ONTARIO POWER AUTHORITY

Submissions on Issues List

January 14, 2008

Outline

- Structure of Submissions
- Purpose of Issues List
  - Scope of Proceeding
  - Questions which Board must address
- Scope of Proceeding
    - Three-Staged Planning Process:
      - Minister Determines Goals for IPSP
      - OPA Develops IPSP
      - OEB Review
- Questions for Board
    - IPSP:
      - Compliance with Directive
      - Economic Prudence and Cost Effectiveness
    - Procurement Process
    - Aboriginal Peoples Consultation

Structure of Submissions

- Submissions supporting proposed issues list, including in support of proposed structure by reference to intervenor alternatives.
- Submissions identifying specific intervenor proposed issues that are, in OPA's view, clearly out of scope.
- In addition, many issues, if framed properly, could be sub-issues in proposed list; question is whether they should be separately identified.

Sub-Issues

"The Board does not believe it is appropriate to define the Issues List in complete detail. For many issues, the Board expects that sub-issues will arise during the course of the proceeding which will need to be addressed in argument and in the final decision. It is not possible to identify all of those detailed issues now so early in the process. The Board is therefore hesitant to include detailed sub-issues on the Issues List if the matters are otherwise included in a broader issue." (EB-2007-0050, September 26, 2007, p. 2).

Purpose of Issues List

"The Board reminds the parties that the issues List has two purposes: 1) it defines the scope of the proceeding; and 2) it articulates the questions which the Board must address in reaching a decision on the application." (EB-2007-0050, September 26, 2007, p. 2).

Scope of Proceeding: Context

- Scope of Proceeding determined by reference to its role in planning process.
- One element of three staged process:
    - Government's Development of Supply Mix Goals;
    - OPA's development of IPSP; and
    - OEB review of IPSP.

Stage One: Developing IPSP Goals – Determining Supply Mix

Electricity Act, s. 25.30 (2):

"The Minister may issue, and the OPA shall follow in preparing its integrated power system plans, directives that have been approved by the Lieutenant Governor in Council that set out *the goals to be achieved during the period to be covered by an integrated power system plan, including goals relating to*,

(a) the production of electricity from particular combinations of energy sources and generation technologies;

(b) increases in generation capacity from alternative energy sources, renewable energy sources or other energy sources;

(c) the phasing-out of coal-fired generation facilities; and

(d) the development and implementation of conservation measures, programs and targets on a system-wide basis or in particular service areas."

Stage One: Developing IPSP Goals – Input for Supply Mix

- Minister's May 2, 2005 letter to OPA
- Minister chooses supply mix that "conforms closely to the values and wishes of the people of Ontario."
- 8 month technical and consultative process leading to Supply Mix Advice (December, 2005).
- Supply Mix Advice developed 10 candidate alternative plans for Minister's consideration.

Stage One: Developing IPSP Goals – Supply Mix Directive

- June 13, 2006 Directive has two types of goals: Plan Resources (paragraphs 1-6) and Plan Development (paragraph 7).
- The IPSP is to meet goals for each type of Plan Resource and component of Plan Development.
- Goals are precise and explicit.

IPSP Goals

OEB Report, “There are three fundamental themes that underlie the statutory framework that governs the IPSP”:

“First, it is the Government, and not the Board or the OPA, which is responsible for articulating the goals that the IPSP is to assist in achieving.”

- i.e., “goals” should not be rewritten.

IPSP Goals

"Second, these goals go beyond simply ensuring that supply is adequate to meet demand, and the IPSP in that sense is a plan whose scope and purpose is different from that of other, more traditional power system plans."

- i.e., the goals reflect Government policy.

IPSP Goals

"Third, it is the OPA, and not the Board, that has the statutory role of developing the IPSP."

- i.e., OPA is carrying out statutory mandate to implement specific policy goals of government in the public interest.

Stage Two: IPSP Development

- What is the IPSP?
- Directive leaves open a number of areas of discretion; IPSP addresses those areas.
- Extensive Public consultation (See: Exhibit C of Application)

Stage Three: OEB Review – Electricity Act, s. 25.30(4)

"The Board shall review each integrated power system plan submitted by the OPA to ensure it complies with any directions issued by the Minister and is economically prudent and cost effective."

Purpose of OEB Review: Financial Check on Discretionary Decisions

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

"The Government has a clear understanding of how the Board operates and the economic regulation principles that it utilizes as an economic regulator and has witnessed the Board's practices in that regard." (EB-2006-0034, April 26, 2007, pp. 4-5

Purpose of OEB Review: Financial Check

- Board has applied this rationale to inform its approach to reviewing amendments of IESO market rules under s. 33 of *Electricity Act*: "in the context of its mandate under section 33 of the Act, unjust discrimination means unjust economic discrimination." (EB-2007-0040, April 10, 2007, p.26).

Post-OEB Hearing

- Implementation will be carried out in accordance with project specific approval processes:
  - environmental
  - municipal
  - economic regulation
- Impossible to predict in precise detail how those processes will work in future – will not be determined in this case.

Part II: Issues List - Issue I(1): Compliance with Directive

- Compliance with Directive:
  - Language chosen by Government – should not be departed from.
  - Two types of Requirements: Resource Requirements and Plan Development Requirements (i.e., compliance with O. Reg. 424/04).
  - Resource Requirements: (1)1-6.

Compliance with Directives

- Plan Development Requirements: (1)7.
- Key terms:
  - “considered”
  - “replace”
- choice of words deliberate, reflected in change from previous language required that safety and economic and environmental sustainability and protection be “reflected” in the IPSP.

Key Term: "Consider"

"What, then, is involved in its duty to 'consider' the report? Certainly the Board must have the report before it …I do not think a Court can or should impose any arbitrary temporal standard any more than it can or should monitor the degree of required concentration of the report."

"Unless the good faith, indeed the honesty, of the members of the Board is called into question, the fact that they are briefed or counselled in advance to a rejection of the report is not a ground for concluding that they did not 'consider' it."

(*Walters v. Essex County Board of Education*, [1974] S.C.R. 481 at pp. 486-487.

Key Term: "Consider"

"County Council was required …to do no more than 'consider' the Minister's principles. In my opinion, that imposes no greater requirement on County Council than to take the principles into account when developing a restructuring proposal to be submitted to the Minister. [The Act]…does not state how or when the principles are to be considered. Moreover, to 'consider' is a somewhat conditional requirement in the sense that it does not imply that the principles must be followed in the development of a restructuring proposal."

(*Bruce (Township) v. Ontario (Minister of Municipal Affairs and Housing),* (1998), 41 O.R. (3d) 309 at 320 (Ont. C.A.)

"Consider"

- PWU: "Does the OPA adequately and reasonably weigh and evaluate safety, environmental protection and environmental sustainability?" (p.26)
- Energy Probe: "It goes without saying that the Board is entitled to evaluate the OPA's weighing and evaluating and to draw its own conclusion on whether the IPSP complies with the IPSP Regulation." (p.4).

"Consider"

- GEC:
  - "Has OPA's planning approach adequately weighed and evaluated environmental impacts and risks and considered sustainability appropriately and applied these in its plan development?"
  - "Has OPA adequately recognized and accounted for economic externalities in its planning and its analysis of sustainability?"

Key Term: "Replace"

- The Directive requires the IPSP to "plan for coal-fired generation to be replaced by cleaner sources in the earliest practical time frame that ensures adequate generating capacity and electricity system reliability in Ontario."
- The IPSP is a coal *replacement* plan, not a coal operation plan.

"Replace"

- PWU: "Does OPA adequately address practical factors that affect the operation of coal-fired generation units until they are replaced (e.g. supply chain issues, unit operability to respond to system requirements, staffing and community impacts?)"
- These are all types of issues that result from the consequences of shutting down coal plants – driven by Directive, not IPSP's replacement plan, and not OEB's review of that plan.

"Replace"

- Pollution Probe: IPSP ignores, and OEB should examine options of:
  - "banning non-emergency coal-fired electricity exports".
  - dispatching natural gas-fired generation in advance of coal-fired generation (p.6).
- GEC:
  - "in a market regime that dispatches coal when les expensive than gas (regardless of externalities) and encourages exports of coal power so long as the plants remain open (regardless of urgency), even if the 'insurance' policy is not needed, there will inevitably be increased coal burning and emissions as a result of the prolonged availability of the plants…Therefore it is appropriate for the Board to consider matters such as the market rules that dispatch environmentally inferior generation, both because the current rules are the context for the plan and because the Board could encourage alternative rules as one of the means of affecting or implementing preferred plan outcomes." (p. 12)

“Replace”

- Issues of Market Rules and environmental regulation, not replacement.

Issue I(2): Economic Prudence and Cost Effectiveness

- Revised List identifies areas of discretion left open by Supply Mix Directive and sets the context for the Board to review the economic prudence and cost effectiveness of the way in which the IPSP addresses those areas.
- Approach is consistent with Part I of OEB Report and is open to substantive review.

OEB Report

- “The principles set out in Part One are those that the Board considers should, as a matter of policy and interpretation of the Board’s mandate, inform the panel’s overall approach.” (OEB Report on IPSP, p.1).

Issues List/OEB Report - Conservation

Issues List

- Is the mix of Conservation types and program types included in the Plan to meet the 2010 and 2025 goals economically prudent and cost effective?
- Would it be more economically prudent and cost effective to seek to exceed the 2010 and 2025 goals?
- Is the implementation schedule for Conservation initiatives economically prudent and cost effective?

OEB Report

"The IPSP will need to address how the costs of different types of conservation measures (e.g. customer-based generation programs or energy efficiency programs) are to be compared in determining which portfolio of measures achieve the conservation targets in an economically prudent and cost effective manner. The conservation targets set out in the Supply Mix Directive is the minimum that must be achieved. An economically prudent and cost effective plan may, however, contain greater quantities of conservation than required by the Supply Mix Directive, provided that those additional investments are shown to be prudent and cost effective against other resources."

Issues List/OEB Report – Renewable Resources

Issues List

- Is the mix of renewable resources included in the plan to meet the 2010 and 2025 targets economically prudent and cost effective?
- Would it be more economically prudent and cost effective to seek to exceed the 2010 and 2025 targets?
- Is the implementation schedule for the renewable resources in light of lead times for supply and transmission economically prudent and cost effective?

OEB Report

"The achievement of renewable energy targets allows the economic prudence and cost-effectiveness of different renewable resources to be compared with one another to achieve the renewable target in an economically prudent and cost effective manner. The renewable energy targets set out in the Supply Mix Directive are the minimum that must be achieved. An economically prudent and cost effective plan may, however, contain greater quantities of renewable energy than required by the Supply Mix Directive, provided that those additional investments in renewable energy are shown to be prudent and cost effective against other resources."

Issues List/OEB Report – Nuclear for Baseload

Issues List

- What is the baseload requirement after the contribution of existing and committed projects and planned Conservation and renewable supply?
- Is the IPSP's plan to use nuclear power to meet the remaining baseload requirements economically prudent and cost effective?
- Is it more economically prudent and cost effective to build new plants or refurbish existing plants to supply new nuclear power?

OEB Report

"The OPA will need to demonstrate how the IPSP implements the nuclear energy portion of the Supply Mix Directive and whether the means by which any nuclear supply investments will be effected (i.e., by the refurbishment of existing facilities or by the construction of new facilities) are economically prudent and cost effective."

Issues List/OEB Report – Coal Fired Generation

Issues List

- How do existing, committed and planned Conservation initiatives, renewable resources and nuclear power contribute to meeting the contribution that coal-fired generation currently provides to meeting Ontario's electricity needs with respect to capacity (6,434 MW), energy production (24.7 TWh) and reliability (flexibility, dispatchability, and the ability to respond to unforeseen supply availability)?
- What are the remaining requirements in all of these areas?
- Will the IPSP's combination of gas and transmission resources meet these remaining requirements in the earliest practical timeframe and in a manner that is economically prudent and cost effective?

OEB Report

"The OPA will need to demonstrate how the schedule set out in the IPSP allows for such replacement in the earliest practical time frame while ensuring adequate generating capacity and electricity system reliability, and that the replacement plan is cost effective and economically prudent."

Issues List/OEB Report – Natural Gas

Issues List

- How can gas be used for peaking, high value and high efficiency purposes?
- How can gas-fired generation contribute to meeting transmission capacity constraints?
- Is the IPSP's plan for additional gas resources for peaking, high value and high efficiency purposes and for contributing to transmission capacity constraints economically prudent and cost effective?

OEB Report

"The OPA will have to address how the IPSP allows for the use of natural gas capacity at peak times and enables the pursuit of applications that allow high efficiency and high value use of natural gas in an economically prudent and cost effective manner."

Issues List/OEB Report – Transmission

Issues List

- For facilitating resource requirements, see issues embedded in each resource requirement.
- For system efficiency and congestion reduction: "Does the IPSP promote system efficiency and congestion reduction and facilitate the integration of new supply, all in a manner consistent with the need to cost effectively maintain system reliability?"

OEB Report

"The OPA will need to demonstrate how the IPSP provides for the strengthening of the transmission system to achieve these diverse goals. To the extent that strengthening the transmission system is proposed for purposes of system efficiency and congestion reduction, the OPA will need to identify how and to what degree system efficiency will be improved or congestion will be reduced, as well as the justification for selecting the chosen levels of efficiency and congestion reduction."

Substantive Review

- Each proposed issue relates to substantive areas for review of IPSP.
- Application sets out the facts, assumptions, analysis and judgment used to address areas of discretion.
- The facts, assumptions, analysis and judgment *relied upon to address areas of discretion* are in scope. Issue is how much detail to include in list.
- Free floating filibustering not in scope.

Free Floating Filibustering

- Application contains extensive analysis, models, data, etc.
- Review and questions of data should have a point, e.g.: forecast.
- Reference forecast and Reserve Requirement is relied upon throughout evidence to address areas of discretion.

Forecast and Reserve

- Areas where relied upon (examples):
  - Choosing conservation portfolio (baseload and peaking contributions);
  - remaining base-load requirements after contribution of existing projects and planned Conservation and renewable supply;
  - remaining requirements that must be satisfied by coal-fired generation replacement;
  - peaking requirements for gas fired plants.

Demand Forecast and Reserve

- What is in: discretionary area that relies upon demand forecast and reserve requirement can be tested by reference to demand forecast and reserve requirement evidence.
- What is out: review of demand forecast and reserve requirement as a stand alone issue with out reference to how it is used in IPSP.

Summary

- IPSP review is carried out by Board in its capacity as an economic regulator to provide financial check on plan in light of statutory mandate.
- Statutory mandate exclusively relates to IPSP's compliance with Directive and Economic Prudence and Cost Effectiveness.
- IPSP begins where Directive ends (areas of Discretion)
- Issues List addresses economic prudence and cost effectiveness in areas of Discretion.

Paths Not to Follow

- Parties offer three different Path for IPSP to follow:
  - Totally unconstrained wandering through application – “Meandering Walk” (SEC)
  - Filing Guidelines as a substitute for Directives – “Discovery Walk” (PWU), (AMPCO)
  - Subtle departures from Directive – “Clever Dance” (GEC)

Meandering Walk

- SEC submissions premised on argument that it is inappropriate for OEB's role to be restricted to "making check marks on a list to confirm compliance with government directives or legislative requirements".
- Rather, role is to "exercise independent judgment as to whether the IPSP 'works' in a practical sense."

Meandering Walk

- This “independent judgment” is independent of the terms of the Directive. Reviewing compliance with terms of Directive is too limited (see para. 12 - 14).

Meandering Walk

- Result is virtually unconstrained hearing that includes:
  - Canada's position on Kyoto and its successor treaties, and in particular, the potential introduction, in the near term, of a carbon trading market affecting Ontario emitters (par. 20)
  - Board creating "stretch" targets for conservation and renewable power "even if potentially more expensive if too hard to achieve, is still worth the risk, whether for economic, social, environmental, or other reasons." (par. 29 and 45).

Meandering Walk

- OPA's role in "introducing new efficiency technologies into the market place… is not fully embraced, and we believe the Board could assist all parties by reviewing this aspect of the Plan." (par. 36).
- "The Board should consider whether the OPA should be more proactive in partnering with school boards and others to teach 'conservation culture' to the next generation." (par. 37)
- "to what extent should continuation of coal availability beyond 2014 be considered to deal with project capacity shortfalls during that period" (par. 59)

Key Assumption of Approach

- OEB hearing is the appropriate place to deal with virtually all issues of energy policy because it is superior to political system: "The Board's review of the IPSP would be a failure if the result is that important interests are forced, through their exclusion to seek other routes – political, media, etc. – to express their concerns".

Discovery Walk

- Issues list should replicate Filing Guidelines. According to PWU: "the Filing Guidelines speak to the specific factual issues that stakeholders and the Board identified as requiring regulatory review" (at p. 7) (See also AMPCO, at s. 1.1).
- Turns hearing into discovery process based on filing guidelines.

Concerns with Guideline Approach

- Does not address questions which OEB must address. Compliance with Guidelines is separate from compliance with legislation.
- Guidelines not intended to fulfill this function: "The filing guidelines set out in Part Two reflect the Board's current view as to the information that may be required to fulfill its statutory mandate. The Board recognizes that, while there is some merit in providing guidance in this regard, there is also a need to maintain some degree of flexibility. The OPA is responsible for making its case for approval of the IPSP and its procurement processes to the satisfaction of the Board. It retains the right to do so in the manner it considers most appropriate."

