized Demand Overrun Gas, the Contract Demand shall be adjusted to the actual maximum daily volume taken and the Demand Charges stated above shall apply for the whole contract year, including retroactively if necessary.

The third instance of such failure in any contract year may result in the Applicant forfeiting the right to be served under this Rate Schedule. In such case service hereunder would cease, notwithstanding any Service Contract between the Company and the Applicant. Gas supply and/or transportation service would continue to be available to the Applicant pursuant to the provisions of the Company's Rate 6 until a Service Contract pursuant to another applicable Rate Schedule was executed.

***MINIMUM BILL:***

Per cubic metre of Annual Volume Deficiency
(See Terms and Conditions of Service):

**4.0432 ¢/m³**

***TERMS AND CONDITIONS OF SERVICE:***

The provisions of PARTS III and IV of the Company's **HANDBOOK OF RATES AND DISTRIBUTION SERVICES** apply, as contemplated therein, to service under this Rate Schedule.

***EFFECTIVE DATE:***

To apply to bills rendered for gas consumed by customers on and after April 1, 2006 under Sales Service, including Buy/Sell Arrangements, and Transportation Service. This rate schedule is effective April 1, 2006 and replaces the identically numbered rate schedule that specifies, as the Effective Date, January 1, 2006 and that indicates, as the Board Order, Final EB-2005-0001.

| RATE NUMBER: 200 | WHOLESALE SERVICE |
|---|---|

***APPLICABILITY:***

To any Distributor who enters into a Service Contract with the Company to use the Company's natural gas distribution network for the transportation of an annual supply of natural gas to customers outside of the Company's franchise area.

***CHARACTER OF SERVICE:***

Service shall be continuous (firm), except for events as specified in the Service Contract including force majeure, up to the contracted firm daily demand and subject to curtailment or discontinuance, of demand in excess of the firm contract demand, upon the Company issuing a notice not less than 4 hours prior to the time at which such curtailment or discontinuance is to commence.

***RATE:***

Rates per cubic metre assume an energy content of 37.69 MJ/m³.

| | Billing Month<br>January<br>to<br>December |
|---|---|
| **Monthly Customer Charge** | |
| The monthly customer charge shall be negotiated with the applicant and shall not exceed: | **$2,000.00** |
| **Delivery Charge** | |
| Per cubic metre of Firm Contract Demand | **10.0000 ¢/m³** |
| Per cubic metre of gas delivered | **0.7051 ¢/m³** |
| **Gas Supply Load Balancing Charge** | **4.7832 ¢/m³** |
| **System Sales Gas Supply Charge per cubic metre** (If applicable) | **35.2597 ¢/m³** |
| **Buy/Sell Sales Gas Supply Charge per cubic metre** (If applicable) | **35.2418 ¢/m³** |

The rates quoted above shall be subject to the Gas Inventory Adjustment contained in Rider "C" and the Revenue Adjustment Rider contained in Rider "E". Also, meter readings will be adjusted by the Atmospheric Pressure Factor relevant to the customer's location as shown in Rider "F". The Gas Supply Charge is applicable to volumes of natural gas purchased from the Company. The volumes purchased shall be the volumes delivered at the Point of Delivery less any volumes, which the Company does not own and are received at the Point of Acceptance for delivery to the Applicant at the Point of Delivery.

***DIRECT PURCHASE ARRANGEMENTS:***

Rider "A" or Rider "B" shall be applicable to Applicants who enter into Direct Purchase Arrangements under this Rate Schedule.

***CURTAILMENT CREDIT:***

Rate for 4 hours of notice per cubic metre of Mean Daily Volume from December to March **$ 1.10 /m³**

In addition, if the Applicant is supplying its own gas requirements, the gas delivered by the Applicant during the period of curtailment shall be purchased by the Company for the Company's use. The purchase price for such gas will be equal to the price that is reported for the month, in the first issue of the Natural Gas *Market Report* published by Canadian Enerdata Ltd. during the month, as the "current" "Avg." (i.e., average) "Alberta One-Month Firm Spot Price" for "AECO 'C' and Nova Inventory Transfer" in the table entitled "Domestic spot gas prices", adjusted for AECO to Empress transportation tolls and compressor fuel costs.

For the areas specified in Appendix A to this Rate Schedule, the Company's gas distribution network does not have sufficient physical capacity under current operating conditions to accommodate the provision of firm service to existing interruptible locations. For any location presently served or any new Applicant for service pursuant to this Rate Schedule in these areas, the Company shall purchase the rights to take service hereunder at 1.25 ¢/m³ per unit of Daily Capacity Repurchase Quantity.

***UNAUTHORIZED OVERRUN GAS RATE:***

When the Applicant takes Unauthorized Supply Overrun Gas, the Applicant shall purchase such gas at a rate of 150% of the average price on each day on which an overrun occurred for the calendar month as published in the Gas Daily for the Niagara and Iroquois export points for the CDA and EDA respectively.

On the second and subsequent occasions in a contract year when the Applicant takes Unauthorized Demand Overrun Gas, the Contract Demand shall be adjusted to the actual maximum daily volume taken and the Demand Charges stated above shall apply for the whole contract year, including retroactively if necessary.

The third instance of such failure in any contract year may result in the Applicant forfeiting the right to be served under this Rate Schedule. In such case service hereunder would cease, notwithstanding any Service Contract between the Company and the Applicant. Gas supply and/or transportation service would continue to be available to the Applicant pursuant to the provisions of the Company's Rate 6 until a Service Contract pursuant to another applicable Rate Schedule was executed.

***MINIMUM BILL:***

Per cubic metre of Annual Volume Deficiency
(See Terms and Conditions of Service): **5.3908 ¢/m³**

***TERMS AND CONDITIONS OF SERVICE:***

The provisions of PARTS III and IV of the Company's **HANDBOOK OF RATES AND DISTRIBUTION SERVICES** apply, as contemplated therein, to service under this Rate Schedule.

***EFFECTIVE DATE:***

To apply to bills rendered for gas consumed by customers on and after April 1, 2006 under Sales Service, including Buy/Sell Arrangements, and Transportation Service. This rate schedule is effective April 1, 2006 and replaces the identically numbered rate schedule that specifies, as the Effective Date, January 1, 2006 and that indicates, as the Board Order, Final EB-2005-0001.

| RATE NUMBER: 300 | FIRM TRANSPORTATION SERVICE |
|---|---|

***APPLICABILITY:***

To any Applicant who enters into a Service Contract with the Company to use the Company's natural gas distribution network for the transportation to a single Terminal Location of a specified maximum daily volume of natural gas. This rate is also applicable to volumes delivered to any applicant taking service under a Curtailment Delivered Supply contract with the Company.

***CHARACTER OF SERVICE:***

Service shall be continuous (firm) except for events as specified in the Service Contract including force majeure. The volume of gas taken by the Applicant at the Terminal Location must not vary by more than two percent (2%) from the Delivered Volume.

***RATE:***

The following rates and charges, as applicable, shall apply for deliveries to the Terminal Location.

| | **Billing Month January to December** |
|---|---|
| **Monthly Customer Charge** | |
| The monthly customer charge shall be negotiated with the Applicant and shall not exceed: | **$2,000.00** |
| **Delivery Charge** | |
| Per cubic metre of Contract Demand | |
| For the first 100,000 $m^3$ | **18.0000 ¢/$m^3$** |
| For the next 100,000 $m^3$ | **12.0000 ¢/$m^3$** |
| For all over 200,000 $m^3$ | **6.0000 ¢/$m^3$** |
| Per cubic metre of gas delivered | |
| For the first 2,000,000 $m^3$ per month | **0.4853 ¢/$m^3$** |
| For the next 2,000,000 $m^3$ per month | **0.4653 ¢/$m^3$** |
| For all over 4,000,000 $m^3$ per month | **0.4453 ¢/$m^3$** |
| **Direct Purchase Administration Charge** | **$50.00** |
| **UFG Credit** (If applicable) | **0.3996 ¢/$m^3$** |

The UFG Credit is applicable if the Applicant contracts to supply a quantity of natural gas to supplement the Company's purchases for Unaccounted for Gas. (See Terms and Conditions of Service).

***UNAUTHORIZED OVERRUN GAS RATE:***

On the first occasion in a contract year when the Applicant, under a contract other than a Curtailment Delivered Supply contract, takes Unauthorized Overrun Gas the Applicant may elect to either:

(i) purchase such gas at a rate of 150% of the average price on each day on which an overrun occurred for the calendar month as published in the Gas Daily for the Niagara and Iroquois export points for the CDA and EDA respectively.
(ii) adjust the Contract Demand to the actual maximum daily volume taken and the Demand Charges stated above shall apply for the whole contract year, including retroactively if necessary.

On the second and subsequent occasions in a contract year when the Applicant takes Unauthorized Overrun Gas both (i) and (ii) shall apply.

When the Applicant under Curtailment Delivered Supply contract takes Unauthorized Overrun Gas the Applicant shall purchase such gas at a rate of 150% of the average price on each day on which an overrun occurred for the calendar month as published in the Gas Daily for the Niagara and Iroquois export points for the CDA and EDA respectively.

***MINIMUM BILL:***

Per cubic metre of Annual Volume Deficiency
(See Terms and Conditions of Service): **0.3878 ¢/m³**

***TERMS AND CONDITIONS OF SERVICE:***

1. The provisions of PARTS III and IV of the Company's **HANDBOOK OF RATES AND DISTRIBUTION SERVICES** apply, as contemplated therein, to service under this Rate Schedule.

2. Where an Applicant contracts to supply the Company with a volume of natural gas to supplement the Company's purchases for Unaccounted for Gas (UFG) the Applicant will be deemed to have delivered at the Point of Acceptance a volume of natural gas equal to 99.01 percent of the volume actually delivered by the Applicant. Such deemed volume of gas delivered shall be considered to be the volume of gas delivered as it applies to the Terms and Conditions of Service under this Rate Schedule.

3. Any volume of gas taken by the Applicant on a day at the Terminal Location which exceeds the lesser of:

   (a) the sum of
      (i) any applicable Load Balancing Demand pursuant to Rate 310 or any applicable Storage Demand pursuant to Rate 315
      plus
      (ii) the volume of gas delivered by the Applicant on that day
      and
   (b) the Contract Demand

   shall be classified as Overrun Gas ("Overrun Gas").

   Overrun Gas up to a maximum of two percent (2%) of the volume delivered by the Applicant in the case of (a) above or two percent (2%) of the Contract Demand in the case of (b) above shall be debited to the Applicant's Banked Gas Account. Any remaining excess shall be classified as Unauthorized Overrun Gas.

4. Any volume of gas delivered by the Applicant on any day in excess of the sum of:

   (i) any applicable Load Balancing Demand pursuant to Rate 310 or any applicable Storage Demand pursuant to Rate 315
   plus
   (ii) the volume of gas taken by the Applicant at the Terminal Location on that day

   shall be classified as Underrun Gas.

   Underrun Gas up to a maximum of two percent (2%) of the volume delivered by the Applicant on that day (or, all underrun gas if deliveries are being made under a Curtailment Delivered Supply Contract), shall be credited to the Applicant's Banked Gas Account. Any remaining excess shall be classified as Unauthorized Underrun Gas and shall be deemed to have been offered for sale to the Company and the Company shall purchase such

Unauthorized Underrun Gas at a price of eighty percent (80%) of the Western Canada Buy Price in effect on that day.

5. If the Applicant has contracted for service under Rate 310 or Rate 315 for the Terminal Location and if on any day the volume delivered by the Applicant other than as Underrun Gas minus the volume taken by the Applicant other than as Overrun Gas ("Difference") is positive/negative then volumes equal to the Difference shall be deemed to be received / delivered under Rate 310 as load balancing gas or Rate 315 as gas received from or delivered to storage as applicable.

***EFFECTIVE DATE:***

To apply to bills rendered for gas delivered on and after April 1, 2006. This rate schedule is effective April 1, 2006 and replaces the identically numbered rate schedule that specifies, as the Effective Date, January 1, 2006 and that indicates, as the Board Order, Final EB-2005-0001.

| RATE NUMBER: 305 | INTERRUPTIBLE TRANSPORTATION SERVICE |
|---|---|

***APPLICABILITY:***

To any Applicant who enters into a Service Contract with the Company to use the Company's natural gas distribution network for the transportation of a specified maximum daily volume of natural gas to a single Terminal Location in an area in which the Company does not have the capacity in its gas distribution network to provide firm service to existing interruptible customers and which can accommodate the total interruption of gas service when required by the Company.

***CHARACTER OF SERVICE:***

In addition to events as specified in the Service Contract including force majeure, service shall be subject to curtailment or discontinuance upon the Company issuing a notice not less than 4 hours prior to the time at which such curtailment or discontinuance is to commence. On each day in a period of interruption of service to the Terminal Location ordered by the Company, the Company shall purchase, at the rate of 39.9582 ¢/m³ the gas delivered by the Applicant on such day which is in excess of any applicable Load Balancing Demand or any applicable Storage Demand if the Company has accepted the Applicant's Nominated Volume for such day. The volume of gas taken by the Applicant at the Terminal Location must not vary by more than two percent (2%) from the Delivered Volume (see below).

***RATE:***

The following rates and charges, as applicable, shall apply for deliveries to the Terminal Location.

| | **Billing Month January to December** |
|---|---|
| **Customer Charge** | |
| The monthly customer charge shall be negotiated with the Applicant and shall not exceed: | **$2,000.00** |
| **Delivery Charge** | |
| For the first 2,000,000 m³ per month | **0.4853 ¢/m³** |
| For the next 2,000,000 m³ per month | **0.4653 ¢/m³** |
| For all over 4,000,000 m³ per month | **0.4453 ¢/m³** |
| **Direct Purchase Administration Charge** | **$50.00** |
| **UFG Credit** (If applicable) | **0.3996 ¢/m³** |

The UFG Credit is applicable if the Applicant contracts to supply a quantity of natural gas to supplement the Company's purchases for Unaccounted for Gas. (See Terms and Conditions of Service).

***UNAUTHORIZED OVERRUN GAS RATE:***

On the first occasion in a contract year when the Applicant takes Unauthorized Overrun Gas the Applicant may elect to either:

(i) purchase such gas at a rate of 150% of the average price on each day on which an overrun occurred for the calendar month as published in the Gas Daily for the Niagara and Iroquois export points for the CDA and EDA respectively.
(ii) adjust the Contract Demand to the actual maximum daily volume taken and the Demand Charges stated above shall apply for the whole contract year, including retroactively if necessary.

On the second and subsequent occasions in a contract year when the Applicant takes Unauthorized Overrun Gas both (i) and (ii) shall apply.

The third instance of such failure in any contract year may result in the Applicant forfeiting the right to be served under this Rate Schedule. In such case service hereunder would cease, notwithstanding any Service Contract between the Company and the Applicant. Gas supply and/or transportation service would continue to be available to the Applicant pursuant to the provisions of the Company's Rate 6 until a Service Contract pursuant to another applicable Rate Schedule was executed.

***MINIMUM BILL:***

Per cubic metre of Annual Volume Deficiency
(See Terms and Conditions of Service): **0.3878 ¢/m³**

***TERMS AND CONDITIONS OF SERVICE:***

1. The provisions of PARTS III and IV of the Company's **HANDBOOK OF RATES AND DISTRIBUTION SERVICES** apply, as contemplated therein, to service under this Rate Schedule.

2. Where an Applicant contracts to supply the Company with a volume of natural gas to supplement the Company's purchases for Unaccounted for Gas (UFG) the Applicant will be deemed to have delivered at the Point of Acceptance a volume of natural gas equal to 99.01 percent of the volume actually delivered by the Applicant. Such deemed volume of gas delivered shall be considered to be the volume of gas delivered as it applies to the Terms and Conditions of Service under this Rate Schedule.

3. Any volume of gas taken by the Applicant on a day at the Terminal Location which exceeds the lesser of:

   (a) the sum of
      (i) any applicable Load Balancing Demand pursuant to Rate 310 or any applicable Storage Demand pursuant to Rate 315
      plus
      (ii) the volume of gas delivered by the Applicant on that day
      and
   (b) the Contract Demand

   shall be classified as Overrun Gas ("Overrun Gas").

   Overrun Gas up to a maximum of two percent (2%) of the volume delivered by the Applicant in the case of (a) above or two percent (2%) of the Contract Demand in the case of (b) above shall be debited to the Applicant's Banked Gas Account. Any remaining excess shall be classified as Unauthorized Overrun Gas.

4. Except on a day of interruption of service, any volume of gas delivered by the Applicant on any day in excess of the sum of:

   (i) any applicable Load Balancing Demand pursuant to Rate 310 or any applicable Storage Demand pursuant to Rate 315
   plus
   (ii) the volume of gas taken by the Applicant at the Terminal Location on that day
   shall be classified as Underrun Gas.

Underrun Gas up to a maximum of two percent (2%) of the volume delivered by the Applicant on that day shall be credited to the Applicant's Banked Gas Account. Any remaining excess shall be classified as Unauthorized Underrun Gas and shall be deemed to have been offered for sale to the Company and the Company shall purchase such Unauthorized Underrun Gas at a price of eighty percent (80%) of the Western Canada Buy Price in effect on that day.

Any volume of gas delivered by the Applicant and accepted by the Company on a day of interruption of service shall be purchased by the Company at the rate of 39.9582 ¢/m³ and shall not be classified as Underrun Gas.

5. If the Applicant has contracted for service under Rate 310 or Rate 315 for the Terminal Location and if on any day the volume delivered by the Applicant other than as Underrun Gas minus the volume taken by the Applicant other than as Overrun Gas ("Difference") is positive/negative then volumes equal to the Difference shall be deemed to be received / delivered under Rate 310 as load balancing gas or Rate 315 as gas received from or delivered to storage as applicable.

***EFFECTIVE DATE:***

To apply to bills rendered for gas delivered on and after April 1, 2006. This rate schedule is effective April 1, 2006 and replaces the identically numbered rate schedule that specifies, as the Effective Date, January 1, 2006 and that indicates, as the Board Order, Final EB-2005-0001.

| RATE NUMBER: 310 | LOAD BALANCING SERVICE |
|---|---|

***APPLICABILITY:***

To any Applicant who has entered into a Companion Service Contract with the Company for service under Rate 125, Rate 300 or Rate 305 and for whom the Company has determined that this service is available. The Applicant for service hereunder must enter into a Service Contract for a maximum daily volume of natural gas which the Company must deliver to or receive from the Applicant for load balancing purposes at the Terminal Location specified in the Companion Service Contract. Such Load Balancing Demand shall not exceed fifty percent (50%) of the Contract Demand specified in the Companion Service Contract.

***CHARACTER OF SERVICE:***

Service shall be continuous (firm) except for events as specified in the Service Contract including force majeure.

***RATE:***

The following rates and charges shall apply in respect to any Daily Difference between the volume of gas delivered by the Applicant other than as Underrun Gas under the Companion Service Contract and the volume of gas taken at the Terminal Location other than as Overrun Gas.

**Monthly Demand and Commodity Charges:**

| | |
|---|---|
| **Demand Charge** | |
| Per cubic metre of Load Balancing Demand | **11.9817 ¢/m³** |
| **Commodity Charge** | |
| Per cubic metre of Difference | **3.7698 ¢/m³** |

***MINIMUM BILL:***

See Terms and Conditions of Service.

***TERMS AND CONDITIONS OF SERVICE:***

1. The provisions of PARTS III and IV of the Company's **HANDBOOK OF RATES AND DISTRIBUTION SERVICES** apply, as contemplated therein, to service under this Rate Schedule.

2. The actual volumes of gas received as or delivered as load balancing gas on a day shall be determined pursuant to the Terms and Conditions of Service of the Companion Rate Schedule applicable to the Companion Service Contract.

3. The Company shall keep a record ("Load Balancing Account") of the net volume of gas owing to or from the Applicant. Any debit or credit balance in the Load Balancing Account shall be cleared within 20 days of the end of the contract year.

4. If within 20 days of the end of each contract year in a continuing relationship any balance in the Applicant's Load Balancing Account with respect to the prior contract year has not been cleared, such balance shall be disposed of as follows:

   (i) any debit balance shall be deemed to have been sold to the Applicant pursuant to the provisions of Rate 320 as if the gas had been consumed in equal portions during the months of December, January, February and March, of the contract year and the Applicant shall pay for such gas within ten (10) days of the rendering of a bill therefor.

(ii) any credit balance shall be deemed to have been tendered for sale to the Company and the Company shall purchase such gas at a price per cubic metre of eighty percent (80%) of the Western Canada Buy Price in effect at the end of the contract year.

***EFFECTIVE DATE:***

To apply to bills rendered for gas service provided on and after April 1, 2006. This rate schedule is effective April 1, 2006 and replaces the identically numbered rate schedule that specifies, as the Effective Date, January 1, 2006 and that indicates, as the Board Order, Final EB-2005-0001.

| RATE NUMBER: 315 | GAS STORAGE SERVICE |
|---|---|

***APPLICABILITY:***

To any Applicant who has entered into a Companion Service Contract with the Company for service under Rate 125, Rate 300 or Rate 305 and for whom the Company has determined that this service is available. The Applicant for service hereunder must enter into a Service Contract with the Company for a maximum daily volume of natural gas which the Company must receive from storage for transportation to a single Terminal Location specified in the Companion Service Contract. The Service Contract shall also specify a minimum annual capacity of storage space of sixty (60) times the Storage Demand.

***CHARACTER OF SERVICE:***

Service shall be continuous (firm) except for events as specified in the Service Contract including force majeure. The maximum daily volume of natural gas that the Company must receive for injection to storage shall be sixty percent (60%) of the Storage Demand.

***RATE:***

The following rates and charges shall apply in respect to all gas received by the Company from and delivered by the Company to storage on behalf of the Applicant.

**Monthly Demand and Commodity Charges:**

| | |
|---|---|
| **Demand Charge** | |
| Per cubic metre of Storage Demand | **12.0806 ¢/m³** |
| Per cubic metre of Space Demand | **0.0378 ¢/m³** |
| **Commodity Charge** | |
| Per cubic metre of gas delivered to / received from storage | **0.5472 ¢/m³** |

***FUEL RATIO REQUIREMENT:***

The Fuel Ratio per unit of gas injected and withdrawn is 0.35%.

***MINIMUM BILL:***

See Terms and Conditions of Service.

***TERMS AND CONDITIONS OF SERVICE:***

1. The provisions of PARTS III and IV of the Company's **HANDBOOK OF RATES AND DISTRIBUTION SERVICES** apply, as contemplated therein, to service under this Rate Schedule.

2. A Nominated Volume will not be accepted for withdrawal if greater than:

   (I) the Storage Demand
   (ii) the balance of gas in storage on the day of a withdrawal nomination.

3. A Nominated Volume will not be accepted for injection if greater than:

   (I) sixty percent (60%) of the Storage Demand
   (ii) the difference between the Space Demand and the balance of gas in storage on the day of an injection nomination.

4. The actual volumes of gas received from and delivered to storage on a day shall be determined pursuant to the Terms and Conditions of Service of the Companion Rate Schedule applicable to the Companion Service Contract.

5. The Company shall keep a record of the net volume of gas owing to the Applicant.

6. If the Service Contract is renewed the Applicant may elect to carry any balance of gas in storage at the end of the current Service Contract forward into the renewal Service Contract, provided that such carry forward quantity shall not exceed the Space Demand under the renewal Service Contract.

7. The Applicant shall give notice in writing at least ninety (90) days in advance of the end of the contract year that it will not be renewing the Service Contract and in such notice shall advise the Company of its plans to dispose of any balance of gas in storage as of the date of giving such notice. Any balance not withdrawn by the end of the contract year shall be forfeited to, and be the property of, the Company.

***EFFECTIVE DATE:***

To apply to bills rendered for gas service provided on and after April 1, 2006. This rate schedule is effective April 1, 2006 and replaces the identically numbered rate schedule that specifies, as the Effective Date, January 1, 2006 and that indicates, as the Board Order, Final EB-2005-0001.

# TAB 3

questions.

MR. KAISER: Thank you.

**QUESTIONS FROM THE BOARD:**

MR. RUPERT: Thanks. I have -- I think most of my questions concern the mechanics or background to the infranchise/exfranchise distinction you are making. Before I get to that, just help me out on the current so-called range rates, I guess.

Those are, I think, at least in the rates schedule C1. Is there another place they appear, as well?

MR. ISHERWOOD: For storage, it's in C1.

MR. RUPERT: As I read that - I just want to clear up this range rate idea - I read maximums in there, and people talk regularly about range rates. I want to understand what you mean by range rates. I see maximums in that schedule.

MR. ISHERWOOD: We always view the minimum being zero.

MR. RUPERT: Now, are those applications to individual transactions or do those maximums apply to the entire aggregate of all of these market-based transactions Union does during a year?

MR. ISHERWOOD: They would be based on each individual contract with an individual party.

MR. RUPERT: Have the rates that are in there currently, the rates that appeared in maybe past C1 schedules, ever been a constraining factor in a transaction, where you were limited by the amount in that rate order where the market was actually considerably

higher?

MR. ISHERWOOD: Actually, as part of our 2007 rate application, we actually filed to increase the range rate under C1 for both space and deliverability. That was done under the expectation that high deliverability storage will be a higher-valued service and may actually get, in certain conditions, outside that range. So that was the main reason why we asked for --

MR. RUPERT: That was sort of forward-looking as opposed to past transactions?

MR. ISHERWOOD: Exactly.

MR. RUPERT: Have you ever had any significant cases where you have been stuck?

MR. ISHERWOOD: We have not.

MR. RUPERT: None, okay.

On the infranchise issue, first I just want to be clear on the definition of infranchise. If I could take you to one of -- this is on your pre-filed evidence. I think this is Exhibit C, tab 1. There is an attachment to that. Attachment 1 to that has two pages. This is page 2 of 2. I think it seems to be called Exhibit J5.02.

Right at the back of -- I think it is an attachment to your evidence on storage. Do you have that? It is a table. It is actually a table which shows storage at Dawn for about seven or eight years, from actual of 2000/actual 2001 all the way up to the forecast 2007, and the space in total and split.

Do you have that one?

**PREFILED EVIDENCE OF**

**MARK ISHERWOOD, DIRECTOR BUSINESS DEVELOPMENT,**

**CAROL CAMERON, STORAGE & TRANSPORTATON SPECIALIST**

**AND**

**MARK KITCHEN, MANAGER OF RATES AND PRICING**

The purpose of this evidence is to describe Union's proposals related to the M12 and C1 rate schedules. Specifically, Union is seeking Board approval of its proposed changes to the:

1. M12 and C1 General Terms and Conditions;
2. M12 rate schedule; and
3. C1 rate schedule

In addition, Union is taking this opportunity to update the Board on how it plans to meet the storage and transportation ("S&T") needs of ex-franchise power market customers within Union's existing suite of ex-franchise services.

## 1. THE M12 AND C1 GENERAL TERMS AND CONDITIONS

Schedule A of the M12 Rate Schedule contains the General Terms and Conditions for service under the M12 Rate Schedule and as such forms part of the M12 Contract between Union and its M12 shippers. Schedule A has not been updated since the

OTHER M12 RATE SCHEDULE CHANGES

Union is proposing a number of other changes to the M12 Rate Schedule. These changes are editorial in nature and are intended to provide more clarity to the rate schedule. For example, Union has organized M12 service offerings under headings to more clearly identify service groupings and enhance comprehension. Union has also added explanatory notes that are intended to clarify service offerings.

In addition, Union is proposing changes to Schedule "B" of the M12 rate schedule and to add Schedule "D". The changes to Schedule "B" reflect the changes to the M12 contract discussed above. Schedule "D" identifies M12 receipt and delivery points.

A black-lined version of the 2007 M12 Rate Schedule highlighting these changes can be found at Exhibit H3, Tab 3, Schedule 1.

## 3. C1 RATE SCHEDULE CHANGES

Union is proposing a number of changes to the C1 Rate Schedule. Union's proposed 2007 C1 rates appear at Exhibit H3, Tab 1, Schedule 2 and Exhibit H3, Tab 2, Schedule 1. Exhibit H3, Tab 3, Schedule 1 provides the proposed C1 rate schedule. The proposed changes to the C1 rate schedule are described below.

STORAGE FUEL RATES AND DEHYDRATION CHARGES

In response to customer requests for the option to supply their own fuel for storage

activity, Union is proposing to add to the C1 Rate Schedule storage injection/withdrawal fuel rates and dehydration charges applicable to customers taking storage service from Union.

MAXIMUM C1 STORAGE RATES

Union is proposing to increase the maximum rates that can be charged for C1 storage services. The current maximum for Short-Term, Off Peak and Long-Term Storage is $3.00/GJ for combined storage space and interruptible deliverability, and an additional $3.00/GJ for firm deliverability. These maximums were last approved by the Board in the RP-2001-0029 proceeding (September, 2002). Union is proposing to increase the maximum for Short-Term, Off Peak and Long-Term Storage to $6.00/GJ for both combined storage space and interruptible deliverability, and for firm deliverability. This wider range will allow Union to better respond to the market needs of all customers, including power customers.[2]

INTERRUPTIBLE AND SHORT TERM (1 YEAR OF LESS) FIRM TRANSPORTATION

Interruptible and short term firm transportation rates are currently negotiated subject to a Board approved maximum of $9.373/GJ. The market value for these services is determined using gas price differentials between two points on Union's system. For example, the gas price differential between Dawn and Parkway will determine the value

2 The maximum rates for Short-Term Storage/Balancing Service appearing on the R1, T1, T3, U2, U5, U7, U9, and Rate 30 rate schedules will also increase to $6.00/GJ if Union's proposal to increase the maximum C1 storage rates is approved.

of interruptible transportation between Dawn and Parkway. In recent years, gas price differentials between points such as Dawn and Parkway have been as high as $55/GJ on a given day.

In response to increased volatility in the price of natural gas and the corresponding impact on the value of Union's interruptible and short term firm transportation services from Dawn to Parkway, Union is proposing to increase the maximum rate to $75/GJ.

C1 TRANSPORTATION FUEL

Union offers cross franchise transportation services under the C1 Rate Schedule. Shippers taking C1 transportation services have the option of providing their own fuel based on an annual fuel ratio. For shippers that do not choose to provide their own fuel, Union recovers the cost of fuel in the commodity charge. The commodity charge is determined using the same annual fuel ratio as that applied to shippers that supply their own fuel.

Union is proposing to change the commodity charge and the corresponding fuel ratios associated with C1 transportation services to account for seasonal differences in fuel requirements. Union is making this proposal to better match fuel charges with the fuel costs incurred and to reflect the load profile of shippers transporting gas on the Dawn-Trafalgar system. The proposed fuel ratios are calculated as the simple average of the monthly fuel ratios for the summer and winter months.

INTERRUPTIBLE TRANSPORTATION WITHIN DAWN

The C1 Rate Schedule currently provides for an interruptible transportation service between interconnecting pipelines within the Dawn yard (i.e. Dawn-TCPL, Dawn-Tecumseh and Dawn-Vector). The current approved rate is $0.007/GJ. This charge was originally designed to recover UFG costs.

Union is proposing to modify the C1 Rate Schedule to clearly identify that the service is interruptible. Union is also proposing to set the rate equivalent to the proposed 2007 system wide UFG factor of 0.329%. Under this proposal any shipper taking interruptible service within the Dawn yard will be required to provide UFG in kind. This treatment is consistent with the Parkway to Parkway rate approved in the RP-2003-0063 proceeding.

C1 UNAUTHORIZED TRANSPORTATION AND STORAGE OVERRUN RATES

*C1 Unauthorized Transportation Overrun Rate*

As indicated above, Union is proposing to change the M12 unauthorized transportation overrun rate such that it is equivalent to the higher of the reported daily spot price of gas at Dawn, Parkway, Niagara or Iroquois in the month of or the month following the overrun occurrence, plus a 25% surcharge. Union proposes to make the same change to the C1 unauthorized transportation overrun rate.

*C1 Unauthorized Storage Overrun Rates*

Union is also proposing changes to unauthorized storage overrun rates associated with the

maximum storage balance and the drafted storage balance. Union last changed the unauthorized storage overrun rate in 1997.

The current approved unauthorized storage overrun rate associated with exceeding the maximum storage balance is $0.937/GJ from August 1 to December 15 and $0.094/GJ from December 16 to July 31. The current approved unauthorized storage overrun rate associated with having a drafted storage balance (i.e. storage position less than zero) is $0.937/GJ from February 1 to April 30 and $0.094/GJ from May 1 to January 31.

Union is proposing to increase the unauthorized storage overrun rate associated with the maximum storage balance for the December 16 to July 31 period and the drafted storage balance for the February 1 to April 30 period to be equal to ten times the C1 maximum storage rate of $6/GJ (i.e. $60/GJ). For the December 16 to July 31 and May 1 to January 31 periods, the unauthorized storage overrun rate associated with the maximum storage balance and the drafted storage balance will be equivalent to the C1 maximum storage rate of $6/GJ. Union is proposing to increase the unauthorized storage overrun rates to the levels indicated to ensure that shippers do not exceed their maximum storage entitlement or draft Union's storage on any given day, and to protect the overall system integrity of Union's system.

OTHER C1 RATE SCHEDULE CHANGES

Union is proposing a number of other changes to the C1 Rate Schedule. These changes

are editorial in nature and are intended to increase rate schedule clarity.

Union is also proposing changes to Schedule "B" of the C1 rate schedule and to add Schedule "C". The changes to Schedule "B" reflect the changes to the C1 contract discussed above. Schedule "C" identifies C1 receipt and delivery points.

The black-lined version of the 2007 C1 rate schedule can be found at Exhibit H3, Tab 3, Schedule 1.

## 4. POWER SERVICES

On November 21, 2005 Board staff issued the Natural Gas Electric Interface Review ("NGEIR") report highlighting potential issues to be dealt with as part of a generic hearing. After receiving comment from interested parties, the Board issued a Notice of Proceeding on December 29, 2005 regarding the generic hearing. In the Notice of Proceeding, the Board indicated that it will:

*"hold a generic hearing 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 eligible customers) that contain the following:*

1. *More frequent nomination windows for distribution, storage and transportation as a new service to gas-fired generators (and other eligible customers).*

# EB-2005-0520

# UNION GAS LIMITED

# SETTLEMENT AGREEMENT

# May 15, 2006

## TABLE OF CONTENTS



**List of Appendices:**

**EB-2005-0520**

**SETTLEMENT AGREEMENT**

This Settlement Agreement ("Agreement") is for the consideration of the Ontario Energy Board ("the Board") in its determination, under Docket No. EB-2005-0520, of Calendar 2007 rates for Union Gas Limited ("Union"). By Procedural Order No. 1 dated February 24, 2006, the Board scheduled a Settlement Conference to commence May 1, 2006. The Settlement Conference was duly convened, in accordance with Procedural Order No. 1, with Mr. Ken Rosenberg as facilitator. The Settlement Conference proceeded until May 12, 2006.

Attached as Appendix A to the Agreement is the Board's Issues List which was issued through Procedural Order No. 3 dated March 22, 2006. The Agreement identifies the issues on the Board's list for which agreement has been reached. The Agreement is supported by the evidence filed in the EB-2005-0520 proceeding.

Each of the issues identified below falls within one of the following three categories:

1. an issue for which there is complete settlement, because Union and all of the other parties who discussed the issue either agree with the settlement or take no position,
2. an issue for which there is partial settlement, agreed to by Union and a majority of parties but one or more parties do not agree with the settlement,
3. an issue for which there is no settlement.

For the purposes of this Agreement, the term "no position" may include both parties who were involved in negotiations on an issue but who ultimately took no position on that issue and parties who were not involved in negotiations on that issue at all.

It is acknowledged and agreed that none of the completely settled provisions of this Agreement is severable. If the Board does not, prior to the commencement of the hearing of the evidence in EB-2005-0520, accept the completely settled provisions of the Agreement in their entirety, there is no Agreement (unless the parties 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 will not withdraw from this Agreement under any circumstances except as provided under Rule 32.05 of the Ontario Energy Board's Rules of Practice and Procedure.

For greater certainty, the parties further acknowledge and agree that these conditions apply to settled issues in respect of which they are shown as taking no position.

It is also acknowledged and agreed that this Agreement is without prejudice to parties re-examining these issues in any other proceeding.

The parties agree that all positions, information, documents, negotiations and discussion of any kind whatsoever which took place or were exchanged during the Settlement Conference 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 on each issue is set out in each section of 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.

The following parties participated in the Settlement Conference:

Canadian Manufacturers & Exporters ("CME")

City of Kitchener ("CCK")

Consumers Council of Canada ("CCC")

Coral Energy Canada Inc. ("Coral")

Enbridge Gas Distribution Inc. ("EGD")

Energy Probe Research Foundation ("Energy Probe")

FONOM & the Cities of Timmins and Greater Sudbury ("FONOM & the Cities")

Industrial Gas Users Association ("IGUA")

London Property Management Association ("LPMA")

Low-Income Energy Network ("LIEN")

Ontario Association of Physical Plant Administrators ("OAPPA")

Ontario Energy Savings L.P. ("OESLP")

School Energy Coalition ("SEC")

Sithe Global Power Goreway ("Sithe")

Superior Energy Management ("SEM")

TransAlta Cogeneration L.P. and TransAlta Energy Corp. ("TransAlta")

TransCanada PipeLines Limited ("TCPL")

Vulnerable Energy Consumers Coalition ("VECC")

Wholesale Gas Services Purchasers Group ("WGSPG")

## OVERVIEW

In support of the need for a rate increase, Union identified factors that have an impact on its current and expected business environment, either affecting Union directly, by increasing Union's costs, or indirectly by changing Union's throughput and corresponding revenues from customers. These factors included the impacts of high energy prices, conservation and demand management, foreign exchange, weather, workforce demographics, cost pressures which exceed the general rate of inflation and the investment climate and available investment opportunities. These factors also included the financial and business risks posed by Union's current equity ratio and the impact this will have on Union's ability to raise capital. The rate adjustments that result from this Settlement Agreement will allow the company to make investments to serve new and existing customers, to maintain the integrity of Union's system, including business support processes, and meet all compliance requirements during 2007.