Guideline Approach

- Guidelines produced during development of plan (December, 2006). Provided guidance, but not meant to set issues for decision. Will not limit record or “privilege” information discovered through filing guidelines

Clever Dance

- GEC:
  - Replaces compliance with Directive with "reasonable basis for planning" for all resources (CDM, Renewable Supply, Nuclear, Coal, Natural Gas, Transmission) (ss. 2.1, 3.1, 4.1, 5.1, 6.1, see also, pp. 9-10).
  - Adds additional requirement that OPA's priorities must "respect" the Directive, not just meet it, and asks whether other priorities that "respect" the Directive are preferable – invites the OEB to develop its own planning criteria (8.1, 8.2)

GEC

- Has OPA considered risk and uncertainties in the Plan “and in the planning environment”? (8.5)
- Does IPSP “appropriately facilitate the development of new technology”? (8.6)
- Is OPA’s modeling methodology “appropriate” (8.7)
- Does OPA’s “preferred plan” conform to “directives, legislation and its stated priorities or to preferred priorities” or is there a “preferable plan”? (ss. 8.8 and 8.9).

Part II: Procurement Process

- The *Electricity Act* provides that the OPA shall "develop appropriate procurement processes for managing electricity supply, capacity and demand in accordance with its approved integrated power system plans" and that the procurement processes must be reviewed by the OEB.

Procurement Process, not Contracts

- OEB's review confined to appropriateness of process, not substantive terms of procurement contracts, such as risk allocation.
- Only regulation of Procurement Contracts is through regulations passed by Government (See: *Electricity Act, ss. 25.32 (2) and 114 (1.3)(e)).*

Exercise of Procurement Process

- procurement process exercised “When the OPA considers it advisable” (*Electricity Act,* s. 25.32(1)).
- Assessment of capability of IESO-administered markets or other investment to be made by OPA “in consultation with interested parties.” (Procurement Process Regulation, s. 1).
- Consideration of factors to be carried out prior to commencement of procurement process (Procurement Process Regulation, s. 2)

Part III – Aboriginal Peoples Consultation

- Proposed language adopts approach in EB-2007-0050.
- IPSP contains evidence of OPA engagement as required by OEB's Aboriginal Consultation Policy (Exhibits C-1-1, Attachments 1 – 17; C-3-1, Attachments 1-4).

Other Submissions

- MNO, Issue #1, SON #1: issue should cover both IPSP and “projects it contemplates”
- Any electricity “project”, whether contemplated by the IPSP or not, may trigger a duty to consult, as well as subsidiary issues, such as who owes it, who can claim it, what does it consist of in the circumstances. Those and other questions to be determined by appropriate authorities at that time.

Other Submissions

- MNO #2, FNEA #3: ongoing processes and mechanisms to ensure appropriate consultation, etc. respecting “implementation” of IPSP.
  - IPSP implementation will involve a large number of public and private sector actors, OEB review of IPSP is not forum to prescribe appropriate mechanisms.
  - complexity of implementation is one of the issues that the OPA has brought to the attention of the Minister of Energy (C-3-1, Attachment 3).
  - Subsequent OEB reviews will have to make independent determinations respecting consultation in accordance with OEB policy and law.

Other Submissions

- MON #3: Appropriate Consultations, etc. in future iterations of IPSP
- OPA has committed to ongoing engagement with First Nations and Métis People for future iterations of IPSP. This involves over 150 First Nations and Métis communities. Terms of engagement should not be dictated here and will likely be evaluated in future IPSPs.
- Plan Development will be determined by Regulation, not OEB.

Other Submissions

- MNO #4; NAN, Issues 1-3; FNEA, Issues #1-2; AFN, pp. 4-6: Does IPSP adequately address unique needs and realities of Aboriginal Communities; set aside rights; social, economic, political and environmental.
- "Income redistributive policies are at the core of the work done by democratically elected governments. The Board is of the opinion that had the Government wanted the Board to engage in such a fundamentally important function it would have specifically stated as such." (EB-2006-0034, April 26, 2007, p.6, see also: p. 12).
- Goes beyond OEB's mandate and OPA has advised Minister on issues brought to its attention (C-3-1, Attachment 3).

Other Submissions

- MNO #5: Were costs and/or impacts on existing or asserted rights factored and, if so, how?
- MON #6, SON #4: Procurement Process.
  - Included in Proposed Issue.
- Nishnawbe Aski Nation: issue of remote communities
  - IPSP deals only with integrated system plan issues.

Other Submissions

- MON #7 – Appropriate Consultation, etc. for procurement processes.
  - if appropriate consideration in procurement process, may be in scope. If substantive entitlement to set asides, out of scope.

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Materials for Submissions on Issues

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Ontario Energy Board

Commission de l'Énergie de l'Ontario

Ontario

EB-2007-0050

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

AND IN THE MATTER OF an Application by Hydro One Networks Inc. pursuant to section 92 of the Act, for an Order or Orders granting leave to construct a transmission reinforcement project between the Bruce Power Facility and Milton Switching Station, all in the Province of Ontario;

BEFORE: Pamela Nowina
Presiding Member and Vice-Chair

Cynthia Chaplin
Member

ISSUES DAY - DECISION AND ORDER

Background

The Board held an Issues Day on September 17, 2007. At the hearing the Board received a list of issues to which the parties had agreed and heard submissions on a number of contested issues.

The Board's findings on the contested issues, which are set out below, include some additions to the issues list and some modifications to the agreed issues. Except where a modification has been made to an agreed issue as a result of the Board's conclusions on a contested issue, the Board accepts the agreed issues for inclusion on the Issues List. The Board also notes that at Issues Day the parties agreed to modify agreed issues 3.1, 3.2 and 3.3 to include the phrase "near term and" before the words "interim measures" in each case. The heading for these issues was changed as well. The

Board also accepts this change. The complete approved Issues List appears at Appendix A.

There was some discussion throughout the course of the proceeding as to the purpose of the Issues List. The Board reminds parties that the Issues List has two purposes: 1) it defines the scope of the proceeding; and 2) it articulates the questions which the Board must address in reaching a decision on the application. The Board does not believe it is appropriate to define the Issues List in complete detail. For many of the issues, the Board expects that sub-issues will arise during the course of the proceeding which will need to be addressed in argument and in the final decision. It is not possible to identify all of those detailed issues now so early in the process. The Board is therefore hesitant to include detailed sub-issues on the Issues List if the matters are otherwise included in a broader issue.

The Contested Issues – Project Need and Justification

1.1 Is it appropriate for Hydro One to have relied as it has on the OPA for the need for the project and the route and corridor selection? Further, has Hydro One properly considered the OPA's current 20 year plan?

This issue was proposed by Powerline Connections and was supported by Pollution Probe and the landowners represented by Mr. Ross and Mr. Fallis. The issue was opposed by Hydro One and PWU.

The Board agrees that Hydro One's reliance on the OPA is a relevant consideration, and we note that Hydro One has confirmed that witnesses from the OPA will appear at the hearing. However, the Board will not adopt the issue as proposed. Rather, the following issue will be added: *Has the need for the proposed project been established?* The Board finds that it is appropriate to add this direct question to the list, as suggested by PWU, as this is one of the key issues which the Board will have to address in its decision. The issue is also broad enough to ensure that Hydro One's reliance on the OPA can be explored.

The aspect of the contested issue related to the OPA's current 20 year plan can be explored in the context of project need and alternatives. The Board's findings in respect of issues related to alternatives and the comparison of alternatives follow later in this decision.

1.2 Should leave to construct be granted now or should the consideration of the need and justification for the line and the leave to construct being sought be deferred until the completion of an approved Environmental Assessment Report, or alternatively at least approval of the EA Terms of Reference?

The issue was proposed by Powerline Connections and was supported by Pollution Probe and the landowners represented by Mr. Ross and by Mr. Fallis. The issue was opposed by Hydro One and PWU.

The Board has to some extent addressed this issue already in its Decision and Order on Motion, dated July 4, 2007, as follows:

> Both the Leave to Construct and the EA approval are required before the project may proceed, but neither process is completely dependent upon the other. There is the potential for conflicting results, but that potential arises no matter which process goes first. Therefore, the proponent and the agencies involved must manage these applications in an appropriate manner. As Hydro One pointed out, the Board's leave to construct orders are conditional on all necessary permits and authorizations being acquired, including a completed EA. In this way, the Board ensures that it is not in contravention of the EA Act but allows for the timely consideration of applications before it.
>
> The Board, however, is of the view that the two processes should not be significantly out of step. For example, the leave to construct would be significantly affected if the EA Terms of Reference did not include the same route. Therefore, the Board will proceed with the Leave to Construct application, but we will reassess the matter in advance of the oral phase of the hearing if the Terms of Reference are still not approved at that time.

The Board's mandate is to assess the proposal in terms of price, reliability and quality of electricity service. Part of that assessment involves an analysis of alternatives. Any assessment of alternatives in the EA process will be in terms of environmental and socio-economic impact. To the extent that alternatives raised in the EA process are relevant and material to the comparison of alternatives in terms of price, reliability and quality of electricity service, those alternatives may appropriately be considered in the Leave to Construct application. The Board's findings in respect of issues related to alternatives and the comparison of alternatives are set out in the next section of this decision.

The Board (in the Motions Day Decision and Order) has already decided that it is premature to determine, at this point, whether the schedule and finalization of the Leave to Construct application process should be revised in light of the EA process. The Board has also decided that it will reassess the issue of the relative timing of the Leave to Construct application and the EA process, if approved Terms of Reference are not available in advance of the oral hearing. Currently, the processes are aligned; the draft EA Terms of Reference and Leave to Construct application include the same proposed route. Therefore, the Board finds it unnecessary to include the contested issue on the Issues List.

The Board does find that it is appropriate to add an issue to address potential conditions of approval on a leave to construct order. The issue will be: "*If Leave to Construct is approved, what conditions, if any, should be attached to the Board's Order?*"

1.3 Have all appropriate project risk factors pertaining to the need and justification (including but not limited to the costs and rate impacts of EMFs, forecasting, technical and financial risks) been taken into consideration in planning this project?

The underlined text was proposed by Powerline Connections and was supported by the landowners groups represented by Mr. Ross and Mr. Fallis. The additional wording was opposed by Hydro One, PWU and Board staff. The balance of the issue was agreed to by all parties.

Hydro One acknowledged that issues related to electromagnetic fields ("EMFs") would be relevant in the context of the technical risks of the project (and questions of how the design of the options have taken EMFs into account) but submitted that specific identification of EMFs as a risk factor was unnecessary. Hydro One also acknowledged that litigation risk might be a relevant financial risk but cautioned against too detailed an enquiry.

The Board will not include the proposed additional wording. EMFs (the uncertainty related to, and the mitigation in respect of) may have an impact on the design and cost of the project, and, therefore, on the rate impact of the project. However, we conclude that these impacts, if they are material, are among the technical and financial risks of the project. As a result, the impacts can be explored in that context, and it is not necessary to identify this one specific aspect of those risks when setting the issue. The

Board cautions that an examination of the health and/or socio-economic impacts of EMFs is beyond the scope of this proceeding. Any examination of the technical or financial risks to the project related to EMFs must be clearly grounded in the impact on consumers in terms of price (the cost of the project), reliability and quality of electricity service.

The Contested Issues – Project Alternatives

2.1 Have landowner proposed refinements or alternatives to the proposed route and corridor been adequately addressed?

The issue was proposed by Powerline Connections and was supported by the landowners represented by Mr. Ross and Mr. Fallis. The issue was opposed by Hydro One.

There was discussion as to whether the contested issue was already covered by one of the agreed issues (namely: *Have all reasonable alternatives to the project been identified and considered?*). The dispute centred on whether there should be a consideration of alternative routes and/or alternative corridors. Hydro One submitted that detailed routing should be the subject of the EA process only, and that the Board should only hear issues related to alternative corridors and broad alternatives to the proposed project. However, Hydro One was not entirely consistent in its application of this proposed approach in that it agreed that the issue related to the route near Hanover would be a corridor issue, but suggested that switching the route from the applied for corridor to the other side of the existing corridor would be a detailed routing issue.

The Board does not agree with Hydro One's proposed delineation. The Board finds that it can and should address route alternatives that have a material impact on price, reliability and quality of electricity service, and we note Powerline Connections' intention to file evidence in this respect. That assessment should be included in the comparison of all reasonable alternatives. The Board notes that these alternatives may be alternatives in routing within the applied for corridor or alternatives outside the applied for corridor.

The Board concludes that on this basis the agreed issues related to project alternatives and the comparison of alternatives are sufficient to cover any relevant alternatives

proposed by landowners or other parties. Therefore, the contested issue will not be added.

2.2 For all the considered alternatives, does the evaluation methodology utilitized include a cost benefit comparison as well as a comparison of all relevant quantitative and qualitative benefits, including the impact of EMFs?

The underlined text was proposed by Powerline Connections and supported by the landowners represented by Mr. Ross and Mr. Fallis. The proposed additional wording was opposed by Hydro One, PWU and Board staff. The balance of the issue was agreed to by all the parties.

Parties did not make submissions on this issue, but adopted their submissions on contested issue 1.3. Similarly, the Board's finding and reasons for this issue are the same as the findings for contested issue 1.3. The Board concludes that material quantitative and/or qualitative benefits relating to the matter of EMFs that are relevant to price, reliability and quality of service, may be considered under the issues related to the analysis of alternatives. As a result, the contested text will not be added. As stated earlier in this decision, an examination of the health and/or socio-economic impacts of EMFs is beyond the scope of this proceeding.

2.3 Are the project's estimated rate impact and costs reasonable for:

- ***The transmission line;***
- ***The station modifications; and***
- ***The estimated Operating, Maintenance and Administration requirements.***

The underlined text was proposed by Hydro One and opposed by Pollution Probe. The balance of the issue was agreed to by the parties.

All parties agreed that the proceeding is necessarily based on estimated costs, not actual costs. However, Pollution Probe was concerned that with the revised wording the focus of the issue would be on the reasonableness of the cost estimates, rather than on the reasonableness of the rate impacts. Hydro One agreed that the issue is the reasonableness of the rate impacts. The Board agrees that the issue is whether the rate impacts are reasonable and finds that the issue should be revised to remove both references to "estimated". The Board expects that in assessing the reasonableness of the rate impacts there will also be consideration of whether the cost estimates themselves are reasonable.

2.4 As it relates to the cost-benefit analysis, has appropriate consideration been given to both compensable and potentially non-compensable impacts, and how these can be addressed or mitigated with alternative forms of land agreements or changes to the preferred corridor or route?

This issue was initially proposed by Powerline Connections; however, Powerline Connections indicated at Issues Day that it was content that the issue is subsumed within the agreed issues. We therefore do not need to address this contested issue, and it will not be included on the Issues List.

2.5 If the Board is considering approval of the project application prior to the approval of the EA Report, is it fair to consider the quantitative and qualitative impacts contemplated in the EA Terms of Reference when deciding to grant leave?

The issue was proposed by Powerline Connections and was opposed by Hydro One.

Powerline Connections submitted that the issue is related to the assessment of the qualitative and quantitative impacts contemplated in the EA Terms of Reference in the context of price, reliability and quality of electricity service. Although Hydro One questioned whether evidence in the EA process is relevant and material to the Leave to Construct application, it did acknowledge that such matters would be relevant if there is a cogent link with price, reliability and quality of electricity service. The Board agrees, and reiterates our findings above in relation to contested issue 1.2, where we have stated:

> *To the extent that alternatives raised in the EA process are relevant and material to the comparison of alternatives in terms of price, reliability and quality of electricity service, those alternatives may appropriately be considered in the Leave to Construct application.*

The Board concludes that the agreed issues related to project alternatives and the assessment of those alternatives are sufficient to encompass the matters which relate to relevant impacts of all reasonable alternatives, including those which may be part of the EA process.

2.6 Is the additional cost of the use of "narrow base towers" to reduce impacts on Classes 1-3 agricultural lands and farm operations justified?

The issue was proposed by Powerline Connections and was supported by the landowners represented by Mr. Fallis. The issue was opposed by Hydro One.

Powerline Connections submitted that land acquisition costs might be lower if narrow base towers were used, thereby potentially lowering overall project costs. In Powerline Connections' view, the issue is not subsumed within the other issues. The Board accepts that it is appropriate to explore the issue of whether the use of narrow base towers is a preferable alternative in terms of price, reliability and quality of electricity service. However, we find that the agreed issues related to project alternatives and the assessment of those alternatives is sufficiently broad to include this area of review. The proposed issue will not be added.

2.7 Can a reasonable cost-benefit analysis be prepared in the absence of an EA Report?

This issue was proposed by Powerline Connections and supported by the landowners represented by Mr. Ross and Mr. Fallis. The issue was opposed by Hydro One. Parties relied on their submissions in respect of other related issues.

The Board has already decided that the earlier contested issue related to the relative timing of the EA process and the leave to construct approval will not be added to the Issues List. For the same reasons, this contested issue will not be added.

Contested Issues – Reliability and Quality of Electricity Service

4.1 [Is the recommended alternative superior] or [How does the recommended alternative compare] to all other reasonable alternatives with regard to stability and transient stability levels, voltage performance and Loss of Load Expectation projections under normal and post-contingency conditions?

Hydro One proposed the second introduction to the issue; Pollution Probe, Powerline Connections, and the landowners represented by Mr. Ross and Mr. Fallis supported the first. The balance of the issue was uncontested.

Hydro One submitted that it was not required to demonstrate that the proposed project is superior to all alternatives on each aspect; rather the requirement is to demonstrate

that overall the project is superior to the alternatives and that the proposed project is in the public interest in terms of price, reliability and quality of electricity service. Pollution Probe submitted that the onus is on Hydro One to demonstrate that the proposal is better than the alternatives, not on intervenors to show that an alternative is better than the proposal.

Hydro One submitted that specific elements for the comparison are already incorporated within the agreed issue, but Pollution Probe noted that the agreed issue is focussed on the comparison, not the results.

The Board notes that one of the disputed aspects of this issue, and of some of the other contested issues, relates to the extent of Hydro One's onus in this proceeding and the threshold it must meet in assessing the alternatives. As set out in the filing requirements, the Board will require Hydro One to establish that the proposal is better than the other alternatives. The Board concludes that it would provide greater clarity to set an issue directly related to this point. The Board will add the following to the Issues List: *Is the proposal a better project than the reasonable alternatives?* As part of this issue, participants will be able to explore whether Hydro One has met the expectations of the filing requirements and what conclusion should be reached based of the analysis of the reasonable alternatives. The Board agrees with Hydro One that it (Hydro One) is not required to demonstrate that the proposal is superior to the alternatives in each respect and for that reason we will not adopt the wording supported by Pollution Probe.

Therefore, the wording on the original Draft Issues List will not be adopted.

An issue remains as to whether the uncontested specific parameters identified in the contested issue are adequately covered in the agreed issue 2.4. The Board finds that a separate issue is not needed. However, for greater clarity and because the specific parameters were agreed by the parties, the Board will modify the general issue to include the specific parameters. The issue will be: *Have appropriate comparisons been carried out on all reasonable alternatives with respect to reliability and quality of electricity service, including stability and transient stability levels, voltage performance and Loss of Load Expectation projections under normal and post-contingency conditions?*

4.2 Does the placement of 6,000+MW of transmission capacity on one right of way create an unacceptable risk for consumers and system reliability?

This issue was proposed by Powerline Connections and was supported by landowners represented by Mr. Ross and Mr. Fallis. The issue was opposed by Hydro One.

Powerline Connections submitted that issue goes beyond the agreed issue 4.2 regarding whether the proposal meets the applicable standards for reliability and quality of electricity service. In Powerline Connection's view, the proposal might meet the applicable standards, but might still pose an unacceptable risk. Hydro One was of the view that the issue was already included in the agreed issues.

The Board agrees with Powerline Connections that the issues related to reliability and quality of electricity service may go beyond the question of whether applicable standards are met and whether the project has addressed the requirements of the System Impact Assessment and the Customer Impact Assessment. However, the Board will frame the issue in a more general way and will adopt the structure used for the issue respecting the consideration of project risks from the perspective of project need and justification. The issue will be: *Have all appropriate project risk factors pertaining to system reliability and quality of electricity service been taken into consideration in planning this project?*

4.3 What has Hydro One done to make sure that the project is carbon neutral given the major woodlands and habitat that will be removed?

This issue was initially proposed by Powerline Connections, but was withdrawn at Issues Day. It will therefore not be added to the Issues List.

Contested Issues – Land Matters

5.1 Has Hydro One assessed the impacts of the project on landowners whose lands are not specifically required for the project?

This issue was proposed by Powerline Connections and was supported by the landowners represented by Mr. Ross and Mr. Fallis. The issue was opposed by Hydro One.

Powerline Connections submitted that there may be cost impacts arising from claims from landowners outside the applied for corridor. Hydro One opposed the issue and

submitted that it was an inappropriate attempt to build an evidentiary record for an expropriation proceeding.

The Board has already found that it is appropriate to consider the proposal and alternatives to the proposal in terms of price, reliability and quality of electricity service. The Board has also found that it is neither necessary nor appropriate to try to identify each specific aspect of those comparisons. The same conclusion is applicable here. The Board finds that the potential magnitude of various claims arising from the project may be relevant, but to the extent the factor is relevant, it is covered already in the issue related to project alternatives and the comparison of those alternatives.

Contested Issues – Aboriginal Peoples Consultation

6.1 Has the necessary consultation occurred with all Aboriginal Peoples whose interest may be affected by this project?

OR

Have all Aboriginal Peoples whose existing or asserted Aboriginal or treaty rights are affected by this project been identified, have appropriate consultations been conducted with these groups and if necessary, have appropriate accommodations been made with these groups?

Hydro One originally proposed that the first version of the issue replace the second version (which was originally included in Board staff's Draft Issues List). Hydro One indicated at Issues Day that it was withdrawing its proposed issue and accepted the issue as draft by Board staff. This issue is therefore resolved and the Board will include the agreed issue on the Issues List.

The approved Issues List is shown in Appendix A to this Decision and Order.

THE BOARD THEREFORE ORDERS THAT:

The approved Issues List for this application, shown in Appendix A to this Decision and Order, shall be used by all parties in scoping their involvement in this proceeding including questions submitted to Hydro One for the upcoming technical conference, interrogatories, evidence and cross-examination.

DATED at Toronto, September 26, 2007
ONTARIO ENERGY BOARD

Original Signed By

Peter H. O'Dell
Assistant Board Secretary

APPENDIX A

Bruce to Milton Transmission Reinforcement Project
Leave to Construct Application
EB-2007-0050
Issues List

1.0 Project Need and Justification

1.1 Has the need for the proposed project been established?

1.2 Does the project qualify as a non-discretionary project as per the OEB's *Filing Requirements for Transmission and Distribution Applications* and if so what categories of need as referred to in Section 5.2.2 of these Filing Requirements are relevant?

1.3 Have all appropriate project risk factors pertaining to the need and justification (including but not limited to forecasting, technical and financial risks) been taken into consideration in planning this project?

1.4 Is the project suitably chosen and sufficiently scalable so as to meet all reasonably foreseeable future needs of significantly increased or significantly reduced generation in the Bruce area?

2.0 Project Alternatives

2.1 Have all reasonable alternatives to the project been identified and considered?

2.2 Has an appropriate evaluation methodology been applied to all the alternatives considered?

2.3 For all of the considered alternatives, does the evaluation methodology utilized include a cost benefit comparison as well as a comparison of all quantitative and qualitative benefits?

2.4

a) Have appropriate evaluation criteria and criteria weightings been utilized in the evaluation process for the alternatives and the proposed project and what additional criteria/weightings could be considered?

b) Have appropriate comparisons been carried out on all reasonable alternatives with respect to reliability and quality of electricity service, including stability and transient stability levels, voltage performance and

Loss of Load Expectation projections under normal and post-contingency conditions?

c) Do the alternatives meet the applicable standards for reliability and quality of electricity service?

2.5 Is the proposal a better project than the reasonable alternatives?

2.6 Are the project's rate impacts and costs reasonable for:
- the transmission line;
- the station modifications; and
- the Operating, Maintenance and Administration requirements.

3.0 Near Term and Interim Measures

3.1 Are the proposed near term and interim measures as outlined in the application appropriate?

3.2 Can the proposed near term and interim measures be utilized longer than the suggested two to three year time frame?

3.3 If these proposed near term and interim measures could be utilized for a longer period than proposed, could they (or some combination of similar measures) be considered an alternative to the double circuit 500 kV transmission line for which Hydro One has applied?

4.0 Reliability and Quality of Electricity Service

4.1 For the preferred option, does the project meet all the requirements as identified in the System Impact Assessment and the Customer Impact Assessment?

4.2 Does the project meet applicable standards for reliability and quality of electricity service?

4.3 Have all appropriate project risk factors pertaining to system reliability and quality of electricity service been taken into consideration in planning this project?

5.0 Land Matters

5.1 Are the forms of land agreements to be offered to affected landowners reasonable?

5.2 What is the status and process for Hydro One's acquisition of permanent and temporary land rights required for the project?

6. 0 Aboriginal Peoples Consultations

Have all Aboriginal Peoples whose existing or asserted Aboriginal or treaty rights are affected by this project been identified, have appropriate consultations been conducted with these groups and if necessary, have appropriate accommodations been made with these groups?

7. 0 Conditions of Approval

If Leave to Construct is approved, what conditions, if any, should be attached to the Board's order?

TAB 2

Minister of Energy
Hearst Block, 4th Floor
900 Bay Street
Toronto ON M7A 2E1
Tel.: 416-327-6715
Fax: 416-327-6754

Ministre de l'Énergie
Édifice Hearst, 4e étage
900, rue Bay
Toronto ON M7A 2E1
Tél.: 416-327-6715
Téléc.: 416-327-6754

Ontario

MAY - 2 2005

Mr. Jan Carr
Chief Executive Officer
Members of the Board
Ontario Power Authority
608–175 Bloor Street East
North Tower
Toronto, Ontario
M4W 3R8

Dear Mr. Carr and Members of the Board:

Re: Commencement of long-term planning exercise and request for recommendation on supply mix

It is my pleasure to request that the Ontario Power Authority (the OPA) begin the process of developing a proposed Integrated Power System Plan.

It has been many years since a comprehensive, long-term plan for electricity has been prepared for the Province of Ontario, as has been widely noted. The task you will be embarking on will be of historic importance, and will provide a crucial foundation for a clean, reliable, diverse and sustainable electricity supply for the province.

In order to ensure that the Integrated Power Supply Plan conforms closely to the values and wishes of the people of Ontario, section 25.30 (2) of the *Electricity Act, 1998,* allows the Minister, on behalf of the government and the people of the province, to issue directives relating to overall goals for the plan. These goals include:

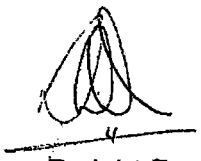
a) the production of electricity from particular combinations of energy sources and generation technologies;
b) increases in generation capacity from alternative energy sources, renewable energy sources or other energy sources;
c) the phasing-out of coal-fired generation facilities; and
d) the development and implementation of conservation measures, programs and targets on a system-wide basis or in particular service areas.

.../cont'd

In order to provide assistance to the government in its deliberations prior to issuing such directives, I am requesting a report addressing these matters to be delivered to the government by December 1, 2005, based on the OPA's internal resources, the government's plan to replace coal-fired generation in Ontario, expert advice solicited from Ontario and abroad, and stakeholder input in a manner developed at the discretion of the OPA. The report should include:

- recommendations with respect to conservation targets for Ontario for 2015, 2020 and 2025, taking into account the target already set by the Government of Ontario for 2007;
- recommendations with respect to additions of new renewable energy capacity by 2015, 2020 and 2025, taking into account the targets already set by the Government of Ontario for 2007 and 2010; and
- recommendations with respect to the appropriate mix of electricity supply sources to satisfy the remaining expected demand in Ontario, after conservation and renewable sources have been taken into account, and with particular attention to baseload, intermediate and peak availability of energy.

Sincerely,



Dwight Duncan
Minister

TAB 2

Ontario Energy Board

Commission de l'énergie de l'Ontario

Ontario

EB-2007-0040

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

AND IN THE MATTER OF an Application by the Association of Major Power Consumers in Ontario under section 33 of the *Electricity Act, 1998* for an Order revoking an amendment to the market rules and referring the amendment back to the Independent Electricity System Operator for further consideration, and for an Order staying the operation of the amendment to the market rules pending completion of the Board's review.

DECISION AND ORDER
(Issued April 10, 2007 and as corrected on April 12, 2007)

BEFORE: Gordon Kaiser
Presiding Member and Vice Chair

Pamela Nowina
Member and Vice Chair

Bill Rupert
Member

The Application

On February 9, 2007, the Association of Major Power Consumers in Ontario ("AMPCO") filed with the Ontario Energy Board (the "Board") an Application under section 33(4) of the *Electricity Act, 1998* (the "Act") seeking the review of an amendment to the market rules approved by the Independent Electricity System Operator (the "IESO") on January 17, 2007. The Board has assigned file number EB-2007-0040 to the Application.

The amendment that is the subject matter of the Application is identified as MR-00331-R00: "Specify the Facility Ramping Capability in the Market Schedule" and relates to the ramp rate assumption used in the market pricing algorithm within the IESO-administered markets (the "Amendment").

The specific relief sought in the Application is the following:

- an order under section 33(7) of the Act staying the operation of the Amendment pending completion of the Board's review of the Amendment;
- an order under section 33(9) of the Act revoking the Amendment and referring the amendment back to the IESO for further consideration; and
- an award of costs, such costs to be payable by the IESO.

On February 9, 2007, the Board issued its Notice of Application and Oral Hearing in relation to the Application.

Under section 33(6) of the Act, the Board is required to issue an order that embodies its final decision in this proceeding within 60 days after receiving AMPCO's application.

This is the first application of its kind to proceed to a hearing before, and a decision by, the Board. An earlier application by a different applicant and in relation to a different amendment to the market rules was subsequently withdrawn.

Although the Board has considered the entirety of the record in this proceeding, the Board has summarized the record only to the extent necessary to provide context for those findings.

The Amendment

The Amendment relates to the calculation of the energy price (the market clearing price or "MCP" that is calculated in five-minute intervals) in the real-time energy market administered by the IESO and, more specifically, to a change (from 12x to 3x) in the assumption that is made about the ramping capabilities of generation facilities when determining market prices.

The algorithm that is used to compute MCP – known as the "market schedule" and sometimes referred to as the unconstrained schedule – contains a parameter (the "TradingPeriodLength") that specifies the ramp rate multiplier to be used in determining energy market prices. Ramp rate, which is usually expressed in MW per minute, indicates how quickly the output of a generation facility can be increased or decreased.

Prior to the Amendment, the market rules authorized the IESO (then known as the Independent Electricity Market Operator or IMO)[1] to establish the "TradingPeriodLength" parameter for the pricing algorithm but did not define its value. Prior to market opening, the value of the parameter was set at 60 minutes, which is the equivalent of a 12x ramp rate. Most generation facilities, and in particular those that typically set market prices, can change their output from minimum levels to full output in roughly one hour. The result of the 12x ramp rate multiplier is that the market schedule has since market opening assumed that generation facilities are able to ramp output up or down 12 times faster than is, in fact, the case. It is widely acknowledged that use of the 12x ramp rate multiplier was implemented as a temporary solution to address extreme price excursions that were experienced during testing prior to opening of the wholesale market.

Further examination of the ramp rate multiplier issue was initiated by the IESO in December, 2005. Stakeholder consultations ensued, principally through the Market Pricing Working Group as well as through the IESO's Stakeholder Advisory Committee.

At the end of this examination, the IESO proposed to amend the market rules by setting the value of the "TradingPeriodLength" parameter at 15 minutes, which is the equivalent of a 3x ramp rate. To that end, on December 27, 2006, the IESO published the Amendment for comment. Five submissions were received in response; one from AMPCO opposing the Amendment and four from generators supporting the Amendment as a move in the right direction albeit not as the preferred solution. The Board of Directors of the IESO approved the Amendment on January 17, 2007, and it was published on January 19, 2007. The Amendment was scheduled to go into effect on February 10, 2007, the earliest date permitted by section 33(1) of the Act.

[1] For convenience, this Decision and Order will refer throughout to the IESO even though, at the time relevant to the point under discussion, it may have been called the IMO.

Once implemented, the Amendment would result in the market schedule assuming that generation facilities are able to ramp output up or down 3 times faster than is, in fact, the case.

It is to be noted that the 3x ramp rate multiplier relates solely to the calculation of energy prices. The physical dispatch algorithm (known as the "real-time schedule" and sometimes referred to as the constrained schedule), which is used by the IESO to dispatch facilities to meet market demand in any given interval, reflects the actual ramping capabilities of generation facilities (in other words, the value of the "TradingPeriodLength" parameter is set at 5 minutes, equivalent to a 1x ramp rate).

The role played by, and the impact of, the ramp rate multiplier in the determination of real-time energy prices is discussed further below under the heading "Pricing and Dispatch in the Real-time Energy Market".

The Proceeding

A brief description of the issues and the orders issued by the Board is summarized below.

1. *Stay of Operation of the Amendment*

The Amendment had an effective date of February 10, 2007. AMPCO's arguments in support of its application for an order under section 33(7) of the Act staying the operation of the Amendment pending completion of the Board's review of the Amendment were that: (i) it is in the public interest to order the stay; (ii) there are legitimate concerns with respect to the Amendment that should be considered by the Board; and (iii) the balance of convenience favours a stay.

On February 9, 2007, the IESO filed a letter with the Board indicating that it consented to the stay of the operation of the Amendment, such consent being without prejudice to any arguments that the IESO might make in relation to the Board's review of the Amendment. The IESO noted that it had given due consideration to the balance of convenience and the short duration of the stay given the Board's statutory deadline for completion of its review of the Amendment.

By Order dated February 9, 2007, the Board stayed the operation of the Amendment pending completion of the Board's review of the Amendment and issuance by the Board

of its order embodying its final decision on AMPCO's application for review of the Amendment. The Board noted in particular that the balance of convenience favoured a stay of the operation of the Amendment, particularly given the long history of the ramp rate issue in the IESO-administered markets.