The revenue deficiency reduction for 2007 which the parties have agreed to is approximately $61.110 million. After excluding incremental DSM budget costs for 2007 of approximately $9.000 million, Union's revenue deficiency claim for 2007 is $85.827 million. With this settlement, the revenue deficiency Union will recover in its 2007 rates will be approximately $24.717 million. (See Appendix E)

The 2007 revenue deficiency of $24.717 million represents an increase of approximately 2.7% over current approved delivery, storage and transportation rates. (See Exhibit H3, Tab 1, Schedule 1 for delivery, storage and transportation revenue at current rates.) It is the overall revenue deficiency reduction of $61.110 million and its component parts which constitutes the

consideration for the intervenors' acceptance of Union's budgets and forecasts for 2007 as more particularly described below.

Evidence References:
1. H1/T1/p21
2. J1.74, J1.75, J1.76, J5.11, J7.13, J17.05, J25.07

### 6.10 ARE THE TERMS AND CONDITIONS OF M12 AND C1 SERVICES, INCLUDING THE PROPOSED RATE SCHEDULE CHANGES, APPROPRIATE (EXCLUDING THE CONSIDERATION OF POTENTIAL NEW SERVICES FOR POWER PRODUCERS)?

(Complete Settlement)

The parties agree to the following modifications to the proposed terms and conditions of M12 and C1 services:

1. Union will post a standard M12 contract and any future changes to the standard contract on its website. Union will provide at least six months advance written notice to all M12 shippers of any changes to the standard contract, except in the case of changes made to the Conditions Precedent Section of the M12 Contract used for facility expansions. A copy of the standard contract is attached for information purposes as Appendix C.

2. Union will use the standard M12 contract as a benchmark for contracting purposes. Union is free to negotiate terms with customers that vary from the standard contract.

3. Existing M12 contracts will be grandfathered until the end of the initial contract term and upon extension or renewal will be moved to the standard contract. An existing M12 shipper may elect to move to the standard contract at any time.

4. Union will file with the Board all variations between the standard contract and new contracts on a contract specific basis before such new contracts come into effect. Union will file the variations directly with the Board and will promptly post this information on its website.

5. The M12 rate schedule provides: "The identified rates represent maximum prices for service. These rates may change periodically. Multi-year prices may also be negotiated, which may be higher than the identified rates". It is the parties' understanding of this section that parties wishing to contract for M12 service may do so at the Board approved rate. They may also negotiate a higher multi-year rate should they so choose.

6. The parties accept the general terms and conditions of the M12 rate schedule as provided in Appendix D. Union agrees that changes made to the terms and conditions of the M12 rate schedules will be applied to the terms and conditions of the C1 rate schedule where applicable for consistency. Additional changes to C1 Schedule B (Nominations) may be required to ensure alignment with the M12 Service.

7. In the event the Board approves this Settlement Agreement, Union will send a letter to the Board panel presiding over the NGEIR proceeding (supported by TCPL) providing for the following:

    1. Union agrees to amend the contracts of the Parties that bid a premium in the 2006 and 2007 open seasons to remove the premium. These customers would then pay the posted M12 toll only. This would reduce Union's revenue forecast for 2007 by $150,000.
    2. Union agrees to develop, prior to its next open season, an allocation procedure which defines the criteria by which Union will allocate long term firm transportation capacity for expansion, promptly post it on its web site, and notify shippers of any changes six months in advance.
    3. Union will include in its allocation procedure or otherwise, a requirement that Union identify in its open season documents any anticipated capacity constraints, if a constraint is expected, and
    4. Union agrees to not use bid premium as a criterion for allocating long term firm transportation capacity in the future.

The parties accept all other proposed changes to the M12 and C1 rate schedules as proposed in Union's application.

The following parties agree with the settlement of this issue: CME, FONOM & the Cities, CCK, CCC, EGD, Energy Probe, IGUA, LPMA, SEC, Sithe, TransAlta, TCPL, WGSPG

The following parties take no position on this issue: Coral, LIEN, OAPPA, OESLP, SEM, VECC

Evidence References:
1. H1/T2
2. J1.77, J7.14, J9.02, J22.01, J22.02, J22.03, J22.04, J25.08, J27.15, J27.16, J27.17, J27.18, J27.19, J27.20, J27.21, J27.22, J27.23, J27.24, J27.25, J27.26, J27.27, J27.28, J27.29

### 6.11 Is Union's proposal for approval of changes to the Direct Purchase Administration Charge (DPAC) to $72.50 per month and $0.24 per customer appropriate?

(Complete Settlement)

The parties accept that Union's current DPAC charges of $75.00 per month per contract and $0.19 per customer per month should be maintained. The parties accept that the projected 2007 revenue shortfall of $254,000 shall be collected from in-franchise customers through delivery charges when setting 2007 rates pursuant to this Agreement. The settlement is made with the

# TAB 4

MR. CHARLESON: Our expectation would be, yes, that they would be at market-based prices. Those contracts are currently at market-based prices. Obviously, still subject to the outcome of this proceeding. But our expectation that whatever the rules are for the storage market in Ontario at that time would prevail in terms of replacing those contracts.

MR. KAISER: What I'm driving at here, previous questions were quite properly trying to identify what differences, if any, there were between the ultimate proposals of yourself and Union.

You're a bit different in the sense that you buy more of your storage than they do. I'm trying to understand whether that would mean that, for the infranchise customers below 1.2, your costs would rise to market quicker than would be the case in Union. Have you considered that?

[Witness panel confers]

MR. GRANT: Yes. We haven't done too much thinking on that, but I take your point. I think our costs would generally rise faster toward the end state than an infranchise Union customer, in part because of the fact that 20 Bcf is contracted for in the marketplace by ourselves.

MR. KAISER: Now, Mr. Grant, turning just to a different topic. I'm referring to Mr. Thompson's brief. It's tab 2 of his brief. And this is your submission to the Natural Gas Forum, November 10th. And I'm over at page 8.

MR. GRANT: Yes. I have that.

MR. KAISER: And under the heading "Storage and Upstream Transportation" you go through the general proposition which we've heard many times that traditional role of storage, seasonal storage, seasonal sources of supply, will change as more gas-fired power generation is built. A new slate of services is required to meet short-term dispatching needs, requiring investments in both underground surface storage structure. And then you say, "To encourage the development of new storage capabilities."

And this is the sentence I want to focus on:

> "The pricing of both the existing and new storage must be considered."

And you, of course, have described not only the need for market-based pricing with respect to new capacity, but repricing the services that come from the existing capacity.

If the goal of this isn't just competition for the sake of competition, but if the goal of this is to create new storage facilities, as you say in your NGF submission.

MR. GRANT: Yes.

MR. KAISER: You would agree that that's the goal of all of this; at the end of the day, that's what we're trying to do here? Mr. Smead, you at least agree?

MR. SMEAD: Yes, sir.

MR. KAISER: That's the goal.

MR. SMEAD: Yes.

MR. KAISER: And if that is the goal, what does the

repricing of the existing plant have anything to do with it? It's not going to produce one iota of new investment. That's sunk cost, isn't it?

MR. GRANT: It is sunk cost. And the question that you pose really does go to why we ended up where we did with our proposal; that is, to take the existing capacity and essentially don't mess with it for now and come up with this exemption proposal, because what we need at the margin to develop new storage is forbearance. That's what's going to get it done.

Having said that, the broader implications of this type of pricing of storage at the margin or forbearance of storage at the margin needs to be considered in the context of existing rates in some fashion. Existing storage rates.

So in essence, our proposal puts off to another day those issues as to how you reprice any of the existing storage capabilities, and allows full flexibility for the Board and all interested parties to debate those issues over time and perhaps trend it over time to some ultimate end state.

MR. KAISER: Could we at least agree on this, that with respect to the repricing of the existing facilities there is an argument for leaving it the way it is because, one, there's not the same degree of competition at that retail level that there is at the wholesale level, and two, replacing it isn't going to produce any new investment. Would you agree with that?

MR. GRANT: I agree with that.

MR. KAISER: Right. Thank you, gentlemen. Mr. Rupert, I think, had one more question.

MR. RUPERT: Sorry, one last question. My question may be general and woolly, but just give me a quick reaction and that will be fine.

Every expert report that's been filed in this proceeding so far has defined the product market as physical gas storage, or words to that effect.

And yet, at the same time -- goes with it the sort of notion that we're tracing molecules around the system, moving them from pool A to pool B, through pipelines and so on. At the same time, you hear about the dynamic marketing world where you can do virtually everything at a moment's notice.

Is physical storage space really the market here? It may be the market that a utility uses to supply its infranchise customers with seasonal storage needs that are there. But for the rest of the world, is it really physical storage or is it something else?

MR. SMEAD: I guess I'll start, Mr. Rupert. I believe we had some -- at the beginning of this discussion with Ms. Sebalj yesterday, I strongly believe, and believe it's consistent with what the FERC has done in its most recent rules on storage, it would be fully appropriate to recognize storage for what it really is, just the right to tender gas at one point in time and get gas back at another point in time, regardless of how that happened.

I know this was a fundamental issue in the

# TAB 5

MR. BAKER: Again, it's to regulate and set the prices for the services that are subject to regulation. I think that's the issue that bears in this proceeding, which is, is storage as a service particularly from Union's position in the exfranchise market, is that a regulated service and should that be subject to regulation?

MR. THOMPSON: All right. Well, it is one of the Board's objectives under its legislation to protect consumers with respect to gas prices. Are you aware of that?

MR. BAKER: I believe that's in the objectives of the Act.

MR. THOMPSON: All right. Let's move on, if we might, to a consideration of your proposals here.

Backing up, if I might, with respect to the status quo. Right now you have market-based rates for exfranchise storage services, or so-called market-based rates?

MR. BAKER: That's correct.

MR. THOMPSON: For exfranchise service. But as part of the determination of the overall revenue requirement to be recovered from ratepayers generally the Board determines the extent to which those market-based rates exceed what would be the cost-based rates, the so-called premium?

MR. BAKER: That's correct.

MR. THOMPSON: And so the upshot of that exercise in determining the premium and allocating it back to system users in one way or another is to confine the return on

assets to the reasonable rate of return the Board allows; right?

MR. BAKER: When I look back on what's gone on in terms of how this issue has been regulated, I'm not sure it's necessarily a reasonable return on the asset, but we're taking the premium, as you put it, that we're able to realize on the marketplace in terms of selling those exfranchise services, and it has been, to date, reallocated back into the rates of the regulated services.

So it, in effect, acts as a subsidization to existing rates and distribution services.

MR. THOMPSON: Well, that may be your view, and it depends on how it's allocated, but in terms of the big picture, what the premium calculation does, I suggest, is confine the return of the integrated enterprise as a whole to the return that the Board allows, the reasonable return.

MR. BAKER: Under the existing framework where those assets are under regulation, but, again, I think the issue at play in this hearing is whether those assets should still be subject to regulation and be within the regulated assets that determine rates.

MR. THOMPSON: All right. But in terms of the exercise by the Board of the power to determine those prices or rates at the moment, there's the return piece, there's the cost-of-service piece, then there's the pricing piece, which in your case is market-based, and then there's the premium piece in the equation that is intended to keep

the overall returns at a reasonable level. Is that a fair paraphrase of how it works?

MR. BAKER: I'd paraphrase it a little bit differently, where, again, the assets today, the storage assets are in rate base. So the Board will determine a reasonable rate of return on those assets. We'll look at our costs as in a cost-of-services proceeding, all the revenues from the regulated services, and the net difference between the market revenues and the cost associated with providing those services, that's the premium that's been allocated back as a credit against other rate classes.

MR. THOMPSON: Right. But if it wasn't allocated back, there would be a huge jump in the return that the enterprise -- if it wasn't brought into account in the rate-making process, there would be a huge jump in the return on equity.

MR. BAKER: I would say that a little bit differently. I would say that for the assets that remain under cost-of-service regulation, there would be an appropriate and reasonable return on those assets deemed to be providing the regulated service. And for -- our position on storage is, the market is competitive, and market-based rates are appropriate and should be removed.

And when you do that, a cost-of-service determination in terms of a return, in our view, just doesn't have the relevance that it does when it's looked at as part of a regulated asset today.

MR. THOMPSON: Well, let's move on, then.

In terms of your proposal -- and the status quo now is you have market-based prices for exfranchise, for storage services. You have cost-based prices for infranchise storage services. And that has been provided to the company, presumably, by the Board through an exercise of its rate-making jurisdiction. Is that fair?

MR. BAKER: That's fair. The only clarification I would make is for infranchise customers, they are, in effect, paying than the cost-of-service rate because that premium in the exfranchise market from selling those services as market, based rates is allocated back.

So there is, in effect, a subsidy.

MR. THOMPSON: Well, they could be allocated back to the exfranchise, I suppose, and it wouldn't be a subsidy. I take it your point, there's an allocation issue that gives rise to a subsidy topic.

MR. BAKER: That's correct.

MR. THOMPSON: But the bottom line is, in terms of pricing today, you have market-based pricing for your exfranchise storage services.

MR. BAKER: Yeah, I wasn't disagreeing with you. We have market-based pricing for exfranchise services.

MR. THOMPSON: So you don't need forbearance to get that result; you've got it already.

MR. BAKER: I think our definition of forbearance and my understanding of what we're trying to do in this proceeding is to first make a determination in terms of

whether, in our proposal, the exfranchise storage market is competitive. That would support market-based rates.

And our definition of "forbearance" is when you have those two conditions, that the assets in that revenue stream get removed from what is considered under cost-of-service regulation.

MR. THOMPSON: Right. But my point is, I think the answer is yes, you don't need an exercise by the Board of its forbearance power to get market-based pricing authority in the exfranchise market; you have that already.

MR. BAKER: Yeah, we do have that already.

MR. THOMPSON: Okay. And you concede that the rates for infranchise customers for storage services should remain cost-based in this proceeding?

MR. BAKER: That's right. For the specific assets that underpin that service.

MR. THOMPSON: All right. And so that's status quo.

MR. BAKER: Well, it's not status quo, because today, what they're paying is not a pure cost-based rate on the assets that are underpinning their service. There is the subsidy issue, so they are paying less than a cost-based rate today.

MR. THOMPSON: All right. So it appears to me that the sole purpose of your forbearance request is to enable Union to scoop the premium. Is that what it shakes down to?

MR. BAKER: No, I think when you step back, this proceeding has some history, and it was really dealt with

by the Board, to look at what is going on in the storage market, what's changed, what are the potential future requirements for Ontario gas-fired generators, for storage. And the Board itself asked the question: Is the market competitive? And should it forbear, in whole or in part?

And what we've done in this proceeding is tried to address that question. We've stepped back and looked at the market, as I said, the 17 years that we've had market-based rates in the province and the changes that have happened over that period of time. And we stepped through it in a little bit different order, which is to say, is the market competitive.

And we say it is. And based on that, that supports the requirement for market-based rates, which you have said we've had for a long period of time.

And then, when those two steps are made, you look at: What is the impact of forbearance? And that's where we say, in our position, that that would take those revenues, costs, and rate base associated with those services outside of regulation, based on the fact that the market's competitive.

MR. THOMPSON: But in five words, it's scooped the premium, isn't it?

MR. BAKER: No, I say it's getting the return -- it's getting the revenue for offering a service in a competitive market. And there's no certainty going forward in terms of what those revenue streams will be. So we can talk about premium at a snapshot point in time but, as I mentioned in

my opening comments, storage is based on largely commodity market spreads. It's volatile. It changes. And it will be up and down.

MR. THOMPSON: I'll come to the market analysis in a moment, the market power analysis.

But I want to get the impacts of all of this on the record. And I did ask some questions. They were actually in your company's rate case, but they pertain -- where the numbers were on the table with respect to the forecast premium and responses were provided on the understanding they be used in this case.

And Ms. Clark was good enough to copy these for me, so I have copies for the Board Panel and everybody else. Do you folks have copies?

MR. BAKER: You're referring to Undertaking U.2.7, is that the -- too many.

MR. THOMPSON: Yes, U.2.7 and U.2.8 in the -- oh, here. Thanks.

MR. KAISER: Did you want to give this a number?

MR. THOMPSON: Yes, please.

MS. SEBALJ: Is this not already marked as part of this -- oh, sorry, it's part of the other proceeding.

MR. KAISER: That's in another case.

MS. SEBALJ: It is J.2.1.

**EXHIBIT NO. J.2.1: UNION GAS LIMITED UNDERTAKING U.2.7 FROM UNION RATES CASE REPRODUCED BY MR. THOMPSON**

MR. THOMPSON: I'm sorry, Ms. Sebalj. I didn't get that number.

MS. SEBALJ: Exhibit J.2.1.

MR. THOMPSON: J.2.1. Thanks.

Now, Mr. Baker, just to put this in context, in your examination in-chief, you indicated that the impact of your proposal which would see the premium flow to the shareholder was $44.5 million, if I noted it correctly. Is that right?

MR. BAKER: Yeah, and just to clarify, what I was referring to specifically was the storage premium. There are other amounts that are recorded in the storage and transportation deferral accounts related to interruptible transportation and things of that nature, but I was trying to specifically focus on the storage premium.

MR. THOMPSON: And just to put it in context, when the evidence was initially filed - I think it shows up in one of the exhibits that is on the record - the premium in your 2007 case was being forecast in the $30 to $35 million range. Would you take that, subject to check?

MR. BAKER: Subject to check. I think it was 31 to 33, is my recollection, but in the range.

MR. THOMPSON: Anyway, around 30, 30 and change. And then, as a result of the settlement of the 2007 rate case, the company accepted that some of its forecasts of settlement, the settlement of the 2007 rate case premium S&T revenue were low, and that's how the number got increased to the larger number we see on Exhibit J.2.1; is that fair?

MR. BAKER: There was an adjustment agreed to as part

of the ADR settle, that's right.

MR. THOMPSON: Right. And so it's the number that you were quoting, of 44 and a half million, in your examination in-chief, stems from the results of the settlement of your 2007 rate case?

MR. BAKER: That's correct.

MR. THOMPSON: Okay. And it is obviously the substantial component of what appears here on Exhibit J.2.1?

MR. BAKER: The storage amounts are the majority of the S&T amounts.

MR. THOMPSON: All right. And so what this document, J.2.1, is showing, it's for a total of $46.1 million, approximately. It shows that if you get what you're asking for in this case, the impact on the various rates will be as shown in lines 1 to 15?

MR. BAKER: It's largely the case, although we are not proposing that the premiums associated with other transactional services non-storage-related be pulled out. That's why, in my opening remarks, I just referred to the storage, which was the 44 and a half. The small difference would continue to remain in rates.

MR. THOMPSON: My point is you're pulling out 44.5. The impact of that will be an immediate increase in the residential rate class in the north of close to $10 million, and the residential class, the M2 class in the south of close to -- well, over $26 million. That's the impact of your proposal?

MR. BAKER: That is the impact of the proposal, in terms of the gross numbers. I would just say that what's currently in rates right now, as we sit here today, is not this 46 million or the 44.5. It's something in the area of 24 million. I just want to clarify that it's not going to be an immediate increase to what customers are already paying, because this full amount is not currently in rates.

MR. THOMPSON: All right. But, well, let's just make sure we're clear on that.

The revenue requirement that was settled in your 2007 rate case is a revenue requirement for the period commencing January 1, 2007?

MR. BAKER: That's correct.

MR. THOMPSON: Okay. And what you're saying is, for rates that are in force for 2006, the actual embedded amount for a premium is lower?

MR. BAKER: That's correct.

MR. THOMPSON: All right. But based on the settlement, rates would go into effect on January 1, 2007, that will be $44 and a half million lower than they will be under your proposal?

MR. BAKER: That's correct.

MR. THOMPSON: And comparing the 2007 revenue requirement settled versus what you're proposing, the impact on the rate classes will be as I've described?

MR. BAKER: That's correct. Roughly.

MR. THOMPSON: Roughly, roughly -- well, over $35 million increase to the residential rate class.

MR. BAKER: Again, with the caveats that that's based on the market value as forecast at this particular point in time as part of that settlement. And I'd just go back to my other comment that the value of storage in the market changes, and there's no certainty that that same level is going to continue to be there forever and a day.

MR. THOMPSON: All right. And then if you just go to the second response to the undertaking, and this goes to the point I was making earlier about how the premium is in the rate-making process for the purposes of constraining your returns to a reasonable level.

This response indicates that when you get the $44.5 million that you're proposing, the equity return will increase by 234 basis points; right?

MR. BAKER: I don't agree with that. Again, on that -

MR. THOMPSON: Isn't that what it says?

MR. BAKER: Well, I think what was asked for in this question is to take the premium and convert it into what it would mean in terms of return on equity ,or basis points on return on equity. So I was asked for a calculation and we provided it.

But again, I would say the impact of our proposal would be that, under forbearance, the assets that remain under regulation would earn a return commensurate with what the Board determined under what it is today, under the formula ROE. And again, under our definition of

"forbearance," the storage market and the assets and the revenues would have really no relation in terms of a regulated return on rate base concept.

MR. THOMPSON: Well, I think what I hear you saying is, if we split the rate base into your exfranchise storage-related rate base, the piece you're taking out -- that is part of the rate base you're taking out; is that correct? Proposing to take out?

MR. BAKER: That's right.

MR. THOMPSON: And what is that? What is it you're taking out?

MR. BAKER: We'd be looking to split the -- we'd be looking to split the assets, remove the revenues and the costs associated with the exfranchise storage.

MR. THOMPSON: All right. But in words, what are the assets that you say come out, the assets that supposedly are supporting the exfranchise storage business? How do you determine what they are?

MR. BAKER: It would be an allocation of the current storage assets that we have today. So we have a block of storage assets today that supports the combined business, infranchise and exfranchise, and we would need to do a cost allocation to split that.

MR. THOMPSON: And when will we be doing that, if you get what you're after?

MR. BAKER: After we got a Board decision, we would undertake to do that work and to file that material and that calculation.

MR. THOMPSON: So we go back and revisit the 2007 rate case, is that the idea?

MR. BAKER: My understanding is that there was already language incorporated into the 2007 ADR agreement related to this very issue, and specifically, when you look at the fact that we've got an Enbridge storage contract that has been the subject of some discussion in front of this Board, which we've negotiated and we have a market-based contract in place, and part of the revenues that are in our 2007 forecast relate to that Enbridge contract.

I can't remember exactly what page it's on, Mr. Thompson, but I know that there was language in that agreement that tied in together that there would be a potential impact on the 2007 settlement linked to what would come out of this proceeding.

MR. THOMPSON: I don't know that we're aware of the split rate-based concept, but that's neither here nor there. What I'm trying to get my head around is, are you saying that in the exercise of its forbearance power the Board has the power to start splitting up an integrated transmission, distribution, and storage utility?

MR. BAKER: We're not proposing a physical separation of the assets; we're proposing a cost allocation of those assets.

So we aren't proposing that we would divvy up specific storage pools and have one be infranchise and one exfranchise. Physically, we're proposing that we leave the storage operation integrated as it is today and that we

would do a cost allocation to split the rate base and the costs on the revenues.

MR. THOMPSON: But is it your position that is being done under an exercise of forbearance?

MR. BAKER: That's correct.

MR. THOMPSON: So it's, what, the Board's forbearing from including part of the integrated system in what?

MR. BAKER: It's forbearing from including the assets that underpin a competitive storage service in the exfranchise wholesale market from the determination of regulated rates.

MR. THOMPSON: Okay. Well, let's just try, if we can, then -- well, so you don't see any impediment to an exercise of the forbearance power as a result of the fact that this system of yours, storage, distribution, and transmission, is wholly integrated?

MR. BAKER: No.

MR. THOMPSON: That's not going to hold you back.

MR. BAKER: No, we don't see any problem with that. I mean, we do have a cost-allocation study. We do cost allocation all the time, so we don't see that as a major impediment, or a major hurdle.

And again, it stems from our proposal that when we step back and look at it, particularly the infranchise market, where storage is still for the most part bundled with other monopoly distribution and transmission services, it was our view that that was the most practical and appropriate way to approach it.

MR. THOMPSON: Okay. I'd like to just try and take a stab at trying to find out the measure of returns that this proposal will generate if it's approved on the piece you want to take out.

You want to take out a certain component of the storage assets, or an allocation of storage assets?

MR. BAKER: That's correct. An allocation of the assets, the revenues and the costs; that's right.

MR. THOMPSON: And in terms of the assets, it's the assets that you will determine are supporting the exfranchise storage business only?

MR. BAKER: That's correct.

MR. THOMPSON: And in trying to get a measure of the level of returns that that new little line of business is going realize under this scenario you're proposing where you keep all the premium, what I've done is this. I've compared it to the cost-based rate information that was provided in response to some undertakings by Mr. Kitchen and by Mr. Isherwood to Mr. Brown. They are Exhibit B, tab 1, Undertaking 15, and Exhibit B, tab 1, Undertaking 16.

I apologize, Mr. Chairman. I don't have this in a bound brief, but I couldn't locate a copier at 4:00 a.m. last night.

And the other document you'll need, witness panel, is the transcript of the Technical Conference on May the 19th, and it's my examination of the panel. Mr. Isherwood was on the panel. He was answering the questions. And I'm looking at, in particular, at pages 97 and following.

MR. BAKER: Sorry, can you repeat the page again?

MR. THOMPSON: 97. I'm discussing these two undertaking responses with Mr. Isherwood there.

MR. THOMPSON: Does everybody -- no?

MR. BAKER: I think we have it all.

MR. THOMPSON: Okay, and I just really wanted to get on the record here the discussion I had with Mr. Isherwood. Starting about line 13 on page 97, where I referred him to the Undertaking response 15, and he confirmed that the cost-based rate for storage space was about 31 cents per gJ. Do you recall that, Mr. Isherwood?

MR. ISHERWOOD: That's correct.

MR. THOMPSON: October. And then I took you to your undertake Undertaking Response No. 16, which was your calculation of a market-based rate for storage, and on the last page that came to about 92 cents per U.S. -- 92 cents U.S. per MMBTU; do you recall that?

MR. ISHERWOOD: Yes, I do.

MR. THOMPSON: And over on page 98, at the top there, you agreed that that would be about a dollar, Canadian?

MR. ISHERWOOD: Fair enough.

MR. THOMPSON: And then we established that the ratio between cost-based to market-based, was somewhat in excess of 3:1? That's the .31 -- the dollar to the .31?

MR. ISHERWOOD: Right. And I think the point I also made was that the market number in Undertaking No. 16 was really based on the gas commodity market on March 29th,

2005. So it was really a snapshot. It's one point in time.

MR. THOMPSON: That's fair, and I accept that.

MR. ISHERWOOD: Undertaking U.16 is really the intrinsic value of storage. In our reply evidence, we actually submitted a graph that showed the historical value of summer/winter differentials. And it does show the volatility and the rangability of that number, going from actually negative numbers to numbers in this range.

MR. THOMPSON: Well, I just want to use this as an illustration of how I might estimate the so-called supernormal returns that are in play here.

But within the 30 cents, 31 cents, Mr. Baker, based on our earlier discussion, there is a component for return in taxes; right?

MR. BAKER: That's correct.

MR. THOMPSON: And approximately what would that be?

MR. BAKER: You mean, how much out of the …

MR. THOMPSON: How much of the 30 would be returned in taxes?

MR. BAKER: I don't have that in front of me, and I'm not sure I'd know.

MR. THOMPSON: Well, could you undertake to get it, but -- would you undertake to derive that for me, please?

MR. BAKER: Sure.

MR. THOMPSON: I guess I need a number for that.

MS. SEBALJ: That's Undertaking K.2.1.

**UNDERTAKING NO. K2.2: THE COMPANY WILL PERFORM A CALCULATION OF THE COSTS OF CAPITAL IN THE 30 CENTS SHOWN IN UNDERTAKING U.16 FROM THE TECHNICAL CONFERENCE IN THIS HEARING**

MR. THOMPSON: Thank you. And for the purposes of illustration, can we assume it might be something in the order of 10 cents? About a third?

MR. BAKER: Sure, we can assume that.

MR. THOMPSON: Okay. And so the 10 cents of return in taxes on the 30 cents would represent the Board-allowed return on equity for 2007; right? The illustrative 10 cents.

MR. BAKER: I think it would represent the total return on the investment, it wouldn't just be the return on equity. It would be the return on our debt and preferred share capital structure as well.

MR. THOMPSON: Okay. Well, let's just take, then, return on equity. What would it be, about?

MR. BAKER: I don't know.

MR. THOMPSON: Well, for the -- it's going to be less than our illustrative 10, and -

MR. BAKER: Oh, call it 8.

MR. THOMPSON: All right. Let's call it 8 cents. All right.

And so now, under your proposal, we've got a 30 cent price of which 8 cents is return on equity. And that price goes up to a buck.

MR. BAKER: Well, I think the total cost of this service is the 30 cents that is indicated there.

MR. THOMPSON: Yes, which includes a return.

MR. BAKER: Which includes a return.

MR. THOMPSON: Right. And if you get what you're asking for, the 8 cents in that price that is currently return on equity, the price will now be a buck.

MR. BAKER: At that the specific snapshot, point in time; that's correct.

MR. THOMPSON: Right. And so the revenue attributable to equity - nothing else has changed - is 70 cents plus the 8 cents; Right? In this illustration?

MR. BAKER: In that illustration, that's probably right.

MR. THOMPSON: And if your return on equity at the 8 cents is about 9 percent, then at 78 cents it's about 80 percent.

MR. BAKER: I think on part of the same undertaking, we can undertake to look at that and do that calculation.

MR. THOMPSON: But directionally, that's what happens.

MR. BAKER: Directionally, it's going to be higher; that's correct.

MR. THOMPSON: Well, it's going to be way up there. It's not going to be 9 percent.

MR. BAKER: Again, at that point in time, I go back to Mr. Isherwood's comment that this is a competitive market and the prices change. And when you look back over history, you've seen significant change in volatility and

the seasonal price spread of natural gas, in those values, to some points where it's been negative.

So I'm not disputing the fact that it's volatile, and particularly, if you look at a situation that we've had this year, as an example, where we've come out of a very warm winter. We've seen short-term commodity prices fall given the excess inventory we've had, and that spread widens out. So you'll have periods of time when it's wide, and you'll have periods of time when it's very tight.

MR. THOMPSON: You would not be asking the Board to forbear from regulation if rates were going down, would you?

MR. BAKER: What we've been asked to do is take a look at, in our view, is the market competitive. And we filed the analysis which says, in our view, it is. That's what we were asked to do as part of looking at this whole question of forbearance.

And what we've said is that we're prepared to go forward and we'll take the risk on ups and downs in terms of what happens in that market.

But I think the other thing that we're also addressing in this hearing is what we need to do to continue to develop more storage as well, as we go forward, whether that's storage space or deliverability. And again it's part of a package in terms of what we're looking at.

MR. THOMPSON: But the bottom line, Mr. Baker, I'd suggest, is this.

What you're asking this Board to do in the exercise of its forbearance power will have an impact, an immediate impact, 2007 current Board-approved, versus the output of your proposal, of about $45 million increase in rates to infranchise customers. That's what's going to happen.

MR. BAKER: It will remove that current subsidy that based on the 2007 settlement would flow back, that's right.

MR. THOMPSON: And the impact on your shareholder, you're asking the Board to do that so that your shareholder can earn about an 80 percent return on the investment in assets to support exfranchise storage services?

MR. BAKER: I'm going disagree again, because you cannot take a snapshot point in time of a commodity price spread and say that that is the ongoing return that the shareholder's going to earn.

Again, you have to come back to the fact that storage is valued based on seasonal commodity prices. We all know that they're volatile and they change. So you can't look at a one-day commodity price differential and say that's the return to the shareholder because that's just not the way to look at it.

MR. THOMPSON: Well, what is a good way to look at it? I'm sure you've probably done it.

MR. BAKER: The way you look at it is you can go back, at least in part, by looking at history in terms of what the historical price spreads have been. But I would submit that trying to predict with any degree of assurance going forward where commodity prices are going and where seasonal

commodity price spreads are going is a very, very difficult task. I, for one, can't predict it.

MR. THOMPSON: Are you telling me that nobody's forecast the returns on equity that are likely to be realized in the exfranchise business line if your proposal is approved?

MR. BAKER: We have not done a long-term forecast of where we think commodity prices and seasonal price spreads are going to be.

MR. THOMPSON: I asked about the returns on equity.

MR. BAKER: But that's the basis by which you would determine the return on equity. You have to start with what the value of the storage is, and what you think that value's going to be, going forward in order to determine your return.

MR. THOMPSON: So nobody's done an estimate of the type.

MR. BAKER: We have not.

MR. THOMPSON: I see. I find that hard to believe. However...

MS. SEBALJ: Mr. Thompson, I apologize. I need to correct the record. It should be undertaking 2.2. And I'm wondering if we should clarify, because I think there was a subsequent piece that was offered up as part of that undertaking. If we can just clarify what it was.

MR. THOMPSON: I have to get Mr. Baker to clarify it because I think he suggested that the 10 cents, as I understood it, was all costs of capital, or all return. So

my understanding is that the company will be doing a calculation of the costs of capital in the 30 cents, including the equity return. Is that correct?

MR. BAKER: That's correct.

MR. THOMPSON: Okay.

MS. SEBALJ: Thank you.

MR. THOMPSON: Now, would you agree with me, Mr. Baker, that in order to prevent this supernormal returns potential from being realized, the options are for the Board to either stick with the status quo, which would have your market prices in the exfranchise area plus the premium calculated and allocated in an appropriate manner. That's one way to prevent the bump-up in return?

MR. BAKER: Again, I'm just not -- I'm not buying into the characterization of "supernormal return," again, because those words -

MR. THOMPSON: Well, those words weren't mine. It came from Professor Schwindt. I thought he, in his reply material, was trying to justify supernormal returns.

MR. SCHWINDT: I think I used the term "economic rent." I don't know that I ever used supernormal return, but it's okay. It really doesn't make much difference that way. In other words, there would be a return to that specific asset, yes, that would be high.

MR. THOMPSON: If we look, Professor Schwindt, at your reply testimony, at page 5, at line 10, you use the phrase "supernormal returns."

MR. SCHWINDT: You're correct. Supernormal returns are a form of economic rent.

MR. THOMPSON: Yes. And you're sort of telling us there that's nothing to be concerned about; is that right? That's your message?

MR. SCHWINDT: That the existence of economic rents is nothing to be concerned about, is that the question?

MR. THOMPSON: Supernormal returns.

MR. SCHWINDT: Or supernormal returns.

MR. THOMPSON: Is nothing to be concerned about. Is that your message?

MR. SCHWINDT: No, that's not my message. I thought it was -- well, as I set out in the reply argument, there are a number of reasons why a firm would earn those types of returns. One of them is due to monopoly power. But there are other quite innocuous explanations for it.

MR. THOMPSON: Right. But it seems to me to the company is asking the Board to exercise its statutory powers in a way that will require consumers to pay supernormal returns.

MR. SCHWINDT: Well, what they're asking for is to be allowed to put this particular activity into a competitive realm, and to accept the risk of not making money and a reward if they do make money.

And in my experience, Union has asked for other activities to be taken out of regulation where everyone was talking about what a cash cow this would be, and with

hindsight it turned out that it was a competitive market and Union didn't do particularly well.

So I don't know how one can predict that this is going to continue to generate economic rents, regardless of what the current situation is.

MR. THOMPSON: Well, I thought that was pretty valuable stuff. I thought it was pretty valuable stuff. I thought you've spent a lot of time here telling us how valuable storage is.

MR. SCHWINDT: Today it is very valuable. What it's going to be tomorrow, I think I've explained over and over again, one can't predict with accuracy.

MR. BAKER: I'd also just come back. I think what you had said was what we were seeking is that we would require consumers to pay supernormal returns, and that's not an appropriate characterization. Again, in this market, what Union does is take storage out in an open season, and parties bid on it. So we're not requiring them to pay anything.

The market bids for the value of storage based on what it is at the point in time of that storage is released, again, largely based on commodity price differential, so Union is not determining or indicating any price that consumers need to pay for that product.

MR. THOMPSON: Well, there are two ways to come at this, and without having this return jump, as I've described it. One is we can maintain the status quo with

the premium being calculated and allocated back. That's one way of doing it. I know you don't agree with it.

And another way, what you mentioned in your testimony, was if the exfranchise market were priced at cost-based rates, then that would be another way of eliminating the premium, but you wouldn't get this big -- well, you would get a jump in infranchise customers' rates one way or the other. That was your point in examination in-chief.

MR. BAKER: I think the point I was trying to make is that in our view, if the Board were to determine that the market is, in fact, not competitive, and therefore market-based rates are not appropriate because the market's not competitive, then those assets would remain in regulation, and we presumably wouldn't be charging the market-based rates that we have been charging since 1989 for those services. So, therefore, that money would come out.

MR. THOMPSON: So of the -

MR. BAKER: It's the difficulty with the middle ground, which is to say that market-based rates are appropriate, which in our view means that there's determination that the market is competitive to support the pricing of services at market based rates. And then to say, given that, that there's market-based rates and the market's competitive, to maintain the status quo would not be, in our view, consistent with the definition of forbearance.

MR. THOMPSON: All right. Well, it all comes down as to whether the Board is going to continue exercising rate-

making jurisdictions, which includes market-based rate authority, and the calculation of premium or, in your view, forbear, which means no regulation whatsoever; right?

MR. BAKER: Would you repeat that again? Sorry.

MR. THOMPSON: Well, perhaps I should ask you: Is it your view of forbearance that it's not regulation whatsoever?