2. *Intervenors*

The following parties requested and were granted intervenor status in this proceeding: the Association of Power Producers of Ontario ("APPrO"); Coral Energy Canada Inc. ("Coral Energy"); the Electricity Market Investment Group ("EMIG"); Hydro One Networks Inc. ("Hydro One"); the IESO; Ontario Power Generation Inc. ("OPG"); TransAlta Energy Corp. and TransAlta Cogeneration L.P. (collectively "TransAlta"); TransCanada Energy Ltd. ("TransCanada"); and the Vulnerable Energy Consumers Coalition ("VECC").

In addition, the Board received on March 30, 2007 a letter of comment filed by Constellation Energy.

3. *Procedural Order No. 1*

On February 16, 2007, the Board issued its Procedural Order No. 1. In addition to establishing the process and timelines for this proceeding, Procedural Order No. 1 also:

- indicated that cost awards would be made available in this proceeding to eligible intervenors, and solicited written submissions on the issue of the party from whom cost awards should be recovered;

- directed the IESO to file materials associated with the development and adoption of the Amendment; and

- identified the following as the issues to be considered in this proceeding:

  (i) is the Amendment inconsistent with the purposes of the Act?

  (ii) does the Amendment unjustly discriminate against or in favour of a market participant or a class of market participants?

4. *Cost Awards*

Requests for eligibility for an award of costs were made by AMPCO, VECC and APPrO. TransAlta reserved its right to apply for an award of costs should special circumstances arise in the proceeding. In its letter of intervention, the IESO also indicated that it would seek an award of costs.

In response to Procedural Order No. 1, four parties made submissions in relation to the issue of the party from whom cost awards should be recovered. The submissions are summarized in the Board's Procedural Order No. 2 issued on March 9, 2007. The Board determined that cost awards in this proceeding should be recovered from the IESO, for the reasons stated in Procedural Order No. 2. The Board also determined that VECC, APPrO and AMPCO are eligible for an award of costs in this proceeding, subject to any objections that the IESO might wish to make for consideration by the Board. By letter dated March 16, 2007, the IESO indicated that while it accepts and respects the Board's decision regarding cost eligibility, it reserved the right to ask the Board to limit the amount of costs recoverable by parties objecting to the Amendment in the event that it appears, at the end of the proceeding, that some or all of the grounds for the objection ought not to have been advanced.

5. *Production of Materials by the IESO*

As noted above, among other things Procedural Order No. 1 directed the IESO to file materials associated with the development and adoption of the Amendment. By letter dated March 2, 2007, AMPCO alleged that the IESO's filing in response to Procedural Order No. 1 was deficient in a number of respects. By letter also dated March 2, 2007, the IESO replied to the allegations contained in AMPCO's letter, stating that there is no merit to AMPCO's allegations and that the IESO had produced all of the materials required by Procedural Order No. 1.

In its Procedural Order No. 2, the Board among other things ordered the IESO to produce certain materials, including material prepared by the IESO in the context of the Day Ahead Commitment Process and/or the Day Ahead Market initiative that directly relates to ramp rate (the "DAM/DACP Materials"). In ordering the IESO to produce the DAM/DACP Materials, the Board expressly recognized that the relevance of those Materials to the criteria set out in section 33(9) of the Act, which form the basis of the issues list set out in Procedural Order No. 1, is not clear. Procedural Order No. 2 thus also invited parties to make submissions on the issue of the relevance to this

proceeding of the DAM/DACP Materials, and more specifically to the criteria set out in section 33(9) of the Act and the issues list set out in Procedural Order No. 1.

On March 12, 2007, the IESO filed a letter with the Board in response to Procedural Order No. 2. In that letter, the IESO stated that the nature and extent of the task involved in satisfying the document production requirements of Procedural Order No. 2 makes completion of the task within anything remotely close to the specified timeframe completely impractical. Without waiving any of its rights or accepting the relevance to this proceeding of the materials identified in Procedural Order No. 2, the IESO put forward a proposed plan to meet the Board's information requirements within the requisite timeframes. On March 14, 2007, AMPCO filed a letter with the Board expressing its concerns regarding the IESO's proposed plan. The concerns related principally to the scope of the IESO's production in respect of the subject matter and time period to be covered.

On March 14, 2007, the Board issued its Procedural Order No. 3. The effect of Procedural Order No. 3 was to revise the nature of the production required of the IESO under Procedural Order No. 2, generally in line with the proposed plan submitted by the IESO in its letter of March 12, 2007 but with the exception that the production should cover a longer period than that proposed by the IESO.

6. *Technical Conference*

Procedural Order No. 1 made provision for a technical conference to be held in this proceeding. On March 20, 2007, and in response to inquiries received by certain parties, Board staff communicated with the parties to confirm whether they wished to proceed with the technical conference. Based on the responses received to that communication, the Board decided to cancel the technical conference and the parties were so advised by Board staff on March 21, 2007.

7. *Submissions on the "Relevance Issue"*

On March 21, 2007, AMPCO filed with the Board a letter setting out a proposal for submissions on the issue of the relevance of certain materials to this proceeding. As noted above, in its Procedural Order No. 2 the Board invited parties to make submissions on the relevance of the DAM/DACP Materials. AMPCO's proposal, made with the consent of the IESO, was to the effect that AMPCO would provide the Board and all parties with a "comprehensive submission on the relevance of materials

produced by the IESO in relation to a central theme contained in AMPCO's application: "that the Amendment violates fundamental principles of procedural fairness". The proposal also suggested that, rather than filing submissions in accordance with Procedural Order No. 2, parties should await production of AMPCO's comprehensive submission and respond to that document.

On March 22, 2007, the Board issued its Procedural Order No. 4 setting out the timeframe for the filing of AMPCO's submissions on relevance. The Board encouraged intervenors to make written submissions in response to those of AMPCO but, given the imminence of the commencement of the oral hearing, indicated that it would allow all intervenors to make oral submissions on the relevance issue at the beginning of the oral hearing.

Written submissions on relevance were filed by AMPCO, the IESO, APPrO and Coral Energy. The positions of the parties are summarized below under the heading "The Board's Mandate".

8. *The Oral Hearing and Final Written Argument*

The Board held an oral hearing in this proceeding, commencing on March 29, 2007 and concluding on March 30, 2007. The first day of the hearing was devoted almost exclusively to submissions by the parties on the "relevance issue", as described in greater detail below under the heading "The Board's Mandate". On the second day of the hearing, witnesses gave evidence on behalf of AMPCO, the IESO, APPrO and TransCanada, principally in relation to the nature and impact or effect of the Amendment. The position of the parties in this regard is discussed in greater detail below under the heading "The Impact of the Amendment".

During the hearing, proposals were also made by certain of the parties in relation to the filing of final written argument, and these were accepted by the Board. AMPCO filed its final written argument on April 2, 2007. VECC filed its final written argument on April 3, 2007. The following parties filed their final written argument on April 4, 2007: the IESO; APPrO; and TransCanada. OPG filed a letter with the Board indicating its support for the final argument filed by APPrO. Coral Energy did not file final written argument, but did indicate during the oral hearing that it would address the substantive issues associated with the Amendment through APPrO. AMPCO filed its written reply argument on April 5, 2007.

The Board's Mandate

The "relevance issue", as it has been referred to in this proceeding, arose initially in relation to the DAM/DACP Materials. As stated in Procedural Order No. 4, the issue is relevance of materials – and hence of the position or argument that the materials support – relative to the criteria set out in section 33(9) of the Act. This issue, of necessity, requires consideration of the scope of the Board's mandate on applications to review amendments to the market rules under section 33 of the Act.

As the proceeding progressed, it became clearer that AMPCO's views as to the scope of the Board's mandate differs markedly from the views of other parties. A number of the concerns raised by AMPCO regarding the Amendment relate not to the impact or effect of the Amendment, but rather to the process by which the Amendment was made by the IESO. Many of the materials filed by the IESO in response to the Board's Procedural Orders are relevant to those concerns, but have little or no relevance to the issue of the impact or effect of the Amendment.

The position of the parties in relation to the scope of the Board's mandate, as expressed in the written submissions filed in response to Procedural Order No. 4 and/or in oral submissions made at the commencement of the oral hearing, may be summarized as follows.

AMPCO's position is that the Board's mandate is not limited to the grounds set out in section 33(9) of the Act. Rather, the Board has a "plenary review jurisdiction" that would allow the Board to address what AMPCO alleges as significant failures of procedural fairness by the IESO. In support of its position, AMPCO referred to and relied on sections 33(4), 33(5) and 33(6) of the Act, on section 19(4) of the *Ontario Energy Board Act, 1998*, on the Board's authority to determine all questions of law and fact in all matters within the Board's jurisdiction, and on the Board's public interest role. On that basis, in AMPCO's view the criteria expressed in section 33(9) of the Act are better understood as the two instances in which the legislature has directed the Board on how it must exercise its review discretion, leaving the Board otherwise able to exercise its review discretion as the Board sees fit.

By contrast, the position of the IESO, APPrO, Coral, OPG and TransCanada is that the Board's mandate is limited by section 33(9) of the Act to a determination of whether (a) the amendment is inconsistent with the purposes of the Act; or (b) the amendment unjustly discriminates against or in favour of a market participant or a class of market

participants. On that basis, whether the IESO has, and breached, a common law duty of procedural fairness or acted in a manner giving rise to a reasonable apprehension of bias (both of which allegations were denied by the IESO), are not matters for consideration by the Board on a market rule amendment review application under section 33 of the Act. Materials produced by the IESO that are relevant only to the IESO's processes in making the Amendment should therefore be disregarded. The IESO also specifically requested that the Board strike AMPCO's March 26, 2007 submission from the record.

On March 29, 2007, the Board rendered an oral decision on this issue. Specifically, the Board determined that its mandate under section 33 of the Act is limited to an examination of the market rule amendment against the criteria set out in section 33(9) the Act. The Board also ordered that any evidence relating to the IESO's stakeholdering process, including AMPCO's March 26, 2007 submission, be struck from the record. An excerpt from the transcript of the oral hearing that contains the Board's decision and order in this regard is set out in Appendix A to this Decision and Order.

The parties agreed to, and filed with the Board, a list of the materials affected by the Board's decision (i.e., those to be struck from the record and those to remain on the record).

The Impact of the Amendment

It remains for the Board to determine whether the Amendment is inconsistent with the purposes of the Act or unjustly discriminates against or in favour of a market participant or a class of market participants.

A brief summary of the position of the parties is set out below, followed by the Board's findings.

In order to better understand the position of the parties, however, it is necessary to provide some further context around the setting of prices in the IESO-administered energy market and the role that the ramp rate multiplier plays, if only at a high and simplified level.

1. *Pricing and Dispatch in the Real-time Energy Market*

The MCP, which is calculated in five-minute intervals, is determined using a market schedule (pricing algorithm) that calculates the price based on the most economical offers submitted by generators that would satisfy the demand for energy in a particular five-minute interval. Dispatchable generators receive the MCP for their output, and dispatchable loads pay MCP for the energy they consume. All other generators and loads receive or pay, respectively, the Hourly Ontario Energy Price ("HOEP"). HOEP is a simple average of the 12 MCPs determined for the hour. Ontario currently has a uniform pricing system and MCP (and thus HOEP) are the same everywhere in the province. The introduction of locational marginal pricing for the province, which has long been the subject of discussion, is not expected to occur at least in the short term. However, the IESO does calculate what the prices would be in different locations were locational marginal pricing to be in place. These are referred to as "shadow prices".

Three aspects of the market schedule are of particular relevance to this proceeding:

- the market schedule is "myopic", in that it ignores expected demand in future intervals and sets the MCP based solely on demand conditions in each five-minute interval;

- the market schedule ignores transmission constraints, and assumes for pricing purposes that the cheapest available generation facility anywhere in Ontario is available to satisfy demand in any interval when, in fact, it may be unavailable due to transmission constraints; and

- the market schedule assumes for pricing purposes that generation facilities are able to ramp output up or down faster than they might actually be able to do so (by a factor of 12 currently or by a factor of 3 under the Amendment).

By contrast, the algorithm used by the IESO to dispatch facilities has the following characteristics:

- the dispatch algorithm has, since 2004, incorporated multi-interval optimization ("MIO"), which "looks ahead" to expected demand in future five-minute intervals;

- the dispatch algorithm takes account of all physical constraints on the system; and

- the dispatch algorithm respects the actual ramping capabilities of generation facilities.

The result is that MCP does not necessarily reflect what the prices would have been had the prices been determined on the basis of the offers submitted by generation facilities that are actually dispatched to provide energy to meet demand in a given five-minute interval. The ramp rate multiplier allows the market schedule to set prices on the basis of generation facilities that are cheaper but unavailable due to actual ramping restrictions, and as a result reduces both price volatility and the average level of prices. The same can be said for the market schedule assumption that the system is unconstrained.

A consequence of the lack of complete alignment between the pricing algorithm and the dispatch algorithm is that generation facilities that were assumed by the market schedule to be supplying energy in a five-minute interval might not in fact be dispatched due to the presence of transmission or ramping constraints. A generation facility may have to be dispatched even though it had offered to supply electricity at a price that is higher than HOEP. These generation facilities will be "constrained on", and under the market rules are entitled to an additional payment referred to as a Congestion Management Settlement Credit ("CMSC") payment. Similarly, when a cheaper generation facility is not dispatched due to the presence of transmission constraints or because it can ramp down more quickly than a more expensive generation facility, the cheaper facility will be "constrained off" and also entitled to a CMSC payment. In both cases, the CMSC payment reflects the difference between HOEP and the offer made by the generation facility that has been constrained on or constrained off, as the case may be. CMSC payments are not reflected in the energy price, but are recovered through uplift charges from wholesale market participants on a pro-rata basis based on their energy consumption at the time at which the CMSC payments were incurred.

2. *Position of the Parties on the Impact of the Amendment*

The following summary is based principally on the final arguments filed by the parties. For the most part, these largely reflect the tenor of each party's participation in this proceeding.

The position of the parties to this proceeding fall into two distinct camps: AMPCO and VECC oppose the Amendment while the IESO, APPrO, Coral Energy (through APPrO),

OPG and TransCanada support it. The letter of comment received from Constellation Energy also supports the Amendment. TransAlta was not an active participant in this proceeding, but is one of the generators that indicated its support for the Amendment as an interim solution in response to the IESO's request for submissions referred to above. EMIG (of which Coral Energy and Constellation Energy Group Inc. are members) was also not an active participant in this proceeding, but noted in its letter of intervention its belief that "in order to support new private investment in generation, Ontario must transition towards a competitive market where prices reflect the true cost of power". Hydro One did not take a position in this proceeding.

A number of the arguments made by AMPCO and VECC challenge the validity or reliability of the IESO's assessment of the costs and benefits associated with the Amendment, and are therefore better understood if the position of the parties supporting the Amendment is presented first.

Parties Supporting the Amendment

Active participants in this proceeding that support the Amendment assert that the Amendment is consistent with the purposes of the Act and does not unjustly discriminate against or in favour of a market participant or a class of market participants. Certain parties have added that the evidence in this proceeding is overwhelmingly to that effect.

The IESO's position is that the Amendment is consistent with, and will promote, a number of the purposes of the Act. Specifically, the IESO submits that the Amendment will: enhance overall reliability, better protecting the interests of consumers in that regard (sections 1(a) and 1(f) of the Act); encourage conservation and demand management (sections 1(b) and 1(c) of the Act); promote economic efficiency (section 1(g) of the Act); and cultivate a financially viable electricity industry (section 1(i) of the Act). According to the IESO, the Amendment will contribute to the achievement of these objectives by: more closely aligning the dispatch and pricing algorithms; resulting in more accurate price signals for consumers and producers; reducing uneconomic exports out of Ontario with resulting efficiency gains realized through the mechanism of export arbitrage; providing immediate efficiency gains for the Province; reducing fossil fuel generation; and achieving a significant improvement in efficiency for the Ontario market.

The IESO further submits that the Amendment, a superior solution to the available alternatives (including incorporation of MIO in the pricing algorithm), will be simple and inexpensive to implement and will achieve the noted benefits with minimal, if any, impact on average prices for consumers. The IESO has estimated that the impact of the Amendment on HOEP will be an average 2.6 percent increase. However, the IESO has also estimated that the impact on consumer bills will be mitigated by: the export arbitrage response that is expected to follow implementation of the Amendment; the global adjustment; the rebate that is currently paid out on revenues earned by OPG on its non-prescribed assets (the "OPG Rebate"); savings in CMSC payments; and savings in Intertie Offer Guarantee payments (these being payments made to importers to reduce price risks for imports that result from the fact that they are scheduled based on pre-dispatch prices but settled on the basis of real-time prices). After accounting for such mitigation, and based on 2006 market prices, the impact of the Amendment would, according to the IESO, vary from a net cost of $6.68 million or 0.004 cents/kWh (assuming an export arbitrage response of 50%, which the IESO considers conservative) to a net saving of approximately $13 million or 0.008 cents/kWh (assuming an export arbitrage response of 100%). As a supplementary mitigation measure, the IESO intends to disburse surplus funds from the transmission rights clearing account (the "TR Clearing Account") over 12 consecutive months to begin in conjunction with implementation of the Amendment.

With respect to the issue of unjust discrimination, the IESO argues that discrimination, in the context of a market for electricity, refers to economic discrimination. As such, more must be involved than an economic advantage accruing to one party rather than the other. The IESO further states that, by lessening subsidies and better aligning prices and dispatch costs, the Amendment plainly lessens inappropriate economic treatment of market participants.

Similar to the IESO, APPrO submits that improvements resulting from implementation of the Amendment are consistent with the purposes set out in sections 1(b), 1(c), 1(f), 1(g) and 1(i) of the Act. According to APPrO, the Amendment addresses many of the challenges and inefficiencies resulting from the use of the 12x ramp rate multiplier by creating just price signals for generators and loads, and does so with minimal, if any, customer cost impacts. APPrO also argues that the effects resulting from the 12x ramp rate multiplier are prejudicial to, and discriminate against, consumers and suppliers. APPrO states that, by more closely aligning the pricing algorithm with the dispatch algorithm, the Amendment would mitigate those prejudicial and discriminatory effects

(such effects including that consumers are not paying the true cost of the electricity they consume and are paying for inefficiencies through uplift charges).

TransCanada's position is that the Amendment will improve the operation of Ontario's competitive electricity market and, since many of the purposes of the Act have as their object the promotion of a competitive market, improvements to the market support the purposes of the Act. According to TransCanada, by moving the market closer to real prices, the Amendment will also specifically encourage conservation (section 1(b) of the Act) and promote the use of cleaner energy sources (section 1(d) of the Act). TransCanada also submits that market efficiency will be promoted by: more closely aligning the pricing and dispatch algorithms; increasing the internal consistency of the market rules; improving price signals and inducing more efficient investment; and improving price transparency and reducing less transparent uplift payments (by reducing CMSC payments). While not a perfect solution, in TransCanada's view the Amendment represents an important step in the right direction.

On the issue of unjust discrimination, TransCanada agrees with the view expressed by Coral Energy in submissions made before and during the oral hearing to the effect that "unjust" discrimination equates with "inefficient" discrimination.

Parties Opposing the Amendment

AMPCO and VECC take the position that the Amendment fails when considered in light of the criteria set out in section 33(9) of the Act, and should therefore be revoked and referred back to the IESO for further consideration.

AMPCO's position is that the Amendment is inconsistent with certain of the purposes of the Act. The purposes of the Act that underlie this position are: (i) ensuring the adequacy, safety, sustainability and reliability of electricity supply in Ontario through responsible planning and management of electricity resources, supply and demand (section 1(a) of the Act); and (ii) protecting the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service (section 1(f) of the Act). AMPCO also submits that the Amendment unjustly discriminates against consumers (by increasing prices) and in favour of generators (by providing "windfall profits" to generators – such as nuclear generators – that are unable to respond quickly to changing demand conditions).

In support of its position, AMPCO submits that the IESO is not at liberty to pick and choose the purposes of the Act that it will further while ignoring others in favour of perceived improvements in efficiency. The Act does not assign differing weights or priorities to the various purposes of the Act and, if anything, the protection of the interests of consumers has been given priority.

AMPCO also submits that the IESO's estimates of the costs and benefits of moving to a 3x ramp rate multiplier in terms of determining the wealth transfer implied by the Amendment are unreliable. According to AMPCO, the efficiency gains flowing from the Amendment, as articulated by the IESO and other parties, are: (i) not supported by economic theory having regard to the "Theory of the Second Best"; (ii) based on the mistaken view that uneconomic exports are principally the result of the 12x ramp rate multiplier rather than being largely attributable to Ontario's uniform pricing structure; and (iii) overstated. AMPCO states that, by contrast, the impact of the Amendment on consumers – a price impact variously estimated by the IESO at approximately $225 million, $197 million, $112 million and $100 million depending on whether the effect of arbitrage is taken into account – has been understated. AMPCO notes that a number of the price mitigation mechanisms identified by the IESO are of short (the OPG Rebate and the disbursement of funds from the TR Clearing Account) or uncertain (the global adjustment) duration or are speculative (export arbitrage), and a longer term price mitigation strategy is required. AMPCO also notes that the 3x ramp rate multiplier solution is inferior to incorporation of MIO in the pricing algorithm, which is a superior solution that could be implemented at a modest cost, and is not the preferred option identified by any market participant.

In its reply argument, AMPCO submits that the evidence in this proceeding does not, contrary to the position expressed by APPrO, answer the question of whether the Amendment will result in a HOEP that more closely approximates the price that would result were the pricing and dispatch algorithms perfectly aligned. AMPCO also submits that the evidence does not address what the "true cost" of electricity might be, nor how such notion compares based on the current HOEP versus HOEP calculated on the basis of the Amendment. Moreover, given the hybrid nature of the market, prices are not in AMPCO's view expected to have more than a marginal impact on investment decisions. AMPCO also notes that, contrary to the view articulated by TransCanada, the Act does not have as one of its objectives the promotion of a competitive market.

VECC's position is that the Amendment unjustly discriminates against consumers because it results in a pricing algorithm that moves away from, rather than towards, the

prices generated by the IESO's dispatch algorithm, resulting in overall inefficiency in the setting of HOEP by unjustifiably increasing the prices consumers pay on a province-wide basis. While agreeing that the Board's role is not to "remake" the IESO's decision in relation to the Amendment, VECC submits that the Board must determine whether the decision-making process was sound and led to a reasonable result in that: the issue was clearly defined; the criteria used by the IESO were comprehensive and consistent with the purposes of the Act; and the criteria were applied on a consistent and balanced basis throughout the decision-making process. VECC argues that the IESO's characterization of the issue changed over time from a focus on the differences between the pricing algorithm and the dispatch algorithm to a focus on inefficient exports. According to VECC, there is no confidence that the Amendment is the best way to address the newly framed issue without unjustly discriminating against consumers. In VECC's view, the IESO should therefore be directed to reconsider alternative solutions to the inefficient export issue that do not unjustly discriminate against consumers by inexplicably raising domestic prices.

VECC also expressed concern regarding use of the IESO's cost/benefit analysis as the measure of economic efficiency for changes in rules dealing with the market schedule and the determination of energy prices, noting that: uneconomic exports are largely the result of the fact that Ontario has uniform pricing; the IESO has narrowly redefined the issue of economic efficiency as reducing exports to New York; certain of the benefits that the IESO has identified in relation to the Amendment are unsubstantiated; and any amendment to the market rules that increased market prices would be judged as economically efficient when based on the IESO's analytical framework.

3. *Position of the Parties on the Burden of Proof*

An issue that arose most squarely in the exchange of final written argument is the question of which party bears the burden of proof in an application under section 33 of the Act.

Certain references in the IESO's final written argument make it clear that, in the IESO's view, in an application under section 33 of the Act the burden of proof is on the applicant to demonstrate that the market rule amendment is inconsistent with the purposes of the Act or is unjustly discriminatory.

AMPCO takes a different view, and submits that the burden of proof is ultimately on the IESO to show that the market rule amendment at issue in fact satisfies the test to be

applied by the Board as set out in section 33(9) of the Act. In support of that view, AMPCO notes that a market rule amendment review is fundamentally different from a more typical proceeding before the Board in that, among other things, applicants have no ability to pursue the relief of their choice by seeking an alternative or different amendment to the one adopted by the Board of Directors of the IESO. AMPCO also notes that the 60-day timeline within which the Board must issue its order on an application under section 33 of the Act supports AMPCO's position on the burden of proof issue. It would be patently unreasonable to expect that any applicant could develop a traditional applicant's filing complete with a full array of econometric and other analyses in the time allowed.

4. *Board Findings*

a. The Burden of Proof

In applications before the Board, the burden of proof is typically on the applicant to satisfy the Board that the requested relief should be granted. The Board certainly expects that the IESO will participate fully in proceedings relating to applications under section 33 of the Act in support of the amendment that is under review. However, the Board has heard no compelling reason that would cause it to take a different approach and place the burden of proof on the IESO in the circumstances of this case.

b. The Merit of Addressing the 12x Ramp Rate Multiplier Issue

Before turning to an examination of the impact or effect of the Amendment, the Board considers it useful to provide further context regarding the history and impact of the 12x ramp rate multiplier in the marketplace. Several parties noted that, as the wholesale market was designed for implementation at market opening, inputs to both the pricing algorithm and the dispatch algorithm were aligned in relation to the value to be used to reflect the ramping capabilities of generation facilities (in both algorithms, the value of the "TradingPeriodLength" was set at 5 minutes). To this day, that remains the case for the dispatch algorithm. As noted above, however, prior to market opening the market rules were amended to allow the IESO to set a different value for the "TradingPeriodLength" parameter in the pricing algorithm as a temporary measure to address extreme real-time price excursions that occurred during market testing. This is reflected in the "Explanation for Amendment" contained in market rule amendment proposal MR-00189-R00, dated April 16, 2002, which proposed the amendment to the

market rules that would allow the IMO the discretion to set the value of the TradingPeriodLength parameter in the pricing algorithm:

> The proposed amendment would permit the IMO to establish a longer Trading Period Length in the market schedule (unconstrained) to overcome the [price excursion] problems identified above. With a longer Trading Period Length within the market schedule (unconstrained), generation facilities will have large ramping capability and there will be less need to select additional higher cost resources to meet the increasing demand. As a result, less extreme price excursions will occur.
>
> The real-time schedule (constrained) will continue to use the 5 minute Trading Period Length. Therefore, discrepancies will increase between the real-time schedule and the market schedule (unconstrained). As a consequence, congestion management settlement credit (CMSC) payments will increase. However, the decreases in energy prices, resulting from the change in the ramp time in the market schedule, are expected to offset increases in CMSC payments.
>
> It should be noted that using a longer Trading Period Length in the determination of the market schedule is judged to be a transitional provision. It is expected that a longer term solution will need to be considered which could include a day-ahead market with unit commitment, increased generator self-scheduling, contracted ramp capability, or multi-period optimization.

The Board has not heard any evidence in this proceeding that would point to the introduction of the 12x ramp rate multiplier as having a basis rooted in market economics. To the contrary, the evidence in this proceeding is that the 12x ramp rate multiplier distorts wholesale market prices downwards and engenders adverse consequences for the marketplace in the form of generation and demand side inefficiencies. For example, dampened wholesale prices diminish incentives for conservation, load management and demand side management. The evidence in this proceeding is also that the 12x ramp rate multiplier contributes to inefficient exports. Inefficient exports, in turn, can increase the need for coal-fired generation to meet Ontario demand and thereby contribute to increased emissions. These adverse consequences were identified and discussed at some length in the evidence filed by, and the testimony given on behalf of, the IESO and APPrO, and are also discussed in the evidence filed by TransCanada. That adverse consequences flow from the 12x ramp rate multiplier was not seriously contested by evidence to the contrary filed by

AMPCO, although AMPCO did challenge the strength of any causal connection between the 12x ramp rate multiplier and inefficient exports.

The Board also notes that the 12x ramp rate multiplier issue has been the subject of comment by the Market Surveillance Panel. Specifically, the potential adverse market impact of the 12x ramp rate multiplier has been referred to or discussed in the following Market Surveillance Panel semi-annual monitoring reports, which were referred to by a number of parties to this proceeding: December 13, 2003 (covering May 2002 to October 2003); December 13, 2004 (covering the period May to October 2004); June 9, 2005 (covering the period November 2004 to April 2005); June 14, 2006 (covering the period November 2005 to April 2006); and December 13, 2006 (covering the period May to October 2006).

For example, after concluding that a significant portion of the difference between the constrained and unconstrained real-time prices, and of the remaining difference between HOEP and the unconstrained pre-dispatch price, is due to the 12x ramp rate assumption, the Market Surveillance Panel stated as follows in its December 13, 2004 report (at page 66):

> The Panel is of the view that the continued understatement of the HOEP leads to inefficient decisions by both loads and generators in both the short-term and the long-term. This takes the form of an inefficient load profile and of under-investment in both conservation and generation.
>
> With respect to the argument that the assumption that ramp rates are 12-times their true value results in a more stable HOEP, the Panel recognizes that price stability can be beneficial to market participants. The Panel observes, however, that it is open to market participants to insulate themselves contractually from price variation. Moreover, price volatility presents a profit opportunity for more price responsive generation and loads. To the extent that it is efficient to do so, volatility can be reduced by the actions of market participants. This is much better, in the Panel's view, than suppressing price variation by artificial means, especially when this has the side effect of understating the average price. The Panel strongly recommends that actual ramp rates be used to determine the HOEP.

Eighteen months later, the Market Surveillance Panel further commented on the issue in its June 14, 2006 report (at page 79) as follows:

> For these and possibly other reasons, arbitrage between Ontario and New York is focused on the HOEP. The result is inefficient exports and the effective extension of the cross-subsidy inherent in Ontario's uniform price regime to New York loads. This problem has been exacerbated by market rules that, other things being equal, would have reduced the HOEP relative to prices in the constrained schedule. For example, the 12 times ramp rate assumption, which has the appearance of systematically lowering the HOEP (i.e., because it removes ramp effects in price), may simply lead to more exports than would otherwise occur.

In its most recent report, dated December 13, 2006, the Market Surveillance Panel stated as follows on page 106:

> There are two major causes of socially inefficient exports from Ontario to New York. First, like privately inefficient exports, the lack of accurate price signals or information can lead to "guessing wrong" and hence socially inefficient exports ex post. Improvements in price signals should result in a higher frequency of socially efficient exports. Socially inefficient exports can also occur, however, if there are defects in the market design. Ontario's uniform pricing regime is poorly designed in the sense that it admits to the possibility that the prices that exporters pay do not reflect the incremental cost of supply. Other aspects of the unconstrained pricing algorithm such as the 12 times ramp rate assumption can further misalign the HOEP and the relevant nodal prices thereby contributing to the potential for ex post socially inefficient exports... (footnote omitted)

And again at pages 147 and 148:

> Moreover, with the Global Adjustment dampening the redistributive effects of changes in HOEP and mitigating any harm that might be said to be visited upon consumers from potentially higher HOEP, the Panel contends that there may be no better time than now to address the remaining sources of inefficiency in the design of the Ontario spot market. Artificially reducing the HOEP, as is the outcome under the current market design, simply means that consumers pay more (or receive a smaller rebate) through the Global Adjustment, all the while inducing market inefficiencies from which all Ontarians lose.

> The real-time price signals generated by an efficient wholesale market are central to the economic success of the new hybrid market for several reasons:
>
> - First, the real time production and consumption decisions of many wholesale market participants will continue to be guided by real-time prices. If these price signals continue to ignore certain system realities such as transmission constraints or the actual ramping capabilities of generation facilities, they will at times induce these participants to make decisions that reduce the short-term dispatch efficiency. As we have indicated in Chapter 3, factors such as the uniform pricing system and the 12 times ramp rate assumption create a wedge between the HOEP and local shadow prices. This can result in inefficient production and consumption decisions such as the inefficient exports from Ontario to New York that we began documenting in our last report....(footnote omitted)
>
> - Second, even though long-term investment will be guided through central planning in the near term, price signals from an efficient wholesale market can and should play an important role in guiding this planning process...Furthermore, as we have argued above, attempts to subsidize consumers by suppressing real-time prices leads to over-consumption and could ultimately lead to over-investment by the planners at [the Ontario Power Authority].

These comments reinforce the evidence in this proceeding as to the inefficiencies to which the 12x ramp rate multiplier contributes.

The observations of the Market Surveillance Panel in its most recent (December 13, 2006) report also support the assertion made by the IESO and others that addressing efficiency of the market remains a relevant objective even in the context of the hybrid framework under which Ontario's electricity sector operates at this time. Even AMPCO's expert witness, Dr. Murphy, who questioned the relevance or merits of the Amendment in light of the evolution of the market to a hybrid structure, conceded on cross-examination that improvements in wholesale market efficiency and accurate price signals are important even in a hybrid market.

The Board accepts that the 12x ramp rate multiplier, introduced as a temporary measure, has price distorting effects that can and do engender inefficiencies. The Board therefore also accepts that, in principle, there is merit in addressing the 12x ramp

rate multiplier issue if and to the extent that efficiency improvements can be expected to result, and that this is so even in the context of the hybrid market.

c. Evaluation of the Amendment as a Solution

The IESO has put forward credible evidence that the Amendment will result in greater efficiency in the IESO's real-time market as compared to the status quo. The benefits from this improved efficiency include, but are not limited to, reduced uneconomic exports to New York. The impact of this latter benefit is quantifiable, and has been quantified by the IESO. The other benefits are less easily quantified, but bear consideration nonetheless.

The Board does not agree with AMPCO's argument that the Amendment is inconsistent with the purposes of the Act and that the IESO has selectively chosen the purposes of the Act it will further while ignoring others. AMPCO asserts that the Amendment is contrary to section 1(a) of the Act ("responsible planning and management of electricity resources, supply and demand"). The Board concurs with the IESO's view that greater economic efficiency will further that objective. AMPCO also argues that the Amendment is inconsistent with section 1(f) of the Act ("protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service"). As discussed more fully below, the Board finds that the IESO has carefully considered the impact of the Amendment on consumers' average bills and determined that the impact is likely to be relatively modest. It may even be positive. The IESO has also noted that, while there may be a modest impact on consumers' bills, the Amendment is consistent with the purpose of protecting the interests of consumers with respect to the adequacy and reliability of supply.

There is no evidence before the Board in this proceeding that would lead the Board to take issue with the assertion made by the IESO and others that improvements in the economic efficiency of the electricity system in Ontario will promote adequacy and reliability of supply by providing more accurate price signals and triggering more appropriate price responsive behaviour. The same can be said for the assertions that the Amendment will encourage conservation, load management and demand side management and will, by reducing inefficient exports, also reduce the need for coal-fired generation to meet Ontario demand and thereby contribute to a lessening of emissions.