MR. BAKER: That's correct. If it's a determination that the market's competitive, then the Board would forbear from regulating that service.

MR. THOMPSON: Okay. And so if the decision is made to forbear, I understand your position to be the premium goes to the shareholder.

MR. BAKER: The revenues and the costs associated with that service would be managed by the shareholder. That's correct.

MR. THOMPSON: Which means the premium goes to the shareholder.

MR. BAKER: What is a current premium today. That's right.

MR. THOMPSON: And so it's your view of forbearance that the Board loses its authority to continue to supervise that premium under a forbearance scenario?

MR. BAKER: That would be our definition; that's correct.

MR. THOMPSON: Right.

Whereas, if the Board continues to exercise its rate-making authority, including its power to establish market-

based rates where it considers it appropriate, it maintains supervisory power over the premium. That's the distinction, isn't it?

MR. BAKER: I see where you're going, but today, when I look at it, I mean, what the Board approves in terms of rates is a range rate for those services. So it's not really approving a market-based rate, per se. We have a range. It's the market that is determining what the value of that service is, not the Board.

MR. THOMPSON: But you asked the Board to set the range to encompass the market, as you see it.

MR. BAKER: We've asked the Board to set a wide enough range so that the value of the services in the marketplace can be realized.

MR. THOMPSON: All right.

MR. BAKER: In the competitive market.

MR. THOMPSON: Okay. Let me move on to just an understanding of the deferral account regime that you're proposing as well. And I think in-chief, the account numbers were read out, 179-69, 179-70, 179-72, 179-73, 179-74.

These are all revenue deferral accounts; right?

MR. BAKER: They're margin deferral accounts, so they're not a cost.

MR. THOMPSON: Oh, margin. Sorry. But are there ever any negatives that go in them, I guess is what I'm -- I thought they were revenue deferral accounts as opposed to cost deferral accounts.

# TAB 6

MR. REED: Yes, I have it. Go ahead.

MR. THOMPSON: Then the last two sentences read:

> "Determination of the bundled services could raise the total costs of serving infranchise customers without a detailed analysis of the potential impact on costs, we are unable to opine on the desirability of applying market-based rates to infranchise storage."

Do you share those views?

MR. REED: Again, not necessarily. Parts of this are issues I haven't looked at. I am a little confused by the issue here that is labelled as the "use of market-based rates" as opposed to the issue of forbearance.

Their fundamental conclusions in which they are confident, absent regulation, is infranchise customers or their agents would find an abundance of competitive alternatives to Union Gas storage. I agree with that.

They then go on to say they're not confident that the benefits would outweigh the cost of a policy change. That is not something I have looked at, the benefits and cost they're talking about are these economies of scale and scope. Again, I did not see, in any of the regulations that are applicable here, any direction that once you've determined that the market is workably competitive, that you should then consider potential lost economies of scale from the unbundling of that, from the utility's operations.

MR. THOMPSON: All right. Well, let's just take a high-level look at some of these impacts of, first of all,

Union's proposal as it stands and then the corollary of market-based in the infranchise sector.

To do that I wanted you -- if you could get in front of you Exhibit K2.2. You also should, if you wouldn't mind, just open up your report, not the reply, but the original at page 18 where you tell us how much Union has and how much Enbridge has in terms of storage.

Now, I don't know if you were here, Mr. Reed, when this undertaking was given by Mr. Baker to me, but it derived from - perhaps you can just take this subject to check - two undertaking responses that Union had provided as a result of the Technical Conference. One was Undertaking 16, which indicated that the market value of Union's storage at a point in time in March was about 92 cents US per MMBTU. Would you take that, subject to check?

MR. REED: Okay.

MR. THOMPSON: We rounded that up to a dollar. Then Undertaking 15 indicated that Union's cost-based storage was about 30.9 cents per gJ.

So it was those two amounts that then led to the information that appears on Undertaking K2.2. There was one other exhibit that pertained to it, and that was -- I don't have the number, unfortunately.

It was an undertaking response that was marked -- it was given in the rate case but it was marked in this case, that showed that the $44.5 million of premium that will froe to Union's shareholder under their proposal of forbearance in the exfranchise market, that indicated, the

undertaking response indicated that that created an increment to equity return of 242 basis points. So it was those three pieces of information that led to a discussion between myself and Mr. Baker about the equity return and taxes component of the 30 cents.

What we were trying to get a handle on, what would be the return of equity on this line of business with the $44.5 million in the pockets of the shareholder rather than being refunded to customers under the current regime. So hopefully, you followed me through that.

MR. REED: In general, yes.

MR. THOMPSON: We see here that with the cost-based storage and adding to it the $44.5 million, the return on equity on the exfranchise line of business goes from 9.5 -- 9.63 percent, I think it is, up to 86.41 percent.

You will see on page 2 the return at 9.63 percent, that's the return -- equity return implicit in the 31 cents. Would you take that, subject to check?

MR. REED: I see that figure.

MR. THOMPSON: Okay. So the 7 cents of return on income taxes here, when you divide the $44.5 million, you add that, that works out to I think it is, what, 65 cents per gigaJoule. You add that to the 7 cents. You then get this big jump in equity return. Would you take that, subject to check?

MR. REED: I see the calculations, yes. I follow those.

MR. THOMPSON: Do you regard that level of return as

supernormal?

MR. REED: I would describe the return as certainly being supernormal. It is certainly not the product of the exercise of market power.

MR. THOMPSON: Well, I will come to its costs, but just in terms of the 44.5 million, that is increasing the cost-based rate of about 30 cents up to about 65 cents -- sorry, it is increasing it from 30 cents to about 95 cents. That is only on the exfranchise volume which, in your exhibit, for Union is I think about 79.5 Bcf. Is that right?

MR. REED: 79.5 is the infranchise.

MR. THOMPSON: Oh, I'm sorry. So it's 70.1 Bcf for exfranchise?

MR. REED: Yes.

MR. THOMPSON: Okay. So if the infranchise of 79.5 goes to market-based rates, would you agree with me we would have to add something greater than 44.5 million, 45 million? It would be up closer to 50 to 60 million.

MR. REED: Can I have that last part again?

MR. THOMPSON: Yes. If 70 Bcf going to market-based rates, i.e., the premium is no longer refunded, produces 44 and a half million dollars for Union's shareholder, then an additional 79.5, is going to produce something more than 44.5. We can do the calculation, but I have estimated in the 50 to 55 million dollar ballpark.

MR. REED: Yes. I would say if all of the costs are the same associated with the infranchise as exfranchise,

then the increment would be something just above 50 million.

MR. THOMPSON: And then if then Enbridge does the same, that is another 90 Bcf, although I think there's 20 Bcf in there from Union so it may be a net of 70.

But if the same numbers apply and we take Enbridge infranchise storage to market-based rates, that is another big number; would you agree?

MR. REED: Yes. I haven't calculated the number. Again, all of this is predicated on the Board accepting Union's position with regard to the use of the margins.

MR. THOMPSON: All right. Well, we can do it at 40, 50, 60 or 70. These are Union's numbers.

But if we look at it in combination, the increased cost to ratepayers of taking everybody to market-based rates at those numbers would exceed $160 million a year; would you agree?

MR. REED: Again, I haven't done the full calculation. I would say, subject to check, I think your math is probably right.

I would point out two other things. The first is that presumes the Board accepts Union's position with regard to how the margins above the cost-based level should be treated. Just to be clear, that is not Market Hub Partners' position. We're not taking any position on that issue.

Secondly, that is assuming that there is no offsetting benefit associated with going to either forbearance or

market-based rates, meaning no benefits in terms of rationalizing the market, no benefits in terms of promoting new entry for storage, no other benefits whatsoever.

I think, in fact, there would be additional benefits, which aren't in your calculation, but I can accept your math, subject to check.

MR. THOMPSON: All right. Do you know what an additional 65 cents per gJ does to the cost of electricity?

MR. REED: That's not something I have looked at.

MR. THOMPSON: Can you help us at all with the big-picture estimate? Is it the same sort of order of magnitude when it flows through to electricity prices?

MR. REED: I think it would actually be a relatively trivial impact on electric prices. One would need to look at what the contracting levels are for storage services by electric generators and compare that to the overall level of electric rates in -- or electric prices, I should say, in the Ontario market, but storage tends to be a relatively trivial -- I should say relatively small component of the overall cost structure of electric generation.

MR. THOMPSON: All right. Well, now in terms of the Market Hub Partners' recommendations, in your report there is a table, I believe, at the end, page 54, where under item 4 you have infranchise consumer interests. You talk about the potential flow back of economic rents.

Perhaps you could just describe what your recommendations are, and then what -- how this particular recommendation fits in.

MR. REED: Well, our proposals, first of all, are laid out on page 52 in terms of our proposed findings. The bottom line of that is that we believe the market is workably competitive and that forbearance would be appropriate.

When you get to page 53 and page 54, those are the sort of core points that we talked about before, which is, short of forbearance, there are several recommended policy actions that will ensure a more efficient natural gas market, and they are there: Establish clear standards, facilitate new storage entry, establish open access tariffs, establish market-based pricing, allow the market to determine storage-related service offerings, permit longer-term contracts, and implement other policies.

What we have said, when we compare those proposals to the status quo, the point you were making was with regard to item 4, infranchise consumer interests. We talked here about efficiency gains, in terms of both productive efficiency and allocative efficiency. I believe there will be gains. There are almost always gains in a marketplace when you allow the parties that value the service most to gain access to the service and when you put competitive pressure to reduce costs as much as possible.

Then the second item there is the potential flow back of economic rents. We have not taken a position on who should receive the economic rents, which are defined here as the delta between the cost-based level and whatever is produced in the marketplace.

MR. THOMPSON: Why not?

MR. REED: Why have we not taken a position on that issue?

MR. THOMPSON: Right.

MR. REED: It is not an issue that is germane to MHP.

MR. THOMPSON: Well, just in terms of the status quo at the moment, are you aware that under the status quo, Union's shareholder gets about, I hope - I think I am right - about 25 percent of the $44 million? That's the current sharing regime.

MR. REED: I can accept that, subject to check.

MR. THOMPSON: Would you accept, subject to check, that if we went through the math to figure out what a quarter of the 44-1/2-million dollars would do to the ROE on this line of business, it would be in excess of 20 percent?

MR. REED: Yes, I can accept that, subject to check.

MR. THOMPSON: Yes. Do you think that is fair for that line of business; more than fair?

MR. REED: Again, that is not something I have looked at. I haven't done a cost-of-capital study or a risk assessment for this business for Union under the regulatory regime that exists today.

MR. KAISER: Mr. Thompson, is this a convenient time to break for the evening?

MR. THOMPSON: Yes. I probably have another 20 minutes or so, Mr. Chairman. This would be fine.

MR. KAISER: All right. We will resume Thursday

Mr. Reed, when we broke last day, you and I were discussing estimates of the rate impact on the ratepayers of what I would call the end state of moving all storage in Ontario to market prices.

Do you recall that?

MR. REED: Yes.

MR. THOMPSON: All right. Would you agree with me, sir, that regardless of the market power issue, that the impact on ratepayers of that end state is a matter relevant to the public interest?

MR. REED: Yes, I think that is certainly relevant to the public interest.

MR. THOMPSON: I would like to move on, then, to the last topic that I want to cover, but it has a number of sub-topics. This is the market power matter. Just to give you an outline of where I am going, I have six sub-topics here that I want to touch on with you.

The first is context; the second is perspectives; the third is criteria to be applied; the fourth is the application of the criteria to Union; fifth topic is FERC precedents; and the last one, the Board's ability to allocate what we're calling the premium. I will try to get through each of these quickly.

In terms of the context, I wondered if you could just turn up your evidence, your initial evidence. I don't have the new X number, but at page 5.

MR. REED: I have that.

MR. THOMPSON: There, you have listed at pages 5 and

# TAB 7

well.

Secondly, I want to get some clarification on EGD's proposals and their rationale with respect to forbearance.

Thirdly, I'll turn to the market power evidence, hopefully briefly.

Fourthly, storage development is a topic I have some questions on.

And then, finally, transactional services.

So those are the five areas that I would like to explore with you in cross-examination.

Let's start with the first, the impact of complete forbearance for all storage services. And you were discussing this with Mr. Warren on Friday. I think the quickest way to deal with this, if you could turn up tab 8 of the cross-examination brief, Exhibit J7.1.

And this captures a number of items that are already in the evidence. And if you would just bear with me, if you go to the third page under this tab, you'll see the undertaking response from Union number 15 showing the market price for storage at about $31 per gJ in line 1. Do you see that, Mr. Grant?

MR. GRANT: Yes.

MR. THOMPSON: Do you accept that as Union's cost-based rate -- sorry, its cost-based rate for storage?

MR. GRANT: Yes

MR. THOMPSON: And then if you go, I think it's three pages beyond, you come to Undertaking Response from Union 16. It's four pages.

And the last page Mr. Isherwood, as I understand it, calculated the market price for storage at this point in time, at about 92 cents U.S. per mmbtu, which the evidence indicated was about a dollar Canadian, as I recall it. Do you accept that, or does Enbridge accept that as the market price for storage at that point in time?

MR. GRANT: Based on the assumptions that he gives in this undertaking, yes, we agree with that.

MR. THOMPSON: All right. And so it would appear that for Union the spread between cost-based storage and market-based storage at that particular time was about 70 cents/gJ, would you agree.

MR. GRANT: Yes.

MR. THOMPSON: Right. And then for Union, the first page of tab 8 shows a number of 46 million and some-odd, which, as I understand it, is a little bit more than the total premium associated with Union's activity in the exfranchise market. And you'll see the number that's associated with Union's activity in the exfranchise market at the next page is $44.5 million. Do you have any reason to quarrel with that number?

MR. GRANT: No.

MR. THOMPSON: And Union's evidence, as I understand it, indicates that if that premium is no longer flowed back as a credit to the cost-of-service, then the rates of existing infranchise ratepayers will increase by $44.5 million. Do you have any reason to quarrel with that?

MR. GRANT: No.

MR. THOMPSON: And the document at page 1 under tab 8 suggests that about 81 percent of that would be picked up by the residential class. Would you take that, subject to check?

MR. GRANT: Yes.

MR. THOMPSON: All right. So I just now, then, want to move to the EGD situation. And you have, I believe, the record indicates, about 112 Bcf of storage; is that right? For your infranchise customers?

MR. GRANT: Both owned and contracted, yes.

MR. THOMPSON: Yes. I think the evidence, to be precise, is you have about 120 in total, but you provide 6.7 Bcf to Union; is that right?

MR. GRANT: That's correct. We -- the net, in terms of Tecumseh, the net turnover available to EGD is just shy of 92 Bcf.

MR. THOMPSON: Okay. And then you have an additional 20 from Union; correct?

MR. GRANT: Correct. Yes.

MR. THOMPSON: All right. And prior to the spring of 2006, the 20 Bcf that you acquired from Union was acquired pursuant to cost-based rates, am I correct?

MR. GRANT: Yes, that's correct.

MR. THOMPSON: Now, what is Enbridge's cost-based rate for storage? And here I'm talking about the total 112 when it was all cost-based, compared to Union's 31 cents.

MR. GRANT: I'll give you a number, but I do want to, again, check with our rates group. I believe it's in the

order of 40 cents.

MR. THOMPSON: Okay. Thank you.

And just on the Union contract that was entered into, I believe it's the spring of 2006, have I got that date straight, Mr. Charleson?

MR. CHARLESON: Yes, that contract commenced April 1 of this year.

MR. THOMPSON: Okay. And that, the Board's order with respect to that contract you'll find in the brief at tab 6. If you could just turn that up, please. And if you go to page 4 of the order, you'll see in the second-last paragraph to the statement in the last sentence:

> "The impact of the pricing of the contracts will be addressed in an Enbridge rate proceeding."

Do you see that, Mr. Grant? Mr. Charleson?

MR. CHARLESON: Yes, I see that.

MR. THOMPSON: Okay. But in your evidence, in exchange with Mr. Warren, you were quite careful to say that the 40 cents that you were talking about reflected Board-approved 2006 rates. Do you recall that exchange?

MR. GRANT: Yes.

MR. THOMPSON: Okay. And my question is this. Is the higher price that's been negotiated with Union reflected in your 2006 Board approved rates or not reflected?

MR. CHARLESON: It's not reflected in those rates. Any variance between the cost-based Union contract and the market price is being recorded in the Union Gas deferral account. That may not be the precise name for it, but we

have a deferral account for capturing that variance.

MR. THOMPSON: All right. Thank you. And then the only other -- well, another question I just want to have clarified.

So, just backing up, then. So to the extent -- if the Board adheres to a cost-based rates approach for the purposes of that particular contract, my understanding is that the provisions of the contract will provide that the price will revert to a cost-based price in March of 2007, along with the Board decision as before that date? Is that what those provisions are intended to do?

MR. CHARLESON: I'm just trying to recall the precise provisions as to whether the price reverts to cost or whether the contract terminates, at that point in time.

MR. THOMPSON: Okay.

MR. CHARLESON: I think, if I recall correctly, the contract would terminate at the March -- at the first March 31st following any such decision from the Board.

MR. THOMPSON: All right. But the bottom line is, nothing on account of the added amount above cost that Enbridge has paid will be recoverable in rates until a future Enbridge rate case has determined that that's appropriate, is that -- have I got that straight?

MR. CHARLESON: That's correct.

MR. THOMPSON: Thanks. Now, at tab 7 there was an undertaking response that the company had provided which indicated that the market-based price you'd agreed to pay to Union was about 175 percent increase over the previous

cost-based storage agreement.

And the problem I have with that number is this. You've indicated this morning your cost-based charge is about 40 cents, excluding the Union... the Union renegotiated arrangement.

In the Technical Conference on, I think it was April the 6th, I think it was Mr. Charleson indicated that the price increase was between 40 cents and 50 cents a gigaJoule. So I put those two numbers together, I get a ratio higher than 175 percent. Is this ratio wrong?

MR. CHARLESON: No, this ratio is correct. And I think when I was responding at the Technical Conference that response was given in general terms, looking at round numbers.

In preparing this undertaking response, we did look at the costs that we were incurring under the previous Union Gas contract and the total costs that we would incur under the new contracts that have been put in place.

So this number is correct.

MR. THOMPSON: Well, let's just look at the question again. You were to advise of the percentage difference between the market-based price that the company is paying Union Gas for storage as compared to Union's own cost-based rate for storage. Union's own cost-based rate for storage is 31 cents per gJ. I heard you say you were comparing this price to the price you were previously paying to Union.

MR. CHARLESON: Yes. In preparing this response, we

were looking at it based on the information that we had available to us and the best basis that we had for Union's cost-based rate was the prior rate that we were paying to Union, and that's why in our response we made it clear what the basis of comparison was.

MR. THOMPSON: Well, if we use a base of 31 cents/gJ, does the ratio go up?

MR. CHARLESON: I would have to undertake to check that.

MR. THOMPSON: Would you do that, please?

MR. CHARLESON: Yes, I can.

MS. SEBALJ: It's K -- sorry, K7.3.

**UNDERTAKING NO. K7.3: TO UNDERTAKE TO CHECK COST-BASED RATE RATIOS**

MR. THOMPSON: Thank you.

So you had a discussion with Mr. Warren about these dollar impacts per customer. And what I'd like to get on the record is the total dollar impact of the spread between cost-based storage in your system, which is 40 cents, and the dollar which you accept as appropriate based on the assumptions that Mr. Isherwood utilized. And that spread is 60 cents per gigaJoule, thereabouts. Agreed?

MR. CHARLESON: Yes.

MR. THOMPSON: And you have 112 Bcf of storage. So, big picture, would you agree with me that the impact of forbearing from all storage regulation on Enbridge's ratepayers would be 60 cents times 112 Bcf?

MR. GRANT: That may be the impact on the particular

day that Mr. Isherwood's calculation was done. Again, we have to remember all the assumptions he used to work up the intrinsic value.

MR. THOMPSON: All right. Well, that number is about $67.2 million, would you agree, Mr. Grant?

MR. GRANT: Again, this is the full forbearance --

MR. THOMPSON: Yes.

MR. GRANT: -- scenario?

MR. THOMPSON: Right.

MR. GRANT: On everything? That seems like a reasonable ballpark number that would come from that arithmetic.

MR. CHARLESON: Although I suppose that the one thing that has to be assumed there as well is the assumption that Union would not be able to continue to charge the market prices for the storage that they've been able to do for a number of years now.

MR. THOMPSON: Well, we'll check the reasonableness of that assumption, but it's helpful to have that number on the record.

Now, what I'd like Enbridge to do is similar to what Union did for us. At tab 8, second page, Union expressed the 44 and a half million dollars as a basis point amount on equity return. Could Enbridge undertake to express the $67.2 million as a basis point -- show the basis point impact of that on equity return, for the utility as a whole?

MR. GRANT: Well, I think what you've done now is

moved into a return on equity-type of analysis that doesn't necessarily relate to the rate impact analysis that you had us talking about a few minutes ago. So, simply because 20 Bcf of our needs are met by way of contract, so there's nothing flowing from a return on equity point of view to Enbridge shareholders resulting from that.

So if we were to undertake to do any analysis on this, we'd have to be focussed on simply our own assets and our own owned storage. And it would be with the caveat that we're talking about here about full forbearance, which, of course, is not the company's proposal. The company's proposing an exemption from it.

MR. THOMPSON: Well, I think I understand what you're saying. You're saying you wouldn't take the full amount of the 67.2; you would take something less?

MR. GRANT: Yes, because it's not flowing to the Enbridge shareholder. Enbridge is a customer of 20 of that Bcf with Union.

MR. THOMPSON: All right. So what -- you would take, then, a portion of the 67.2 million? What would that portion be?

MR. GRANT: Well, really what it would relate to, I think, is this; the difference between the intrinsic value as calculated in the Union undertaking, and the existing cost rate, whatever that is, within the Enbridge system, for Tecumseh capacity only.

MR. THOMPSON: All right. So that's 92 Bcf.

MR. GRANT: Correct.

MR. THOMPSON: Right. And so you're going to take the 70 cents -- sorry, 60 cents times 92 Bcf and express that as an increase in equity return on the basis points basis for the entire company. That's what Union has done in this response. Is that what you're undertaking to do?

MR. GRANT: Well, yes. I don't have a problem in undertaking to do that at all. And you're quite correct, we would do that using the Tecumseh capacity. And we would state all of the appropriate assumptions and caveats in that undertaking.

So I can undertake to do that, but there will be a lot of caveats.

MR. THOMPSON: That's fine. May I have a number for that, please?

MS. SEBALJ: It's K7.4.

**UNDERTAKING NO. K7.4: TO PROVIDE CACULATION FOR 60 CENTS TIMES 92 BCF EXPRESSED AS INCREASE IN EQUITY RETURN ON BASIS POINTS**

MR. THOMPSON: And then what Union did for us, if you go in a couple of more pages -- it's Undertaking K2.2, page 2 -- they calculated the return on equity for simply the storage assets, if you got this spread of an additional 60 cents on the 92 Bcf.

Would you add to the previous undertaking or give a separate undertaking to do that calculation as well, please?

MR. GRANT: So again, here what we're talking about is the impact on only the storage systems --

MR. THOMPSON: That's right.

MR. GRANT: -- returns? Yes, we can include that in K7.4, again, with appropriate assumptions.

MR. THOMPSON: Thank you.

Okay. So, now just trying to get the sort of overall -- well, before I move off Enbridge into the overall picture I just want to touch on - I'll come back to this later - the transactional services impact of your proposition that you're requesting forbearance with respect to that particular activity.

And perhaps you could just confirm with me, it's found in the transactional services brief at tab 7. This is probably for you, Mr. Charleson. We've had a fairly exciting history in transactional services and you folks trying to get a greater and greater share of those revenues. But the last word on it was the Board's decision which is in the last case, your 2006 rate case. And we'll find that at tab 7 of the transactional services brief.

Am I correct that the Board in that case found that the forecast that should be included in your revenue requirement for 2006 for transactional services revenues was $10.7 million?

MR. CHARLESON: Yes, that's correct.

MR. THOMPSON: And then revenues above that, according to the Board's decision, would be shared, I believe it's 75/25 in favour of the shareholder; is that correct? Sorry, in favour of the ratepayer? I almost gave it away there.

MR. CHARLESON: Almost. I would have accepted that. But you're correct; it's 75 percent for the ratepayer, 25 percent for the shareholder.

MR. THOMPSON: Right. And if you just quickly look at page 37 of this decision, paragraph 6.2.12, the way I read that is, that's the way it's to stay over the longer term, unless something happens in this case. Is that the way you read it?

MR. CHARLESON: Yes. In the decision the Board indicated a strong desire that this sharing mechanism could be in place for a number of years.

MR. THOMPSON: All right. And so, in terms of the impact of your proposal to request that the Board forbear from regulating transactional services, the effect of that on ratepayers will be to, if it's granted, will be to add, using 2006 numbers, and this enduring paragraph, the enduring proposition that's reflected in the Board's decision, the effect will be to add $10.7 million to the revenue requirement; correct?

MR. CHARLESON: No, that wouldn't be correct. The $10.7 million includes revenues that have been generated both through the use of storage assets and also through the use of transportation assets that the company's contracted for.

What the company is proposing under a forbearance scenario is just the transactional services activities related to storage transactions that would be removed from rates.

MR. THOMPSON: So what's that in the Board-determined $10.7 million? What's that amount?

MR. CHARLESON: We're probably looking at, that could be about 50 to 60 percent. In the discussion I had with Mr. Warren on day 6, we talked about how the storage portion of transactional services will vary year over year. Some years it's as low as 30 percent, other years as high as 80 percent. If we could assume for argument's purposes right now, say, about half of that 10.7.

MR. CASS: Excuse me, Mr. Chair. I'm sorry to interrupt Mr. Thompson, but I do have something that's relevant to this line of inquiry. It's an undertaking response that has just arrived, actually, within the last few moments. I don't know whether Mr. Thompson would want me to pass it out at this point.

MR. THOMPSON: Sure.

MR. CASS: It's undertaking response to K6.1, in which the company was asked to break out from the gross margin storage related and non-storage-related numbers. I just spoke up because I think this is relevant to what's being discussed now, and I can pass it around.

MR. KAISER: All right, thank you. Mr. Thompson may want to look at this over the break and come back to it if he's not ready to proceed on such short notice, but distribute it now.

MR. THOMPSON: Well, I can ask a couple of questions of you now, Mr. Charleson, about this.

In the last column -- sorry, we don't have any 2006

here, do we?

MR. CHARLESON: That's correct. We're only reflecting actual results that we have.

MR. THOMPSON: Okay. But in the 2006 $10.7 million forecast that the Board embedded in rates, was there a storage-related piece of that, to your recollection?

MR. CHARLESON: There would definitely be storage-related dollars included in the 10.7. But given that the company had not prepared a forecast for 2006, there was no breakdown, say, provided by the Board in terms of its determination of the 10.7, in terms of how much would come from storage or how much would come from transportation.

So that's where I'm suggesting you would have to look more to history, in the historical mix, to get -- for, excuse me, for an idea in terms of how much of that 10.7 you would attribute to storage.

MR. THOMPSON: All right. And that's your 50 to 60 percent numbers, based on a historical extrapolation from these numbers.

MR. CHARLESON: Yes, that's right.

MR. THOMPSON: Is that what you're telling us?

But in terms of going forward, if your proposal is accepted, do I understand you to be saying that in your 2007 rate case you will give us a better clarity on the storage piece of the 10.7 million dollars because then you'll have a better idea what it's going to be?

MR. CHARLESON: I would expect in our 2007 filing, our focus on transactional services will be on the

transportation component. Given our evidence is that we believe there should be forbearance on the storage piece, I anticipate our filing will focus on the transportation-related transactional services.

MR. THOMPSON: Okay. Well, then, let's, just before we leave this topic of impact, try and pull this together.

In the Union case, if the exfranchise storage premium is no longer credited to cost-of-service, we know that's 44 and a half million dollars, give or take; correct?

MR. CHARLESON: Correct.

MR. THOMPSON: We know Union has 80 Bcf, about 80 Bcf, of storage that it uses to support its services to infranchise customers. That's in the record. 79 and some change.

MR. GRANT: Yes.

MR. THOMPSON: And we know the spread between Union's cost-based rate of 31 cents and its estimated market rate of a buck is about 70 cents. So if forbearance, if there's entire forbearance there, that's another big picture, 50 -- sorry. Yes, $56 million. 70 cents times 80 Bcf; right?

MR. GRANT: Yes. I understand your calculation.

MR. THOMPSON: And then in your case we have this number of 67.2 million, which we'd discussed. And we have about 6 million from transactional services; right?

MR. GRANT: All under the full forbearance.

MR. THOMPSON: Yes.

MR. GRANT: Scenario where there's an immediate move to full forbearance. That's the assumption.

MR. THOMPSON: And I make that to be a total, and you'll have to take this subject to check, of about $173.7 million per year. Take that subject to check?

MR. GRANT: Full forbearance, all at once, both utilities.

MR. THOMPSON: Yes.

MR. GRANT: That's the number that you add up to.

MR. THOMPSON: And all of that goes to the utility owner.

MR. GRANT: Well, I think, again, you have to delve back into some of the assumptions that underpin these calculations.

The intrinsic value of storage that Union Gas was working up is simply a point estimate. And in the scenario you describe there's a fully functioning and fully competitive storage market, and the returns that any player in the market, including Union and Enbridge, would earn would be a function of the marketplace and would go up and down.

So I can only accept your calculations as being built up based on a whole series of assumptions and a full forbearance all once the scenario, which, of course, we're not proposing, and neither is Union Gas.

MR. THOMPSON: Right. Well, that, then, brings me to your proposal, because as I look at it, you're not proposing, really, any forbearance.

MR. GRANT: Well, that's not the way you should read our proposal. Our proposal is that there is evidence of

memory, potentially 10 or 15 cents lower.

So there is some volatility in terms of the prices, but I think what you'll end up seeing is, when you hit a -- at a point in time when you're going out to bid, or looking for it to secure that capacity, the differences between the multi-year deals, there is some difference within there but it's within a relatively narrow range, because what you tend to see is the forward curves for multiple years will stay fairly constant based on what you see happening in the market at that point in time.

MR. RUPERT: What's the rate comparison, in your opinion, to a cost-based -- well, what's the rate market comparison to a cost-based rate for storage, that previous document we just referred to at 30.9 cents/gJ. I think you said yesterday your cost is around 40 cents/gJ, but that's a rate derived for owned facilities that have been purchased a long time ago. What's the rate -- is it a one-year deal at any point in time? Is it a ten-year deal? What's the rate comparison, because yesterday I think the discussion was all around 30 versus 90 or 30 cents versus a dollar. Is that the right way to think about the differential we've got or is there a better way to compare a cost-based rate to market?

MR. CHARLESON: I think that that is probably the most reasonable comparison based on the information that's able available in the marketplace.

I think the one concern I always have in terms of looking at the cost-based rate is one of the large

underpinning factors in that cost-based rate is the value of the base pressure gas, which is grossly below the market value.

MR. RUPERT: Right.

MR. CHARLESON: So that's, and I think Mr. Reed made some comments in his testimony around the existing cost base for both Union and Enbridge being somewhat suppressed given the timing and when the storage was developed and...

MR. RUPERT: Okay, so you're not offended by, in a very crude way, looking at 30 cents versus a dollar as a measure of the kind of differences, or 40 cents versus a dollar, in your case?

MR. CHARLESON: No.

MR. RUPERT: I don't know if you have it handy or not, but this is a document, I think Mr. Cass handed it out yesterday morning. It was a response to one of your undertakings. It was the undertaking K6.1. And it's the attachment that has about seven or eight years' worth of your transactional services revenue split between storage and non-storage.

MR. CHARLESON: Yes, I have that.

MR. RUPERT: The top line is storage-related. And if we just look at the last two numbers. The 2005 year ended October, I guess, and then the stub period.

I know there are lots of different kinds of services that end up generating revenue, but in that 2005 stub as a for instance, what were the typical kinds of transactions? What's a typical transaction that would earn you revenue in

# TAB 8

VALUE OF SERVICE RATES

the market-based pricing in the exfranchise market. Do you recall that discussion by any chance?

MR. GRANT: Only generally.

MR. THOMPSON: All right. Well, if you need to turn something up, and I don't know whether you have this at hand, these decisions, or at least some of them, are in the IGUA/AMPCO pre-filed evidence.

And what you have there at tabs 3, 4, and 5, are some of the Union cases where this concept of market-based pricing for the exfranchise market was discussed, and then it was eventually approved in a decision RP-1999-0017, I believe. And if you just want to go to that decision to get the flavour of what I want to discuss with you. You can probably best glean it from page 140, paragraph 2.5.01, where the Board in the RP-1999-0017 proceeding made reference to some earlier proceedings of Union in which this topic of market-based pricing for exfranchise services came up.

One of them was the EBR-0486-02 decision, where Union had taken the decision that ratepayers were entitled to have the premiums from this flowed back to the cost-of-service.

Do you have any familiarity with this background, Mr. Grant?

MR. GRANT: I'm sorry, Mr. Thompson, I really don't have any detailed familiarity. I see the reference you've taken us to, but I don't have too much else to say.

MR. THOMPSON: All right. Let me try, then, another

way. If you go to tab 12 of the cross-examination brief, Exhibit J7.1, what you have at the first part of the tab that goes into page 175 is the 1969 edition of Gas Rate Fundamentals, a publication of the American Gas Association. Starting with that page -- it's the same publication but a later version. It's a date in the 1980s. I think it's the last version of the publication that I am aware of.

Are you familiar with these publications, either Mr. Grant or Mr. Smead?

MR. SMEAD: Yes, I am certainly familiar with it.

MR. THOMPSON: Okay. Well, let's take the last one. They both discuss this subject, but if you go to the most recent edition, at page 156 you'll find a heading: "Value of service."

MR. SMEAD: Yes, I have that.

MR. THOMPSON: You see that? This is a concept of rate-making that goes way back. And the text reads as follows:

> "Utility rates that reflect competitive factors are often called value-of-service rates. Value-of-service is shorthand for the highest price that a single customer is willing or able to pay for service."

And it goes on.

Are you familiar with the value-of-service concept, Mr. Smead, for rate-making purposes?

MR. SMEAD: Yes, I am.

MR. THOMPSON: Are you, Mr. Grant?

MR. GRANT: Generally, yes.

MR. THOMPSON: Okay. And it carries on and discusses Ramsay pricing and that kind of thing. But the concluding paragraph is what I wanted to draw your attention to, the sentence in the concluding paragraph at the end.

> "Maximization of consumer surplus in the foregoing example is tantamount to the maximization of economic efficiency subject to the constraint of the utility's revenue equalling its allowed revenue requirement."

And in the text previously what they talk about is, in effect, how to distribute, for example, the premium that Union realizes on market-based pricing for storage services.

Would you agree with me, Mr. Smead, that in the value-of-service pricing concept, to the extent there is a premium, it gets credited back to the cost-of-service?

MR. SMEAD: Not necessarily. In this particular formulation of it, it is going through that example, but, you know, really, the question of what you can charge, whether you can charge somebody what the service is worth and the question of who gets the money, are unrelated questions in a lot of circumstances.

Obviously, the "who gets the money" issue in this case is somewhat outside the scope of my evidence, but usually that decision gets made based on who takes what risk and who should get what reward.

Certainly the model described here wherein, no matter what you do to price services to anybody, the ultimate utility revenue requirement just is a zero-sum game -- it just adds up to 100 percent of normal revenue requirement -- that has been a traditional requirement in the absence of findings of no market power, or in the absence of risk/reward balances that dictated a different result.

MR. THOMPSON: And that, I am suggesting to you, was the rationale for the initial pricing that Union has enjoyed -- well, its ratepayers have enjoyed, substantially, under the exfranchise market-based rates? That's what's in fact happened?

MR. SMEAD: Yes, that would appear to have been the historic results, that their ratepayers have gained a great deal of benefit from what Union was able to charge to other market participants.

MR. THOMPSON: All right. And I suggest to you that what that approach does is it balances economic efficiency as well as productive efficiency. And those terms Mr. Reed has defined in his material, which you'll find at tab 4 of this brief. At the bottom of page 9, he says:

> "There are two types of economic efficiency that enter into the welfare maximization process: Productive efficiency and allocative efficiency."

Just stopping there, are you familiar with these concepts.

MR. SMEAD: Yes.

MR. THOMPSON: Mr. Smead? Then he goes on:

> "Productive efficiency, also sometimes referred

to as technical efficiency, represents the use of the combination of inputs that produces the desired output level at the lowest opportunity cost for the inputs consumed. Essentially, this is the market-based equivalent of least cost planning and lowest reasonable cost production, both of which are regulatory objectives."

Do you agree with that?

MR. SMEAD: Yes, as a concept; that's correct.

MR. THOMPSON: And then he goes on and describes allocative efficiency:

"... focuses on consumption decisions for the product being produced."

And refers to the principle that:

"Those who value a scarce good or service most highly should be the ones to whom the product or service is produced and the ones which consume it."

Do you agree with that description?

MR. SMEAD: Yes.

MR. THOMPSON: And so I am suggesting to you that the current status quo for Union exfranchise storage achieves a balance between those two concepts. Do you agree?

MR. SMEAD: It achieves a balance. Whether that should be the proper balance longer term, I think, is a more complex question, Mr. Thompson.

As to allocative efficiency, it works fine in the exfranchise market.

As to productive efficiency, the basic question is what incentives are created, what stimulus is created, to develop more storage?

MR. THOMPSON: All right. Then on this point of the value-of-service technique having to comply with the overall return standard for the utility, I wanted to just draw your attention to tab 15 of the brief, which is an oft-quoted decision about return. This is the Bluefield Water Works case. If I've heard utilities cite it once, I've heard them cite it a thousand times. Now it's my turn.