AMPCO and VECC both assert that the "3x myopic" Amendment is, by the IESO's own submission, inferior to a "1x MIO" solution. They support this view by reference to

documents that were prepared by the IESO at various times in the Amendment development process. They submit that this is a valid basis on which the Board should revoke the Amendment.

The Board does not accept that view. Although it is obvious that the IESO reviewed several alternatives in the course of developing the Amendment, it has consistently taken the position in this proceeding that a "3x myopic" rule is superior to a "1x MIO" option. This conclusion appears in the document issued by the Board of Directors of the IESO when the Amendment was approved, and it is supported by the IESO's and APPrO's experts. Other than referring to earlier assessments that the IESO does not currently support, AMPCO and VECC provided no evidence that "1x MIO" is a superior solution.

d. The Anticipated Impact on Consumer Bills

The Board has also considered the possible impact of the Amendment on consumers' electricity bills.

As noted above, the IESO has calculated that the net annual cost to consumers of adopting the 3x ramp rate assumption in the pricing algorithm is $6.68 million, or 0.004 cents/kWh. That calculation is based on the following assumptions and estimates:

- an average annual HOEP of $49 per MWh (the average price in 2006);
- an increase of 2.6% in the average HOEP as a result of the Amendment, before consideration of mitigating factors;
- mitigation of 50% of the estimate increase in HOEP due to "export arbitrage";
- mitigation of 80% of the net price increase (that is, after the export arbitrage effect) due to the global adjustment and the OPG Rebate; and
- reductions in CMSC payments and Intertie Offer Guarantees that are paid through uplift charges.

In its calculation of the net consumer impact, the IESO also takes into account a planned distribution to consumers of approximately $54 million from the IESO's TR Clearing Account. The Board does not believe that this particular distribution is

appropriately considered as a mitigation measure in relation to the Amendment. Elimination of this particular mitigation measure does not affect the Board's overall assessment of the Amendment.

Dr. Rivard of the IESO testified that, on the basis of additional analysis on the elasticity of export response, the export arbitrage effect on HOEP would likely be higher than 50%, which would reduce further the net cost of the Amendment to consumers. He noted that were the export arbitrage effect to reach approximately 65%, and keeping the other assumptions the same, the impact of the Amendment would be a net reduction in consumers' bills.

AMPCO disputes most of the assumptions and estimates that underlie the IESO's calculations. It claims that the IESO's estimates are unreliable, although it provided little evidence about the estimates it believes should be used.

Predicting the net effect of the Amendment on consumer's bills is a complex exercise and is not something the Board believes can be done with precision. The Board does, however, view the IESO's calculation as an indicator of the order of magnitude of the net effect of the Amendment. The Board agrees with AMPCO that the base price of $49 per MWh, which is the starting point of the IESO's calculation, is low by historical standards. The Board notes, however, that the IESO provided additional information on a range of net consumer costs using higher average HOEPs. The Board also acknowledges AMPCO's comment that the OPG Rebate is scheduled to expire in two years. Even if the OPG Rebate is discontinued at that time, the IESO has estimated that the global adjustment would still provide significant price mitigation, approximately 60% compared to the current 80% from the combined global adjustment and OPG Rebate.

The Board finds that the expected impact on consumers' bills is relatively modest. The IESO's published calculation shows a very minor impact – just 0.004 cents/kWh – based on estimates that the IESO considers to be conservative. Even if a higher base price were used (an average annual HOEP of $70 per MWh based on 2005 prices), and assuming no replacement for or extension of the OPG Rebate in two years, the estimated net impact would be larger but still relatively small. The difference resulting from the use of a higher base price relative to use of the lower one would be much less than 1/10th of a cent/kWh.

e. Conclusions

The Board concludes that the efficiency benefits that are anticipated to arise as a result of the Amendment are consistent with the purpose of the Act that speaks to promoting economic efficiency in the generation, transmission, distribution and sale of electricity. The Amendment also supports the purposes that relate to encouraging electricity conservation, demand management and demand response; ensuring the adequacy, safety, sustainability and reliability of electricity supply in Ontario; and protecting the interests of consumers in relation to the adequacy and reliability of electricity service. While the Board acknowledges that the Amendment may result in an increase in average consumer bills, that increase is anticipated to be modest.

The Board is also of the view that, in the context of its mandate under section 33 of the Act, unjust discrimination means unjust economic discrimination.

Based on the record of this proceeding, the Board finds that the Amendment is consistent with the purposes of the Act. The Board also finds that the Amendment does not unjustly discriminate for or against a market participant or a class of market participants.

Other Matters

1. *Stay of the Amendment Pending Appeal*

By the terms of the Board's February 9, 2007 Order, the stay of the operation of the Amendment applies pending completion of the Board's review of the Amendment. Issuance of this Decision and Order completes the Board's review, and has by the terms of the Order the effect of lifting the stay. For greater certainty, however, the Board will include an order to that effect in this Decision and Order.

In its final written argument, AMPCO requested that, in the event that the Board does not revoke the Amendment, the Board order a stay of the Amendment pursuant to section 33(6) of the *Ontario Energy Board Act, 1998* pending appeal to the Divisional Court.

In the letter accompanying its final written argument, the IESO noted that this request for relief was not included in the Application and is out of time. While the IESO therefore did not address this request in its final written argument, the IESO did in its

letter express the view that the Board does not have jurisdiction to grant such relief, and that if AMPCO wants a stay it must apply to the Divisional Court. APPrO's position is to the same effect.

In the circumstances of this case, the Board has decided not to extend its February 9, 2007 order staying the operation of the Amendment.

The Board understands that the IESO may wish to proceed with implementation of the Amendment on a timely basis, and that parties that are supportive of the Amendment would be equally supportive of prompt implementation. However, the Board does not believe that it is in the best interests of the wholesale electricity marketplace to face the prospect of the Amendment being implemented one day and suspended shortly thereafter further to the invocation of a judicial process. The Amendment is not urgently required for reasons such as reliability and the ramp rate issue is one that has been outstanding for several years. In the circumstances, the Board expects that the IESO will act responsibly by allowing AMPCO a reasonable opportunity to request judicial recourse prior to taking whatever steps may be required to implement the Amendment. The Board similarly expects that AMPCO will act responsibly by ensuring that any request for a stay of the operation of the Amendment that it may wish to make to the Divisional Court is made without undue delay.

2. *New Obligations for IESO under its Licence*

In its final written argument, AMPCO requested that the Board require the following, either under an existing condition of the IESO's licence or by way of a new licence condition:

- that the IESO prepare and submit to the Board, for every proposed market rule and market rule amendment, a report supported by appropriate analysis and available to the public, that explains how the proposed rule or amendment is consistent with the objects of the IESO and promotes the purposes of the Act; and

- that, in relation to the Amendment and such other market rules or market rule amendments as the Board considers appropriate, the IESO report publicly on an annual basis with respect to whether and the extent to which the amendments have met the IESO's objectives and provided the benefits anticipated by the IESO at the time each of the amendments were made.

In the letter accompanying its final written argument, the IESO noted that this request for relief was not included in the Application, is out of time, was not dealt with in any way in this proceeding and is entirely inappropriate.

Whatever the Board may think of AMPCO's request on the merits, the Board does not consider it appropriate to address the request at this stage in the proceeding. The issue of new reporting requirements for the IESO in relation to amendments to the market rules was not raised by AMPCO on a timely basis, and the other parties to this proceeding will not have had a fair opportunity to consider and respond to the request. AMPCO may, if it so wishes, pursue this matter further outside the context of this proceeding.

3. *Cost Awards*

Parties eligible for an award of costs, as identified in Procedural Order No. 2, shall submit their cost claims by April 24, 2007. A copy of the cost claim must be filed with the Board and one copy is to be served on the IESO. The cost claims must comply with section 10 of the Board's *Practice Direction on Cost Awards.*

The IESO will have until May 8, 2007 to object to any aspect of the costs claimed. A copy of the objection must be filed with the Board and one copy must be served on the party against whose claim the objection is being made.

A party whose cost claim was objected to will have until May 15, 2007 to make a reply submission as to why its cost claim should be allowed. Again, a copy of the submission must be filed with the Board and one copy is to be served on the IESO.

The Board will issue its decision on cost awards at a later date once the above process has been completed.

THE BOARD ORDERS THAT:

1. The Application by the Association of Major Power Consumers in Ontario for an order under section 33(9) of the *Electricity Act, 1998* revoking the market rule amendment identified as MR-00331-R00: "Specify the Facility Ramping Capability in the Market Schedule" and referring the amendment back to the IESO for further consideration is denied.

2. The stay of the operation of the market rule amendment identified as MR-00331-R00: "Specify the Facility Ramping Capability in the Market Schedule", as ordered by the Order of the Board dated February 9, 2007, is lifted.

DATED at Toronto, April 10, 2007.

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary

APPENDIX A

to

Decision and Order
April 10, 2007

Association of Major Power Consumers in Ontario
Review of Market Rule Amendment
EB-2007-0040

Excerpt from Transcript of Oral Hearing Held March 29, 2007

(see attached document)

our binder. I apologize, it might just be me, but the record, the decision does not bear out the quote that that included.

MR. RUPERT: Mr. Rodger, I was going to mention, I think the page 5 reference, at least as I read it here, didn't refer to the page that was doing what you thought it did. Maybe there is a cross-reference issue in your submissions.

MR. RODGER: I'll certainly check that. Sorry, Mr. Rupert.

MR. KAISER: Why don't you have a look now, and see if you can help us.

MR. RODGER: Mr. Chair, we'll endeavour to get copies during the lunch break.

MR. KAISER: All right. We'll take the lunch break now. We'll come back at 2 o'clock.

--- Recess taken at 12:34 p.m.

--- On resuming at 2:11 p.m.

DECISION:

MR. KAISER: Please be seated.

The Board has decided to issue a decision now on the matter of the relevance of the evidence with respect to the process, rather than deferring it, as Mr. Rodger suggested, in order that we can proceed with the case in a more orderly manner.

We are dealing with an application by AMPCO under section 33(4) of the *Electricity Act* for review of the three times ramp rate market rule amendment. In that

context there has been a discussion and a concern about the scope of the case, and particularly whether evidence regarding the process by which the IESO reached this rule is relevant.

AMPCO submits that the three times ramp rate market rule amendment should be revoked by this Board and referred back to the IESO for stakeholder consultation, based on the following grounds: First, that the process followed by the IESO in the three times ramp rate stakeholder consultation process violated IESO's common-law duty of procedural fairness, by breaching AMPCO's legitimate expectation that the IESO would follow its published stakeholder engagement process and apply its stakeholder engagement principles, and raising a reasonable apprehension of bias that the IESO favoured the interests of generators; secondly, that the integrity of the statutorily-mandated consultation process has been undermined. They say this is inconsistent with the purposes of the *Electricity Act* and unjustly discriminates against Ontario consumers in favour of Ontario generators.

They also allege certain substantive failures, as well, which are not at issue in the proceeding this morning.

Accordingly, AMPCO argues that the materials produced by IESO relating to procedural matters are relevant both to the issue of procedural fairness and also the substantive issues.

The starting point in this discussion is section 33(9)

of the *Electricity Act*. It has been referred to by virtually everyone this morning. It provides that:

> "If, on completion of its review, the Board finds that the amendment is inconsistent with the purposes of this *Act*, or unjustly discriminates against or in favour of a market participant or a class of market participants, then the Board shall make an order revoking the amendment on the date specified by the Board and referring the amendment back to the IESO for further consideration."

AMPCO argues that all of the IESO materials are relevant because they demonstrate that the IESO failed to follow procedural fairness in developing the amendment. According to AMPCO, the lack of procedural fairness demonstrates that the amendment unjustly discriminates against its members in favour of generators.

In other words, AMPCO argues that it has rights of natural justice in IESO rule-making and that those rights should be enforced by the Board in the market review amendment process.

All of the other parties appearing before us this morning state that this is an incorrect interpretation of section 33(9), because it equates the term "unjustly discriminates" with a violation of the rules of natural justice and it equates the Board's review process with a judicial review application.

They argue that the purpose of the Board's review in a

market review amendment should be aimed at economic efficiency and not natural justice.

They say that the OEB should be reviewing an amendment to the IESO rules and not the IESO stakeholdering process; that the scope of the Board's review should be aimed at the rule itself, and the impact of that rule, not the process by which the amendment was made.

In other words, it's argued before us that the issue is whether the rule is unjustly discriminatory. The Board agrees with that position.

Sections 19(1) and 20 of the *OEB Act*, read together, provide that the Board has general authority to determine any question of law or fact arising in any matter before it except where that authority is limited by statutory provision to the contrary.

In the case of a market rule amendment, another statutory provision does limit the Board's jurisdiction. Section 33(9) of the *Electricity Act* specifically sets out certain grounds on which the Board may make an order.

Accordingly, we find that section 33(9) of the *Electricity Act* is a jurisdiction-limiting provision, not another jurisdiction-granting provision. That is, with respect to a market rule amendment, the Board's jurisdiction is not as broad as suggested by section 20 of the *OEB Act*, but limited by section 33(9) of the *Electricity Act*.

In this regard, the Board has also considered the submissions of various parties, and agrees, that the 60-day

time limit for disposing of this review is consistent with the conclusion that the Board's scope of review is limited to the criteria set out in section 33(9).

The legislature can be taken as having known that an exhaustive review of the process would render it impossible to meet these timelines.

We then come to what can be seen as a second and distinct issue. That is whether there is a common-law principle of administrative law that the IESO has violated in the course of this market rule amendment process which yields a separate and distinct remedy.

The IESO says the common-law principles of administrative law do not assist AMPCO in extending the jurisdiction of the Board to review the details of the stakeholdering process. They say that the IESO is a statutory corporation whose affairs are managed and supervised by an independent board of directors, and the functions carried out by the IESO under the review at issue in this proceeding is a rule-making function and is essentially a legislative function.

They rely upon the Supreme Court of Canada's 1980 decision in the Inuit Tapirisat as support for the proposition that in legislative functions these rules do not apply.

AMPCO takes a different view and it relies upon the Supreme Court of Canada 1990 decision in Baker, as well as the Divisional Court decision in Bezaire.

The aspects of the decision that AMPCO relies upon can

be found at pages 15 and 14, where the Court stated that one of the criteria that must be looked at in determining whether the rules of natural justice apply to a process is whether the parties had a legitimate expectation that those rules would be followed. The Court states, in part:

> "Fourth, the legitimate expectations of the person challenging the decision may also determine what procedures the duty of fairness requires in given circumstance."

They go on to say:

> "This doctrine as applied in Canada is based on the principle that the circumstances affecting procedural fairness take into account the promises or regular practices of administrative decision-makers and it would generally be unfair for them to act in contravention of representations as to procedure or to backtrack on substantive promises without according significant procedural rights."

The Court also noted that another factor to be considered in determining the nature and extent of the duty of fairness that's owed to the parties is the importance of the decision to individuals involved.

As has been pointed out, there's no question that there's a significant amount of money involved in this decision; it's an important decision. With respect to the expectations of the parties, there is a provision in section 13.2 of the *Electricity Act* requiring the IESO to

establish processes by which consumers, distributors and generators may provide advice. AMPCO makes the point that a framework was established to govern the process by which these rules would be amended and implemented. They say that this procedure, despite the expectation they were entitled to, has not been followed.

That may or may not be the case, but this Panel is of the view that that is not a matter for our consideration. Mr. Vegh in his submissions questioned whether the Board should be a parallel Divisional Court. We don't think it should be.

IESO may or may not have followed the rules of natural justice. And they may or may not have been required to do so based upon the different authorities that have been cited by the different parties. But that, we believe, is a matter to be determined by the Divisional Court, not the Ontario Energy Board.

Mr. Rodger did refer us to a decision of this Board on September 20th, 2005. That appears at tab 11 of Ms. DeMarco's brief. I'm reading in part:

> "The Board concludes that stakeholder concerns have been substantially met. The true test will, however, be the experience of stakeholders in the new process. Stakeholders and the Board will have opportunities to review how well the process works over time as they are implemented. The Board therefore approves the IESO proposals on its stakeholdering process. It should be noted,

however, that this approval relates to the processes that the IESO has proposed. It does not change the Board's obligation to review IESO programs that have implications for IESO fees, expenses and revenue requirements, even when these programs have been subjected to the IESO stakeholdering process."

Mr. Rodger's submission was that having approved the stakeholdering process it was incumbent upon the Board to follow through and police, if you will, the rule-making process.

We differ on that. The two are distinct functions. The review at question is a judicial review and best reserved for the courts.

That leads us to the Order requested. Pursuant to this decision, the Board will order that any evidence relating to the stakeholdering process be struck. That would include Mr. Rodger's submission of March 26th. If the parties are unable to agree on what evidence is to be excluded or not excluded, the Board may be spoken to.

That completes the Board's ruling in this matter.

PROCEDURAL MATTERS:

Mr. Rodger and Mr. Mark, we were going to suggest, subject to your convenience, that you may want to adjourn for the rest of the day and regroup in light of that.

MR. MARK: It probably makes sense.

MR. KAISER: Unless there be some debate and discussion as to what evidence is to be struck and what

TAB 4

Ontario Energy Board

Commission de l'énergie de l'Ontario

Ontario

EB-2006-0034

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

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

BEFORE: Gordon Kaiser
Presiding Member and Vice Chair

Paul Vlahos
Member

Ken Quesnelle
Member

DECISION - RATE AFFORDABILITY PROGRAMS

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

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

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

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

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

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

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

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

Positions of the Parties

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

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

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

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

Board Findings

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Analysis of Submissions

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

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

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

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

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

The Ontario Energy Board Act

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

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

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

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

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

Explicit Powers

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

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

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

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

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

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

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

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

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

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

Implicit Powers

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

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

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

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

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

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

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

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

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

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

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

The Board's treatment of similar requests

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

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

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

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

The Charter

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

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

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

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

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

Conclusion

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

DATED at Toronto, April 26, 2007

Original signed by

Paul Vlahos
Member

Original signed by

Ken Quesnelle
Member

DISSENTING DECISION

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

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

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

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

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

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

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

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

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

Jurisdiction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Ability to Pay

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Unjust Discrimination

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

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

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

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

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

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

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

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

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

Charter of Rights and Freedoms

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

DATED at Toronto, April 26, 2007

Original signed by

Gordon Kaiser
Presiding Member and Vice Chair

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

TAB 5

Emile Walters, Louis Walters and Albert Walters *(Plaintiffs) Appellants;*

and

The Essex County Board of Education *(Defendant) Respondent.*

1973: April 26, 27; 1973: June 29.

Present: Martland, Judson, Spence, Laskin and Dickson JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Expropriation—Proposed taking of certain land for school—Duty of approving authority to "consider" report of inquiry officer—Whether failure on part of respondent Board to carry out such duty—Whether obliged to act on report at public meeting—Certain new material before Board—Whether duty to give owners opportunity to make further representations—The Expropriations Act, R.S.O. 1970, c. 154, s. 8.

The respondent Board of Education, as an expropriating authority, proposed to take certain land, part of a highly productive farm owned by the appellants, for a new secondary school in a rural area. By virtue of s. 5(1)(*b*) of *The Expropriations Act*, 1968-69 (Ont.), c. 36, now R.S.O. 1970, c. 154, it was put in the position of applying under s. 6(1) for its own approval for its intended expropriation. The report that came to the respondent Board as approving authority was a comprehensive document in which the inquiry officer carried out the duties laid upon him by s. 7(6). He found that the proposed expropriation was indefensible, that it was neither fair nor sound and that on the merits it should not be approved. When the chairman of the respondent Board received a copy of the report, he conferred with the director of education for the Board, who had been its chief witness at the hearing, and with the solicitor for the Board who had represented it at the hearing. The Chairman instructed the solicitor to prepare reasons for rejecting the inquiry officer's opinion on the proposed expropriation. This was done, and the reasons were before the Board when it met in private committee of the whole to consider the expropriation as approving authority. Both the director and the solicitor were present. The meeting lasted about one hour and one-half, and it culminated in acceptance of the solicitor's reasons and in the approval of the expropriation. Following the private meeting the

Emile Walters, Louis Walters et Albert Walters *(Demandeurs) Appelants;*

et

The Essex County Board of Education *(Défendeur) Intimé.*

1973: les 26 et 27 avril; 1973: le 29 juin.

Présents: Les Juges Martland, Judson, Spence, Laskin et Dickson.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Expropriation—Acquisition projetée d'un certain terrain en vue d'une école—Devoir de l'autorité approbatrice «d'examiner» le rapport de l'enquêteur—Le Conseil intimé a-t-il manqué à ce devoir?—Y a-t-il une obligation de donner suite au rapport au cours d'une réunion publique?—Documentation nouvelle dont le Conseil est saisi—Y a-t-il une obligation de donner aux propriétaires l'occasion de soumettre de nouvelles observations?—Expropriations Act, R.S.O. 1970, c. 154, art. 8.

Le Conseil scolaire intimé, en qualité d'autorité expropriante, voulait acquérir un certain terrain, faisant partie d'une ferme très productive dont les appelants sont propriétaires, en vue d'une nouvelle école secondaire dans une région rurale. En vertu de l'art. 5, par. 1, al. *b*) de l'*Expropriations Act*, 1968-1969 (Ont.) c. 36, maintenant R.S.O. 1970, c. 154, il s'est trouvé à faire, sous le régime de l'art. 6, par. 1, une demande destinée à être approuvée par lui-même, en vue de l'expropriation qu'il projetait. Le rapport remis au Conseil intimé à titre d'autorité approbatrice est un document détaillé qui fait foi que l'enquêteur s'est fidèlement acquitté des fonctions dont l'art. 7, par. 6, l'avait chargé. Il a conclu que l'expropriation était indéfendable, qu'elle n'était ni équitable ni juste et que sur le fond elle ne devait pas être approuvée. Lorsque le président du Conseil intimé reçut un exemplaire du rapport, il en discuta avec le directeur de l'éducation relevant du Conseil, qui avait été son principal témoin à l'audition, et avec l'avocat du Conseil qui avait représenté ce dernier à l'audition. Le président chargea l'avocat de rédiger des motifs de rejet de l'opinion de l'enquêteur sur l'expropriation projetée. La chose fut faite, et le Conseil avait en main les motifs lorsqu'il a tenu une réunion privée en comité plénier en vue d'étudier l'expropriation en sa qualité d'autorité approbatrice. Le directeur et l'avocat étaient tous deux présents. La réunion dura environ une heure et demie et elle aboutit à l'acceptation

Board met in public for some ten minutes to formalize what it had done in committee of the whole. The appellants were not at the public meeting and the evidence did not show whether they had any notice thereof.

Shortly afterwards the appellants brought a declaratory action to annul the expropriation and also sought damages. The trial judge dismissed the action and his judgment of dismissal was affirmed on appeal. The appellants then appealed to this Court.

Held: The appeal should be dismissed.

The appellants' contentions that the Board had failed to "consider" the inquiry officer's report as required by s. 8(1); that it was also obliged to act on the report at a public meeting and failed to do so; that because of certain new material and representations that were before it, beyond what was in the report, it was under a duty to give notice to the appellants before approving the expropriation; and that, in any event, the proposed expropriation was contrary to the Official Plan which was in effect in the township in which the land in question lay, and hence in violation of s. 15 of *The Planning Act*, R.S.O. 1970, c. 296, were rejected.

APPEAL from a judgment of the Court of Appeal for Ontario, dismissing an appeal from a judgment of Stark J. Appeal dismissed.

Gordon F. Henderson, Q.C., and *Brian A. Crane*, for the plaintiffs, appellants.

Douglas K. Laidlaw, Q.C., for the defendant, respondent.

The judgment of the Court was delivered by

LASKIN J.—This case involves a point of first impression under *The Expropriations Act*, 1968-69 (Ont.), c. 36, now R.S.O. 1970, c. 154. Under s. 4(1) of the Act, an expropriating authority must have the sanction of an approving authority to effect an expropriation, and under s.6, unless the Lieutenant Governor in Council directs otherwise, an owner whose land is sought to be expropriated has a right to demand a hearing on the intended expropriation before he is deprived of his land. The hearing is before

des motifs de l'avocat et à l'approbation de l'expropriation. Après la réunion privée, le Conseil a tenu une réunion publique d'une dizaine de minutes pour rendre officiel ce qui avait été fait en comité plénier. Les appelants n'assistaient pas à la réunion publique et rien dans la preuve n'indique si elle avait été portée à leur connaissance.

Peu de temps après les appelants ont intenté une action déclaratoire pour annuler l'expropriation et ils ont aussi demandé des dommages-intérêts. Le juge de première instance a rejeté l'action et son jugement fut confirmé en appel. Les appelants ont alors interjeté appel en cette Cour.

Arrêt: L'appel doit être rejeté.

Les allégations des appelants que le Conseil a omis «d'examiner» le rapport de l'enquêteur comme l'exige l'art. 8, par. 1; qu'il était aussi tenu de prendre sa décision sur le rapport au cours d'une réunion publique et qu'il a omis de le faire; que, à cause de certaines documentation et observations nouvelles dont il était saisi, en outre de ce que contenait le rapport, il avait l'obligation de signifier un avis aux appelants avant d'approuver l'expropriation, et que, en tout état de cause, l'expropriation projetée allait à l'encontre du Plan officiel en vigueur pour le *township* dans lequel se situe le bien-fonds en cause, et partant contrevenait à l'art. 15 du *Planning Act*, R.S.O. 1970, c. 296, ont été rejetées.

APPEL d'un arrêt de la Cour d'appel de l'ontario rejetant un appel d'un jugement du Juge Stark. Appel rejeté.

Gordon F. Henderson, c.r., et *Brian A. Crane*, pour les demandeurs, appelants.

Douglas K. Laidlaw, c.r., pour le défendeur, intimé.

Le jugement de la Cour a été rendu par

LE JUGE LASKIN—Cette affaire soulève un point sans précédent sous le régime de l'*Expropriations Act*, 1968-69 (Ont.), c. 36, maintenant R.S.O. 1970, c. 154. En vertu de l'art. 4, par. 1 de la Loi, une autorité expropriante doit avoir la sanction d'une autorité approbatrice pour effectuer une expropriation, et en vertu de l'art. 6, sauf si le Lieutenant-Gouverneur en conseil en décrète autrement, un propriétaire dont on cherche à exproprier le bien-fonds a le droit d'exiger une audition au sujet de l'expropriation projetée

an inquiry officer who is charged by s. 7(5) to inquire whether the taking "is fair, sound and reasonably necessary in the achievement of the objectives of the expropriating authority". Section 7(4) obliges the expropriating authority to serve upon the parties to the inquiry, at least five days before the hearing date, a notice indicating the grounds upon which it intends to rely at the hearing. Obviously, this notice feeds the inquiry officer's function. He is required by s. 7(6) to report to the approving authority (1) a summary of the evidence and arguments, (2) his findings of fact, and (3) his opinion on the merits of the application for approval with his reasons therefor. The report goes to the approving authority under s. 8, and the main issue in the present appeal is whether the prescriptions of that section were fulfilled by the approving authority, having regard to the manner in which it acted with respect to the inquiry officer's report.

avant d'être dépossédé de son bien. L'audition est présidée par un enquêteur que l'art. 7, par. 5, charge de faire enquête pour savoir si la dépossession (traduction) «est équitable, juste et raisonnablement nécessaire pour atteindre les objectifs de l'autorité expropriante». Le par. 4 de l'art. 7 oblige l'autorité expropriante à signifier aux parties en cause, au moins cinq jours avant la date d'audience, un avis indiquant les raisons qu'elle entend invoquer à l'audition. Évidemment, cet avis précise la fonction de l'enquêteur. Ce dernier est tenu par le par. 6 de l'art. 7 de faire à l'autorité approbatrice un rapport incluant: (1) un résumé de la preuve et des plaidoiries, (2) ses conclusions sur les faits, et (3) son opinion motivée sur le bien-fondé de la demande d'approbation. Le rapport est transmis à l'autorité approbatrice en vertu de l'art. 8, et la principale question dans la présente affaire est de savoir si les prescriptions de cet article ont été observées par l'autorité approbatrice en ce qui concerne la façon dont elle a agi en ce qui a trait au rapport de l'enquêteur.

The issue has a special character here because of the anomaly, a conscious expression of the Legislature, that the expropriating authority is also the approving authority. The respondent Board of Education, as an expropriating authority, proposed to take certain land, part of a highly productive farm owned by the appellants, for a new secondary school in a rural area. By virtue of s. 5(1)(*b*) of *The Expropriations Act*, it was put in the position of applying under s. 6(1) for its own approval for its intended expropriation. The same anomaly exists in the case of a municipal expropriation, in which case the approving authority is the council of the expropriating municipality. The scheme of s. 5, under which approving authorities are specified, is that in general the approving authority is the Minister responsible for the administration of the Act in which the expropriating power is given, and in any unprovided for case the approving authority is the Minister of Justice and Attorney General.

Le litige revêt ici un caractère particulier à cause de l'anomalie, sciemment exprimée par le législateur, créée par le fait que l'autorité expropriante est aussi l'autorité approbatrice. Le Conseil scolaire (Board of Education) intimé, en qualité d'autorité expropriante, voulait acquérir un certain terrain, faisant partie d'une ferme très productive dont les appelants sont propriétaires, en vue d'une nouvelle école secondaire dans une région rurale. En vertu de l'art. 5, par. 1, al. *b*) de l'*Expropriations Act*, le Conseil s'est trouvé à faire une demande sous le régime de l'art. 6, par. 1, destinée à être approuvée par lui-même, visant l'expropriation qu'il projetait. La même anomalie existe dans le cas d'une expropriation municipale, où l'autorité approbatrice est le conseil de la municipalité expropriante. Le principe de l'art. 5, qui précise quelles sont les autorités approbatrices, est qu'en général l'autorité approbatrice est le ministre responsable de l'administration de la Loi qui confère le pouvoir d'expropriation, et dans tous les cas non prévus l'autorité approbatrice est le ministre de la Justice et Procureur général.

Section 8 reads as follows:

8 (1) The approving authority shall consider the report of the inquiry officer and shall approve or not approve the proposed expropriation or approve the proposed expropriation with such modifications as the approving authority considers proper, but an approval with modifications shall not affect the lands of a registered owner who is not or has not been made a party to the hearing.

(2) The approving authority shall give written reasons for its decision and shall cause its decision and the reasons therefor to be served upon all the parties within ninety days after the date upon which the report of the inquiry officer is received by the approving authority.

(3) The approving authority shall certify its approval in the prescribed form.

The report that came to the respondent Board as approving authority was a comprehensive document in which the inquiry officer faithfully carried out the duties laid upon him by s. 7(6). He found that the proposed expropriation was indefensible, that it was neither fair nor sound and that on the merits it should not be approved. When the chairman of the respondent Board received, on or about September 17, 1970, a copy of the report, which was dated September 8, 1970, he conferred with one Wood, director of education for the Board, who had been its chief witness at the hearing, and with the solicitor for the Board who had represented it at the hearing. The chairman instructed the solicitor to prepare reasons for rejecting the inquiry officer's opinion on the proposed expropriation. This was done, and the reasons were before the Board when it met on September 21, 1970, in private in committee of the whole to consider the expropriation as approving authority. Both Wood and the solicitor were present. The meeting lasted about one hour and one-half, and it culminated in acceptance of the solicitor's reasons and in the approval of the expropriation. The only change in the reasons was substitution of the word "majority" for the word "unanimous" because two members of the sixteen who were present dissented. Following the private meeting the Board met in public for some ten minutes to formalize what it had done in committee of the whole. The appellants were

L'article 8 se lit comme suit:

[TRADUCTION] 8 (1) L'autorité approbatrice doit examiner le rapport de l'enquêteur et approuver ou refuser l'expropriation projetée, ou approuver l'expropriation projetée avec toute modification que l'autorité approbatrice estime juste, mais une approbation assortie de modifications ne doit pas viser les biens-fonds d'un propriétaire inscrit qui n'est pas ou n'a pas été fait partie à l'audition.

(2) L'autorité approbatrice doit exposer par écrit les motifs de sa décision et elle doit faire signifier sa décision et les motifs de celle-ci aux parties dans les quatre-vingt-dix jours de la date à laquelle l'autorité approbatrice a reçu le rapport de l'enquêteur.

(3) L'autorité approbatrice doit attester son approbation en la forme prescrite.

Le rapport remis au Conseil intimé à titre d'autorité approbatrice est un document détaillé qui fait foi que l'enquêteur s'est fidèlement acquitté des fonctions dont l'art. 7, par. 6 l'avait chargé. Il a conclu que l'expropriation était indéfendable, qu'elle n'était ni équitable, ni juste et que sur le fond elle ne devait pas être approuvée. Lorsque le président du Conseil intimé reçut, le 17 septembre 1970 ou vers cette date, un exemplaire du rapport, daté du 8 septembre 1970, il en discuta avec un M. Wood, le directeur de l'Éducation relevant du Conseil, qui avait été son principal témoin à l'audition, et avec l'avocat du Conseil qui avait représenté ce dernier à l'audition. Le président chargea l'avocat de rédiger des motifs de rejet de l'opinion de l'enquêteur sur l'expropriation projetée. La chose fut faite, et le Conseil avait en main les motifs lorsque, le 21 septembre 1970, il a tenu une réunion privée en comité plénier en vue d'étudier l'expropriation en sa qualité d'autorité approbatrice. M. Wood et l'avocat étaient tous deux présents. La réunion dura environ une heure et demie et elle aboutit à l'acceptation des motifs de l'avocat et à l'approbation de l'expropriation. La seule modification aux motifs a consisté à substituer le mot «majorité» aux termes «à l'unanimité», parce que deux des seize membres présents avaient signifié leur dissidence. Après la réunion privée le Conseil a tenu une réunion publique d'une dizaine de minutes pour rendre officiel ce qui avait été fait

not at the public meeting and the evidence does not show whether they had any notice thereof.