And if you go to, it's at the top of the page, it's about... sorry, six pages in. And in the right-hand column you'll see a paragraph number 692.

MR. SMEAD: Yes, I have it.

MR. THOMPSON: Okay. And down at the bottom of the page, this is part of a quote that's cited in every utility factum I've ever seen.

And it starts about ten lines from the bottom:

> "A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties."

Just stopping there, do you agree that that's a

statement of the rate of return principle for utilities?

MR. SMEAD: That is a statement of the open Bluefield standards for utility rate of return, sir.

MR. THOMPSON: And then the text goes on:

> "But it has no constitutional right to profits such are realized or anticipated in highly profitable enterprises or speculative ventures."

Do you agree with that aspect of the principle?

MR. SMEAD: Yes, as a utility, I agree with that aspect of the principle.

MR. THOMPSON: So that a utility is not entitled to supernormal returns, in your view?

MR. SMEAD: Not on its utility business.

MR. THOMPSON: When you say "utility business," you mean utility assets?

MR. SMEAD: No, its utility business. Which assets are involved in that is a question for the regulator.

MR. THOMPSON: All right.

MR. SMEAD: But where a utility is part of an organization that has non-utility businesses that are unregulated or where there has been forbearance from regulation, then this standard no longer applies to that segment of the business.

MR. THOMPSON: But when we're dealing with value-of-service pricing, we're dealing with the pricing of services in a utility business; correct?

MR. SMEAD: If you are dealing with value-of-service pricing as a regulatory construct within a regulated

utility business; that's correct.

MR. THOMPSON: Okay. Okay. Well, then, let's move on, then, to some of these tests that relate to competitiveness in the market.

One of them that we rely on is the price threshold test. And I think you've proffered some reply evidence on that subject?

MR. SMEAD: Yes, sir.

MR. THOMPSON: We have said that the prices of the competitive service offerings versus the prices of the services provided by the utility in the marketplace are relevant to an assessment of market power, or words to that effect. Do you agree?

MR. SMEAD: I agree if that's what you've said. Mm-hm.

MR. THOMPSON: Well, do you agree with the proposition?

MR. SMEAD: I do not agree with the concept that the relationship between the market prices and cost-of-service rates is the appropriate comparison.

MR. THOMPSON: All right. Well, do you say FERC does not look at the extent to which proposed prices exceed the prevailing prices in applying this threshold test?

MR. SMEAD: Well, first, whether they exceed the prevailing prices, I think that that is the standard. Whether the prices that would exist upon permitting market-based pricing will or will not exceed prevailing prices, assuming those prevailing prices are competitive, is the

# TAB 9

# SCHEDULE B
# ONTARIO ENERGY BOARD ACT, 1998

## CONTENTS



## PART I
## GENERAL

Board objectives, electricity

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

1. To facilitate competition in the generation and sale of electricity and to facilitate a smooth transition to competition.
2. To provide generators, retailers and consumers with non-discriminatory access to transmission and distribution systems in Ontario.
3. To protect the interests of consumers with respect to prices and the reliability and quality of electricity service.
4. To promote economic efficiency in the generation, transmission and distribution of electricity.
5. To facilitate the maintenance of a financially viable electricity industry.
6. To facilitate energy efficiency and the use of cleaner, more environmentally benign energy sources in a manner consistent with the policies of the Government of Ontario.

Board objectives, gas

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

# ANNEXE B
# LOI DE 1998 SUR LA COMMISSION DE L'ÉNERGIE DE L'ONTARIO

## SOMMAIRE



## PARTIE I
## DISPOSITIONS GÉNÉRALES

Objectifs de la Commission : électricité

**1.** Lorsqu'elle s'acquitte des responsabilités que lui impose la présente loi ou une autre loi relativement à l'électricité, la Commission se laisse guider par les objectifs suivants :

1. Faciliter la concurrence dans la production et la vente d'électricité ainsi qu'une transition sans heurts en l'occurrence.
2. Assurer aux producteurs, aux détaillants et aux consommateurs un accès non discriminatoire aux réseaux de transport et de distribution situés en Ontario.
3. Protéger les intérêts des consommateurs en ce qui concerne les prix ainsi que la fiabilité et la qualité du service d'électricité.
4. Promouvoir l'efficience économique au niveau de la production, du transport et de la distribution d'électricité.
5. Faciliter le maintien d'une industrie de l'électricité qui soit financièrement viable.
6. Promouvoir l'efficacité énergétique et l'utilisation de sources d'énergie propres et écologiques d'une manière compatible avec les politiques du gouvernement de l'Ontario.

Objectifs de la Commission : gaz

**2.** Lorsqu'elle s'acquitte des responsabilités que lui impose la présente loi ou une autre loi relativement au gaz, la Commission se laisse guider par les objectifs suivants :

(e) prescribing the proportion of the assessment for which each person or class of persons is liable or a method of determining the proportion;

(f) prescribing such other matters relating to the carrying out of an assessment as the Lieutenant Governor in Council considers appropriate.

e) prescrire la fraction de la quote-part que chaque personne ou catégorie de personnes est tenue de payer, ou son mode de calcul;

f) prescrire les autres questions que le lieutenant-gouverneur en conseil estime appropriées relativement à la fixation de quotes-parts.

Scope

(7) A regulation under this section may be general or particular in its application.

(7) Les règlements pris en application du présent article peuvent avoir une portée générale ou particulière.

Portée

Policy directives

**27.** (1) The Minister may issue, and the Board shall implement, policy directives that have been approved by the Lieutenant Governor in Council concerning general policy and the objectives to be pursued by the Board.

**27.** (1) Le ministre peut donner des directives en matière de politique, approuvées par le lieutenant-gouverneur en conseil, sur la politique générale de la Commission et les objectifs qu'elle doit poursuivre. La Commission met ces directives en œuvre.

Directives en matière de politique

Publication

(2) A policy directive issued under this section shall be published in *The Ontario Gazette*.

(2) Les directives en matière de politique qui sont données en vertu du présent article sont publiées dans la *Gazette de l'Ontario*.

Publication

Directives re: market rules, conditions

**28.** (1) In order to address the abuse or possible abuse of market power in the electricity sector, the Minister may issue, and the Board shall implement, directives that have been approved by the Lieutenant Governor in Council concerning market rules made under section 32 of the *Electricity Act, 1998* and existing or proposed licence conditions.

**28.** (1) Afin de contrer l'abus effectif ou éventuel du pouvoir sur le marché dans le secteur de l'électricité, le ministre peut donner des directives, approuvées par le lieutenant-gouverneur en conseil, sur les règles du marché qui sont établies en vertu de l'article 32 de la *Loi de 1998 sur l'électricité* et sur les conditions dont sont assortis les permis ou dont il est projeté de les assortir. La Commission met ces directives en œuvre.

Directives : règles du marché, conditions

Hearing

(2) A directive issued under subsection (1) may require the Board to hold a hearing or not to hold a hearing.

(2) Les directives données en vertu du paragraphe (1) peuvent exiger que la Commission tienne ou non une audience.

Audience

Refrain from exercising power

**29.** (1) On an application or in a proceeding, the Board shall make a determination to refrain, in whole or part, from exercising any power or performing any duty under this Act if it finds as a question of fact that a licensee, person, product, class of products, service or class of services is or will be subject to competition sufficient to protect the public interest.

**29.** (1) Sur présentation d'une requête ou lors d'une instance, la Commission décide de s'abstenir d'exercer, en totalité ou en partie, un pouvoir ou une fonction que lui attribue la présente loi si elle conclut comme question de fait que le titulaire d'un permis, une personne, un produit, une catégorie de produits, un service ou une catégorie de services est ou sera suffisamment concurrentiel pour protéger l'intérêt public.

Exercice restreint

Scope

(2) Subsection (1) applies to the exercise of any power or the performance of any duty of the Board in relation to,

(a) any matter before the Board;

(b) any licensee;

(c) any person who is subject to this Act;

(d) any person selling, transmitting, distributing or storing gas; or

(2) Le paragraphe (1) s'applique à l'exercice des pouvoirs ou fonctions de la Commission relativement à ce qui suit :

a) les questions dont est saisie la Commission;

b) les titulaires de permis;

c) les personnes qui sont assujetties à la présente loi;

d) quiconque vend, transporte, distribue ou stocke du gaz;

Champ d'application

(e) any product or class of products supplied or service or class of services rendered within the province by a licensee or a person who is subject to this Act.

e) les produits ou catégories de produits ou les services ou catégories de services que fournit dans la province le titulaire d'un permis ou une personne qui est assujettie à la présente loi.

Where determination made

(3) For greater certainty, where the Board makes a determination to refrain in whole or in part from the exercise of any power or the performance of any duty under this Act, and does so refrain, nothing in this Act limits the application of the *Competition Act* (Canada) to those matters with respect to which the Board refrains.

(3) Il est entendu que lorsque la Commission décide de s'abstenir d'exercer, en totalité ou en partie, un pouvoir ou une fonction que lui attribue la présente loi et qu'elle s'abstient effectivement de le faire, la présente loi n'a pour effet de limiter l'application de la *Loi sur la concurrence* (Canada) aux questions envers lesquelles la Commission s'abstient.

Cas où la Commission décide de s'abstenir

Notice

(4) Where the Board makes a determination under this section, it shall promptly give notice of that fact to the Minister.

(4) La Commission avise promptement le ministre des décisions qu'elle rend aux termes du présent article.

Avis

Costs

**30.** (1) The costs of and incidental to any proceeding before the Board are in its discretion and may be fixed in any case at a sum certain or may be assessed.

**30.** (1) Les frais directs ou indirects entraînés par une instance introduite devant la Commission sont laissés à l'appréciation de celle-ci et peuvent, dans tous les cas, être fixés à une somme déterminée ou liquidés.

Frais

Same

(2) The Board may order by whom and to whom any costs are to be paid and by whom they are to be assessed and allowed.

(2) La Commission peut ordonner par qui et à qui les frais doivent être payés et par qui ils doivent être liquidés et adjugés.

Idem

Scale

(3) The Board may prescribe a scale under which such costs shall be assessed.

(3) La Commission peut prescrire un barème d'après lequel les frais doivent être liquidés.

Barème

Inclusion of Board costs

(4) The costs may include the costs of the Board, regard being had to the time and expenses of the Board.

(4) Les frais peuvent comprendre ceux de la Commission, compte tenu du temps qu'elle a investi et de ses dépenses.

Inclusion des frais de la Commission

Considerations not limited

(5) In awarding costs, the Board is not limited to the considerations that govern awards of costs in any court.

(5) Lorsqu'elle adjuge les frais, la Commission n'est pas tenue aux seules considérations dont un tribunal doit tenir compte en la matière.

Considérations

Power to review, etc.

**31.** (1) In addition to its powers under section 21.2 of the *Statutory Powers Procedure Act*, the Board may at any time rehear or review any matter before deciding it.

**31.** (1) Outre les pouvoirs que lui confère l'article 21.2 de la *Loi sur l'exercice des compétences légales*, la Commission peut réentendre ou réviser une question avant d'en décider.

Pouvoir de révision

Review by director

(2) Despite subsection 50 (4) and section 64, the director may review all or part of his or her decision and section 21.2 of the *Statutory Powers Procedure Act* applies, with necessary modifications, to the review.

(2) Malgré le paragraphe 50 (4) et l'article 64, le directeur peut réviser, en totalité ou en partie, sa décision, et l'article 21.2 de la *Loi sur l'exercice des compétences légales* s'applique alors à cette révision avec les adaptations nécessaires.

Révision par le directeur

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, in the opinion of the Board, is a question of law.

**32.** (1) À la demande du lieutenant-gouverneur en conseil, de sa propre initiative ou sur motion d'une partie à une instance, et sur dépôt du cautionnement qu'elle fixe, la Commission peut présenter un exposé de cause par écrit à la Cour divisionnaire pour obtenir son avis sur une question qui, selon la Commission, constitue une question de droit.

Exposé de cause

Question referred to Board

**35.** The Minister may require the Board to examine, report and advise on any question respecting energy.

Renvois de questions à la Commission

**35.** Le ministre peut exiger que la Commission examine toute question sur l'énergie, qu'elle lui présente ensuite un rapport et qu'elle le conseille à ce sujet.

## PART III
## GAS REGULATION

## PARTIE III
## RÉGLEMENTATION DU GAZ

Order of Board required

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

Ordonnance de la Commission obligatoire

**36.** (1) Les transporteurs de gaz, les distributeurs de gaz et les compagnies de stockage ne doivent pas vendre de gaz ni exiger de frais pour son transport, sa distribution ou son stockage si ce n'est conformément à une ordonnance de la Commission, qui n'est liée par les conditions d'aucun contrat.

Order re: rates

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

Ordonnance : tarifs

(2) La Commission peut, par ordonnance, approuver ou fixer des tarifs justes et raisonnables pour la vente de gaz par les transporteurs de gaz, les distributeurs de gaz et les compagnies de stockage, ainsi que pour son transport, sa distribution et son stockage.

Power of Board

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

Pouvoir de la Commission

(3) Lorsqu'elle approuve ou fixe des tarifs justes et raisonnables, la Commission peut adopter toute méthode ou technique qu'elle estime appropriée.

Contents of order

(4) An order under this section may include conditions, classifications or practices applicable to the sale, transmission, distribution or storage of gas, including rules respecting the calculation of rates.

Contenu de l'ordonnance

(4) L'ordonnance visée au présent article peut contenir des conditions, des classifications ou des pratiques applicables à la vente, au transport, à la distribution ou au stockage de gaz, y compris des règles concernant le calcul des tarifs.

Fixing other rates

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

Autres tarifs

(5) Sur présentation d'une requête en vue d'obtenir une ordonnance approuvant ou fixant des tarifs, la Commission peut fixer les autres tarifs qu'elle estime justes et raisonnables si elle n'est pas convaincue que ceux qui font l'objet de la requête le sont.

Burden of proof

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

Fardeau de la preuve

(6) Sous réserve du paragraphe (7), dans une requête portant sur les tarifs applicables à la vente, au transport, à la distribution ou au stockage de gaz, le fardeau de la preuve incombe au requérant.

Order

(7) If the Board of its own motion, or upon the request of the Minister, commences a proceeding to determine whether any of the rates for the sale, transmission, distribution or storage of gas by any gas transmitter, gas distributor or storage company are just and reasonable, the Board shall make an order under subsection (2) and the burden of establishing that the rates are just and reasonable is on the gas transmitter, gas distributor or storage company, as the case may be.

Ordonnance

(7) Si, de sa propre initiative ou à la demande du ministre, la Commission introduit une instance pour établir si les tarifs de vente, de transport, de distribution ou de stockage de gaz qu'exige un transporteur de gaz, un distributeur de gaz ou une compagnie de stockage sont justes et raisonnables, elle rend une ordonnance en vertu du paragraphe (2). Le fardeau de démontrer que les tarifs sont justes et raisonnables incombe au transporteur, au distributeur ou à la compagnie, selon le cas.

Exception

(8) This section does not apply to a municipality or municipal public utility commission transmitting or distributing gas under the *Public Utilities Act* on the day before this section comes into force.

Exception

(8) Le présent article ne s'applique pas à la municipalité ou à la commission municipale de services publics qui transporte ou distribue du gaz en vertu de la *Loi sur les services*

(b) the period for which the agreement or renewal is to be in operation; and

(c) the storage that is the subject of the agreement or renewal.

b) la durée de l'entente ou de son renouvellement;

c) le stockage visé par l'entente ou son renouvellement.

Referral to Board of application for well licence

**40.** (1) The Minister of Natural Resources shall refer to the Board every application for the granting of a licence relating to a well in a designated gas storage area, and the Board shall report to the Minister of Natural Resources on it.

**40.** (1) Le ministre des Richesses naturelles renvoie à la Commission les demandes de permis ayant trait à un puits situé dans un secteur de stockage de gaz désigné. La Commission présente un rapport à ce sujet au ministre des Richesses naturelles.

Renvoi à la Commission

Hearing

(2) The Board may hold a hearing before reporting to the Minister if the applicant does not have authority to store gas in the area or, in the Board's opinion, the special circumstances of the case require a hearing.

(2) La Commission peut tenir une audience avant de présenter son rapport au ministre si l'auteur de la demande n'est pas autorisé à stocker du gaz dans le secteur ou que la Commission est d'avis que les circonstances particulières de l'affaire l'exigent.

Audience

Copy of report to be sent to parties

(3) The Board shall send to each of the parties a copy of its report to the Minister made under subsection (1) within 10 days after submitting it to the Minister and such report shall be deemed to be an order of the Board within the meaning of section 34.

(3) Dans les 10 jours qui suivent la présentation au ministre du rapport qu'elle a rédigé aux termes du paragraphe (1), la Commission en envoie une copie à chaque partie. Le rapport est réputé une ordonnance de la Commission au sens de l'article 34.

Envoi du rapport aux parties

Minister's decision

(4) The Minister of Natural Resources shall grant or refuse to grant the licence in accordance with the report.

(4) Le ministre des Richesses naturelles accorde ou refuse d'accorder le permis conformément au rapport.

Décision du ministre

Allocation of market demand

**41.** The Board by order may allocate a just and equitable share of the market demands for gas or oil to the several sources from which the gas or oil is produced and to the several interests within a field or pool.

**41.** La Commission peut, par ordonnance, attribuer une part juste et équitable du marché du gaz ou du pétrole aux différentes sources de production et aux différents détenteurs d'une participation dans un champ ou un gisement.

Répartition du marché

Discontinuance of transmission or distribution

**42.** (1) Subject to the *Public Utilities Act* and to the *Energy Act*, and in the absence of an agreement to the contrary between the parties affected, no gas transmitter shall voluntarily discontinue transmitting gas to a gas distributor without leave of the Board.

**42.** (1) Sous réserve de la *Loi sur les services publics* et de la *Loi sur les hydrocarbures*, et en l'absence d'entente contraire entre les parties, aucun transporteur de gaz ne doit interrompre volontairement le transport de gaz à un distributeur de gaz sans l'autorisation de la Commission.

Interruption du transport ou de la distribution

Duty of gas distributor

(2) Subject to the *Public Utilities Act* and to the *Energy Act*, a gas distributor shall provide gas distribution services to any building along the line of any of the gas distributor's distribution pipe lines upon the request in writing of the owner, occupant or other person in charge of the building.

(2) Sous réserve de la *Loi sur les services publics* et de la *Loi sur les hydrocarbures*, le distributeur de gaz fournit des services de distribution de gaz à tout bâtiment situé le long de ses pipelines de distribution sur demande écrite du propriétaire ou de l'occupant du bâtiment ou de quiconque en est responsable.

Devoir du distributeur de gaz

Order

(3) Upon application, the Board may order a gas transmitter, gas distributor or storage company to provide any gas sale, transmission, distribution or storage service or cease to provide any gas sale service.

(3) La Commission peut, sur présentation d'une requête, ordonner au transporteur de gaz, au distributeur de gaz ou à la compagnie de stockage de fournir un service de vente, de transport, de distribution ou de stockage de gaz ou de cesser de fournir un service de vente de gaz.

Ordonnance

Restriction

(4) Despite subsection 19 (4), the Board may not commence a proceeding under subsection (3) on its own motion.

(4) Malgré le paragraphe 19 (4), la Commission ne peut pas introduire d'instance en

Restriction

# TAB 10

# ENERGY REGULATION IN ONTARIO

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Chapter 4

# GAS TRANSMISSION AND DISTRIBUTION

## 4:10 OVERVIEW

There are five gas utilities in Ontario. Enbridge Consumers Gas and Union Gas Limited are the two largest, serving most of the natural gas customers in Ontario. The others are Natural Resource Gas Limited (NRG), a privately owned utility, and Kingston Utilities and the City of Kitchener, two municipally owned utilities. The Ontario Energy Board (OEB, or the Board) regulates the rates charged by Enbridge Consumers Gas, Union Gas and NRG, but not those charged by Kingston Utilities or the City of Kitchener. However, Kingston Utilities and the City of Kitchener are subject to other provisions of the *Ontario Energy Board Act, 1998*[1] (*OEB Act*). Through its leave-to-construct jurisdiction, the OEB also regulates the expansion of transmission systems. Under the *Municipal Franchises Act*,[2] the OEB approves franchise agreements entered into between gas distributors and municipalities.

## 4:20 GAS TRANSMITTERS AND DISTRIBUTORS

### 4:20:10 Definitions

Under the *OEB Act*, "gas" means: natural gas; substitute natural gas; synthetic gas; manufactured gas, which means any artificially produced fuel gas, except acetylene and any other gas used principally in welding or cutting materials; propane air gas, where propane means a hydrocarbon consisting of 95% or more of propane, propylene, butane or butylene, or any blend thereof; or any mixture of any of those elements.[3]

A "gas transmitter" is a person who carries gas by hydrocarbon transmission line.[4] Although this term is not defined, s. 89 of the *OEB Act*

1 Being Schedule B of the *Energy Competition Act, 1998*, S.O. 1998, c. 15.
2 R.S.O. 1990, c. M.55.
3 *OEB Act*, s. 3.
4 *Ibid.*, s. 3.

defines a "hydrocarbon line" to mean a pipeline carrying any hydrocarbon, other than a production line, a hydrocarbon distribution line or a pipeline within an oil refinery, oil or petroleum storage depot, chemical processing plant, or pipeline terminal or station.[5] A "gas distributor" is a person who delivers gas to a consumer.[6]

## 4:20:20 Need for Board Order

A gas transmitter or gas distributor cannot sell gas, or charge for the transmission or distribution of gas, except in accordance with an order of the OEB.[7] In making such an order, the Board is not bound by the terms of any contract.[8] The requirement for a Board order does not apply to a municipality or municipal public utility commission transmitting or distributing gas under the *Public Utilities Act* before November 7, 1998, and consequently, neither the City of Kitchener nor Kingston Utilities requires a Board order for those activities.[9]

While an order under s. 36(1) of the *OEB Act* is colloquially referred to as a "rate order", the Board has made it clear that its jurisdiction under that section is much broader:

> The Board's interpretation of subsection 36(1) of the Act is that an order of the Board is required for a gas transmitter, gas distributor, or storage company to sell gas or charge for the transmission, distribution or storage of gas. The Board has authority to regulate the *activity* of selling gas, transmitting, distributing or storing gas, not merely to regulate the fees charged for performing these activities.[9a]

The conditions that the Board may attach to an order under s. 36 may cover both the activities of the sale, transmission, distribution or storage of gas as well as rates, but there must be a reasonable nexus between the order granted and the conditions imposed.[9b]

## 4:20:30 Duties of Gas Transmitters and Distributors

The *OEB Act* specifies some of the duties of gas transmitters and distributors, and the Gas Distribution Access Rule also prescribes certain duties for gas distributors. Under the *OEB Act,* no gas transmitter can voluntarily discontinue transmitting gas to a gas distributor without leave of

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5 *Ibid.*, s. 89.
6 *Ibid.*, s. 3.
7 *Ibid.*, s. 36(1).
8 *Ibid.*
9 *Ibid.*, s. 36(8); *Public Utilities Act*, R.S.O. 1990, c. P.52.
9a RP-2001-0032, Enbridge Consumers Gas, Decision with Reasons, December 13, 2002, para. 5.11.85.
9b RP-2001-0032, Enbridge Consumers Gas, Decision with Reasons, December 13, 2002, para. 5.11.89 and 92.

the Board,[10] unless there is an agreement between the parties affected. This is subject to the *Technical Standards and Safety Act, 2000*.[10a] A gas distributor must provide gas distribution services to any building along the line of any of the distributor's distribution pipelines upon the written request of the owner, occupant or any person in charge of the building.[11] In the case of municipal utilities, the *Public Utilities Act* contains provisions dealing with the shut-off of supply.[12]

A person may apply to the Board for an order that a gas transmitter or distributor provide any gas sale, transmission or distribution service or cease to provide any gas sales service.[13] However, the Board may not commence such a proceeding on its own motion.[14]

## 4:30 CHANGE OF CONTROL OR DISPOSITION OF A GAS TRANSMITTER OR DISTRIBUTOR

The *OEB Act* contains several provisions requiring OEB approval of any material changes in the business or control of any gas transmitter, gas distributor or gas storage company.

### 4:30:10 System Dispositions and Amalgamations

A gas transmitter, gas distributor or gas storage company must first obtain leave from the OEB, in the form of an order, before doing any of the following: selling, leasing or otherwise disposing of its gas transmission, gas distribution or gas storage system as an entirety or substantially as an entirety; selling, leasing or otherwise disposing of that part of a gas transmission, gas distribution or gas storage system that is necessary in serving the public; or amalgamating with any other corporation.[15]

The Board has noted that the wording of this section is very broad and that the phrase, "otherwise dispose of" in s. 43(1)(b) of the *OEB Act* could cover situations where a utility outsources a large segment of its core utility functions.[15a] In its decision dealing with Enbridge Gas Distribution's 2002 Test Year rates, the Board commented extensively on this point:

> A gas transmission system and gas distribution system clearly means more than the physical transmission and distribution system assets, such as pipelines, compressors and related facilities. It includes all aspects that are necessary in

10 *OEB Act*, s. 42(1).
10a S.O. 2000, c.16.
11 *OEB Act*, s. 42(2).
12 *Public Utilities Act*, ss. 28 and 50.
13 *OEB Act*, s. 42(3).
14 *Ibid.*, s. 42(4).
15 *Ibid.*, s. 43(1).
15a RP-2001-0032, Enbridge Consumers Gas, Decision with Reasons, December 13, 2002, para. 5.11.69-73.

**39.** (1) **Gas storage, surplus facilities and approval of agreements.**–Upon the application of a gas transmitter or gas distributor, the Board by order may direct a storage company having storage capacity and facilities that are not in full use to provide all or part of the storage capacity and facilities for the applicant upon such conditions as may be determined by the Board.

(2) **Gas storage agreements to be approved.**–No storage company shall enter into an agreement or renew an agreement with any person for the storage of gas unless the Board, with or without a hearing has approved,

(a) the parties to the agreement or renewal;

(b) the period for which the agreement or renewal is to be in operation; and

(c) the storage that is the subject of the agreement or renewal.

**40.** (1) **Referral to Board of application for well licence.**–The Minister of Natural Resources shall refer to the Board every application for the granting of a licence relating to a well in a designated gas storage area, and the Board shall report to the Minister of Natural Resources on it.

(2) **Hearing.**–The Board may hold a hearing before reporting to the Minister if the applicant does not have authority to store gas in the area or, in the Board's opinion, the special circumstances of the case require a hearing.

(3) **Copy of report to be sent to parties.**–The Board shall send to each of the parties a copy of its report to the Minister made under subsection (1) within 10 days after submitting it to the Minister and such report shall be deemed to be an order of the Board within the meaning of section 34.

(4) **Minister's decision.**–The Minister of Natural Resources shall grant or refuse to grant the licence in accordance with the report.

**41. Allocation of market demand.**–The Board by order may allocate a just and equitable share of the market demands for gas or oil to the several sources from which the gas or oil is produced and to the several interests within a field or pool.

**42.** (1) **Duties of gas transmitters and distributors.**–Subject to the *Technical Standards and Safety Act, 2000*, and the regulations made under that Act and in the absence of an agreement to the contrary between the parties affected, no gas transmitter shall voluntarily discontinue transmitting gas to a gas distributor without leave of the Board.

(2) **Duty of gas distributor.**–Subject to the *Public Utilities Act*, the *Technical Standards and Safety Act, 2000* and the regulations made under the latter Act and to sections 80, 81, 82 and 83 of the *Municipal Act, 2001*, a gas distributor shall provide gas distribution services to any building along the line of any of

the gas distributor's distribution pipe lines upon the request in writing of the owner, occupant or other person in charge of the building.

(3) **Order.**–Upon application, the Board may order a gas transmitter, gas distributor or storage company to provide any gas sale, transmission, distribution or storage service or cease to provide any gas sale service.

(4) **Restriction.**–Despite subsection 19(4), the Board may not commence a proceeding under subsection (3) on its own motion. 2002, c. 17, Sch. F, Table; 2003, c. 3, s. 32.

**43.** (1) **Change in ownership or control of systems.**–No gas transmitter, gas distributor or storage company, without first obtaining from the Board an order granting leave, shall,

(a) sell, lease or otherwise dispose of its gas transmission, gas distribution or gas storage system as an entirety or substantially as an entirety;

(b) sell, lease or otherwise dispose of that part of a system described in paragraph (a) that is necessary in serving the public; or

(c) amalgamate with any other corporation.

(1.1) **Same.**– Subsection (1) does not apply with respect to a disposition of securities of a gas transmitter, gas distributor or storage company, or of a corporation that owns securities in a gas transmitter, gas distributor or storage company.

(2) **Acquisition of share control.**–No person, without first obtaining an order from the Board granting leave, shall,

(a) acquire such number of voting securities of a gas transmitter, gas distributor or storage company that together with voting securities already held by such person and one or more affiliates or associates of that person, will in the aggregate exceed 20 per cent of the voting securities of a gas transmitter, gas distributor or storage company; or

(b) acquire control of any corporation that holds, directly or indirectly, more than 20 per cent of the voting securities of a gas transmitter, gas distributor or storage company if such voting securities constitute a significant asset of that corporation.

(2.1) **Same.**– Subsection (2) does not apply to,

(a) an underwriter (within the meaning of the *Securities Act*) who holds the voting securities solely for the purpose of distributing them to the public;

(b) any person or entity who is acting in relation to the voting securities solely in the capacity of an intermediary in the payment of funds or the delivery of securities or both in connection with trades in

# TAB 11

CED Estoppel §2

Canadian Encyclopedic Digest
Estoppel
II -- Estoppel in Pais (by Conduct or Representation)
1 -- Definition



To check the currency of the title, please refer to the subject title page.

§2

When one person, by declaration, act or omission, has intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he or she nor his or her representative may be allowed, in any suit or proceeding between himself or herself or his or her representative and such person or representative, to deny the truth of that thing.[FN1] Estoppel is a complex legal notion involving a combination of several essential elements -- the statement to be acted upon, action on the faith of it and resulting detriment to the actor.[FN2] When the party relying upon a statement is aware of the truth of the matter, estoppel cannot lie.[FN3]

FN1. *R. v. Chesley* (1889), 16 S.C.R. 306 at 323; *Hatfield v. Canadian Pacific Railway* (1911), 3 Alta. L.R. 307; *Milman v. Canadian Fairbanks-Morse Co.*, [1919] 1 W.W.R. 923 (Sask.); *Capital Trust Corp. v. Gordon*, [1945] O.R. 277 at 286; *Jamesway Ltd. v. Krug* (1932), 41 O.W.N. 146; *Sohio Petroleum Co. v. Weyburn Security Co.*, [1971] S.C.R. 81; affirming (1969), 69 W.W.R. 680 (Sask. C.A.) (oil and gas lease extension); *M.E.P.C. Canadian Properties Ltd. v. R.* (1974), 64 D.L.R. (3d) 707 (Fed. Ct.) (estoppel of claimant saying expropriation invalid); *O'Flaherty v. British Acceptance Corp.* (1964), 50 W.W.R. 485 (B.C. S.C.); *Santori v. Northwestern Securities of Victoria Ltd.* (1965), 51 W.W.R. 297 (B.C. C.A.); *Ocsko v. Cypress Bowl Recreations Ltd.* (1992), 74 B.C.L.R. (2d) 159 (C.A.) (experienced skier signing release of liability and indemnity agreement without pressure or indicating lack of consent; skier bound by document; dismissal of skier's action affirmed).

FN2. *Canada & Dominion Sugar Co. v. Canadian National (West Indies) Steamships Ltd.*, [1946] 3 W.W.R. 759 (P.C.); *Colvin v. Metropolitan Life Insurance Co.*, [1936] O.R. 160.

FN3. *Livingstone v. Jannetta*, [1931] O.R. 325 at 335; reversed on other grounds [1932] S.C.R. 175.

END OF DOCUMENT

CED Estoppel §147

Canadian Encyclopedic Digest
Estoppel
III -- Equitable or Promissory Estoppel
3 -- Promissory Estoppel



To check the currency of the title, please refer to the subject title page.

§147

When promissory estoppel is raised, a party is precluded from resiling from its representation or promise.[FN1]

FN1. *Dean v. Bruce*, [1952] 1 K.B. 11 at 14 (C.A.); *Ajayi v. R.T. Briscoe (Nigeria) Ltd.*, [1964] 1 W.L.R. 1326 at 1330 (P.C.); *Clark Trading Co. (Nfld.) v. Corner Brook (City)* (1977), 22 Nfld. & P.E.I.R. 462 (Nfld. T.D.); *Bojtar v. Parker* (1979), 99 D.L.R. (3d) 147 (Ont. H.C.); affirmed (1979), 103 D.L.R. (3d) 577 (Ont. C.A.); *Tudale Explorations Ltd. v. Bruce* (1978), 88 D.L.R. (3d) 584 (Ont. Div. Ct.); *Bank of Montreal v. McIntyre* (1974), 44 D.L.R. (3d) 476 (B.C. S.C.); *Sohio Petroleum Co. v. Weyburn Security Co.* (1969), 69 W.W.R. 680 (Sask. C.A.); affirmed [1971] S.C.R. 81; *Watson v. Canada Permanent Trust Co.*, [1972] 4 W.W.R. 406 (B.C. S.C.); affirmed (1974), 66 D.L.R. (3d) 85 (B.C. C.A.); *Reitmeier v. Exner* (1969), 68 W.W.R. 16 (Sask. Q.B.); reversed on other grounds (1970), 75 W.W.R. 97 (Sask. C.A.); *Perma Therm Insulators Ltd. v. Bank of Montreal* (1981), 35 N.B.R. (2d) 386 (C.A.); *Bank of Montreal v. Loomis Armoured Car Service Ltd.* (1980), 21 B.C.L.R. 247 (S.C.); *Villa Real Estate & Development Ltd. v. Bloomenthal* (1982), 39 A.R. 277 (Q.B.); *Montreal Trust Co. of Canada v. Dahl* (1992), 99 Sask. R. 182; additional reasons 101 Sask. R. 241 (Q.B.) (mortgagor entering into mortgage because mortgagee promising no liability on personal covenant to pay; mortgagor establishing promissory estoppel); *Shaw v. Tillsonburg (Town)* (1992), 8 O.R. (3d) 273 (Gen. Div.); *Taylor v. R.* (1997), [1997] 2 C.T.C. 201 (Fed. C.A.); affirming (1995), [1995] 2 C.T.C. 2133 (T.C.C.); leave to appeal refused (1997), 223 N.R. 399 (S.C.C.) (promissory estoppel incapable of eliminating statutory liability for tax).

END OF DOCUMENT

CED Estoppel §149

Canadian Encyclopedic Digest
Estoppel
III -- Equitable or Promissory Estoppel
3 -- Promissory Estoppel



To check the currency of the title, please refer to the subject title page.

§149

For promissory estoppel to be raised, it must be shown that a party made a promise or representation intended to be relied upon by the other and that the other did rely upon it to his or her detriment.[FN1] The requirement of a representation or promise marks the distinction between promissory estoppel and "estoppel by convention."[FN2] The promisee must also have acted equitably.[FN3]

FN1. *Perma Therm Insulators Ltd. v. Bank of Montreal* (1981), 35 N.B.R. (2d) 386 (C.A.) (no evidence recipient of letter having acted upon its statement to its detriment); *Sohio Petroleum Co. v. Weyburn Security Co.* (1969), 69 W.W.R. 680 (Sask. C.A.); affirmed [1971] S.C.R. 81 (whether oil and gas lease extended; no showing of reliance, or detriment, by defendant); *Watson v. Canada Permanent Trust Co.*, [1972] 4 W.W.R. 406 (B.C. S.C.); affirmed (1974), 66 D.L.R. (3d) 85 (B.C. C.A.) (company acquiring option to purchase shares without any consideration for option; acting in reliance on option agreement; promissory estoppel); *Reitmeier v. Exner* (1969), 68 W.W.R. 16 (Sask. Q.B.); reversed on other grounds (1970), 75 W.W.R. 97 (Sask. C.A.) (agent misappropriating proceeds of sale, then sending statements showing proceeds standing to plaintiff's credit; sufficient to show plaintiff relying on statements and failing to take action available to her); *Sturgeon (Municipal District) v. Alberta (Assessment Appeal Board)*, [1971] 3 W.W.R. 185 (Alta. T.D.); affirmed [1971] 4 W.W.R. 584 (Alta. C.A.); which was affirmed [1972] 3 W.W.R. 455 (S.C.C.) (railway terming certain land "industrial spur line" not estopped as no representation made to appellant and no detriment suffered); *Suppa Construction Ltd. v. Etobicoke (City)* (1992), 10 O.R. (3d) 430 (Gen. Div.); *Fort Frances (Town) v. Boise Cascade Canada Ltd.* (1983), 143 D.L.R. (3d) 193 (S.C.C.); varying (1981), 126 D.L.R. (3d) 649 (Ont. C.A.) (company agreeing to supply power to town; company officer informing town of its entitlement to unlimited amount of power; at time statement made, neither party demonstrating intention to alter strict terms of agreement; promissory estoppel not applying); *A.U.P.E. v. Alberta* (1987), 77 A.R. 271 (C.A.) (appellant paying salary modifier gratuitously; accordingly, payment could not be turned into positive, binding obligation; employees not induced into altering position in reliance on promise); *First City Trust Co. v. Triple Five Corp.* (1989), 65 Alta. L.R. (2d) 193; additional reasons 66 Alta. L.R. (2d) 314 (C.A.) (defendant purchaser under agreement for sale being sued by plaintiff mortgagee; vendor having mortgaged lands and assigned interest under agreement to plaintiff; plaintiff's conduct not amounting to promissory estoppel); *Smoky River Coal Ltd. v. U.S.W.A., Local 7621* (1985), 38 Alta. L.R. (2d) 193 (C.A.); affirming (1984), 31 Alta. L.R. (2d) 269 (Q.B.) (employer following practice of paying overtime notwithstanding lack of provision therefor in collective agreement; employer not estopped from ceasing to pay overtime; neither union nor employees induced to alter positions in reliance on employer's promise); *B.P.*

CED Estoppel §149

*Resources Canada Ltd. v. General American Oils Ltd.* (1989), 66 Alta. L.R. (2d) 82 (Q.B.) (defendant notifying plaintiffs clause benefiting them included in agreement in error; plaintiff acknowledging error but exercising rights under clause and defendant seeking rectification; promissory estoppel not preventing enforcement of agreement since acknowledgement not causing act or omission by defendant to its detriment); *Wilway Lumber Sales Inc. v. Bank of Nova Scotia* (1984), 54 B.C.L.R. 336 (S.C.); *CAE Aircraft Ltd. v. Canadian Commercial Corp.* (1989), 57 Man. R. (2d) 1 (Q.B.) (Crown corporation having assisted company in obtaining fixed price contract which customer later terminated; Crown corporation not estopped from raising company's performance since no detriment or prejudice suffered even if representations made); *Royal Trust Corp. of Canada v. Anthem Holdings Ltd.* (1984), 33 Sask. R. 188 (Q.B.) (evidence mortgagors under impression action not to be brought on covenant insufficient to prove promise upon which relying to detriment); *R.L. Wilson Engineering & Construction Ltd. v. Metropolitan Life Insurance Co.* (1988), 30 C.L.R. 161; additional reasons 32 C.P.C. (2d) 76 (Ont. H.C.) (defendant refusing to provide financing until receiving discharge of plaintiff's lien; plaintiff delivering documents knowing delivery causing defendant to alter position to its detriment; plaintiff's inducement of defendant's reliance on documents estopping plaintiff from asserting claim for judgment); *Olsen v. Moncton* (1986), 72 N.B.R. (2d) 281 (Q.B.) (applicant not resident within city limits as required by collective agreement; however, representations made that circumstance would not matter; applicant foregoing permanent employment with another employer; collective agreement not preventing applicant from arguing that individual agreement made at hiring stage); *Wilson v. Sears Canada Inc.* (1990), 96 N.S.R. (2d) 361 (C.A.) (plaintiff's solicitors advising defendants that plaintiff abandoning claim for loss of income in personal injury action and amending statement of claim accordingly; plaintiff's new lawyer seeking to reinstitute claim; solicitor's undertaking giving rise to promissory estoppel which bound plaintiff); *Saskatchewan Trust Co. v. Hawrish* (1993), [1994] 4 W.W.R. 225 (Sask. Q.B.); affirmed (February 21, 1995), Cameron, Lane, Jackson JJ.A. (Sask. C.A.); leave to appeal to S.C.C. refused (1996), [1996] 2 W.W.R. lxxx (S.C.C.) (lawyer mortgagor stating wish to avoid personal liability while negotiating mortgage; mortgagee remaining silent and making no commitment; lawyer believing that statute preventing personal liability; lawyer not establishing promissory estoppel preventing mortgagee from seeking personal judgment); *Beatrice Foods Inc. v. Retail, Wholesale & Department Store Union, Local 440* (1994), 44 L.A.C. (4th) 59 (Ont.) (union relying on continuation of employer's practice with respect to calculating overtime, foregoing opportunity to negotiate appropriate language; employer estopped from resiling established practice); *Manitoba Housing Authority v. International Union of Operating Engineers, Local 827* (1994), 41 L.A.C. (4th) 225 (Man.) (employer providing employees with free parking; new collective agreement being negotiated with no mention of parking; previous parking policy being privilege; estoppel could only be created with respect to matters in collective agreement or matters raised during bargaining where specific representation made and relied upon); *Catt Steel Services Ltd. v. Delta* (1995), 26 C.L.R. (2d) 170 (B.C.S.C.) (solicitors for general contractor asking subcontractor to refrain from enforcing lien until project completed and threatening to claim solicitor and client costs otherwise; general contractor never promising to either pay lien claim or waive limitation period; promissory estoppel inapplicable); *Campbell v. Campbell* (1995), [1995] 4 W.W.R. 542 (Man. Q.B.); reversed on other grounds (1995), [1996] 1 W.W.R. 457 (Man. C.A.); leave to appeal to S.C.C. refused (1996), [1996] 7 W.W.R. lix (S.C.C.); *Maracle v. Travellers Indemnity Co. of Canada* (1991), 80 D.L.R. (4th) 652 at 656 (S.C.C.); *Drews v. Insurance Corp. of British Columbia* (1998), 55 B.C.L.R. (3d) 281 (B.C. S.C.) (by paying no-fault benefits, insurer not intending to affect legal relations to extent of relieving insured from obligation to look to primary insurance for those benefits; no promissory estoppel); *Sanderson v. Cardiff (Township)* (1997), 43 M.P.L.R. (2d) 262 (Ont. Gen. Div.) (no unambiguous promise or assurance; plaintiffs always aware that by-law required and that no agreement existing until by-law passed); *3173763 Canada Inc. v. York Condominium Project No. 780* (1997), 10 R.P.R. (3d) 163 (Ont. Gen. Div.); *1037733 Ontario Inc. v. Royal Bank*, 1999 CarswellOnt 1437 (Ont. Gen. Div.); *Freeman v. General Motors Acceptance Corp. of Canada Ltd.* (1999), 186 Sask. R. 104 (Sask. Q.B.); *Valley Equipment Ltd. v. John Deere Ltd.* (2000), 4 B.L.R. (3d) 282 (N.B. Q.B.) (promise or assurance must be intended to affect legal relationship between parties and to be acted on; representee must establish that, in reliance on representation, he or she acting on it or in some way changing his or her position); *Shapiro v. Tanabe*, 2000 CarswellOnt 171 (Ont. S.C.J.) (vague and uncertain assurances insufficient; promise must be clear and unambiguous to justify promisee in relying on it); *Tate v. Canada Mortgage & Housing Corp.* (2001), [2002] 6 W.W.R. 163 (Alta. Master); affirmed 2002 ABQB 465 (Alta. Q.B.) (no detrimental reliance on part of plaintiffs on two letters demanding two cents in

CED Estoppel §149

satisfaction of CMHC debt; representation would merely suspend creditor's right of enforcement for stipulated or reasonable time and would not extinguish right completely; indulgences by creditors not creating promissory estoppel); *Fraser Valley Credit Union v. Siba* (2001), 42 R.P.R. (3d) 135 (B.C. S.C.) (credit union relying on signed letter by second mortgagee's branch manager to grant priority to credit union's mortgage; promissory estoppel doctrine not applying; to say that it was inequitable for promisor to retract non-binding promise because promisee had, without promisor's knowledge, relied on promise to its detriment, would extend doctrine of promissory estoppel); *Dewindt v. Sandalwood Homes Ltd.* (2002), 23 C.P.C. (5th) 320 (Alta. Q.B.) (plaintiff's solicitor could not rely on fact that settlement was arranged before limitation period expired to occur after expiry as inferred promise not to rely on limitation period); *Murphy Oil Co. v. Commercial Petroleum & Hydraulic Service Ltd.* (2005), 2005 CarswellOnt 4363 (Ont. C.A.); affirming (2004), 2004 CarswellOnt 5358 (Ont. S.C.J.) (relationship between parties being such that defendant C Ltd. accepting responsibility for improperly installed equipment, that plaintiff would supervise cleanup and that defendant's insurers would, in consequence of admission of liability, pay cleanup costs; conduct of defendant leading to conclusion that it would not rely on limitation period).

FN2. Chitty on Contracts, 28th ed. (1999: Sweet & Maxwell), vol. 1 (General Principles), at 223, §3-100; Treitel, The Law of Contract, 10th ed. (1999: Sweet & Maxwell), at 110; Fridman, The Law of Contract, 4th ed. (1999: Carswell), at 140 note 302; *see also* §§1.1, 32.1-32.3.

FN3. *1037733 Ontario Inc. v. Royal Bank*, 1999 CarswellOnt 1437 (Ont. Gen. Div.); *Famous Players Development Corp. v. Capitol Life Insurance Co.* (1996), 17 O.T.C. 362 (Ont. Gen. Div.).

END OF DOCUMENT

# TAB 12

Union Gas' DSM Plan also contains an annual volumetric savings target and LRAM. However, the plan does not contain a shared-saving mechanism.[105h]

In EGDI's 2006 rate case the OEB refused to approve a proposed three-year DSM plan for the utility. Instead it approved a one-year plan based on a spending budget and forecast "volume savings estimate" and approved some variations to EGDI's SSM mechanism. The Board indicated that it would convene a generic hearing to consider the DSM programmes of both EGDI and Union Gas.[105i]

## 4:70 OEB GENERAL RATE-MAKING PRINCIPLES

The economic regulation of utilities has spawned a large body of administrative jurisprudence regarding the content of just and reasonable rates which the OEB in large part follows. This section collects references that the Board has made over the years in its decisions to general rate-making principles applicable to natural gas utilities. As a work-in-progress this section does not claim to be comprehensive in scope, but it is designed to provide the reader with some specific citations for general rate-making principles.

### 4:70:10 Prior Board Decisions

Although the OEB is not bound by previous decisions, they possess a high degree of persuasive value.[105j]

### 4:70.20 Basic Principles of Rate-making

The OEB has stated:

> Principled ratemaking involves the creation of a unified and theoretically consistent set of rates for all participants within the system. It begins with the establishment of a revenue requirement for the regulated utility and proceeds to design rates for the respective classes according to well-recognized and consistent theory respecting such elements as cost allocation. This is an objective and dispassionate process, which is driven by system integrity and consistent treatment between consumers on the system. Principled ratemaking typically does not involve a ranking of interests according to a subjective view of the societal value of any given participant or group of participants. This approach is not unique to Ontario. A departure from these principles should only be

[105g] "Demand-Side Management and Demand Response in the Ontario Electricity Sector", Report of the Board to the Minister of Energy, March 1, 2004.
[105h] Union Gas Limited, RP-2003-0063 (March 18, 2004), pp. 191-2.
[105i] EGDI, Partial Decision with Reasons, EB-2005-0001, December 22, 2005, section 2.
[105j] Enbridge Gas Distribution Inc., Decision with Reasons, RP-2003-0203, November 1, 2004, section 5.3.3.

> undertaken where the evidence and all other circumstances outweigh the inherent virtue of an objective process.[105k]

Although in setting rates the Board is not bound by third party contracts, it strives not to unnecessarily frustrate pre-existing commercial arrangements.[105l]

In setting rates, the contractual arrangements with the utility should govern, not the physical movement of gas.[105m]

## 4:70:30 Prudency Reviews of Costs

The Board ensures that costs are reasonable and prudently incurred before allowing their recovery through rates.[105n] Accordingly, the Board must be in a position to understand the basis for any costs that a utility seeks to recover in rates.[105o]

The Ontario Divisional Court has held that a utility is entitled to recover its prudently incurred costs and has described the prudence standard in the following way:

> Expenditures are deemed to be prudent, in the absence of some evidence suggesting the contrary. However, costs that are found to be dishonestly incurred, or which are negligent or wasteful losses, are excluded from the legitimate operating costs of the utility in determining rates that may be charged. The examination of whether an expenditure was prudent must be based on the particular circumstances at the time the decision to incur those costs was made. That is so even if in hindsight it is obvious the decision was a bad one.[105p]

In its 2002 decisions in the Union Gas Customer Review Process and Enbridge Gas Distribution's 2002 rates, the Board was required to consider the prudency of both utilities entering into long-term upstream transportation contracts on the Alliance and Vector pipelines. In the course of its decisions, the Board articulated the principles that should guide the prudency review of a utility's activities. The OEB essentially adopted a prudency approach consistent with guidelines developed by the National Regulatory Research Institute (NRRI):

- There is a presumption of prudence with regard to the acts of a regulated utility. However when serious questions are raised by stakeholders respecting the prudence of a utility's actions which give rise to material cost consequences to ratepayers, it is necessary for the regulator to examine the prudence of the utility's action.

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[105k] Union Gas, Decision with Reasons, RP-2003-0063, May 19, 2005.
[105l] *Ibid.*
[105m] *Ibid.*
[105n] EGDI, Decision with Reasons on Motion, RP-2001-0032, February 10, 2003.
[105o] EGDI, Decision and Order, RP-2002-0133, April 15, 2003, para. 2.4.
[105p] *Enbridge Gas Distribution Inc. v. Ontario (Energy Board)* (2005), 75 O.R. (3d) 72 (S.C.J.) (Div. Ct.)), at para. 9.

# TAB 13

Ontario Energy Board

Commission de l'Énergie de l'Ontario


# RP-2003-0203

## IN THE MATTER OF AN APPLICATION BY

# ENBRIDGE GAS DISTRIBUTION INC.

## FOR RATES FOR FISCAL 2005

## DECISION WITH REASONS

November 1, 2004

## 5.3 BOARD FINDINGS

5.3.1 In previous proceedings the Board has already heard and decided a number of the substantive arguments put forward by Intervenors in connection with the deferred taxes issue. What is different this time is that the Board has the advantage of historic financial data.

5.3.2 The key decisions or principles set out in past Board decisions that are relevant to the question of the amount of deferred taxes payable by Rentco are set out below:

1) The Company may seek to recover up to $50 million to pay deferred taxes associated with the rental program assets as they become due. (179 Decision, para. 3.3.19) The Board confirmed this in the 135 Decision, para. 59.

2) The $42 million credit arising from the Supreme Court's 1998 decision on expensing versus capitalizing the rental program installation costs belongs to the shareholder. (179 Decision, para. 3.3.11)

3) The Board accepted that the deferred taxes payable should be assessed from the perspective of Rentco alone, and not in combination with other affiliated companies. (135 Decision, para. 60)

4) The Board confirmed the entitlement of the Company to collect the deferred taxes that became payable for Rentco between the relevant dates. (135 Decision, para. 62)

5.3.3 The Board has carefully considered all of the evidence put forward by the Parties on this issue. The Board relies on the guidance provided in past decisions on this subject and this guidance fundamentally settles much of what is being disputed. Although the Board is not bound by previous decisions, they have a high degree of persuasive value. Many of the arguments put forward in this case are either

subsumed or become irrelevant if these previous decisions are relied upon and applied.

5.3.4 The Board is not convinced that the additional evidence available in this proceeding would have caused a different outcome in the 135 Decision or the 179 Decision had it been available at that time.

5.3.5 Nevertheless, the Board believes that it would be instructive to provide additional clarity on three points, namely, the combination issue, the gain on the sale of the business issue, and the issue respecting the $42 million tax credit.

5.3.6 Confirming the 135 Decision, the Board finds that it is not appropriate to consider the tax deductions contributed by other affiliates as an offset to the taxes payable by Rentco. The ratepayer was not entitled to benefit from the tax deductions attributable to affiliate losses, since those tax deductions were not related to the rental program and the parent could have chosen a different time or way to capture them. In the specific case of the $11 million tax savings, outlined in the ESI tax plan as referred to by SEC, the Board is further comforted by the Company's evidence that the $11 million savings was only a matter of timing and that there were no permanent savings available from that transaction.

5.3.7 The second point for clarification is the treatment of the gain on the sale of the business to Centrica plc and whether that gain should be considered in reducing, or eliminating, the deferred taxes payable. The Board has decided that a reduction is not appropriate because the Board's 135 Decision confirmed the entitlement of the Company to collect the deferred taxes. The Board made its decision in the 135 case with full knowledge of the Centrica plc transaction, and chose to confirm the Company's entitlement to a draw from the notional utility account notwithstanding the same.

5.3.8 Intervenors argued that the $42 million tax credit should not be allocated to the shareholder because the liability had been transferred to the new owner of the assets as a result of the sale. The 179 Decision established that the shareholder

# TAB 14

Case Name:

# AstraZeneca AB v. Apotex Inc.

Between
AstraZeneca AB and AstraZeneca Canada Inc., applicants,
and
Apotex Inc. and the Minister of Health, respondents

[2004] F.C.J. No. 54
2004 FC 71
Docket T-2311-01

**Federal Court**
**Toronto, Ontario**
**O'Keefe J.**

Heard: November 3-5, 2003.
Judgment: January 16, 2004.
(47 paras.)

**Counsel:**

Gunars Gaikis and Yoon Kang, for the applicants.
H.B. Radomski, Andrew Brodkin and Ildiko Mehes, for the respondent, Apotex Inc.
Rick Woyiwada, for the respondent, Minister of Health.

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REASONS FOR ORDER AND ORDER

¶ 1 **O'KEEFE J.**— By motion, the applicants seek to set aside the order of Prothonotary Aronovitch dated August 5, 2003 which granted the respondent, Apotex, leave to file the affidavit of Dr. Bernard Sherman affirmed July 23, 2003. Appended as an exhibit to the Sherman affidavit was a revised product monograph filed with the Minister of Health in respect of Apotex' Apo-Omeprazole capsules.

Background

¶ 2 The underlying proceeding was commenced by the applicants by notice of application dated December 31, 2001 in response to a Notice of Allegation ("NOA") dated November 16, 2001 served by the respondent, Apotex.

¶ 3 The applicants, in the underlying proceeding, seek an order prohibiting the Minister from issuing a Notice of Compliance ("NOC") to Apotex in respect of Apo-Omeprazole capsules containing omeprazole in 20 mg strength for oral administration until the expiration of Canadian Patent No. 2,133,762 (the "'762 Patent").

¶ 4 The '762 Patent relates to the use of omeprazole concomitantly with an antibiotic, and in particular, claims the use of omeprazole for increasing the bioavailability of antibacterial compounds including clarithromycin.

¶ 5 Apotex' NOA asserts non-infringement of the '762 Patent on the following legal and factual basis:

> The remaining claims relate only to use for increasing the bioavailability of an antibacterial compound.
> Our product will not infringe because we are not seeking approval for such use and no such use will

be included in our product monograph.

¶ 6 The applicants filed their evidence on the merits on February 6, 2002.

¶ 7 On March 8, 2002, Apotex served an affidavit of Dr. Sherman along with a notice of motion to dismiss the proceedings pursuant to subsection 6(5) of the Patented Medicines (Notice of Compliance) Regulations, S.O.R./93-133. Attached to Dr. Sherman's affidavit was excerpts of the original product monograph for Apo-Omeprazole. The March 8, 2002 Sherman affidavit was also put forward on the merits of the application by Apotex.

¶ 8 Dr. Sherman stated at paragraphs 10 and 24 of his affidavit of March 8, 2002:

> Prior to November 16, 2001, Apotex filed an Abbreviated New Drug Submission with the Minister for Apo-Omeprazole capsules containing omeprazole in 20mg strength for oral administration. As part of its submission, Apotex filed a draft Product Monograph which sets out, among other things, the uses to which Apo-Omeprazole may be put, as authorized by the Minister. The relevant portions of Apotex' Product Monograph are attached as Exhibit "B". The reason I have not included the entire Product Monograph herein is that it includes confidential Apotex data regarding Apo-Omeprazole which data is not relevant to this proceeding.
> [...]
> Claims 68 to 77 of the '762 Patent relate only to use for increasing the bioavailablity of an antibacterial compound. Apotex' Apo-Omeprzaole capsules will not infringe these claims as Apotex has not sought an approval for such and no such use will be included in its Product Monograph.

¶ 9 The parties' witnesses were cross-examined during March and April 2002.

¶ 10 During cross-examination, Dr. Sherman stated that Apotex would not produce anything for pharmacists so long as the '762 Patent is in force, that mentioned the concomitant administration of antibiotics and Apo-Omeprazole.

¶ 11 By letter dated April 16, 2002, Apotex produced a more complete product monograph which contained the following reference to the concomitant administration of omeprazole and clarithromycin:

> There is an increase in bioavailability (AUC) and half-life of omeprazole, and bioavailability (AUC) and C[max] of clarithromycin during concomitant administration in healthy volunteers.

¶ 12 Apotex' motion to dismiss the proceedings was dismissed on July 17, 2002. The Prothonotary, in her decision, stated in part:

> ... Apotex makes the point that the evidence that will ultimately be placed before the Judge hearing the merits of the underlying application is already produced in the context of the present motion. That does not help Apotex, as there can be no determination of disputed facts in the context of a motion for summary dismissal.

¶ 13 The applicants' application record including its memorandum of fact and law was filed on August 13, 2002.

¶ 14 Apotex filed a motion on August 22, 2002 seeking leave to file the affidavit of Kenneth Brown, sworn August 19, 2002. The notice of motion stated at paragraphs 18 and 21:

> In their voluminous Written Representations, the Applicants specifically made reference to the above noted portions of the Product Monograph and argued, therefore, that Apotex' Notice of Allegation and Dr. Sherman's evidence were contradicted by the Product Monograph itself. The Applicants advanced this position notwithstanding the clear fact that any references in the Product Monograph to "concomitant administration" or "increase in bioavailablity" were statements of scientific fact and were clearly directed to omeprazole generally and not to Apotex' Apo-Omeprazole capsules.

> [...]
> In response to the Applicants' submissions, Apotex' counsel explained that the particular references noted above pertain not to Apo-Omeprazole, but rather, to omeprazole generally, and further asserted that the noted references were required, in effect, as warnings to prospective readers of the Product Monograph so as to enable them to fully understand the pharmacology and pharmacokinetics of omeprazole.

¶ 15 Apotex was granted leave to file the Brown affidavit on November 13, 2002. The Brown affidavit basically stated that the reference in the Apotex product monograph for Apo-Omeprazole to increased bioavailability and concomitant administration are scientific statements required to be there by Health Canada and should, therefore, not be attributed to Apotex' brand.

¶ 16 The applicants sought to file the reply affidavit of Dr. Karen Burke, sworn December 11, 2002, in response to the Brown affidavit. Apotex opposed the applicants' motion. By order dated February 14, 2003, Prothonotary Aronovitch granted the applicants leave to file the Burke affidavit.

¶ 17 Mr. Justice O'Reilly dismissed the appeal of the order granting leave to file the Brown affidavit, a ruling that was upheld by the Court of Appeal on May 21, 2003.

¶ 18 By letter dated May 9, 2003, Apotex advised the applicants as follows:

> The capsule product monograph previously produced to you has now been updated. Accordingly, we are enclosing herewith the most current version of Apotex capsule product monograph as submitted to the Minister by Apotex.

¶ 19 On June 16, 2003, Apotex filed and served its responding application record which contained the May 9, 2003 letter and the revised version of Apotex' product monograph for Apo-Omeprazole. The revised product monograph did not include the wording objected to by the applicants, i.e. the reference to increased bioavailability and concomitant use.

¶ 20 The applicants made a motion to strike the letter and the revised product monograph from Apotex' responding record. This motion was allowed on July 18, 2003.

¶ 21 On July 25, 2003, Apotex made a motion for leave to file as further evidence, an affidavit of Dr. Sherman, affirmed July 23, 2003, which appended Apotex' revised product monograph.

¶ 22 By order dated August 5, 2003, the Prothonotary granted Apotex leave to file the Sherman affidavit, affirmed July 23, 2003.

¶ 23 This is the appeal of that order.

Issue

¶ 24 Should the appeal of the Prothonotary's order be allowed?

Applicants' Arguments

¶ 25 The applicants submit that the Prothonotary erred in fact and law by granting leave to Apotex to file the Sherman affidavit which included a revised product monograph.

¶ 26 The applicants submit that the Prothonotary failed to make a determination of the relevance of the Sherman affidavit to Apotex' original litigation position and therefore proceeded on a wrong principle.

¶ 27 The applicants submit that the Prothontoary erred in law by applying the wrong test governing leave to file

further evidence.

¶ 28 The applicants submit that Dr. Sherman's affidavit includes arguments on the merits which are not facts and thus, cannot be admitted as new evidence.

¶ 29 The applicants submit that although the revised product monograph may qualify as a fact, it is not referred to in the NOA as part of the detailed factual basis for the allegation of non-infringement. Apotex produced and defended the original product monograph which it said was the subject of its allegation of non-infringement. The applicants state that Apotex is limited to its original position including the legal and factual basis detailed in its NOA.

¶ 30 The applicants submit that the Prothonotary erred by failing to recognize that Apotex is estopped from relying on the revised product monograph as Apotex had previously represented to the Court that the reference to increased biovavailablity and concomitant use were required to be in the original product monograph. The applicants argue that Apotex cannot now be permitted to adopt a contrary position.

Apotex' Arguments

¶ 31 Apotex submits that the standard of review to be applied to the appeal of the Prothonotary's decision is that as outlined in Canada v. Aqua-Gem Investments Ltd., [1993] 2 F.C. 425 at 454 (C.A.). Apotex also submits that case management prothonotaries, , must be given latitude to manage cases and that their exercise of discretion should only be interfered with "in the clearest case of a misuse of judicial discretion" (see Microfibres Inc. v. Annabel Canada Inc. (2001), 16 C.P.R. (4th) 12 at 15 - 17 (F.C.T.D.)).

¶ 32 Apotex submits that while the applicants boldly state that the Prothonotary was clearly wrong, they do not address the proper test, namely, whether the Prothonotary's exercise of discretion was judicial. Apotex states that the Prothonotary exercised her discretion not only judicially, but correctly.

¶ 33 Apotex submits that after the Prothonotary properly considered each element of the test for filing additional evidence, she correctly determined that the Sherman affidavit was relevant to the matters at issue, that it would provide assistance to the hearing judge and that filing it would serve the interests of justice. Apotex relies on Rules 3, 8, 312 and 84(2) of the Federal Court Rules, 1998, S.O.R./98-106 in support of its position.

¶ 34 Apotex submits that its NOA speaks to what its product monograph "will" mention and that the product monograph referred to in the NOA is the revised product monograph, i.e. the final product monograph that will be in effect when the product is approved.

¶ 35 Apotex argues that it is not taking a different position by submitting the revised product monograph. After stating the references to "increases in bioavailability" and "concomitant administration" were entirely irrelevant to the uses for which Apo-Omeprazole approval was sought and were scientific statements required to be included, Apotex deleted the references so as to remove any doubt regarding the product's claimed uses. Apotex submits there is nothing inconsistent in the stance it has taken during this proceeding and that the applicant's arguments regarding altered litigation strategy are without merit.

¶ 36 Apotex also submits that it is in the interests of justice that the proceeding be conducted on the basis of the most complete and up-to-date evidentiary record, which includes the revised product monograph now on file with the Minister.

Analysis and Decision

Standard of Review

¶ 37 The standard of review to be applied to a prothonotary's decision is stated in Aqua-Gem, supra. MacGuigan J.A. stated at pages 462 to 464:

I also agree with the Chief Justice in part as to the standard of review to be applied by a motions judge to a discretionary decision of a prothonotary. Following in particular Lord Wright in Evans v. Bartlam, [1937] A.C. 473 (H.L.) at page 484, and Lacourciere J.A. in Stoicevski v. Casement (1983), 43 O.R. (2d) 436 (Div. Ct.), discretionary orders of prothonotaries ought not to be disturbed on appeal to a judge unless:

(a) they are clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts, or
(b) they raise questions vital to the final issue of the case.

Where such discretionary orders are clearly wrong in that the prothonotary has fallen into error of law (a concept in which I include a discretion based upon a wrong principle or upon a misapprehension of the facts), or where they raise questions vital to the final issue of the case, a judge ought to exercise his own discretion de novo.
In Canada v. "Jala Godavari" (The) (1991), 40 C.P.R. (3d) 127 (F.C.A.), this Court in an obiter dictum stated the rule the other way around, seeking to emphasize the necessity for the exercise of the Judge's discretion de novo, in contradistinction to the view that was at that time gaining acceptance in the Trial Division that the prothonotary's discretion should be followed unless he had committed error of law. Jala Godavari should not, I think, be read as meaning that the prothonotary's discretion should never be respected, but rather that it is subject to an overriding discretion by a judge where the question involved is vital to the final issue of the case. (Error of law is, of course, always a reason for intervention by a judge, and is not in any way in controversy).
Now, in the case at bar, what kind of interlocutory order was in question? The appellant urged this Court to follow Stoicevski, but was unable to explain in argument why the prothonotary's decision here was not on a question vital to the final issue of the case. The formulations both of Lord Wright and Lacourciere J.A. underline the contrast between "routine matters of pleading" (Lord Wright) and "a routine amendment to a pleading" (Lacourciere J.A.) [italics added] and questions vital to the final issue of the case, i.e., to its final resolution.
The question before the prothonotary in the case at bar can be considered interlocutory only because the prothonotary decided it in favour of the appellant. If he had decided it for the respondent, it would itself have been a final decision of the case: A-G of Canada v. S.F. Enterprises Inc. et al. (1990), 90 DTC 6195 (F.C.A.) at pages 6197-6198; Ainsworth v. Bickersteth et al., [1947] O.R. 525 (C.A.). It seems to me that a decision which can thus be either interlocutory or final depending on how it is decided, even if interlocutory because of the result, must nevertheless be considered vital to the final resolution of the case. Another way of putting the matter would be to say that for the test as to relevance to the final issue of the case, the issue to be decided should be looked to before the question is answered by the prothonotary, whereas that as to whether it is interlocutory or final (which is purely a pro forma matter) should be put after the prothonotary's decision. Any other approach, it seems to me, would reduce the more substantial question of "vital to the issue of the case" to the merely procedural issue of interlocutory or final, and preserve all interlocutory rulings from attack (except in relation to errors of law).

The issue decided by the Prothonotary in this case was whether to grant Apotex leave to file the affidavit of Dr. Sherman which appended a revised product monograph that differed from the original product monograph referenced in Apotex' NOA. Apotex had defended the original product monograph by obtaining an order for leave to file the affidavit evidence of Kenneth Brown and defending the applicants' appeals of that order to both the Federal Court Trial Division (as it was then called) and the Federal Court of Appeal. Since the Prothonotary's decision does not raise questions vital to the final issue of this case, I am of the view that I should exercise my discretion de novo only if the Prothonotary was clearly wrong, in the sense of being based upon a wrong principle or upon a misapprehension of the facts.

¶ 38 Rules 3, 8, 51(1), 84(1) and 312 of the Federal Court Rules, 1998 read as follows:

3. These Rules shall be interpreted and applied so as to secure the just, most expeditious and

least expensive determination of every proceeding on its merits.

8. (1) On motion, the Court may extend or abridge a period provided by these Rules or fixed by an order.

(2) A motion for an extension of time may be brought before or after the end of the period sought to be extended.

(3) Unless the Court directs otherwise, a motion to the Court of Appeal for an extension of time shall be brought in accordance with rule 369.

51. (1) An order of a prothonotary may be appealed by a motion to a judge of the Trial Division.

84. (1) A party seeking to cross-examine the deponent of an affidavit filed in a motion or application shall not do so until the party has served on all other parties every affidavit on which the party intends to rely in the motion or application, except with the consent of all other parties or with leave of the Court.

312. With leave of the Court, a party may

(a) file affidavits additional to those provided for in rules 306 and 307;
(b) conduct cross-examinations on affidavits additional to those provided for in rule 308; or
(c) file a supplementary record.

* * *

3. Les présentes règles sont interprétées et appliquées de façon à permettre d'apporter une solution au litige qui soit juste et la plus expéditive et économique possible.

8. (1) La Cour peut, sur requête, proroger ou abréger tout délai prévu par les présentes règles ou fixé par ordonnance.

(2) La requête visant la prorogation d'un délai peut être présentée avant ou après l'expiration du délai.

(3) Sauf directives contraires de la Cour, la requête visant la prorogation d'un délai qui est présentée à la Cour d'appel doit l'être selon la règle 369.

51. (1) L'ordonnance du protonotaire peut être portée en appel par voie de requête présentée à un juge de la Section de première instance.

84. (1) Une partie ne peut contre-interroger l'auteur d'un affidavit déposé dans le cadre d'une requête ou d'une demande à moins d'avoir signifié aux autres parties chaque affidavit qu'elle entend invoquer dans le cadre de celle-ci, sauf avec le consentement des autres parties ou l'autorisation de la Cour.

312. Une partie peut, avec l'autorisation de la Cour:

a) déposer des affidavits complémentaires en plus de ceux visés aux règles 306 et 307;
b) effectuer des contre-interrogatoires au sujet des affidavits en plus de ceux visés à la règle 308;
c) déposer un dossier complémentaire

¶ 39 Lemieux J., of this Court, discussed the factors to be considered when applying Rule 84(2) in Salton Appliances (1985) Corp. v. Salton Inc. (2000), 4 C.P.R. (4th) 491 (F.C.T.D.), at page 497:

> I am satisfied Rule 84(2), read in its context and against the history of the former Rules, is designed to deal with matters that arise during cross-examination for which there is a need to address by way of further affidavit with leave of the Court.
> The cases decided by this Court and by the Ontario Courts recognize that relevancy of the proposed affidavit, absence of prejudice to the opposing party, assistance to the Court, and the overall interest of justice are relevant factors to be taken into account in deciding whether leave to file a further affidavit should be granted. (See Hiram Walker Consumers Home Ltd. v. Consumers Distributing Company et al., [1981] F.C.J. No. 813, court file T-4539-80; Gingras v. Canadian Security and

> Intelligence Service et al. (1987), 19 C.P.R. (3d) 283; Bayer AG et al. v. Canada (Minister of Health & Welfare) et al. (1994), 83 F.T.R. 318, Eli Lilly et al. v. Apotex Inc. et al. (1997), 144 F.T.R. 189. As I view the law on the point in this Court there is the additional requirement as to the non-availability of the material in the proposed affidavit prior to cross-examination; a supplementary affidavit cannot be a substitute for putting available information to a deponent on cross-examination. A further affidavit is not designed to repair answers which cross-examining counsel wishes he did not get. Moreover, normally, parties are obliged to disclose all available information before cross-examination so as to avoid splitting the evidence.

This Court has held that the same factors discussed in Salton Appliances, supra, apply to the filing of additional affidavits pursuant to Rule 312 (see Marshall v. Canada (Solicitor General) (2002), 216 F.T.R. 85, 2002 FCT 168).

Is it in the Interests of Justice to Allow the Filing of the Supplementary Sherman Affidavit?

¶ 40 As can be seen from this history of the matter (outlined at paragraphs 1 to 22 of these reasons), Apotex was relying on the original product monograph until it sent the revised product monograph to the applicants by letter dated May 9, 2003. By that point in the proceeding, the parties had filed their affidavits, carried out cross-examinations and the applicants had filed both their application record and their memorandum of fact and law on the basis of the original product monograph. In fact, Apotex obtained leave to file the affidavit of Kenneth Brown which stated that the original product monograph's references to increased bioavailability and concomitant use were scientific information required to be included by Health Canada. At this late stage of the application, Apotex was still supporting its use of the original product monograph. It should also be noted that during the applicants' appeals of Apotex being granted leave to file the Brown affidavit, the original product monograph was the product monograph put before the Courts.

¶ 41 I cannot accept that it is in the interests of justice to allow a party to proceed this far into an application and then to change its litigation approach. Applications for prohibition under section 6 of the Regulations are meant to be dealt with in an expeditious manner (see A.B. Hassle v. Canada (Minister of National Health and Welfare) (2000), 7 C.P.R. (4th) 272 (F.C.A.) at paragraph 27). It was only after the cross-examination of Mr. Brown on his affidavit and the cross-examination of Dr. Burke on her reply affidavit that Apotex decided to put forward the revised product monograph.

¶ 42 I am therefore of the view that the Prothonotary was clearly wrong in her decision, since Apotex has not met the requirements for leave being granted to file the supplementary affidavit of Dr. Sherman. It is not in the overall interests of justice that leave be granted to file this affidavit due to Apotex' approach of using the original product monograph and supporting it (as outlined in paragraph 41 of this decision) until just before the hearing date.

¶ 43 As Apotex has not met at least one of the requirements for obtaining leave to file the further affidavit, I need not discuss the other requirements for granting leave or the other arguments raised by the applicants on this appeal.

¶ 44 I am satisfied that the Prothonotary, by granting leave, exercised her discretion based upon a wrong principle thus causing her decision to be clearly wrong.

¶ 45 The motion of the applicants is allowed and the decision of the Prothonotary is set aside.

¶ 46 The applicants shall have their costs of the motion.

ORDER

¶ 47 IT IS ORDERED that:

1. The motion of the applicants is allowed.
2. The applicants shall have their costs of the motion.

O'KEEFE J.

QL UPDATE: 20040128
cp/e/qw/qlspg

# TAB 15

Indexed as:

# Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)

Roland Lapointe, appellant;
v.
Domtar Inc., respondent, and
Commission d'appel en matière de lésions professionnelles, mis en cause, and
Commission de la santé et de la sécurité du travail, mis en cause.

[1993] 2 S.C.R. 756
[1993] S.C.J. No. 75
File No.: 22717

**Supreme Court of Canada**

1993: April 1 / 1993: June 30.

**Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Gonthier, Cory, McLachlin and Iacobucci JJ.**

**ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC**
**(95 paras.)**

*Workers' compensation — Income replacement indemnity — Commission d'appel en matière de lésions professionnelles — Interpretation of s. 60 of the Act respecting Industrial Accidents and Occupational Diseases — Evocation — Standard of review applicable to Commission's decisions — Whether Commission's interpretation patently unreasonable — Whether in the absence of a patently unreasonable error conflicting decisions by two administrative tribunals may give rise to judicial review — Act respecting Industrial Accidents and Occupational Diseases, R.S.Q., c. A-3.001, s. 60.*

*Judicial review — Standard of review — Appellate administrative tribunal — Workers' compensation — Standard of review applicable to decisions of Commission d'appel en matière de lésions professionnelles.*

*Judicial review — Basis for judicial intervention — Conflicting decisions by two administrative tribunals — Whether jurisprudential conflict constitutes an independent basis for judicial review.*

[page757]

The appellant, an employee of the respondent company, was injured in an industrial accident three days before the temporary closure of the plant. Citing the closure, the company refused to compensate the employee for more than those three days. The Commission de la santé et de la sécurité du travail and the Bureau de révision paritaire affirmed the company's decision and dismissed the complaint of the employee, who argued that under s. 60 of the Act respecting Industrial Accidents and Occupational Diseases ("A.I.A.O.D.") he was entitled to an income replacement indemnity covering the entire period of his disability, that is a period of 14 days. On appeal, the Commission d'appel en matière de lésions professionnelles ("CALP") found for the employee and ordered the company to pay him, pursuant to s. 60, 90 percent of his net salary or wages for each day or part of a day he would normally have worked according to his usual work schedule, regardless of the plant closure. The Superior Court dismissed the company's motion in evocation

because, in its view, the CALP had acted within its jurisdiction and its decision was not unreasonable. The Court of Appeal reversed this judgment and granted the application for evocation. While of the opinion that the CALP's decision was not patently unreasonable, the court nevertheless observed that with respect to the interpretation of s. 60 it was in the interest of justice to resolve at once the conflicting decisions of the CALP and the Labour Court, which has jurisdiction over penal proceedings under the A.I.A.O.D. Abandoning traditional curial deference, the court consequently intervened to resolve the unstable situation and held that under s. 60 an employer is not required to pay a salary or wages to an employee injured in an industrial accident when there is a plant closure. This appeal is to determine whether, in the absence of a patently unreasonable error, conflicting decisions by administrative tribunals may give rise to judicial review.

**Held:** The appeal should be allowed.

Strictly speaking, the interpretation of s. 60 is within the CALP's jurisdiction. A functional analysis of the A.I.A.O.D. clearly demonstrates that the legislature intended to give this tribunal the power to make a final ruling on the meaning and scope of s. 60. As an appellate administrative tribunal, the CALP hears and disposes exclusively of all appeals brought under the A.I.A.O.D. and its members have all the powers necessary for the exercise of their jurisdiction, including the power to rule on any question of law or of fact. Protected by a full privative clause, CALP decisions are final and without appeal and every person contemplated [page758] in the decision must comply with them without delay. Further, s. 60 is not only one of the legislative provisions on which the CALP has the express power to rule, it employs concepts which are at the core of its area of expertise. The interpretation of s. 60 by the CALP is thus a function directly relating to the objective sought by the legislature. Since the interpretation of s. 60 is within the tribunal's jurisdiction, the standard of review applicable is whether the decision is patently unreasonable.

The CALP's decision is not patently unreasonable. It can be rationally defended both on the facts and on the law. While the CALP may have overlooked several important aspects which are peculiar to the general system of compensation, this is not a basis for judicial intervention as this would simply be an error of law within jurisdiction.

It is doubtful whether there is a conflict between the decisions of the CALP and the Labour Court with respect to the interpretation of s. 60. For one thing, the Court of Appeal's conclusion on this point is based on a single judgment of the Labour Court in a penal matter and fails to take into account the numerous decisions rendered by the CALP, which has always adopted the same interpretation. The situation created by an isolated decision at variance with a consistent line of authority cannot a priori be characterized as a true "jurisprudential conflict". Furthermore, these two bodies interpreted the same legislative provision, but in the particular context of each one's jurisdiction, in the one case a penal one and, in the other, an administrative one. Since these are matters where the ground rules are completely different, a disagreement on the interpretation of a legislative provision does not necessarily place the CALP and the Labour Court in a jurisprudential conflict. In addition, it is wrong to suggest that the CALP's interpretation leads to a dead end as there exists, parallel to the penal remedy, a civil remedy (s. 429 A.I.A.O.D.). Finally, the allegedly irreconcilable "conflict" between these two tribunals is mitigated by the fact that the Labour Court's decisions, unlike those of the CALP, can be appealed to the Superior Court under the Code of Penal Procedure.

Assuming however, without deciding the point, that the CALP's interpretation and that of the Labour Court create a jurisprudential conflict, such a conflict does not constitute an independent basis for judicial review. When decisions made within jurisdiction are not patently unreasonable, the principles underlying curial [page759] deference should prevail. Consistency in the application of the law is a valid objective but is not an absolute one. This objective must be pursued in keeping with the decision-making autonomy and independence of members of the administrative bodies. Inquiring into a case of decision-making inconsistency and solving it where there is no patently unreasonable error means altering the institutional relationship between administrative tribunals and courts. Such intervention by a court of law risks eliminating the decision-making autonomy, expertise and effectiveness of the administrative tribunal and risks, at the same time, thwarting the original intention of the legislature, which has already determined that the administrative tribunal is the one in the best position to rule on the disputed decision. Administrative tribunals have the authority to err within their area of expertise, and a lack of unanimity is the price to pay for the decision-making freedom and independence given to the members of these tribunals. Recognizing the existence of a conflict in decisions as an independent basis for judicial review would constitute a serious undermining of those principles given that administrative tribunals and the legislature have the power to resolve such conflicts themselves.

**Cases Cited**

Dis*approved*: Produits Pétro-Canada Inc. v. Moalli, [1987] R.J.Q. 261; *considered*: Re Service Employees International Union, Local 204 and Broadway Manor Nursing Home (1984), 48 O.R. (2d) 225; United Steelworkers of America, Local 14097 v. Franks (1990), 75 O.R. (2d) 382; *referred to*: Tousignant et Hawker Siddeley Canada Inc., [1986] C.A.L.P. 48; Commission de la santé et de la sécurité du travail v. BG Chéco International Ltée, [1991] T.T. 405; Dayco (Canada) Ltd. v. CAW-Canada, [1993] 2 S.C.R. 230; Canada (Attorney General) v. Public Service Alliance of Canada, [1993] 1 S.C.R. 941; Université du Québec à Trois-Rivières v. Larocque, [1993] 1 S.C.R. 471; Canada (Attorney General) v. Public Service Alliance of Canada, [1991] 1 S.C.R. 614; CAIMAW v. Paccar of Canada Ltd., [1989] 2 S.C.R. 983; U.E.S., Local 298 v. Bibeault, [1988] 2 S.C.R. 1048; Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp., [1979] 2 S.C.R. 227; Canada Labour Relations Board v. Halifax Longshoremen's Association, Local 269, [1983] 1 S.C.R. 245; National Corn Growers Assn. v. Canada (Import Tribunal), [1990] 2 S.C.R. 1324; United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd., [1993] 2 S.C.R. 316; [page760] Lester (W.W.) (1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740, [1990] 3 S.C.R. 644; Bell Canada v. Canada (Canadian Radio-television and Telecommunications Commission), [1989] 1 S.C.R. 1722; University of British Columbia v. Berg, [1993] 2 S.C.R. 353; Canada (Attorney General) v. Mossop, [1993] 1 S.C.R. 554; Douglas/Kwantlen Faculty Assn. v. Douglas College, [1990] 3 S.C.R. 570; Cuddy Chicks Ltd. v. Ontario (Labour Relations Board), [1991] 2 S.C.R. 5; Tétreault-Gadoury v. Canada (Employment and Immigration Commission), [1991] 2 S.C.R. 22; Desmeules et Entreprises B.L.H. Inc., [1986] C.A.L.P. 66; Béland et Mines Wabush, C.A.L.P., No. 00138-09-8604, November 27, 1986; Collins & Aikman Inc. et Dansereau, [1986] C.A.L.P. 134; Lambert et Vic Métal Corp., [1986] C.A.L.P. 147; Létourneau et Électricité Kingston Inc., [1986] C.A.L.P. 241; Hydro-Québec v. Conseil des services essentiels (1991), 41 Q.A.C. 292; Syndicat canadien de la Fonction publique v. Commission des écoles catholiques de Québec, J.E. 90-176; Syndicat des communications graphiques, local 509M v. Auclair, [1990] R.J.Q. 334; IWA v. Consolidated-Bathurst Packaging Ltd., [1990] 1 S.C.R. 282; Tremblay v. Quebec (Commission des affaires sociales), [1992] 1 S.C.R. 952.

**Statutes and Regulations Cited**

Act respecting Industrial Accidents and Occupational Diseases, R.S.Q., c. A-3.001, ss. 1, 44, 60, 349, 350, 358 [am. 1992, c. 11, s. 31], 373 et seq., 391, 396 [am. 1986, c. 58, s. 114], 397, 400, 405, 406, 407, 409, 429, 458 [am. 1990, c. 4, s. 35], 473 [am. idem, s. 38], 589.
Act respecting Occupational Health and Safety, R.S.Q., c. S-2.1.
Code of Penal Procedure, R.S.Q., c. C-25.1.
Labour Code, R.S.Q., c. C-27, s. 112.

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[page761]

Morissette, Yves-Marie. "Le contrôle de la compétence d'attribution: thèse, antithèse et synthèse" (1986), 16 R.D.U.S. 591.
Mullan, David J. "Natural Justice and Fairness -- Substantive as well as Procedural Standards for the Review of Administrative Decision-Making?" (1982), 27 McGill L.J. 250.
Ouellette, Yves. "Le contrôle judiciaire des conflits jurisprudentiels au sein des organismes administratifs: une jurisprudence inconstante?" (1990), 50 R. du B. 753.
Ouimet, Hélène. "Commentaires sur l'affaire Produits Pétro-Canada c. Moalli" (1987), 47 R. du B. 852.

APPEAL from a judgment of the Quebec Court of Appeal, [1991] R.J.Q. 2438, 39 Q.A.C. 304, reversing a judgment of the Superior Court, [1987] C.A.L.P. 254, dismissing a motion in evocation with respect to a decision of the Commission d'appel en matière de lésions professionnelles, [1986] C.A.L.P. 116. Appeal allowed.

Laurent Roy, for the appellant.
René Delorme and Martin Roy, for the respondent.
Claire Delisle, for the mis en cause CALP.
Jean-Claude Paquet, Louise Chayer and Berthi Fillion, for the mis en cause CSST.
Solicitors for the appellant: Trudel, Nadeau, Lesage, Clearly, Larivière & Associés, Montréal.
Solicitors for the respondent: Desjardins, Ducharme, Stein, Monast, Québec.
Solicitors for the mis en cause CALP: Levasseur, Delisle, Morel, Québec.
Solicitors for the mis en cause CSST: Chayer, Panneton, Lessard, Québec.

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The judgment of the Court was delivered by

¶ 1 **L'HEUREUX-DUBÉ J.**:— This appeal raises questions which lie at the core of the institutional relationship between courts of law and administrative tribunals. The issue is whether, in the absence of a patently unreasonable error, conflicting decisions by administrative tribunals may give rise to judicial review. The provision at issue here (s. 60 of the Act respecting Industrial Accidents and Occupational Diseases, R.S.Q., c. A-3.001 ("A.I.A.O.D.")) reads as follows:

> 60. The employer of a worker at the time he suffers an employment injury shall pay him, if he becomes unable to carry on his employment by reason of his injury, 90% of his net salary or wages for each day or part of a day the worker would normally have worked had he not [page762] been disabled, for fourteen full days following the beginning of his disability.
>
> The employer shall pay the salary or wages referred to in the first paragraph to the worker at the time he would normally have paid them to him if the worker has furnished the medical certificate contemplated in section 199.
>
> The salary or wages referred to in the first paragraph constitute an income replacement indemnity to which the worker is entitled for fourteen full days following the commencement of his disability and the Commission shall reimburse the amount thereof to the employer within fourteen days of receipt of his claim, failing which it shall pay him interest determined in accordance with section 323 from the first day it is late.
>
> If the Commission subsequently decides that the worker is not entitled to the whole or part of the indemnity, the Commission shall claim reimbursement from the worker in accordance with Division I of Chapter XIII.

I - Facts

¶ 2 At about 11:30 a.m. on December 17, 1985, the appellant, a joiner permanently employed by the respondent Domtar Inc., was injured in an industrial accident. As a consequence of his employment injury, he was unable to carry on his employment from December 18, 1985 until January 2, 1986. In the days preceding the accident, Domtar had planned and announced the temporary closure of its newsprint plant for the period from 4 p.m. on December 21, 1985 to 8 a.m. on January 2, 1986.

¶ 3 Domtar compensated the appellant for the day of December 18 and for the days of December 19 and 20. Citing the temporary closure of the plant, Domtar refused to compensate the appellant for more than those three days. On January 6, 1986, in a complaint submitted to the mis en cause the Commission de la santé et de la sécurité du travail ("CSST"), the appellant argued that he was entitled to an income replacement indemnity covering the entire period of his disability, that is a period of 14 days ending on January 2, 1986. On January 24, 1986, the CSST dismissed the complaint and confirmed that Domtar had paid the correct amount. On January 30, 1986, the appellant asked the compensation [page763] branch of the CSST to issue a payment order against Domtar. On February 10, 1986, the

compensation branch affirmed the CSST's original decision and denied the application for an order.

¶ 4 On February 21, 1986, the appellant filed an application for review with the Bureau de révision paritaire ("BRP") of the CSST. On April 10, 1986, a majority of the BRP affirmed the original decision. The appellant then appealed to the mis en cause the Commission d'appel en matière de lésions professionnelles ("CALP"). On November 27, 1986, the CALP found that on account of his employment injury and in accordance with s. 60 A.I.A.O.D., the appellant was entitled to 90 percent of his net salary or wages for each day or part of a day on which, according to his usual work schedule, he would have worked between December 22, 1985, the date on which the plant closed, and January 1, 1986. The CALP accordingly reversed the decision of the BRP and ordered Domtar to pay the appellant this amount.

¶ 5 On December 23, 1986 Domtar brought a motion in evocation to the Quebec Superior Court from the decision of the CALP. By judgment dated June 30, 1987, the motion in evocation was dismissed. This decision was appealed to the Quebec Court of Appeal. By a unanimous judgment dated September 11, 1991, that court allowed the appeal, granted the motion in evocation and reversed the CALP decision.

II - Legislation

¶ 6 The mechanism set up by the legislature to implement the A.I.A.O.D. comprises several decision-making bodies.

¶ 7 The CSST, established by the Act respecting Occupational Health and Safety, R.S.Q., c. S-2.1, is the body responsible for administering the A.I.A.O.D. (s. 589). Section 349 A.I.A.O.D. gives it jurisdiction to decide any question contemplated by the Act:

> 349. The Commission has exclusive jurisdiction to decide any matter or question contemplated in this Act [page764] unless a special provision gives the jurisdiction to another person or agency.

¶ 8 Decisions of the CSST are subject to the following privative clause:

> 350. Except on a question of jurisdiction, no proceedings under article 33 of the Code of Civil Procedure (chapter C-25) nor any extraordinary recourse within the meaning of the said Code may be taken, nor any provisional remedy be ordered against the Commission by reason of an act performed or decision rendered pursuant to an Act under its administration.

¶ 9 The BRP is an intermediary level of jurisdiction. A person aggrieved by a decision of the CSST may ask this body to review it. Section 358 A.I.A.O.D. reads as follows:

> 358. A person who believes he has been wronged by a decision rendered by the Commission under this Act may, within 30 days of notification of the decision, apply for review thereof by a review office established under the Act respecting occupational health and safety (chapter S-2.1).
>
> However, a person may not apply for the review of any matter of a medical nature in respect of which the Commission is bound under section 224 or of any decision of the Commission rendered under section 256 or the first paragraph of section 365.2, or for the review of a refusal by the Commission to reconsider its decision pursuant to the first paragraph of section 365.

¶ 10 BRP decisions are not protected by a privative clause.

¶ 11 The CALP is the body to which BRP decisions may be appealed. Under s. 397 A.I.A.O.D., the CALP has exclusive jurisdiction to hear and dispose of appeals brought under ss. 37.3 and 193 of the Act respecting Occupational Health and Safety and the A.I.A.O.D. Section 400 further provides:

400. The board of appeal may confirm the decision or the order brought before it; it may also quash the decision or the order and shall in that case render the decision or make the order that should have been given initially.

[page765]

¶ 12 CALP decisions are final and not subject to appeal and they are protected by a full privative clause:

405. Every decision of the board of appeal must be in writing and substantiated, signed and notified to the parties and to the Commission.

Decisions are final and without appeal and every person contemplated in the decision shall comply therewith without delay.

409. Except on a question of jurisdiction, no proceedings under article 33 of the Code of Civil Procedure (chapter C-25) nor any extraordinary recourse within the meaning of the said Code may be taken, nor any provisional remedy be ordered against the board of appeal or one of its commissioners acting in his official capacity.

A judge of the Court of Appeal may annul summarily, upon a motion, any action granted, any writ, order or injunction issued or granted contrary to this section.

¶ 13 The Labour Court was established by the Quebec Labour Code, R.S.Q., c. C-27, s. 112. Penal proceedings under the A.I.A.O.D. are brought before it. Section 473 reads as follows:

473. Proceedings pursuant to this chapter are instituted before the Labour Court created by the Labour Code (chapter C-27) and sections 118, 121, 124 to 128 and 133 to 136 of that Code apply.

No proceedings may be brought except by the Commission or by a person generally or specially designated by it for that purpose within one year after the Commission becomes aware of the offence.

¶ 14 A breach of s. 60 A.I.A.O.D. is dealt with in s. 458:

458. Every employer who contravenes the first paragraph of section 32 or 33, section 59, the first or second paragraph of section 60 ... is guilty of an offence and liable to a fine of not less than $500 nor more than $1 000 in the case of a natural person and to a fine of not less than $1 000 nor more than $2 000 in the case of a legal person.

¶ 15 Decisions of the Labour Court may be appealed to the Superior Court under the Code of Penal Procedure, R.S.Q., c. C-25.1.

[page766]

III - Judgments

Bureau de révision paritaire, [1985-86] B.R.P. 505

¶ 16 The majority summed up the issue as follows (at p. 506):

[TRANSLATION] The issue raised before the Bureau de révision paritaire is whether the worker was entitled to more than two days' compensation for his period of disability from December

19, 1985 to January 2, 1986.

¶ 17 It added (at p. 507):

> [TRANSLATION] In order to answer the question raised it must be determined whether, had he not been disabled, the worker would normally have worked during the 14-day period following the beginning of his disability. Specifically, if the worker had not suffered the industrial accident on December 17, 1985, would he have worked during that 14-day period?
>
> In our opinion, the closure of the plant must be regarded as normal in this case as it was scheduled, and even if the worker had not suffered an accident he would only have received two days of his wages, that is up to December 20, 1985, as indeed most of the workers did. [Emphasis in original.]

¶ 18 In the absence of evidence establishing that the appellant intended to use his seniority right during the layoff period to bump another employee with less seniority, the majority concluded that the application should be dismissed (at p. 507):

> [TRANSLATION] We accordingly believe that had he not been disabled, and based on the evidence presented, Mr. Lapointe would normally have worked only 2 days, namely December 19 and 20, during the 14-day period following the beginning of his disability.
>
> The original decision is accordingly upheld.

¶ 19 In the opinion of the dissenting member, Mr. Tardif, there was no doubt that the appellant intended to use his seniority right. Being of the view that, had the appellant not been disabled, this seniority right would have enabled him to work during the layoff period, Mr. Tardif would have overturned the CSST's decision and ordered Domtar to compensate the appellant for each day or part of a day he would have worked during the [page767] 14 days following the beginning of his disability. (The dissenting member's reasons are not reported in the B.R.P.)

Commission d'appel en matière de lésions professionnelles, [1986] C.A.L.P. 116

¶ 20 After reviewing the wording and purpose of s. 60 A.I.A.O.D., the CALP found that the expression "would normally have worked" could not be separated from the words "had he not been disabled" which immediately follow it. Accordingly, it considered that, in interpreting this provision, no account whatever could be taken of factors or circumstances extrinsic to the worker's inability to carry on his employment by reason of his employment injury. The CALP referred to its own decision in Tousignant et Hawker Siddeley Canada Inc., [1986] C.A.L.P. 48, to the effect that the suspension or breach of an employment contract by a layoff has no effect on the worker's inability to carry on his employment as a result of an employment injury. Applying these principles to the facts of this case, it added (at p. 119):

> [TRANSLATION] In the present case, the appellant was employed by the party concerned on December 17, 1985, the date on which he suffered an employment injury. By reason of this employment injury the appellant was unable to carry on his employment until January 2, 1986.
>
> Under s. 60 of the Act respecting Industrial Accidents and Occupational Diseases, the party concerned was therefore obliged to pay the appellant, regardless of the plant closure, 90% of his net salary or wages for each day or part of a day he would normally have worked, according to his usual work schedule, had it not been for his inability to carry on his employment by reason of his injury for the first 14 full days following the beginning of that disability.

¶ 21 It concluded that Domtar should pay the appellant 90 percent of his net salary or wages for each day or part of a day he would normally have worked according to his usual work schedule, regardless of the plant closure.

[page768]

Superior Court, [1987] C.A.L.P. 254

¶ 22 Summarizing the CALP's conclusion in this case and in Tousignant et Hawker Siddeley Canada Inc., supra, Masson J. recalled the purpose and wording of the A.I.A.O.D. Even if the CALP's decision was wrong, he was of the view that the CALP had nevertheless acted within its general jurisdiction (at p. 257):

> [TRANSLATION] We are of the view that, by acting in this way, the respondent Commission d'appel carried out one of the duties imposed on it by law and acted within its general jurisdiction.
> The decision of the Commission d'appel may be wrong, but it was nonetheless made within the limits of its jurisdiction.

¶ 23 Adding that the CALP's decision was not unreasonable, Masson J. concluded that the CALP had not exceeded its jurisdiction and he accordingly dismissed the motion in evocation.

Court of Appeal, [1991] R.J.Q. 2438

Mailhot J.A.

¶ 24 Mailhot J.A. first reviewed ss. 405 and 409 A.I.A.O.D., which exclude, respectively, all appeals from decisions of the CALP and extraordinary remedies, except on a question of jurisdiction. She noted that, for the CALP's decision to be reversed, it had to be shown that the CALP had [TRANSLATION] "exceeded its jurisdiction or given the provision in question an interpretation so unreasonable that it could not be rationally supported on the relevant legislation" (p. 2441).

¶ 25 Recalling the wording of s. 60 A.I.A.O.D. and the arguments of the parties, Mailhot J.A. considered that the application of the patently unreasonable error test would not satisfactorily dispose of the case. In this regard, she cited the Labour Court's decision in Commission de la santé et de la sécurité du travail v. BG Chéco International Ltée, [1991] T.T. 405, where it was held that s. 60 raised a reasonable, significant and insurmountable doubt as to an employer's duty in the event of a layoff occurring within the 14-day period mentioned in that provision. Mailhot J.A. also referred [page769] to the Court of Appeal's decision in Produits Pétro-Canada Inc. v. Moalli, [1987] R.J.Q. 261, and observed that it was in the interest of justice for the conflict to be resolved at once, regardless of traditional curial deference, because such deference, while ordinarily leading to dismissal of the application for evocation, did not resolve the unstable situation. Although there were two possibilities which could be rationally defended, in her opinion the ideal of justice, which promotes the rule of law, was not really served. She therefore felt it desirable that the intention of the legislature should prevail.

¶ 26 Concluding that the issue could only be resolved by the exception indicated in Moalli, supra, Mailhot J.A. noted that the legislative intent was not to treat injured workers differently from other workers as regards the first 14 days covered by s. 60. In her view, the words "for each day or part of a day the worker would normally have worked" are intended to ensure that the injured person is treated like other workers, in other words, that he is entitled to the salary or wages to which he would have been entitled if the employer had work to give him and could do so, if these days were part of his regular schedule or if his contract was still in effect. Finally, Mailhot J.A. noted that this interpretation is fairer to everyone and is consistent with the other provisions of the A.I.A.O.D. She concluded that, as there is no obligation to pay a salary or wages when there is a plant closure, strike, lockout, layoff, unpaid leave and so on, there can be no obligation on the employer to pay 90 percent of the net salary or wages during these periods.

¶ 27 Mailhot J.A. accordingly would have allowed the appeal and granted the application for evocation.

Baudouin J.A. (concurring)

¶ 28 While concurring in Mailhot J.A.'s conclusion, Baudouin J.A. was of the view that, even though the wording of s. 60 may be open to several interpretations, [page770] it does not automatically follow that no interpretation can ever be patently unreasonable. He disposed of the appeal in the same way as Mailhot J.A. (at p. 2446):

> [TRANSLATION] Like my colleague, I am of the view in this case that the function of this Court is to resolve the conflict between the two administrative agencies, a conflict which creates

> uncertainty and is not in the interests of effective justice. Accordingly, without necessarily finding that the interpretation given by the Commission d'appel is patently unreasonable (even though it seems illogical to me, given a rational interpretation of the Act read as a whole, and inconsistent with the resulting philosophy), I believe that this situation is identical to that confronting this Court in Produits Pétro-Canada Inc. v. Moalli. [Emphasis in original.]

IV - Issues

¶ 29 As I said at the outset, this appeal raises questions which lie at the core of the institutional relationship between courts of law and administrative tribunals: was the CALP's decision patently unreasonable? If so, it is open to judicial review. If not, does the fact that there were, at least apparently, divergent interpretations of the same legislative provision by two administrative tribunals give rise to judicial review?

V - Analysis

¶ 30 While the first question raises issues which this Court has already had an opportunity to decide on several occasions, the second raises a problem which has been the subject of some controversy. A review of the principles laid down by this Court in recent years will, first, provide the background against which this appeal must be analysed. This review will indicate the principles underlying the standard of review applicable to the CALP's decision and clarify the real issues presented here by the Court of Appeal's intervention.

[page771]

A. Applicable Standard of Review

¶ 31 Although the Court of Appeal recognized that, strictly speaking, the interpretation of s. 60 was within the CALP's jurisdiction, a functional analysis of the Act, however brief, seems desirable if not essential to decipher the legislative intent (see Dayco (Canada) Ltd. v. CAW-Canada, [1993] 2 S.C.R. 230, at p. 258 (per La Forest J.); Canada (Attorney General) v. Public Service Alliance of Canada, [1993] 1 S.C.R. 941 ("PSAC No. 2"), at pp. 965 (per Cory J.) and 977 (per L'Heureux-Dubé J.); Université du Québec à Trois-Rivières v. Larocque, [1993] 1 S.C.R. 471, at pp. 485-86 (per Lamer C.J.); Canada (Attorney General) v. Public Service Alliance of Canada, [1991] 1 S.C.R. 614 ("PSAC No. 1"), at pp. 628 (per Sopinka J.) and 657 (per Cory J.); CAIMAW v. Paccar of Canada Ltd., [1989] 2 S.C.R. 983, at p. 1002, and U.E.S., Local 298 v. Bibeault, [1988] 2 S.C.R. 1048, at p. 1088). Determining the legislative intent as to the standard of review applicable to the decision of an administrative tribunal involves recognizing that, within its area of expertise, its decision-making autonomy may be of prime importance. Conversely, failing to go through the process of rejecting the correctness standard may conceal the real meaning of judicial intervention that falls outside the limits of the jurisdiction of an administrative agency. An initial conclusion that, for purposes of judicial review, the legislature admits several possible and rational constructions of the same legislative provision thus becomes of primary importance. This conclusion, while constituting the necessary starting-point of a discussion of the powers of supervision and control of courts of law, is ultimately the guiding principle for analyzing the appropriateness of judicial review.

¶ 32 In Bibeault, Beetz J. summarized the principles governing judicial review of decisions of an administrative tribunal, emphasizing its area of jurisdiction (at p. 1086):

[page772]

> 1. if the question of law at issue is within the tribunal's jurisdiction, it will only exceed its jurisdiction if it errs in a patently unreasonable manner; a tribunal which is competent to answer a question may make errors in so doing without being subject to judicial review;
> 2. if however the question at issue concerns a legislative provision limiting the tribunal's powers, a mere error will cause it to lose jurisdiction and subject the tribunal to judicial review.

¶ 33 The initial step advocated by this Court must therefore focus primarily on the concept of jurisdiction. This step must, however, take into account both the desirability of curial deference and the ease with which a question can be incorrectly characterized as one of jurisdiction (see Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp., [1979] 2 S.C.R. 227, at p. 233, and Canada Labour Relations Board v. Halifax Longshoremen's Association, Local 269, [1983] 1 S.C.R. 245, at p. 256). Bibeault explained the meaning of the concept of jurisdiction in the context of judicial review as follows (at p. 1090):

> Jurisdiction stricto sensu is defined as the power to decide. The importance of a grant of jurisdiction relates not to the tribunal's capacity or duty to decide a question but to the determining effect of its decision. As S. A. de Smith points out, the tribunal's decision on a question within its jurisdiction is binding on the parties to the dispute... . The true problem of judicial review is to discover whether the legislator intended the tribunal's decision on these matters to be binding on the parties to the dispute, subject to the right of appeal if any. [Emphasis added.]

¶ 34 This amounts to asking "Who should answer this question, the administrative tribunal or a court of law?" It thus involves determining who is in the best position to rule on the impugned decision. According to Beetz J., at p. 1088, in order to deal adequately with the question "Did the legislator intend the question to be within the jurisdiction conferred on the tribunal?", a court of law

[page773]

> examines not only the wording of the enactment conferring jurisdiction on the administrative tribunal, but the purpose of the statute creating the tribunal, the reason for its existence, the area of expertise of its members and the nature of the problem before the tribunal.

¶ 35 The legislature's intention to give the CALP the power to make a final ruling on the meaning and scope of s. 60 A.I.A.O.D. is not open to question. As an appellate administrative tribunal, the CALP hears and disposes exclusively of appeals brought under ss. 37.3 and 193 of the Act respecting Occupational Health and Safety and the A.I.A.O.D. (s. 397). It has exclusive jurisdiction to "confirm the decision or the order brought before it; it may also quash the decision or the order and shall in that case render the decision or make the order that should have been given initially" (s. 400). Its members are subject to specific obligations set out in ss. 373 et seq. A.I.A.O.D., they have all the powers necessary for the exercise of their jurisdiction and may rule on any questions of law or of fact (s. 407). In addition to these significant powers, the CALP has an obligation to publish its own decisions (s. 391), the authority to make recommendations to the Minister (s. 396) as well as the authority to review or revoke its own decisions for cause (s. 406).

¶ 36 Several provisions are designed to ensure that CALP decisions are effective. The decisions are final and without appeal and every person contemplated in the decision must comply with them without delay (s. 405). They may be filed in the office of the prothonotary of the Superior Court of the district in which the appeal was brought and such filing makes them executory as if they were final judgments of the Superior Court without appeal, and with all the effects thereof (s. 429). CALP decisions are also protected by a full privative clause, which I reproduce here for the sake of convenience:

[page774]

> 409. Except on a question of jurisdiction, no proceedings under article 33 of the Code of Civil Procedure (chapter C-25) nor any extraordinary recourse within the meaning of the said Code may be taken, nor any provisional remedy be ordered against the board of appeal or one of its commissioners acting in his official capacity.
>
> A judge of the Court of Appeal may annul summarily, upon a motion, any action granted, any writ, order or injunction issued or granted contrary to this section.

¶ 37 Finally, the nature of the problem presented here raises questions on which the CALP is eminently qualified.

Section 60 A.I.A.O.D. is not only one of the legislative provisions on which the CALP has the express power to rule, it employs concepts which are at the core of its area of expertise, namely disability, employment injury and the complex system of compensation set up by the Quebec legislature. The interpretation of s. 60 by the CALP is, thus, a function directly relating to the objective sought by the legislature: to permit an administrative tribunal to issue a final ruling on decisions of first instance by giving a final interpretation of its enabling statute.

¶ 38 Since the interpretation of s. 60 A.I.A.O.D. is, strictly speaking, within the jurisdiction of the CALP, the standard of review applicable here is whether the decision is patently unreasonable. In Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp., supra, Dickson J. formulated the question which courts of law must constantly keep in mind in such circumstances (at p. 237):

> Did the Board here so misinterpret the provisions of the Act as to embark on an inquiry or answer a question not remitted to it? Put another way, was the Board's interpretation so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review? [Emphasis added.]

¶ 39 The patently unreasonable error test is the pivot on which judicial deference rests. As it relates to matters within the specialized jurisdiction of an [page775] administrative body protected by a privative clause, this standard of review has a specific purpose: ensuring that review of the correctness of an administrative interpretation does not serve, as it has in the past, as a screen for intervention based on the merits of a given decision. The process by which this standard of review has progressively been accepted by courts of law cannot be separated from the contemporary principle of curial deference, which is, in turn, closely linked with the development of extensive administrative justice (see Cory J.'s reasons in PSAC No. 1 and PSAC No. 2, supra, and National Corn Growers Assn. v. Canada (Import Tribunal), [1990] 2 S.C.R. 1324 (per Wilson J.)). Substituting one's opinion for that of an administrative tribunal in order to develop one's own interpretation of a legislative provision eliminates its decision-making autonomy and special expertise. Since such intervention occurs in circumstances where the legislature has determined that the administrative tribunal is the one in the best position to rule on the disputed decision, it risks, at the same time, thwarting the original intention of the legislature. For the purposes of judicial review, statutory interpretation has ceased to be a necessarily "exact" science and this Court has, again recently, confirmed the rule of curial deference set forth for the first time in Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.: United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd., [1993] 2 S.C.R. 316; PSAC No. 2, supra; Lester (W.W.) (1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740, [1990] 3 S.C.R. 644; Bell Canada v. Canada (Canadian Radio-television and Telecommunications Commission), [1989] 1 S.C.R. 1722; National Corn Growers Assn. v. Canada (Import Tribunal), supra, and CAIMAW v. Paccar of Canada Ltd., supra. In the recent decision PSAC No. 2, Cory J. noted that this was a strict test (at p. 964):

> It is not enough that the decision of the Board is wrong in the eyes of the court; it must, in order to be [page776] patently unreasonable, be found by the court to be clearly irrational.

B. Is the CALP's Interpretation Patently Unreasonable?

¶ 40 While agreeing with the interpretation adopted by the Court of Appeal, Domtar argues that the court should have concluded that the CALP's decision in the case at bar was patently unreasonable. The CALP interpreted s. 60 A.I.A.O.D., which I reproduced earlier, as follows (at p. 118):

> [TRANSLATION] That section imposes on the employer with whom the worker is employed when he suffers an employment injury an obligation to pay him, as an income replacement indemnity on account of his employment injury, 90% of his net salary or wages for each day or part of a day the worker would normally have worked had he not been unable to carry on his employment by reason of his injury, for the first 14 days following the beginning of his disability.
>
> The Commission d'appel concluded in this regard that the words "would normally have worked" used in s. 60 should not be separated from the words "had he not been disabled" which immediately follow them, so that no account should be taken of factors or circumstances extrinsic to the worker's inability to work by reason of his employment injury in determining what period he would have

worked, in the usual way and had he not been disabled, during the first 14 days following the beginning of his disability.

The Commission d'appel accordingly concluded that under s. 60 of the Act respecting Industrial Accidents and Occupational Diseases, the employer must pay the worker 90% of his net salary or wages for each day or part of a day on which he would normally have worked had he not been disabled by reason of his injury, regardless of any extrinsic cause, such as plant closure, which had no connection with the worker's inability to carry on his employment by reason of his employment injury. [Emphasis added.]

¶ 41 The CALP, therefore, concluded that the respondent had to pay the appellant 90 percent of his net salary or wages for each day or part of a day on which he would normally have worked according to his usual work schedule, regardless of the plant closure.

[page777]

¶ 42 In my opinion, this decision cannot be said to be patently unreasonable. This is also the conclusion reached by the Superior Court and the Court of Appeal. It is one thing to argue, as Domtar does, that the CALP's interpretation unduly favours workers who suffer occupational injuries over employees who receive no salary or wages during a strike, lockout or layoff; it is quite another to conclude that this decision is clearly irrational. In order to show that the CALP's interpretation is unreasonable, Domtar in its factum emphasized the difficulty of determining the frequency of the services provided by the worker prior to an injury for purposes of the phrase "would normally have worked":

> [TRANSLATION] Thus, what does this "habit" signify for a worker who suffers an employment injury after working for the same employer for 10 years? Is the habit to be assessed on the basis of the entire period or only part of it? Should we only take into account the last year, the last month or the last week? If a collective agreement was signed on the day a worker suffers an employment injury and that collective agreement increases a worker's work week from four to five days a week, what happens according to the interpretation proposed by the C.A.L.P.? And if a worker suffers an employment injury on the day he is hired, can the employer successfully contend that he owes the worker no income replacement indemnity under s. 60 of the A.I.A.O.D.?

¶ 43 Without ruling on the merits of these hypotheses, I am of the view that, even if these problems arose in connection with the compensation system created by the Act, it would be for the CALP, and not a court of law, to dispose of them in a final fashion under its jurisdiction stricto sensu for the purposes of the A.I.A.O.D. This jurisdiction necessarily includes some room to manoeuvre, avoiding the need to anticipate all the legal consequences that may result from a given decision. In the case at bar the CALP did not go beyond the limits laid down by the legislature. The purpose of the A.I.A.O.D. is summarized in s. 1, which reads as follows:

[page778]

> 1. The object of this Act is to provide compensation for employment injuries and the consequences they entail for beneficiaries.
>
> The process of compensation for employment injuries includes provision of the necessary care for the consolidation of an injury, the physical, social and vocational rehabilitation of a worker who has suffered an injury, the payment of income replacement indemnities, compensation for bodily injury and, as the case may be, death benefits.
>
> This Act, within the limits laid down in Chapter VII, also entitles a worker who has suffered an employment injury to return to work.

¶ 44 The entitlement of a worker who has suffered an employment injury to an income replacement indemnity is further dealt with in s. 44. This provision reads as follows:

> 44. A worker who suffers an employment injury is entitled to an income replacement indemnity

> if he becomes unable to carry on his employment by reason of the injury.
>
> A worker who is no longer employed when his employment injury appears is entitled to the income replacement indemnity if he becomes unable to carry on the employment he usually held.

¶ 45 In concluding that the effect of the application of s. 60 was not to deprive the worker who suffers an employment injury of the right conferred on him by s. 44, the CALP did not render a patently unreasonable decision. The argument put forward by Domtar that the CALP's conclusion overlooks several important aspects which are peculiar to the general system of compensation may well be correct. This is not, however, a basis for judicial intervention as, in my view, this would simply be an error of law within jurisdiction. Since the evidence that the appellant suffered an employment injury on the relevant dates has never been disputed, the CALP's decision can be rationally defended both on the facts and on the law.

¶ 46 In principle, this conclusion should suffice to dispose of this appeal. This was not a case in which the CALP was deciding a general point of [page779] law, to which, in the absence of a privative clause, this Court has held that there is no reason to show deference (University of British Columbia v. Berg, [1993] 2 S.C.R. 353; United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd., supra; Dayco (Canada) Ltd. v. CAW-Canada, supra; Canada (Attorney General) v. Mossop, [1993] 1 S.C.R. 554). Similarly, since the interpretation of s. 60 A.I.A.O.D. does not raise constitutional questions here, the rule of curial deference clearly cannot be excluded on this ground (Douglas/Kwantlen Faculty Assn. v. Douglas College, [1990] 3 S.C.R. 570; Cuddy Chicks Ltd. v. Ontario (Labour Relations Board), [1991] 2 S.C.R. 5, and Tétreault-Gadoury v. Canada (Employment and Immigration Commission), [1991] 2 S.C.R. 22). Finally, as I pointed out earlier, the intention of the legislature to confer on the CALP the power to make a final ruling on the meaning and scope of s. 60 A.I.A.O.D. is not open to question. As the interpretation of this provision is at the core of its specialized jurisdiction, the rule of curial deference should in principle apply.

C. Court of Appeal's Intervention

¶ 47 Against this background, the intervention of the Court of Appeal may now be considered. Though it properly concluded that the CALP's decision was not patently unreasonable, the court was of the view that to apply this standard of review would not satisfactorily resolve the issue. According to Mailhot J.A. (at p. 2443):

> [TRANSLATION] In fact, it is clear that if this Court dismissed the appeal based on a finding that the C.A.L.P.'s interpretation was not unreasonable, the difficulties would not be resolved. This is well illustrated by a recent judgment of the Labour Court filed by the appellant. In Commission de la santé et de la sécurité du travail du Québec v. BG Chéco International ltée, supra, the C.S.S.T. brought penal proceedings against an employer which refused to pay a worker 90% of his net salary or wages for seven days, and the employer gave as its defence the fact that four days before suffering an employment injury the worker had been given a layoff notice for a temporary lack of work, a layoff which took [page780] effect three days after the injury. After a carefully reasoned analysis, the Labour Court judge acquitted the employer. [Emphasis added.]

¶ 48 In the case referred to above by the Court of Appeal, the Labour Court was of the view (at p. 411) that:

> [TRANSLATION] Though we are dealing here with remedial legislation the aim and purpose of which are to compensate workers who suffer industrial accidents and occupational diseases, the Court must necessarily ask itself whether, despite recourse to this rule of interpretation, there is nevertheless a reasonable doubt as to the meaning or scope of the text, in which case it must acquit the defendant.

¶ 49 After undertaking its own analysis of several provisions of the A.I.A.O.D., the Labour Court held that s. 60 raised [TRANSLATION] "a reasonable, significant and insurmountable doubt" as to the obligation on an employer in the event of a layoff occurring during the 14-day period mentioned in that provision (p. 412). The Labour Court therefore concluded that, in such circumstances, the employer should be acquitted (at p. 412):

> [TRANSLATION] In such a case, the Court has no choice but to give the defendant the benefit of the statutory interpretation most favourable to it, as in the circumstances such an interpretation is at least equally justifiable. As pointed out in Maxwell [Maxwell on the Interpretation of Statutes (12th ed. 1969), at p. 239]:
>
> > "If there is a reasonable interpretation which will avoid the penalty in any particular case", said Lord Esher M.R., "we must adopt that construction. If there are two reasonable constructions we must give the more lenient one. That is the settled rule for the construction of penal sections".

¶ 50 Citing its precedent in Produits Pétro-Canada Inc. v. Moalli, supra, the Court of Appeal held that it was in the interest of justice to resolve the conflict at once, abandoning the curial deference which would otherwise be required here. Mailhot J.A. concluded that she was faced with [TRANSLATION] "two ... possibilities that could be rationally defended" and summed up the situation [page781] created by the interpretation of the CALP, on the one hand, and that of the Labour Court, on the other (at p. 2444):

> [TRANSLATION] It is true that in the instant case the fate of the parties does not depend on the identity of a member of the administrative tribunal. However, the uncertainty will remain and the outcome of the proceedings will not be satisfactorily resolved since the C.S.S.T., which has adopted the interpretation of s. 60 imposed by the C.A.L.P., is obliged to take action against employers who refuse to accept the C.A.L.P.'s interpretation and who, ultimately, benefit from acquittals as a result of the (probably justified) application of the theory of reasonable doubt "in view of two conflicting possibilities that could be rationally defended", whether in an administrative proceeding or a penal proceeding. The interpretation adopted by the C.A.L.P. thus leads to a dead end. The ideal of justice, which promotes the rule of law, is not really served. It is certainly desirable that the intention of the legislature should prevail. What therefore is that intent? Despite the fact that the wording used may be open to two not unreasonable interpretations, can it be determined?

¶ 51 To rectify this situation, the Court of Appeal decided to intervene to impose its own interpretation of s. 60. Again according to Mailhot J.A. (at p. 2445):

> [TRANSLATION] With respect for the contrary view, I am of the view that the intention of the legislature in this matter was not to treat injured workers differently from other workers as regards the first 14 days mentioned in s. 60. In my opinion, if the legislature intended that the entire first 14 days following the beginning of the disability be paid for by the employer, it would not have added the words "for each day or part of a day the worker would normally have worked". These words are intended to ensure that the injured person is treated like other workers, in other words that he is entitled to a salary or wages as he would be if the employer had work to give him and could do so, if these days were part of his regular schedule or if his contract was still in effect, and so on -- in short, if he had worked as usual, had he not been disabled.
>
> This interpretation is fairer to everyone and consistent with the other provisions of the A.I.A.O.D. Even if it is accepted that the statute is remedial and seeks to compensate the victim of an employment injury, it is still general legislation and is not intended, in my opinion, to [page782] make more favourable provision for such a victim compared with other employees, who may be subject to the ups and downs of the labour market, including the choice to go on strike or the obligation to be subject to a lockout. [Emphasis in original.]

¶ 52 She came to the following conclusion, concurred in by her colleagues (at p. 2446):

> [TRANSLATION] I therefore conclude that when in s. 60 the legislature requires the employer to pay a victim of an employment injury 90% of his net salary or wages, it means payment of the salary or wages to which the victim would logically have been entitled if he had worked as usual. As generally there is no obligation to pay a salary or wages when there is a plant closure,

strike, lockout, layoff, unpaid leave and so on, there can be no obligation to pay 90% of the net salary or wages during these periods.

I therefore propose that the appeal be allowed with costs, the application for evocation be granted with costs, the C.A.L.P.'s decision be quashed and the court declare that the appellant has paid Mr. Roland Lapointe the indemnity to which he was entitled under s. 60 of the Act respecting Industrial Accidents and Occupational Diseases.

¶ 53 There are thus two aspects to the Court of Appeal's intervention. First, it concluded that there was a jurisprudential conflict between two administrative jurisdictions as to the same legislative provision. Second, the Court of Appeal relied on an independent ground for judicial review, namely that where there is a conflict of this kind, curial deference should yield to review based on the correctness of the administrative interpretation. I shall examine the two aspects of this intervention in turn.

1. The Conflict

¶ 54 The Court of Appeal relied on a single judgment of the Labour Court in a penal matter, Commission de la santé et de la sécurité du travail v. BG Chéco International Ltée, supra, in concluding that there were conflicting decisions. This conclusion calls for two observations.

[page783]

¶ 55 First, as counsel for the appellant pointed out, this conclusion fails to take into account the large number of decisions rendered by the CALP since the A.I.A.O.D. came into force on August 19, 1985. With reference to s. 60, that tribunal has always adopted the same interpretation (see, inter alia, Tousignant et Hawker Siddeley Canada Inc., supra; Desmeules et Entreprises B.L.H. Inc., [1986] C.A.L.P. 66; Béland et Mines Wabush, C.A.L.P., No. 00138-09-8604, November 27, 1986; Collins & Aikman Inc. et Dansereau, [1986] C.A.L.P. 134; Lambert et Vic Métal Corp., [1986] C.A.L.P. 147, and Létourneau et Électricité Kingston Inc., [1986] C.A.L.P. 241). The Labour Court, for its part, had apparently never had occasion to rule on the scope of s. 60 before BG Chéco. As I see it, the situation created by an isolated decision at variance with a consistent line of authority cannot a priori be characterized as a true "jurisprudential conflict". Moreover, counsel for the CSST noted that the Court of Appeal had taken the Domtar case under advisement on February 14, 1991. The decision of the Labour Court in BG Chéco was not rendered until March 18, 1991. Besides being doubtful in strictly quantitative terms, the "controversy" at issue here therefore also seems to be premature.

¶ 56 Furthermore, apart from this quantitative and temporal aspect, the Court of Appeal was concerned here with two bodies interpreting the same legislative provision, but in the particular context of each one's jurisdiction, in the one case a penal one and, in the other, an administrative one. Before concluding that a jurisprudential conflict existed, some consideration should, therefore, have been given to the distinction between the duty of a tribunal sitting in a penal proceeding to give an accused the benefit of a reasonable doubt and that of an appellate administrative tribunal responsible for making a final ruling on its enabling legislation so as to give effect to that legislation. Can it be said that these two jurisdictions, in deciding on matters where the ground rules are completely different, have created a conflict in the jurisprudence? I am far from sharing the categorical assertion of the Court of Appeal on this point. It should be [page784] noted, in this connection, that the CALP decisions can be filed in the office of the prothonotary of the Superior Court for the district in which the appeal was brought, in order to make them executory as if they were final civil judgments of the Superior Court not subject to appeal (s. 429 A.I.A.O.D.). The Court of Appeal's conclusion that the CALP's interpretation leads to a "dead end" does not take into account the existence of this civil remedy, parallel to the penal remedy, which is in keeping with the twofold nature of the A.I.A.O.D. Furthermore, the fact that the Labour Court's judgment, unlike decisions of the CALP, can be appealed to the Superior Court under the Code of Penal Procedure further mitigates the allegedly irreconcilable "conflict" between these two tribunals.

¶ 57 For discussion purposes, however, I am prepared to assume, without deciding the point, that the interpretation of s. 60 A.I.A.O.D. by the CALP on the one hand and the Labour Court on the other creates a conflict in the jurisprudence. This leads me to discuss the standard of judicial review applicable to such a situation.

2. Consistency of Precedent and Judicial Review

¶ 58 The ground of judicial review referred to by the Court of Appeal should be seen in its proper academic and judicial context. This background will clarify the issues and indicate the relevance of the guiding principles outlined earlier.

¶ 59 While the analysis of the standard of review applicable in the case at bar has made clear the significance of the decision-making autonomy of an administrative tribunal, the requirement of consistency is also an important objective. As our legal system abhors whatever is arbitrary, it must be based on a degree of consistency, equality and predictability in the application of the law. Professor MacLauchlan notes that administrative law is no exception to the rule in this regard:

> Consistency is a desirable feature in administrative decision-making. It enables regulated parties to plan their [page785] affairs in an atmosphere of stability and predictability. It impresses upon officials the importance of objectivity and acts to prevent arbitrary or irrational decisions. It fosters public confidence in the integrity of the regulatory process. It exemplifies "common sense and good administration".
> (H. Wade MacLauchlan, "Some Problems with Judicial Review of Administrative Inconsistency" (1984), 8 Dalhousie L.J. 435, at p. 446.)

¶ 60 In the same vein Professor Comtois writes:

> [TRANSLATION] ... it [consistency] helps to build public confidence in the integrity of the administrative justice system and leaves an impression of common sense and good administration. It might be added, as regards administrative tribunals exercising quasi-judicial functions, that the specialized nature of their jurisdiction makes inconsistencies more apparent and tends to harm their credibility.
> (Suzanne Comtois, "Le contrôle de la cohérence décisionnelle au sein des tribunaux administratifs" (1990), 21 R.D.U.S. 77, at pp. 77-78.)

¶ 61 This consistency requirement has led some writers to defend the idea of judicial review of administrative inconsistency. Thus, Dean Morissette has dealt with the problem of jurisprudential conflicts within administrative jurisdictions as they affect curial deference: "Le contrôle de la compétence d'attribution: thèse, antithèse et synthèse" (1986), 16 R.D.U.S. 591. At page 631, he asks the following question:

> [TRANSLATION] But is an irrational or unreasonable interpretation the only possible form of excess of jurisdiction after C.U.P.E. v. N.B.L.C.?

¶ 62 After giving the example of an administrative tribunal that rules on a constitutional question or misinterprets a provision conferring jurisdiction, Dean Morissette adds (at pp. 632-33):

> [TRANSLATION] Finally, the theory of reasonable interpretation leaves room for intervention by the superior courts when several well-reasoned and apparently rational interpretations are given by the same administrative jurisdiction and their consequences are inconsistent. [page786] The matter can be illustrated by the example of an arbitrator sitting pursuant to s. 124 of the Act respecting Labour Standards. Two arbitrators sitting in different cases may well decide the same legal problem arising on similar facts in opposite ways, which are nevertheless rational and well-reasoned. The fate of the complainant, when discrepancies of this type occur, depends on the identity of the arbitrator hearing the complaint. This result is difficult to reconcile with the notion of equality before the law, which is one of the main corollaries of the rule of law, and perhaps also the most intelligible one. Where discrepancies of this type exist, whether within the same administrative jurisdiction, between different jurisdictions on the same level or between different levels of jurisdiction in the same specialized field, the superior courts will intervene to standardize the law even though each of the diverse interpretations seems to be reasonable. [Emphasis added.]

¶ 63 Dean Morissette considers that these objectives of equality, security and uniformity in implementing the law are

consistent with the ultimate purpose of judicial review (at p. 634):

> [TRANSLATION] On reflection, however, this is undoubtedly a basic form of rationality. As the primary purpose of judicial review is to prevent arbitrariness, what objection can there be to a principle which requires the superior courts to intervene, not in the name of meticulous legalism but in the interests of rationality? Imposing an interpretation one believes to be "correct" because, owing to its consequences or for some similar reason, one does not share some other otherwise rational interpretation is difficult to justify in terms of judicial review, unless of course one assumes that appeals and judicial review are one and the same thing. Imposing the interpretation one believes to be "correct" (or "the most rational") when one is confronted with contradictory but rational interpretations on the same point is fully justified in light of the rule of law, as this is the very kind of arbitrariness that principle is designed to prevent. [Emphasis added.]

¶ 64 In an article published in 1982 Professor Mullan also defends the idea of some form of judicial review of inconsistent decision-making (David J. Mullan, "Natural Justice and Fairness -- Substantive as well as Procedural Standards for the Review of Administrative Decision-Making?" (1982), 27 McGill L.J. 250). Rather than concentrating on the situation created by inconsistency [page787] between two well-reasoned and rational interpretations, Professor Mullan emphasizes the principle that similar cases should be given similar treatment. In the interests of justice, fairness and equality in the application of the law, administrative inconsistency would thus require intervention by the courts (at pp. 285-86):

> Given the prevalence of this principle of consistency of treatment in the development of most legal systems as well as within the various substrata of legal systems, there is a strong case for branding as reviewable those cases where statutory authorities inexplicably fail to act consistently. To do so without reason or without thinking would seem to be the height of arbitrary behaviour. It is also worth remembering that judicial review of administrative action has from its earliest days been concerned with the appearance of the proper administration of justice. If the law is prepared to countenance a rule to the effect that a reasonable apprehension of bias will affect the validity of a decision in order to safeguard the reputation of the law, there is also clearly room for condemning unexplained or inexplicable inconsistencies in the administration of statutory discretions from which the law's reputation will suffer as much. [Emphasis added.]

¶ 65 Finally, Professor Comtois, supra, at p. 88, discusses the same constraints as the preceding writers, emphasizing the emergence of a "flexible" rule of consistency in administrative law:

> [TRANSLATION] A flexible rule, in the sense that it should not be interpreted as an obligation to follow precedents or amount to a strict application of the stare decisis rule, but one which may nevertheless receive judicial sanction when the court finds that fairness or respect for the rule of law requires its intervention to put an end to the uncertainty created by contradictory decisions rendered by different tribunals on the same point. [Emphasis added.]

¶ 66 The requirement of consistency in the application of the law is unquestionably a valid objective and so a persuasive argument. For litigants to receive diametrically opposite answers to the same question, depending on the identity of the members of administrative tribunals, may seem unacceptable to some and even difficult to reconcile with several objectives, including the rule of law. Yet, as the courts have held, consistency in decision-making [page788] and the rule of law cannot be absolute in nature regardless of the context. So far as judicial review is concerned, the problem of inconsistency in decision-making by administrative tribunals cannot be separated from the decision-making autonomy, expertise and effectiveness of those tribunals.

¶ 67 Courts have had the opportunity to consider the advisability of intervening to resolve conflicting decisions by administrative tribunals. In Re Service Employees International Union, Local 204 and Broadway Manor Nursing Home (1984), 48 O.R. (2d) 225 (C.A.), faced with two inconsistent interpretations of s. 13(b) of the Inflation Restraint Act, 1982, S.O. 1982, c. 55, by the Labour Relations Board on the one hand and the Education Relations Commission on the other, the Ontario Court of Appeal (at pp. 237-38) adopted the comments of Galligan J. of the Divisional Court (now of

the Court of Appeal):

> I cannot for one moment suggest that either's interpretation of the Act was patently unreasonable. The decisions of the two tribunals are careful, thoughtful, well-reasoned and persuasive. One of my many problems with this case is that as I read each decision I am persuaded by it. The extension of curial deference to each of them would lead to unacceptable results.
>
> It seems to me that the curial deference demanded by authority ought only be extended to a tribunal when it is interpreting its Constitution or home statute. By that I mean curial deference need only be granted to the Labour Relations Board when it interprets the Labour Relations Act, and to the Education Relations Commission when it interprets the Boards and Teachers Negotiations Act. The Act is a statute that applies not only to workers and employers who are governed by the Labour Relations Act and the Boards and Teachers Negotiations Act but to many others. While it is legislation that applies only to what can loosely be called the public sector of Ontario, and not to the population of Ontario at large, I think the Act is more akin to a "general public enactment" as that term was used by Laskin C.J.C. in McLeod et al. v. Egan et al., [1975] 1 S.C.R. 517 ... [page789] than it is to the specialized and particular Labour Relations Act and Boards and Teachers Negotiations Act. [Emphasis added.]

¶ 68 It concluded (at p. 239):

> We agree with the decision of Galligan J. in this regard. The theory underlining the concept of curial deference has no application here. The Act is, in every sense, a general public enactment. It is not one with which either the Ontario Labour Relations Board or the Education Relations Commission was integrally or closely involved nor over which they could be said to profess any particular expertise. [Emphasis added.]

¶ 69 Domtar referred to Broadway Manor Nursing Home in support of its position. That case cannot be interpreted as adopting the existence of conflicting decisions as an independent basis for judicial review. The Ontario Court of Appeal was actually concerned with the nature of the statute which was the subject of the conflict in question. By characterizing the Inflation Restraint Act, 1982 as a general public enactment which neither the Labour Relations Board nor the Education Relations Commission had the function of interpreting as part of their particular expertise, it simply held that, owing to this lack of expertise, the principle of curial deference did not apply. Since the Act, the interpretation of which was at issue, was not at the core of the specialized jurisdiction of either of the administrative tribunals, any error of law was immediately subject to strict judicial review and not to the patently unreasonable interpretation test.

¶ 70 This reading of Broadway Manor Nursing Home seems to be confirmed by a later judgment, United Steelworkers of America, Local 14097 v. Franks (1990), 75 O.R. (2d) 382. In that case, the Ontario Divisional Court was confronted with two inconsistent interpretations of s. 40a of the Employment Standards Act, R.S.O. 1980, c. 137. Reid J. first [page790] noted the crucial importance of determining the applicable standard of review (at pp. 385-86):

> We have two reasonable, but conflicting, interpretations. (I use the term "reasonable" as a more convenient expression than the traditional but awkward phrase "not patently unreasonable".) It follows that, if the standard of review on this application is reasonableness, the application should be dismissed. If, on the other hand, the standard is correctness, only one may stand and we must choose between them. Two conflicting interpretations of the same statutory provision might be reasonable, but they cannot both be correct. This issue of standard of review is thus critical. [Emphasis added.]

¶ 71 Reid J. distinguished Broadway Manor Nursing Home, noting that, in that case, the administrative tribunal was not interpreting its enabling Act, unlike in the case before him (p. 386). After underlining the existence of a privative clause, he concluded as follows (at pp. 387-88):

> The dismissal of this application will leave in place two conflicting interpretations of equal legal

> stature of a statutory provision. We are informed that it has since been amended, but even if that were not so there does not appear to be any basis on which the court may intervene to resolve the conflict. The doctrine of stare decisis which prevails in the courts tends to the avoidance of conflict in their decisions and such conflict as does occur may be resolved by the mechanism of appeal. But the doctrine of stare decisis does not apply to referees, or arbitrators, or, for that matter, to administrative tribunals generally, nor are referees, or arbitrators, or administrative tribunals generally (there are exceptions) subject to appeal. These are characteristics of tribunals which legislators have created to provide what they believe to be for certain purposes more appropriate forums for decision-making than the courts. The references I have made above confirm that the courts' supervisory role on judicial review is very limited. There is no authority for extending that supervision in the way proposed nor any rationale for doing so. [Emphasis added.]

¶ 72 The Quebec Court of Appeal in turn considered conflicting decisions in Produits Pétro-Canada [page791] Inc. v. Moalli, supra. Noting that there was a serious and unquestionable conflict in interpreting ss. 97 and 124 of the Act respecting Labour Standards, R.S.Q., c. N-1.1, it observed that this resulted in an unacceptable situation (at p. 267):

> [TRANSLATION] For many years the fate of litigants has depended largely on the identity of the arbitrator hearing the dismissal complaint. Positions have hardened. Two separate and inconsistent rules of law are definitely being applied. Does this situation justify intervention by the Superior Court?

¶ 73 The court considered that [TRANSLATION] "in view of the seriousness of the conflict of interpretation that has resulted, however, this is a case in which sooner or later the superior courts will have to intervene" (p. 268). Accordingly (at p. 268):

> [TRANSLATION] The instant appeal clearly raises this problem of interpretation, as to which there are "diametrically opposed" opinions. Its importance for legal practice in this area of labour relations cannot be denied. At this point, it appears that we are confronted with one of those exceptional situations in which, contrary to the general rule of curial deference, the superior courts must intervene to arrive at an interpretation of the law and avoid having litigants subject to two different legal rules, and possibly even the unpredictable appointment of arbitrators ... [Emphasis in original.]

¶ 74 The Court of Appeal thus pointed to the existence of an extremely serious case law conflict which had not been [TRANSLATION] "solved since the Act respecting Labour Standards came into force" (p. 267), and went on to develop its own interpretation of the provisions in question. Since the Court of Appeal and Domtar both referred to Moalli in arguing in favour of an independent basis for judicial review of decision-making inconsistency by administrative tribunals, it becomes necessary to consider the scope of that decision.

¶ 75 To begin with, it appears that, from the outset, the standard of review applicable in that case was the correctness of the arbitrator's interpretation, not whether his decision was patently unreasonable. The Court of Appeal held that the question of [page792] the applicability of s. 97 of the Act respecting Labour Standards to s. 124 of that Act was a question of jurisdiction. Thus, in the view of LeBel J.A. (at p. 266):

> [TRANSLATION] Section 124 requires that certain conditions be met for the arbitrator to hear the dismissal proceeding. One of these is continuous service for the same employer for five years. From this standpoint, the application and interpretation of s. 97 raise a jurisdictional question properly speaking, within the meaning given to that term by Beetz J. in Syndicat des employés de production du Québec et de l'Acadie v. Canada Labour Relations Board. The arbitrator would certainly have the right and even an obligation to deal with this question. However, his error, even a reasonable error, would be subject to judicial review. [Emphasis added.]

¶ 76 In her comment on Moalli Ms. Ouimet expands on this initial description:

> [TRANSLATION] In any case, we have to admit that by characterizing this question as within jurisdiction, the Pétro-Canada decision would have been completely different and LeBel J.A. would only have had to rule on the reasonability of the two schools of thought without at the same time settling the matter. Accordingly, it may be thought that he "chose" to characterize this question as jurisdictional in order to rule on the correctness of the interpretation of the arbitrator Moalli, rather than on his reasonableness, in which case we are back at square one.
> (Hélène Ouimet, "Commentaires sur l'affaire Produits Pétro-Canada c. Moalli" (1987), 47 R. du B. 852, at p. 858.)

¶ 77 Another writer is of the view that this characterization did not disappear in favour of an independent ground of judicial review:

> [TRANSLATION] ... in the view of LeBel J.A., who wrote the reasons, the question before the arbitrator in that case was "properly jurisdictional". Specifically, the applicability of s. 97 of the Act respecting Labour Standards to s. 124 of that Act, which requires continuous service for the same employer for five years for there to be a complaint of dismissal, was a jurisdictional question on which the arbitrator could not err. In other words, the question was from the outset, and always has been, a question of jurisdiction in the strict sense, not a [page793] question within jurisdiction which lost that characterization because of a dispute. [Emphasis added.]
>
> (Jean-François Jobin, "Le contrôle judiciaire des erreurs de compétence ou dites proprement juridictionnelles: où en sommes-nous?" (1990), 50 R. du B. 731, at pp. 748-49.)

¶ 78 Similarly, in Moalli the Court of Appeal referred to Broadway Manor Nursing Home, supra. After citing the reasons of Galligan J. which I reproduced above, LeBel J.A. continued (at pp. 267-68):

> [TRANSLATION] I would hesitate to apply this aspect of the reasoning without qualification in the case at bar ... In some cases the interpretation of the wording of general legislation is a necessary function of the arbitrator or lower court. It is part of what they do and is protected by the usual attitude of curial deference. In any case, the problem does not seem to arise here on account of the jurisdictional characterization which I apply to the problem of interpreting and applying ss. 124 and 97 A.L.S. [Emphasis added.]

¶ 79 In the present case, on the contrary, there could be no question that the CALP was acting within its jurisdiction. The Court of Appeal does not seem to have made this distinction in referring to Moalli.

¶ 80 Furthermore, since Moalli, apart from the case at bar, the Quebec Court of Appeal has not to my knowledge thought it proper to intervene on the ground that there were conflicting decisions between administrative tribunals: Hydro-Québec v. Conseil des services essentiels (1991), 41 Q.A.C. 292; Syndicat canadien de la Fonction publique v. Commission des écoles catholiques de Québec, C.A. Québec, No. 200-09-000463-866, December 20, 1989, J.E. 90-176, and Syndicat des communications graphiques, local 509M v. Auclair, [1990] R.J.Q. 334. In this last case, Tourigny J.A. further clarified the meaning of Moalli as follows (at p. 340):

> [TRANSLATION] It might be argued that Produits Pétro-Canada Inc. v. Moalli created an exception to the generally accepted rule that courts intervene only where there are patently unreasonable errors. In that case, LeBel J.A. came to the conclusion that the Superior [page794] Court could have been justified in intervening in cases where, despite the reasonableness of the error of law, it was in the public interest to put an end to divergent opinions among lower tribunals. However, the wording used in that case should be examined more closely. LeBel J.A. speaks of "... the reality and seriousness of a case law conflict which has not been solved since the Act ... came into force" and of "... two separate and inconsistent rules of law". This language suggests that review in such circumstances should be reserved for cases in which there are significant conflicts in the decisions of the lower tribunals.

That is not the case here.

¶ 81 In Syndicat canadien de la Fonction publique v. Commission des écoles catholiques de Québec, Dussault J.A. rejected as follows the argument that the existence of two diverging lines of arbitral decisions justified intervention by the courts (at pp. 12-13):

> [TRANSLATION] In my view, the judgment of this Court in Produits Pétro Canada Inc. v. Moalli ... must be considered with the greatest circumspection. It was rendered in response to the entirely exceptional circumstances of that case, when the differing interpretations related to the Act itself. It seems to me to be misguided if not dangerous to apply the rule of intervention by the courts every time one arbitrator takes a different approach from the others in interpreting a provision of a collective agreement and so to provide an automatic right of appeal disguised in the form of evocation.

¶ 82 In short, although, strictly speaking, Moalli can be interpreted as saying that the existence of a significant conflict in decisions is an independent basis for judicial review, it must be noted that its impact is both ambiguous and limited. While its scope has been qualified by subsequent decisions of the Quebec Court of Appeal, this restrictive interpretation does not of itself resolve the questions that remain regarding judicial review. The problem presented by the standard of review applicable to an arbitrator's decision seems to me to be unavoidable. If the question before the arbitrator in Moalli was jurisdictional in nature, he could not err without being subject to judicial review. If, on the other hand, the question was within jurisdiction, only a patently unreasonable interpretation [page795] would call for judicial review. The fact that, in that case, the Court of Appeal held that it was departing from the rule of curial deference does not, strictly speaking, in any way alter the following observation: an initial conclusion that, for judicial review purposes, the legislature itself admits several possible and rational constructions of the same legislative provision is the guiding principle without which, in theory, there can be no judicial review in the event of conflicting decisions.

¶ 83 This guiding principle was well delineated by Reid J. in Franks, supra: like the standard of review applicable to the impugned decision, the context in which several contending values conflict, here as there, is crucial. The issue is between the expertise and effectiveness of administrative tribunals and curial deference, on the one hand, and consistency and predictability in the application of the law, on the other. The advisability of judicial intervention in the event of conflicting decisions among administrative tribunals, even when serious and unquestionable, cannot, in these circumstances, be determined solely by the "triumph" of the rule of law. Where decisions made within jurisdiction are not patently unreasonable, the issue instead turns on whether the principles underlying curial deference should give way to other imperatives. In my opinion, the answer is no.

¶ 84 First, dealing with a case of administrative inconsistency and solving it means altering the already delicate institutional relationship between administrative tribunals and courts with reference to the impugned decision. As Professor MacLauchlan notes, supra, at p. 441:

> It is a matter of applying rules, or principles, to facts. The essence of the matter is not to determine in some scientific fashion whether a decision is consistent with a claimed precedent but to determine who should decide. [Emphasis in original.]

¶ 85 At page 445, the author adds: "[r]eview for inconsistency, so far from being neutral or disengaged, invites full judicial reconsideration of the [page796] administrative decision". A jurisprudential conflict must necessarily be found. In order to solve it, courts must proceed to examine the merits of the decisions in question. As Professor Mullan himself points out, supra, at p. 282:

> The determination of whether there has been inconsistency will seldom, if ever, come down to a case of different treatment of two persons in precisely the same situation. Rather, it will generally involve the court in making judgments as to whether A's situation was sufficiently dissimilar to B's to make their differential treatment justifiable. "Is refusing induction qualitatively the same as the situations previously dealt with by the Commission?" As soon as the determination of such questions becomes

the court's function, the judge will be involved in substantially the same assessment task as the statute has confided to the Commission. [Emphasis added.]

¶ 86 In my opinion, there is a real risk that superior courts, by exercising review for inconsistency, may be transformed into genuine appellate jurisdictions. Far from being neutral, the concept of consistency is an elusive parameter which, varying depending on the objective sought, may distort the very nature of judicial review. The arbitrariness which the judicial sanction is designed to remedy may, thus, become the result. In Bibeault, supra, Beetz J. commented as follows on the use of the theory of preliminary or collateral questions as a means of arriving at judicial review (at p. 1087):

> The concept of the preliminary or collateral question diverts the courts from the real problem of judicial review: it substitutes the question "Is this a preliminary or collateral question to the exercise of the tribunal's power?" for the only question which should be asked, "Did the legislator intend the question to be within the jurisdiction conferred on the tribunal?" [Emphasis added.]

¶ 87 In my opinion, questions as to the advisability of resolving a jurisprudential conflict avoid the main issue, namely, who is in the best position to rule on the impugned decision. Substituting one's opinion for that of an administrative tribunal in order to develop one's own interpretation of a legislative provision eliminates its decision-making autonomy [page797] and special expertise. Since such intervention occurs in circumstances where the legislature has determined that the administrative tribunal is the one in the best position to rule on the disputed decision, it risks, at the same time, thwarting the original intention of the legislature. Any inquiry into decision-making inconsistency where there is no patently unreasonable error thus diverts courts of law from the fundamental question which the legislature has in any case already answered.

¶ 88 Moreover, limiting this type of review to serious and unquestionable jurisprudential conflicts would not, by itself, remove all difficulty. There are undoubtedly clear cases of inconsistency where the dictates of equality and consistency in the application of the law will have full effect. I am far from certain, however, that only those cases will come before the courts. The case at bar is a striking demonstration of this: is the fact that two bodies interpret the same legislative provision differently, but in the particular context of the jurisdiction of each, one in a penal and the other in an administrative matter, a "conflict in decisions"? What about an isolated decision conflicting with a consistent line of authority? Must a jurisprudential conflict "continue" before being brought to the attention of the courts? If so, how is the quantitative and temporal threshold to be determined? Professor Ouellette has voiced these concerns:

> [TRANSLATION] Now we know at least that the concept of "serious or significant conflict of decisions" must be strictly interpreted, but it remains a source of confusion and difficult to apply. How many differing opinions or persons affected, assuming that they can be quantified, must there be to justify review on evocation of a decision not otherwise patently unreasonable?
> (Yves Ouellette, "Le contrôle judiciaire des conflits jurisprudentiels au sein des organismes administratifs: une jurisprudence inconstante" (1990), 50 R. du B. 753, at p. 757.)

[page798]

¶ 89 The principle that decisions of administrative tribunals remain effective is accordingly decisive. While answers diametrically opposed according to the identity of the members of an administrative tribunal certainly would seem to be unacceptable, what is the position of the litigant in whose favour the same administrative tribunal has ruled but who sees this decision challenged (with all the costs, delays and so on involved), perhaps needlessly, on the ground of an alleged inconsistency? The first situation is relatively rare and can be resolved outside the judicial arena. The legislature is in that category. Similarly, the administrative body can play a role of primary importance. As Professor MacLauchlan noted, supra, at p. 437:

> The proper response to administrative action which is ostensibly inconsistent but which falls short of traditional jurisdictional grounds of review is not judicial oversight, but the exertion of pressure in the political dynamic, of which the administrative decision-maker forms a vital element.

¶ 90 Similarly, it is important to note the internal mechanisms developed by administrative tribunals to ensure the consistency of their own decisions: IWA v. Consolidated-Bathurst Packaging Ltd., [1990] 1 S.C.R. 282, and Tremblay v. Quebec (Commission des affaires sociales), [1992] 1 S.C.R. 952. In Tremblay, Gonthier J. noted that "the objective of consistency responds to litigants' need for stability but also to the dictates of justice" (p. 968). In Consolidated-Bathurst, Gonthier J. spoke of the importance for an administrative tribunal to maintain a high level of quality and consistency in its decisions (at pp. 327-28):

> It is obvious that coherence in administrative decision making must be fostered. The outcome of disputes should not depend on the identity of the persons sitting on the panel for this result would be [TRANSLATION] "difficult to reconcile with the notion of equality before the law, which is one of the main corollaries of the rule of law, and perhaps also the most intelligible one": Morissette, Le contrôle de la compétence d'attribution: thèse, antithèse et synthèse (1986), 16 R.D.U.S. 591, at p. 632. Given the large number of decisions rendered in [page799] the field of labour law, the Board is justified in taking appropriate measures to ensure that conflicting results are not inadvertently reached in similar cases. [Emphasis added.]

¶ 91 This Court has also recognized that the search for consistency is not an absolute one. Thus, in the foregoing case it was held that the members of an administrative tribunal were not bound by any stare decisis rule (p. 333). Similarly, as Gonthier J. pointed out in Tremblay, the consistency objective must be pursued in keeping with the decision-making autonomy and independence of members of the administrative body (at p. 971):

> We have seen that the justification for institutionalizing decisions lies primarily in the need to ensure consistency in decisions rendered by administrative tribunals. Whether the latter make decisions with a high policy component or not, those decisions must be consistent with the requirements of justice. A consultation process by plenary meeting designed to promote adjudicative coherence may thus prove acceptable and even desirable for a body like the Commission, provided this process does not involve an interference with the freedom of decision makers to decide according to their consciences and opinions. [Emphasis added.]

¶ 92 Finally, in the same case, the Court noted that administrative tribunals could render contradictory decisions (at p. 974):

> Ordinarily, precedent is developed by the actual decision makers over a series of decisions. The tribunal hearing a new question may thus render a number of contradictory judgments before a consensus naturally emerges. This of course is a longer process; but there is no indication that the legislature intended it to be otherwise. Bearing this in mind, I consider it is particularly important for the persons responsible for hearing a case to be the ones to decide it. [Emphasis added.]

¶ 93 Though they were part of a discussion centering on the rules of natural justice, these remarks indicate that certainty of the law and decision-making consistency are chiefly notable for their relativity. Like the rules of natural justice, these objectives cannot be absolute in nature regardless of the context. The value represented by the decision-making [page800] independence and autonomy of the members of administrative tribunals goes hand in hand here with the principle that their decisions should be effective. In light of these considerations we must conclude that, for purposes of judicial review, the principle of the rule of law must be qualified. This is consistent with the continuing evolution of administrative law itself. The process by which curial deference has progressively become established in courts of law was analyzed by Wilson J. in National Corn Growers Assn. v. Canada (Import Tribunal), supra (at p. 1336):

> Canadian courts have struggled over time to move away from the picture that Dicey painted toward a more sophisticated understanding of the role of administrative tribunals in the modern Canadian state. Part of this process has involved a growing recognition on the part of courts that they may simply not be as well equipped as administrative tribunals or agencies to deal with issues which Parliament has chosen to regulate through bodies exercising delegated power, e.g., labour relations, telecommunications, financial markets and international economic relations. Careful management of these sectors often requires the use of experts who have accumulated years of

> experience and a specialized understanding of the activities they supervise.
>
> Courts have also come to accept that they may not be as well qualified as a given agency to provide interpretations of that agency's constitutive statute that make sense given the broad policy context within which that agency must work. [Emphasis added.]

¶ 94 This process has led to the development of the patently unreasonable error test. If Canadian administrative law has been able to evolve to the point of recognizing that administrative tribunals have the authority to err within their area of expertise, I think that, by the same token, a lack of unanimity is the price to pay for the decision-making freedom and independence given to the members of these tribunals. Recognizing the existence of a conflict in decisions as an independent basis for judicial review would, in my opinion, constitute a [page801] serious undermining of those principles. This appears to me to be especially true as the administrative tribunals, like the legislature, have the power to resolve such conflicts themselves. The solution required by conflicting decisions among administrative tribunals thus remains a policy choice which, in the final analysis, should not be made by the courts.

VI - Conclusion

¶ 95 For all these reasons, I would allow the appeal and dismiss the motion in evocation, the whole with costs throughout.

# TAB 16

# Attachment E

## Deliverability
## Market Share and Market Concentration Analysis

### Market Definition: Ontario, Michigan, New York, Pennsylvania, Ohio, Indiana and Illinois

| Line No. | Company | Notes | Total Working Gas Available for All Customers: Working Gas (MMcf) | Market Share | HHI | Working Gas for Ex-Franchise: Working Gas (MMcf) | Market Share | HHI |
|---|---|---|---|---|---|---|---|---|
| | (a) | (b) | (c) | (d) | (e) | (f) | (g) | (h) |
| | **Physical Storage:** | | | | | | | |
| | *Duke Energy:* | | | | | | | |
| 1 | MHP Canada | | 120 | 0.3% | | 120 | 0.4% | |
| 2 | Union Gas | (1) | 2,400 | 5.3% | | 1,125 | 3.9% | |
| 3 | Texas Eastern | | 694 | 1.5% | | 694 | 2.4% | |
| 4 | Total - Duke Energy | | 3,214 | 7.1% | 50 | 1,938 | 6.7% | 45 |
| 5 | Ameren Corp. | | 233 | 0.5% | 0 | 0 | 0.0% | 0 |
| 6 | Aquila | | 85 | 0.2% | 0 | 0 | 0.0% | 0 |
| 7 | Centerpoint Energy | | 30 | 0.1% | 0 | 30 | 0.1% | 0 |
| 8 | Central New York Oil & Gas | | 500 | 1.1% | 1 | 500 | 1.7% | 3 |
| 9 | Citizens Gas & Coke Utility | | 120 | 0.3% | 0 | 0 | 0.0% | 0 |
| 10 | CMS Energy | (2) | 3,069 | 6.8% | 46 | 0 | 0.0% | 0 |
| 11 | Dominion Resources | | 5,779 | 12.7% | 162 | 4,014 | 13.8% | 191 |
| 12 | DTE Energy | (3) | 4,189 | 9.2% | 85 | 889 | 3.1% | 9 |
| 13 | Dynegy | | 338 | 0.7% | 1 | 0 | 0.0% | 0 |
| 14 | El Paso Corp. | | 6,053 | 13.3% | 177 | 6,053 | 20.8% | 435 |
| 15 | Enbridge Inc. | (4) | 1,800 | 4.0% | 16 | 0 | 0.0% | 0 |
| 16 | Equitable Resources | | 404 | 0.9% | 1 | 404 | 1.4% | 2 |
| 17 | KeySpan | | 70 | 0.2% | 0 | 70 | 0.2% | 0 |
| 18 | Kinder Morgan Inc. | | 1,930 | 4.2% | 18 | 1,930 | 6.6% | 44 |
| 19 | Loews Corp. | | 133 | 0.3% | 0 | 0 | 0.0% | 0 |
| 20 | Midwest Gas Storage | | 50 | 0.1% | 0 | 50 | 0.2% | 0 |
| 21 | National Fuel Gas Co. | | 1,195 | 2.6% | 7 | 1,195 | 4.1% | 17 |
| 22 | Nicor Inc. | | 2,800 | 6.2% | 38 | 0 | 0.0% | 0 |
| 23 | Nisource, Inc. | | 2,726 | 6.0% | 36 | 2,644 | 9.1% | 83 |
| 24 | PAA/Vulcan Gas Storage | | 700 | 1.5% | 2 | 700 | 2.4% | 6 |
| 25 | Peoples Energy | | 920 | 2.0% | 4 | 0 | 0.0% | 0 |
| 26 | Robinson Engineering | | 10 | 0.0% | 0 | 10 | 0.0% | 0 |
| 27 | SEMCO Energy | | 244 | 0.5% | 0 | 60 | 0.2% | 0 |
| 28 | Southern Union | | 468 | 1.0% | 1 | 468 | 1.6% | 3 |
| 29 | Steuben Gas Storage Co. | | 60 | 0.1% | 0 | 60 | 0.2% | 0 |
| 30 | T.W. Phillips Gas & Oil | | 62 | 0.1% | 0 | 0 | 0.0% | 0 |
| 31 | The Energy Cooperative | | 40 | 0.1% | 0 | 0 | 0.0% | 0 |
| 32 | Tribute Resources | | 11 | 0.0% | 0 | 11 | 0.0% | 0 |
| 33 | Vectren Corp. | | 200 | 0.4% | 0 | 0 | 0.0% | 0 |
| 34 | Williams Companies | | 858 | 1.9% | 4 | 858 | 3.0% | 9 |
| 35 | WPS Resources | | 100 | 0.2% | 0 | 100 | 0.3% | 0 |
| 36 | Subtotal - Physical Storage | | 35,176 | | | 20,045 | | |
| | **Substitutes for Physical Storage:** | | | | | | | |
| | Local Production | (5) | | | | | | |
| 37 | Ontario | | 36 | 0.1% | 0 | 36 | 0.1% | 0 |
| 38 | Michigan | | 700 | 1.5% | 2 | 700 | 2.4% | 6 |
| 39 | New York | | 126 | 0.3% | 0 | 126 | 0.4% | 0 |
| 40 | Pennsylvania | | 539 | 1.2% | 1 | 539 | 1.9% | 3 |
| 41 | Ohio | | 248 | 0.5% | 0 | 248 | 0.9% | 1 |
| 42 | Indiana | | 9 | 0.0% | 0 | 9 | 0.0% | 0 |
| 43 | Illinois | | 0 | 0.0% | 0 | 0 | 0.0% | 0 |
| | Capacity Release - Marketer Capacity | (6) | | | | | | |
| 44 | Proliance Energy | | 752 | 1.7% | 3 | 752 | 2.6% | 7 |
| 45 | PSEG Energy Resources & Trade | | 563 | 1.2% | 2 | 563 | 1.9% | 4 |
| 46 | Inergy Gas Marketing | | 490 | 1.1% | 1 | 490 | 1.7% | 3 |
| 47 | Amerada Hess | | 467 | 1.0% | 1 | 467 | 1.6% | 3 |
| 48 | Coral Energy Resources | | 324 | 0.7% | 1 | 324 | 1.1% | 1 |
| 49 | Nexen | | 295 | 0.6% | 0 | 295 | 1.0% | 1 |
| 50 | Virginia Power Energy Mktg | | 272 | 0.6% | 0 | 272 | 0.9% | 1 |
| 51 | Tenaska | | 258 | 0.6% | 0 | 258 | 0.9% | 1 |
| 52 | Constellation Energy | | 204 | 0.4% | 0 | 204 | 0.7% | 0 |
| 53 | BP Energy | | 177 | 0.4% | 0 | 177 | 0.6% | 0 |
| 54 | On-System Peakshaving | (7) | 1,593 | 3.5% | 12 | 1,593 | 5.5% | 30 |
| 55 | Subtotal - Substitutes | | 7,052 | | | 7,052 | | |
| 56 | **Total Relevant Market** | | **45,441** | **100.0%** | **674** | **29,035** | **100.0%** | **907** |
| 57 | **Market Share of Top 4 Suppliers** | | | **42.3%** | | | **50.5%** | |

(1) Approximately 53% of Union Gas' storage is reserved for its franchise customers at cost-based rates.
(2) CEA has conservatively assumed that all of CMS Energy's storage is reserved for its LDC customers.
(3) Ex-franchise amounts for DTE Energy represent storage owned by DTE Gas Storage Company.
(4) It is CEA's understanding that most, if not all, of Enbridge's storage is reserved for its franchise customers and has conservatively reflected this assumption in the analysis presented above.
(5) US data based on dry natural gas production data from EIA, Natural Gas Annual 2004 (Released December 2005); Ontario data based on Ontario Oil, Gas and Salt Resources Library, "Industry Fast Facts: Ontario", data presented represents 2003 data
(6) Estimated firm pipeline capacity held by marketers in the relevant geographic market on ANR Pipeline, Great Lakes Gas Transmission, Tennesse Gas Pipeline, Dominion Transmission, National Fuel Supply Corp., Panhandle Eastern and Trunkline Gas.
(7) Represents peakshaving capacity owned by LDCs in New York, Pennsylvania, Indiana and Illinois.

Sources: Intelligence Press, "Natural Gas Storage and LNG Facilities in the United States and Canada", 2004; FERC Filings; CEA research; Energy and Environmental Analysis, "Analysis of Competition in Natural Gas Markets for Union Gas Limited", October 28, 2004.

# TAB 17

**Louis A. Leclerc**
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Montreal July 27th, 2006

Mr. John Zych
Board Secretary
Ontario Energy Board
2300 Yonge Street - 27th Floor
Toronto, Ontario M4P 1E4

Subject : EB-2005-0551 NGEIR
Response to undertaking of *July 13, 2006*
*transcript page 101*

Mr. Zych:

Please find enclosed Gaz Métro's response to the above referenced undertaking.

The information contained in this response was discussed with counsel for IGUA, M. Peter Thompson who agreed that it represented a reasonable estimate of the costs of using an FT long haul supply structure expressed as a percentage of GMi's current supply structure from western Canada to its franchise area which includes the use of Dawn storage.

Should the Board have any questions, please do not hesitate to communicate with the undersigned.

Yours truly

LAVERY, DE BILLY

Louis A. Leclerc

LAL/cab
Cc : Parties of record
Enc. (1)

Exhibit J36
Undertaking No. 10.1

Gaz Métro Limited Partnership

**Undertaking:**

**"To provide, as a percentage, the cost of moving gas as opposed to storing it on Dawn"** *July 13, 2006 Transcript, Page 101.*

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Response:

In order to respond to the undertaking we have analysed the costs involved in using Long Haul Firm Transportation on the TransCanada system to supply our service area winter demand in comparison with a supply structure which uses Dawn based storage. Our analysis is based on our specific situation of an LDC located in Quebec and the costs involved in bringing gas from Empress to the GMi EDA. The results of our analysis might not be applicable to other parties that are located elsewhere.

The assumptions we have used in this analysis are based on the rates in effect in December 2005, which was a pivotal period in our negotiations with Union Gas for our latest contract renewal. The analysis is therefore based on an annual capacity of 4 415 580 GJ with a deliverability rate of 52 987 GJ/Day. The commodity prices we've used are also based on December 2005 market expectations of future commodity prices.

In order to respect our confidentiality obligation with regard to the costs of our existing storage contracts with Union Gas as well as to maintain our ability to negotiate the lowest possible cost for our customers, it is essential to keep the costs of our alternatives confidential. For the purpose of this analysis, we have used as a working hypothesis, a winter summer price differential of 1,403$ and a Storage reservation charge of 0,917$ (Union Gas Limited in Exhibit B, Tab 1 UGL Undertaking 16 dated April 17, 2006).

The factors we considered in our analysis are the rates in effect for both long-haul and short-haul transportation (M12 & STS), the compressor fuel requirement in both scenarios, the expected cost of the commodity and the cost of financing the gas put in storage under a supply structure that would include the use of Dawn based storage as well as the resale value of the transportation capacity when it is not required in the winter and the increased cost of purchasing gas in the winter if we were to use long-haul transportation as a load balancing tool.

The main variable that would influence the costs of using long-haul transportation as a load balancing tool is the resale value of the transportation capacity when it is not required in the summer.

The resale value of the transportation capacity in the market fluctuates significantly over time. Our base scenario is based on an average resale value of 0,40 $/GJ. For comparison we also ran our analysis with a resale value of 0,20 $/GJ and 0,60 $/GJ.

The table below provides a comparison, on a percentage basis, between the costs of using long-haul transportation as a balancing tool and the use of Dawn based storage. We have factored in are all the costs involved in transporting the gas from Empress to the GMI EDA.

In the first table, we have only considered the difference between winter and summer gas prices but not the cost of the gas itself.

| **FT Long-Haul resale value assumptions ($/GJ)** | **Costs of using a FT Long Haul supply structure expressed as a percentage of the costs of a supply structure which includes Dawn based storage (%)** |
|---|---|
| 0,20 $/GJ | 133,2% |
| **0,40 $/GJ** | **119,2%** |
| 0,60 $/GJ | 105,3% |

In the second table, we factored in the total cost of purchasing the commodity in both scenarios and the results would be as follows:

| **FT Long-Haul resale value assumptions ($/GJ)** | **Costs of using a FT Long Haul supply structure expressed as a percentage of the costs of a supply structure which includes Dawn based storage (%)** |
|---|---|
| 0,20 $/GJ | 114,5% |
| **0,40 $/GJ** | **108,4%** |
| 0,60 $/GJ | 102,3% |

# TAB 18

DISCRIMINATION CONCERNS

customers."

That is putting -- there is an "if". So are you saying this is an assumption, or do you know that as a fact, that they can, in fact, pass through these extra storage costs if they were to have to bid at market-based rates?

MR. FOURNIER: Can we just have a moment, please.

[Witness panel confers]

MR. MacDONALD: I think the answer to the question, regardless of the current CES contracts which may or may not - I am not an expert on that contract - allow a generator to pass that cost through, my experience in any deregulated power market, such as Ontario, as a quasi deregulated market, the next contract may not -- in the competitive market in Ontario for electricity without a CES contract, any costs of natural gas will flow through to the electricity price. And that is exactly what we see in our PGM markets in New Jersey where we operate. No one is buying gas ahead of time. People buy gas a day ahead for tomorrow. That's as much risk as they're willing to take. So whatever the costs of that gas is in the competitive electricity market will flow through the electricity price. So if you go to market-based rates for storage and they're paying that, it is a flow-through.

MR. RUPERT: So that's based on the assumption that natural gas generators, even outside the government contracts in the spot market, are setting the market clearing price on the predominant number of hours during the year?

MR. MacDONALD: Agreed.

MR. RUPERT: The other area I wanted, the more important area, I really want to understand IGUA's and AMPCO's position on the forbearance question and what flows from -- what you are recommending the Board ought to do.

In your main evidence, starting on page 27, in paragraph 55, it says in the fourth line:

> "Accordingly IGUA and AMPCO urge the Board to find that EGD and Union clearly have market power in their provision of storage services in Ontario."

And paragraph 59 is a similar sort of comment. Then we go over to paragraph 60, which says -- I will read a bit of it:

> "For the reasons described by Mr. Stauft in his evidence, IGUA and AMPCO question whether there is a principled basis for continuing to allow Union to charge storage services to any end-use consumers in Ontario under the auspices of market-based rates. Such rates should be discontinued for these market sectors and others located in geographic areas outside of Ontario if EGD and Union are unable to convincingly establish, on a principled basis, there is sufficient competition."

Now, I want to be clear that I understand who you are referring to here in this paragraph 60.

The second sentence says:

"Such rates should be discontinued for these market sectors and others located in geographic areas outside of Ontario..."

Are you saying that all rates charged by Enbridge and Union to all customers ought to be at cost-based rates?

MR. FOURNIER: That's our ideal position. You will recall that I have a good many members in Quebec, who I represent also, and the current storage is integral to the operations of Gaz Métro, and you heard their evidence on that. And four or five -- I'm not sure how long ago, this Board allowed Union to move to market-based rates, if I can use that term, because I'm not sure the rates they're charging are market-based, but certainly the exfranchise rates being charged to Gaz Métro, for one, are very, very high.

We have heard evidence, as I understand it here, that the cost-based rates for Union for its customers is something in the order of 30, 31 cents a gigaJoule, and for Enbridge in the order of 40 cents a gigaJoule. Yet I understand the rates being charged by Union for its non-infranchise customers are in the order of a dollar.

That hurts our members in Quebec. It hurts Gaz Métro. And I think when we see Union charging Enbridge a dollar for storage services that Enbridge needs to serve Ontario customers, that that is a rate that this Board should be concerned about.

If we had true competition where we had sufficient suppliers and a fairly vibrant market, I would guess -- I'm

no expert, but I would guess that the sort of market levelling price for storage might be something in the range of 40, 50 cents, somewhere in there.

I think if we're talking of that kind of magnitude, the whole problem goes away.

But when we are talking of an exfranchise price or so-called market-based price that is three times, 300 percent, over the regulatory determined measure of cost-based price, which is 31 cents in Union, then I think this Board, which is responsible for protecting the public interest in this province, needs to look at that. As its decisions in the past, which have allowed Union to charge Enbridge in the range of $1 a gigaJoule, is that a fair and reasonable treatment of the customers served by Enbridge for that existing storage, and for any future storage that Enbridge contracts for, so long as we don't have that competitive -- truly competitive market for storage. So I think that is what is behind our statement here

MR. RUPERT: Let me understand that. I really want to be clear in my mind about that. Obviously the existing infranchise consumers that consume gas from Union and Enbridge, you believe they should have cost-based rates.

MR. FOURNIER: Correct.

MR. RUPERT: You mentioned Enbridge should get cost-based rates for its storage contract it has with Union.

MR. FOURNIER: Correct.

MR. RUPERT: You mentioned GMI should get cost-based rates.

MR. FOURNIER: That's our ideal. But I'm a realist. They're now paying market-based rates. And this proceeding I don't think is here to address the out-of-province rates for storage, at least I don't think that is what you're focussing on.

MR. RUPERT: I want to understand. Also your expert, Mr. Stauft, has, I believe, told us -- although I am not quite clear at the end of the day where he ended up. Certainly his evidence says we ought to roll back the rates for everybody. All of the New England -- all of the marketers that buy storage in Ontario because of the existing of market power, it is unconscionable - my word - to charge anybody anywhere near anything other than 31 cents a gJ.

So I want to understand very clearly where IGUA is on that and AMPCO is on that position.

MR. FOURNIER: Well, to us the fact that Union is selling some storage at $1 is a pure demonstration of huge market power, monopolistic, if you like, power. And this Board, among its mandates, is to act as a proxy for competition where there is no competition. That's why you regulate the distribution rates of Union and Enbridge and others.

I think you need to look at whether or not, in allowing Union to charge a monopoly rate for storage, is in the best interests of the customers served by Union and Enbridge. And if some of those are out of province, out of the country, it is -- it is still the same storage assets

that were developed over, what, 40 years, 50 years, financed on the strength of the utility markets that Union and Enbridge originally had.

So to get where you're going, are we advocating -- are we going to argue that that is the decision that this Board must make, to move everything back to cost-based? I don't think we're -- we're not suggesting that, and the response that Mr. Thompson made to Mr. Smith that was read out earlier I think suggests that for -- certainly for third-party providers, we can see market-based rates being appropriate for them. And as more come on line, we hopefully might see this movement to a competitive market.

But clearly Union especially has huge dominance in this market. It is charging monopoly rates for exfranchise, and you have to decide whether or not that is in the public interest.

MR. RUPERT: Okay. I read your evidence that way, and what Mr. Stauft was saying, but I want to be absolutely clear that would be, as you describe it, your ideal position: that rates for Union and Enbridge, not new third-party storage, I appreciate that, ought to be at cost-based rates for everybody?

MR. FOURNIER: Correct.

MR. WHITE: Could I jump in, because it seems to me there are a number of interesting philosophical questions in this. There is a pile of evidence before the Board, and I have looked at some of it relating to whether or not there is market power or whether it is competition or what

are the -- what factors one might consider in order to establish whether or not competition exists.

I guess the question really philosophically comes down to, in my mind, the nature, the physical nature, of the resources in question, these storage caverns in Ontario -- and if I were to quote Adam Beck, he would say that the gifts of nature are for the people.

So these, obviously, these caverns, are a geographic attribute of Ontario. They are managed by the Crown, for the benefit of the citizens of Ontario. And over time, the rights to develop and use these attributes have been granted, by way of a franchise, to Union and Enbridge. So it is not in dispute that Union and Enbridge, between them, control most of them.

So the question is, from the Board's perspective, in order to fulfil its statutory duty as described by the legislation, the question is whether it is in the public interest to regulate the prices for the services provided by these facilities, or whether it can choose to forebear and whether forbearing would result in a superior outcome for the citizens of Ontario.

So in my view on this, the question of what to charge out-of-province customers is perhaps less critical to the public interest mandate of the Board. If one ascribes to Adam Beck's view that the gifts of nature are for the people, and the people in question are the citizens of Ontario, then it's primarily the interests of consumers within Ontario for whom we should be most concerned.

And if we are able to use our native resources and discriminate, charge discriminatory prices to citizens of other countries and jurisdictions to the benefit of Ontario citizens, then that is not a bad idea. But that is a question of policy, it is not a question of regulatory principle. And I am struck, in my cursory review of the evidence, about how difficult it is to establish what an appropriate market power price if this were to be a theoretically, perfectly-competitive market for storage, which it isn't.

What we do know, is what the costs are. And what we also know, it seems to me, is that the two utility owners who operate that storage do so in a way which is profitable for them. So the question is: What is compelling change in the way the Board regulates prices of these services?

Is it because there is a more efficient outcome ahead of us, in other words, if we allow competition to take place will we achieve greater overall economic efficiency? In other words, will the prices of storage for customers in Ontario go down? I don't think that is the case.

The question is: Are the utilities operating in a situation where their viability is in question? I don't think that is -- that is not at issue either. So the question is really about why to forebear when the obvious implications are a fairly dramatic wealth transfer from consumers to suppliers who have a monopoly franchise on these assets.

MR. RUPERT: Let me just understand, then, your

position, or paraphrase it.

The prices charged currently by Union and Enbridge to exfranchise consumers are the subject, or the outcome of a monopolistic position where they have market power, but that is okay if they're charged to people that you think are outside of Ontario. And that's different than Mr. Fournier has just said with respect to GMI. Let's be clear on the difference there. Is that true?

MR. WHITE: No. I think -- what we know, it seems to me, is what rates derive from a review of the costs of providing the service. And those are the rates currently charged to infranchise customers.

What we also know is Union and Enbridge and storage operators are able to charge higher prices to other customers. But whether those higher prices relate to what a price would be in a competitive market, I don't think we can say.

It seems to me that the fact that they have the ability to charge a price that is higher than the cost reflects the existence of market power, and in economic theory, it is a fairly straightforward example of price discrimination. I guess the question is, from my perspective as a citizen of Ontario and looking to the objectives of the legislation to predict protect the interests of the consumers in Ontario, is it unprincipled or inappropriate to charge discriminatory prices for customers of these services outside of Ontario? That's an interesting question.

But that is a different question than, what is the appropriate basis for setting rates for these services to customers in Ontario.

MR. RUPERT: I want to understand your position on the question. You have talked about it here. I just want to make sure I'm really clear on your position on this inside outside Ontario. I agree it's an interesting questions, but I want to make sure I clearly understand your two organizations' views on where cost-based rates stop and where, what some people call market-based rates, what you call monopolistic prices, start.

MR. FOURNIER: I would think our position is summarized really in paragraph 61 on that same page, where:

> "We urge the Board to re-examine the market-based rates for storage services which Enbridge and Union are currently authorized to charge some of their customers and discontinue such rates if Enbridge and Union cannot demonstrate that there is sufficient competition to protect each of the market sectors currently being served," then it should read Enbridge and Union, "under the auspices of such rates."

MR. RUPERT: But my question is -- I don't want to prolong this. The word "some" is in the third line. I want to be clear how I define "some".

MR. FOURNIER: Some of their customers are being served under cost-based rates. So some of their customers are being served --

MR. RUPERT: Let me try an example. I don't want to make this difficult. I am a utility in the Northeastern United States. I currently, as the evidence has shown, have contracted at market-based rates for storage at Dawn.

Am I in the group that you refer to as some of those customers should have now cost-based rates as opposed to --

MR. FOURNIER: Yes.

MR. RUPERT: This extends to New England and beyond? It extends to everybody then, it is everybody?

MR. FOURNIER: It is all of those not paying cost-based.

MR. RUPERT: That leads to the second and last part of my question. There's been a lot of discussion in this hearing, as you I'm sure know, about this premium that currently exists and is shared in both companies between the shareholders of the company and the ratepayers. A lot of discussion on that.

Now, you're obviously, I'm sure, aware that under the approach you've just advocated there would be no premium to worry about any more because the cost-based rates would apply to all consumers of storage services, whether they're inside Ontario or outside of Ontario. So, again, I wanted to understand your position. You don't really care too much about the premium, in the sense, because in your ideal view of the world there would be no premium to begin with.

MR. FOURNIER: I should qualify and say no premium on, what I would call, vanilla storage, that's the 1.2 percent standard.

I think that if to serve power generators, or any other customer who wanted it, a higher storage injection or withdrawal rate, that does involve separate costs; that would command a premium. And that's a premium that, presumably, would be negotiated between the utility, depending on the circumstances what that was.

So I would exclude that.

But for vanilla storage, if I can use that term, sold by Union in particular - because Enbridge really doesn't have spare to sell to third parties - but storage sold by Union at prices that are clearly dominated by its market power are, I think, where the Board needs to look at how it is addressing those storage rates in that situation of monopoly power.

MR. WHITE: Perhaps I might qualify too, because --

There are two questions in my mind: What is the Board's duty with respect to Ontario customers; and then there is a question about what is the Board's duty to regulate with respect to customers that are exfranchise or outside the province.

And in my view, the Act is fairly clear on this. I'm not a lawyer and I am not an expert, but I don't know that the Board has a duty to protect the interests of consumers outside of Ontario.

So the argument for rates based on costs for Ontario consumers, it seems to me, is clear. The question about whether the utilities should be able to charge a premium to provide storage services based on these assets to customers

outside of Ontario is a question of policy and trade law, more than anything else, it seems to me.

I would say, as a business matter, as a practical concern, if revenues that are realized by charging premiums to out-of-province customers accrue to the benefit of consumers, then that would probably be something upon which we would look favourably. But that is really a question of policy more than anything.

I guess it depends the extent to which the Board determines that these assets are a natural heritage of the Province of Ontario and the extent to which a monopoly exists in the utilization of management of those assets.

MR. RUPERT: One quick follow up and then I will turn it over to my fellow panel members.

Under that point of view, and I asked this question to a few other witnesses, do you force yourself to have to identify the nature of the transaction that -- what might appear to be what a non-Ontario consumer is doing at Dawn. For example, if a marketer has storage at Dawn, do you have to then go back and find out whether that marketer is bundling that storage with products to serve an Ontario-based consumer in order to determine how much to charge that marketer for that storage?

MR. WHITE: Well, I'm not an expert, but I think you identify an example where one would need to be careful about the boundary conditions, because perhaps there is the potential for there to be some ambiguity about where the service originates and to whom it is provided ultimately.

You know, like electricity, natural gas flows around the system and across the borders.

MR. RUPERT: Okay, thanks.

MR. KAISER: Mr. White, I just want to follow up quickly with your Adam Beck and your natural heritage issue. That's one thing. Those are resources that exist today. In Ontario, as you say, we're very fortunate, and you can take the position you have, that the people are entitled to the benefits. And you talk about the Board's duty.

The question I have, because you are addressing this in sort of a broader public policy perspective, perhaps, is hat do you think we have a duty to ask ourselves whether the current regulatory regime - I'm talking about cost-based - is appropriate and creates proper incentives for creating new storage.

One of the different issues which you haven't touched on at all - and it is reflected in what the Americans are doing as well - is whether this cost-based storage that we've all learned to love is preventing us from developing new storage, given that there's an increasing demand for storage, it appears for from a number of different changed circumstances. And the argument goes that those costs are low costs and that -- and I come to you on this, because you started referring to discrimination and reference of price to cost in the market-based sector.

One of the propositions I would ask you is, do you think there is a difference between marginal cost and the

average cost? And you can have situations where the marginal cost of developing new product new storage is significantly greater than the average cost, and therefore as an economist, you know it is not unlikely that in competitive markets priced equal to marginal cost, and that price - I'm talking about new assets now, new storage - is going to be higher than the old price.

Do you accept that?

MR. WHITE: Well, I mean, it depends, in theory, where we are -- whether there are increasing economies of scale, and it depends on the physical nature of the resource and how far it has been exploited. I am not an expert on that. I mean, I was in a meeting yesterday and I was given to understand that, in fact, there is not much new storage to be developed in Ontario. But I am not an expert so I am not sure.

I mean, if we had 250 out of a potential 1,000 Bcf of storage, then no, the marginal costs could be lower than the average costs. But if we were 250 out of a potential total of 270, then the example you illustrate might be accurate.

I guess the question -- see, there is a couple of -- I mean, obviously I don't want to be disrespectful or to suggest to the Board what it needs to do or how to do its job. The question, it seems to me, of how to regulate and why to regulate is multi-faceted. One is, obviously, to preserve the financial viability of the infrastructure of the companies that operate. One is to protect the

interests of consumers to ensure that the rates are just and reasonable, and so on, and to be a proxy for the competition where it doesn't or cannot exist. Another, perhaps, aspect of this is to provide appropriate incentives, not only to suppliers but also to customers.

So the question is, if the marginal costs of developing the next increment of storage is higher than the average cost and the utility can only realize the average cost, then obviously we will have a disincentive to develop that new storage. The question is, what can the Board do to provide the appropriate incentive for that increment of storage to be developed by the utility?

That, it seems to me, is a different question than should we raise rates for all consumers, because that provides a whole different set of incentives for all sorts of things. And the outcome in terms of economic efficiency, it seems to me, is much less clearer. If you want new storage, let's go and develop, by all means, new storage and let's pay what it costs to develop that. The question about how that cost is transmitted through to customers, though, it seems to me, is a different question.

One of the concerns, the increasing concerns, of consumers broadly in Ontario are the unpredicted outcomes of marginal-cost pricing in electricity. And I think that it would be a mistake to, sort of, jump forward with some of these conclusions based on theory, unless we're fairly certain that we can achieve the structural and regulatory result we're looking for in terms of the market.

But if we need to develop infrastructure, then I think we would be supportive of the Board acting in a way that sees that happen.

MR. FOURNIER: Mr. Kaiser I will add and I think Mr. MacDonald wants to add some comments.

I would certainly -- if the development of new storage - and I go back to the question of Mr. Stevens in development by an affiliate - if that new storage increment, turns out that their costs work out to, let's say, 60 cents today -- and clearly that 30 cents of Union reflects a fair bit of depreciation now of assets developed many years ago at much lower costs than that which are developed today. So someone coming new into the field is certainly going to have much higher costs than that 30 cents.

In an environment where we don't have pure competition where that seller then would have to -- you can only get what the market will bear sort of a thing, if that storage developer, whether an affiliate or somebody else, says, Right, we'll sell you storage and our price is 70 cents, if it can be demonstrated that the true costs of developing the storage, say, were 60 cents, plus he's earning a reasonable rate-of-return for the risks and everything else on that energy resulting in that 70-cent price, then that's fair and good. That's great. But if that storage developer is saying, I'm demanding a dollar, when his true costs were 60 cents plus a dime for, say, return, then I think one needs to question whether that dollar is a fair

and reasonable price.

So the Board may or may not have to lock at costs behind it. But if it is -- if the price of that new storage contract is at, let's say, 70 cents, and that is approved and gets rolled in with the rest of the rates -- and we're not suggesting for a minute that if the cost-based rate today in the Union franchise area is 31 cents, that that applies to everybody. No, not at all.

You wanted to add something.

MR. MacDONALD: All I was going to add is that if Union wants to develop another 20 Bcf of storage, they can at the cost-based rates; and if is 60 cents and that gets commingled with the 30 cents and we will pay 37 cents for the new storage rate, there is -- I don't think there is any barrier to building that new storage right now. If they want to spend the money and it is a prudent expense for additional storage, then the costs will be allowed and the return will be allowed.

MR. KAISER: All right.

Ms. Chaplin has some questions.

MS. CHAPLIN: Just coming back for a moment to a question from Mr. Rupert regarding the fact that it's your position the Board should re-examine whether all storage should be priced at cost-based rates. This is particularly for you, Mr. Fournier.

We have had evidence from GMI and Enbridge that, in considering their storage contracts with Union - I believe I am characterizing their evidence correctly - that they

## CORRECTIONS TO TRANSCRIPT
## VOLUME 14 – TESTIMONY OF IGUA/AMPCO WITNESS PANEL

| Page | Line | Correction |
|---|---|---|
| 4 | 13 | the phrase "happened on" should read "have been doing" |
| 4 | 26 | "sixteen" should read "sixteenth" |
| 6 | 3 | "And" should read "I have" |
| 7 | 17 | the phrase "Do you adopt under..." should read "Do you adopt under oath..." |
| 10 | 9 | "excess" should read "access" |
| 11 | 18 | "is" should read "if" |
| 12 | 6 | "Adam Beck" should read "Tembec" |
| 12 | 16 | "is" should read "are" |
| 13 | 18 | "conversions" should read "convergence" |
| 17 | 22 | the phrase "contract amount of $62,500" should read "contract demand of 62,500" |
| 18 | 4 | "my great" should read "migrate" |
| 19 | 13 | the phrase "to be made on" should read "to be made available on" |
| 25 | 15 | "Enbridge Inc." should read "Enbridge Gas Distribution" |
| 41 | 26 | the phrase "who are the marketer, and" should read "from the marketer, and if" |
| 51 | 26-27 | the phrase "and the cost of" should read "in the course of" |
| 56 | 17 | "principle" should read "principled" |

# TAB 19

Answers

So we will break now for 15 minutes.

--- Recess taken at 11:25 a.m.

--- On resuming at 11:39 a.m.

MR. KAISER: Please be seated. Mr. Thompson.

**RE-EXAMINATION BY MR. THOMPSON:**

Yes, thank you, Mr. Chairman. I just have one brief area of re-examination and it's to you, Mr. White. And it's theoretical, primarily, it arises out of some questions that Ms. Chaplin posed, having regard to the fact that EGD and GMI indicated they were able to agree on a price with Union for storage and that they had alternatives, or words to that effect.

My question of you is, is there a distinction to be made between a price two people might agree on and a price which is the result of a workably competitive market and, if so, what is that distinction?

MR. WHITE: Well, I would say so. I mean, I have enough examples in my own experience of having suffered some remorse at having paid too much for something that I could have got cheaper somewhere else. So, again, you know that just confirms my view that evidence of a transaction between two parties isn't evidence of a competitive market, or a market that produces a competitive price.

In reviewing some of the textbooks in my collection on this last night, I was -- it talks about perfect competition. And it does speak to examples of commodities and commodity markets where, more or less, perfect competition might be argued to exist. And if you look at

the Chicago Mercantile Exchange or the New York Mercantile Exchange, you will examples of some of these commodities where they have literally hundreds and thousands of entities transacting very homogenous products, whether it is futures in pork bellies or coffee beans or anything else like that. So you can look to that market and you can be fairly assured, given the market's view of the future and understanding of the present, that the price that's being shown is a competitive price.

But we all see this in markets in which we participate every day. Just the evidence that a transaction has taken place, to me, doesn't prove anything about the competitive nature of the market in which that transaction occurred.

MR. THOMPSON: Just as a follow up to that. Is the availability of an "alternative" at a price of 150 percent, or 200 percent, or 300 percent, of the price being charged by the incumbent, evidence a workably competitive market?

MR. WHITE: No, I wouldn't say -- I mean, I don't know how anyone could draw that conclusion. As I said, one proof that a competitive market exists is evidence that price clears at marginal cost. So there is an example where transactions are taking place at a range of prices, and not clearing at a single price related to the cost of providing the service.

The other question I think -- again, I am not an expert, but the other question I would look to, if you look to the texts to talk about substitutes, whether we're talking about perfect substitutes, or gross substitutes, or

close substitutes, or these kinds of things, the question is really - and I think Mr. Butler put this quite well - the provision of storage services depends on the control and management of those underground caverns in southwestern Ontario. That's where they are.

There are two, or three, or maybe a couple of more that I am not aware of, entities that operate and manage those facilities. There is no free entry and exit. There is no hundreds of new players that are suddenly getting into the market and offering those kind of perfect substitutable products.

The question is: Can you, with a variety of other kinds of bundled products or pro forma products of long pack, and this, that and the other thing, achieve service to your industrial facility that is equivalent? And I think the example that you led me to in your question suggests, no. You can get something that is close, but you're going to pay a heck of a lot more for it. To me, this is, again, evidence that this is not a good substitute and it doesn't derive from a workably competitive market.

MR. THOMPSON: Thank you.

Those are my questions, Mr. Chairman.

MR. KAISER: Thank you. Mr. Thompson.

Ms. Sebalj, where do we go next?

MS. SEBALJ: I think we can dismiss this panel and then the Enbridge panel comes on for the Rate 300 series.

MR. KAISER: All right. Thank you, gentlemen. Thank you, Mr. Fournier, Mr. MacDonald Mr. Butler and Mr. White.