Shortly afterwards the appellants brought a declaratory action to annul the expropriation and also sought damages. Stark J. dismissed the action and his judgment of dismissal was affirmed on appeal without written reasons. In this Court, counsel for the appellants contended that the Board had failed to "consider" the inquiry officer's report as required by s. 8(1); that it was also obliged to act on the report at a public meeting and failed to do so; that because of certain new material and representations that were before it, beyond what was in the report, it was under a duty to give notice to the appellants before approving the expropriation; and that, in any event, the proposed expropriation was contrary to the Official Plan which was in effect for the Township in which the land in question lay, and hence in violation of s. 15 of *The Planning Act*, R.S.O. 1970, c. 296, which forbids any public work (allegedly including a school) not in conformity with an effective Official Plan.

The Court did not find it necessary to hear counsel for the respondent Board on the legality of the expropriation under the Official Plan. It was satisfied at the hearing that since use of rural areas for schools was a permitted use, although qualified by a provision that they not detract from the maintenance of the rural environment, there was, in the circumstances, no contravention of the Official Plan, especially when by its very terms its provisions were to be flexibly interpreted.

I am also of the opinion that the respondent Board as an approving authority was not under any statutory or other obligation to consider approval of an expropriation at a public meeting. Section 47(1) of *The Schools Administration Act*, R.S.O. 1970, c. 424, requiring meetings of a school board, except meetings of committees including a committee of the whole,

en comité plénier. Les appelants n'assistaient pas à la réunion publique et rien dans la preuve n'indique s'ils en avaient eu connaissance.

Peu de temps après les appelants ont intenté une action déclaratoire pour annuler l'expropriation et ils ont aussi demandé des dommages-intérêts. M. le Juge Stark a rejeté l'action et son jugement fut confirmé en appel sans motifs écrits. En cette Cour, l'avocat des appelants a allégué que le Conseil a omis «d'examiner» le rapport de l'enquêteur comme l'exige l'art. 8, par. 1; qu'il était aussi tenu de prendre sa décision sur le rapport au cours d'une réunion publique et qu'il a omis de le faire; que, à cause de certaines documentation et observations nouvelles dont il était saisi, en outre de ce que contenait le rapport, il avait l'obligation de signifier un avis aux appelants avant d'approuver l'expropriation; et que, en tout état de cause, l'expropriation projetée allait à l'encontre du Plan officiel en vigueur pour le *Township* dans lequel se situe le bien-fonds en cause, et partant contrevenait à l'art. 15 du *Planning Act*, R.S.O. 1970, c. 296, qui interdit les travaux publics (y compris une école, allègue-t-on) non conformes à un Plan officiel en vigueur.

La Cour n'a pas jugé nécessaire d'entendre l'avocat du Conseil intimé sur la légalité de l'expropriation sous le régime du Plan officiel. Elle était convaincue à l'audition qu'étant donné que l'utilisation de régions rurales pour fins d'écoles est une utilisation permise, bien que sous réserve d'une disposition prévoyant qu'elle ne doit pas amoindrir le caractère de l'environnement rural, il n'y a pas eu, dans les circonstances, de violation du Plan officiel, spécialement lorsque selon ses termes mêmes ses dispositions doivent être interprétées avec souplesse.

Je suis aussi d'avis que le Conseil intimé, en qualité d'autorité approbatrice, n'avait pas d'obligation légale ou autre de considérer l'approbation d'une expropriation à une réunion publique. L'article 47, par. 1 du *Schools Administration Act*, R.S.O. 1970, c. 424, qui exige que les séances d'un conseil scolaire, sauf les séances de comités, comité plénier y com-

to be open to the public, cannot be read into *The Expropriations Act* to govern the school board's proceedings thereunder. That Act does not expressly say so, nor do any of its provisions import a duty upon a school board not resting upon the generality of approving authorities, to carry out its approving function in public. It is fallacy to say that the respondent Board sitting as an approving authority sits as a school board; rather, being a school board with expropriating powers, it has been legislatively designated as an approving authority.

The remaining two points raised by appellants' counsel are more formidable. They are based on a reference to the grounds upon which the inquiry officer disapproved of the proposed expropriation, a reference to the contrary reasons of the Board's solicitor which became the statutorily-required reasons of the Board in giving its approval to its expropriation, and a reference to the material that was before the Board when in committee of the whole; and they involve too an appeal to aspects of what is conveniently and compendiously called natural justice, a duty of procedural fairness to persons in the course of lawful interference with various of their interests, including interests in property.

The approving authority does not sit under s. 8 as an appeal tribunal nor as a tribunal of review of the inquiry officer's report. It has an independent power to approve or disapprove the proposed expropriation, or to approve it with modifications, subject only to a duty to "consider" the inquiry officer's report. It is not bound by either the findings of fact nor by any interpretation of law in that report. That is plain from s. 8 in its relation to the scheme of the Act as a whole.

What, then, is involved in its duty to "consider" the report? Certainly, the Board must have the report before it, and the evidence shows that

pris, soient ouvertes au public, ne saurait être vu comme incorporé dans l'*Expropriations Act* pour régir les délibérations de conseils scolaires tenues sous l'empire de ce dernier. Celui-ci ne le prévoit pas expressément et aucune de ses dispositions n'implique une obligation de la part du conseil scolaire, n'incombant pas à l'ensemble des autorités approbatrices, de remplir ses fonctions d'approbateur en public. Il est faux de dire que le Conseil intimé siégeant comme autorité approbatrice le fait à titre de conseil scolaire; plutôt, parce qu'il est un conseil scolaire possédant des pouvoirs d'expropriation, il a été désigné par la loi comme autorité approbatrice.

Les deux autres questions soulevées par l'avocat des appelants sont plus difficiles. Elles sont basées sur un renvoi aux motifs sur lesquels l'enquêteur s'est fondé pour désapprouver l'expropriation projetée, un renvoi aux motifs opposés de l'avocat du Conseil, lesquels ont été les motifs que le Conseil a donnés pour se conformer à la loi lorsqu'il a approuvé son expropriation, et un renvoi à la documentation qui était devant le Conseil lorsqu'il s'est constitué en comité plénier; et elles font aussi entrer en jeu des aspects de ce qu'on appelle, pour plus de commodité et de concision, la justice naturelle, une obligation que l'on a envers les gens de procéder équitablement lorsque l'on intervient légalement dans divers droits qu'ils possèdent, y compris les droits de propriété.

L'autorité approbatrice ne siège pas, sous le régime de l'art. 8, à titre de tribunal d'appel ni à titre de tribunal de révision du rapport de l'enquêteur. Elle a un pouvoir indépendant d'approuver ou de refuser l'expropriation projetée, ou de l'approuver avec modifications, sujet seulement à une obligation «d'examiner» le rapport de l'enquêteur. Elle n'est liée ni par les conclusions sur les faits ni par une interprétation juridique quelconque contenue dans ce rapport. C'est ce qui ressort clairement de l'art. 8 dans le contexte du fonctionnement de la Loi dans son ensemble.

Que comporte donc son devoir «d'examiner» le rapport? Il est certain que le conseil doit avoir le rapport devant lui, et la preuve fait voir que

each member had a copy at least three days before the approval meeting. Although the word "consider" imports a time element, I do not think a Court can or should impose any arbitrary temporal standard any more than it can or should monitor the degree of required concentration upon the contents of the report. In the present case, the Board was in session on the report in committee of the whole for about one hour and one-half, and had before it a critical set of opposing reasons which it ultimately accepted. I see nothing improper, in view of the independent power of the Board as an approving authority, in its having a pre-packaged opinion before it prepared by its solicitor. Unless the good faith, indeed the honesty, of the members of the Board is called in question, the fact that they are briefed or counselled in advance to a rejection of the report is not a ground for concluding that they did not "consider" it. I do not read the duty to "consider" as imposing upon an approving authority an obligation, if its decision is adverse to the opinion expressed in the report, to show by its written reasons that its adverse decision is reasonably founded and hence run the risk of review by the Courts if they should conclude that it is not.

chaque membre du Conseil en avait un exemplaire au moins trois jours avant la réunion d'approbation. Bien que le mot «examiner» implique un élément de temps, je ne crois pas qu'une cour puisse ou doive imposer une norme arbitraire de temps pas plus qu'elle ne peut ou ne doit contrôler le degré de concentration requis pour l'examen du contenu du rapport. Dans la pré sente affaire, la séance d'étude du rapport en comité plénier du Conseil a duré environ une heure et demie, et le Conseil avait devant lui un exposé crucial de motifs opposés qu'il a, en fin de compte, acceptés. Je ne vois rien d'irrégulier, étant donné le pouvoir indépendant qu'a le Conseil en tant qu'autorité approbatrice, dans le fait qu'il ait été en possession d'une opinion toute faite préparée d'avance par son avocat. À moins que la bonne foi, et même l'honnêteté, des membres du conseil soit mise en question, le fait qu'ils soient informés ou conseillés à l'avance en vue du rejet du rapport ne suffit pas pour conclure qu'ils ne l'ont pas «examiné». Je n'interprète pas l'obligation «d'examiner» comme imposant à une autorité approbatrice une obligation, si sa décision est contraire à l'opinion exprimée dans le rapport, d'établir par ses motifs écrits que sa décision contraire repose sur des motifs raisonnables et de s'exposer par là à une révision par les cours si celles-ci devaient conclure que tel n'est pas le cas.

Counsel for the appellants did not impugn the good faith of the Board. Objectively, the record in this case indicates that the chairman of the Board, its solicitor and the director of education had strong opinions before the Board met as an approving authority that the expropriation should proceed. If there is an appearance of unfairness from the course of the approval proceedings, it lies in the ambivalent position into which the Board was put by the terms of *The Expropriations Act*. The Legislature has, in my opinion, left little room for judicial supervision of an approving authority's discharge of its duty to approve or disapprove an expropriation; and, short of an attack upon good faith, I see no ground for enlargement of the scope of judicial supervision merely because the Legislature has

L'avocat des appelants n'a pas mis en doute la bonne foi du Conseil. Objectivement, le dossier de la présente affaire indique que le président du Conseil, son avocat et le directeur de l'Education avaient l'opinion bien arrêtée, avant que le Conseil se réunisse à titre d'autorité approbatrice, que l'expropriation devait suivre son cours. Si un semblant d'iniquité se dégage de la façon dont s'est déroulée la procédure d'approbation, cela provient de la position ambivalente dans laquelle les dispositions de l'*Expropriations Act* ont placé le Conseil. Le législateur a, à mon avis, laissé peu de marge à la surveillance judiciaire de la façon dont une autorité approbatrice remplit son obligation d'approuver ou refuser une expropriation; et, à moins de porter une attaque à leur bonne foi, je ne vois

seen fit to make the respondent Board "judge in its own cause". It is not for this Court in such a case, and in respect of such a function in relation to expropriation, to revise legislative policy. The Court is given no role to review the merits of an expropriation proposal, and, for reasons which follow, the Board's function as an approving authority is not one which, on the facts of the present case, is subject to *audi alteram partem* principles.

Counsel for the appellants did not contend that the respondent Board was, as a general rule, obliged to hold a hearing in connection with its consideration of the inquiry officer's report, or obliged to give notice to owners about to be expropriated to enable them to make further representations. (If, in fact, such representations should be made, it would be for the Board to decide on the weight, if any, that they should receive.) In the present case, in addition to the inquiry officer's report, the Board had before it an interim report on soil conditions at the site of the proposed new school, a letter from the architects and a petition of a considerable number of local residents opposing the expropriation. Because of the first two of these matters, counsel for the appellants contended that his clients should have had an opportunity to appear or make further representations, especially when the staff protagonists for expropriation, its solicitor and the director of education, were on hand to lend persuasion to the approval of the expropriation.

Whether a narrow or a broad view be taken of a duty arising in an approving authority in certain circumstances to hear or accept representations from about-to-be expropriated owners, the matter comes down to the question whether the approving authority is strictly limited in its function to the report of the inquiry officer if it would avoid a further hearing or a duty to receive further representations. I do not think

aucun moyen d'étendre le champ de la surveillance judiciaire simplement parce que le législateur a jugé bon de constituer le Conseil intiné «juge dans sa propre cause». Il n'appartient pas à cette Cour en un tel cas, et à l'égard d'une telle fonction relativement à l'expropriation, de réviser l'orientation de la loi. La Cour ne se voit confier aucun rôle de réviser le bien-fondé d'une proposition d'expropriation, et, pour des motifs énoncés plus loin, la fonction d'autorité approbatrice du Conseil n'en est pas une qui, d'après les faits de l'espèce, est assujettie aux principes de la règle *audi alteram partem*.

L'avocat des appelants n'a pas allégué que le Conseil intimé était, règle générale, obligé de tenir une audition relativement à son examen du rapport de l'enquêteur, ou obligé de signifier un avis aux propriétaires sur le point d'être expropriés dans le but de leur permettre de soumettre de nouvelles observations. (Si, en fait, de telles observations devaient être faites, il appartiendrait au Conseil de décider du poids, s'il en est, qu'il convient de leur accorder). En l'instance, outre le rapport de l'enquêteur, le Conseil avait en main un rapport provisoire portant sur les conditions du sol à l'endroit de la nouvelle école projetée, une lettre des architectes et une pétition signée par un nombre considérable de résidents du voisinage s'opposant à l'expropriation. A cause des deux premiers de ces éléments, l'avocat des appelants a allégué qu'il aurait fallu donner à ses clients l'occasion de comparaître ou de faire de nouvelles observations, spécialement quand les membres du personnel du Conseil qui étaient les protagonistes de l'expropriation, soit l'avocat du Conseil et le directeur de l'Education, étaient là pour persuader le Conseil d'approuver l'expropriation.

Que l'on adopte une vue étroite ou large d'une obligation incombant à une autorité approbatrice, en certaines circonstances, d'entendre ou d'accepter les observations de propriétaires sur le point d'être expropriés, tout revient à la question de savoir si l'autorité approbatrice est strictement limitée dans sa fonction au rapport de l'enquêteur si elle veut éviter une nouvelle audition ou une obligation de recevoir de nouvelles

that there can be any such limitation but rather that the answer depends on what is before the approving authority in addition to the inquiry officer's report. On the narrow view, as advanced by counsel for the appellants, namely, that what was before the respondent Board in addition to the report imposed upon it a duty to give the appellants an opportunity to make further representations, I must disagree. I do not regard either the material as to soil conditions or the architect's letter, or both, as giving rise to an obligation to afford the appellants an opportunity to make further representations.

On the broad view, the governing statute does not limit the approving authority in what it may consider so long as it considers the inquiry officer's report, and I would not read any limitation into s. 8. To use case-honoured terminology, the Board as an approving authority is neither a judicial nor a quasi-judicial body, but is invested with the widest discretionary power to determine, subject only to considering the inquiry officer's report, whether an expropriation should proceed. The sanction for a wrong-headed decision (absent bad faith), having regard to its duty to give reasons, is public obloquy not judicial reproof. I do not say, however, that in no circumstances would it be appropriate to fix an approving authority with a duty to hear or accept representations from owners whose lands are in danger of being expropriated. Such instances are likely to be rare but I would not exclude them. The present case is not in that category.

Function and role in which a statutory body is cast, relative to the legislation under which it operates, and in some cases the manner in which it discharges its function and role, govern the procedural duties to which it may be required to conform by the Courts, in the absence of express stipulation in the statute. This is what emerges from *Franklin v. Minister*

observations. Je ne crois pas qu'une telle limitation puisse exister mais je pense plutôt que la réponse dépend de ce que l'autorité approbatrice a devant elle en plus du rapport de l'enquêteur. Sur la vue étroite, telle qu'avançée par l'avocat des appelants, à savoir que ce dont le Conseil intimé était saisi en plus du rapport lui imposait l'obligation de donner aux appelants la chance de soumettre de nouvelles observations, je ne puis être d'accord. Je ne regarde pas la documentation visant les conditions du sol, ou la lettre de l'architecte, ou les deux, comme créant une obligation de fournir aux appelants une occasion de faire de nouvelles observations.

Sur la vue large, la loi qui régit la question ne limite pas l'autorité approbatrice quant à ce dont elle doit tenir compte, pourvu qu'elle examine le rapport de l'enquêteur, et je ne vois aucune limitation dans l'article 8. Pour reprendre une terminologie reconnue par la jurisprudence, le Conseil en tant qu'autorité approbatrice n'est pas un organe judiciaire ni quasi-judiciaire, mais est investi du pouvoir discrétionnaire le plus étendu pour décider, sous réserve seulement d'examiner le rapport de l'enquêteur, si l'expropriation doit suivre son cours. La sanction qui s'attache à une décision prise à tort (mais sans mauvaise foi), compte tenu l'obligation de la motiver, est la censure publique et non un blâme judiciaire. Je ne dis pas, cependant, que dans aucun cas il ne conviendrait d'imposer à une autorité approbatrice l'obligation d'entendre ou d'accepter les observations des propriétaires dont les terrains sont en danger d'être expropriés. Ces cas seront vraisemblablement rares, mais je ne les exclus pas. La présente affaire n'entre pas dans cette catégorie.

Les fonction et rôle dévolus à un organisme établi par texte législatif, en ce qui concerne la loi en vertu de laquelle il fonctionne, et dans certains cas la manière dont il s'acquitte de sa fonction et de son rôle, régissent les devoirs de procédure auxquels les tribunaux peuvent l'astreindre, en l'absence de dispositions expresses de la loi. C'est ce qui ressort des arrêts *Franklin*

of Town and Country Planning[1], from *Calgary Power Ltd. and Halmrast v. Copithorne*[2], and from *Padfield v. Minister of Agriculture, Fisheries and Food*[3], which were among the authorities upon which the parties relied. Of course, assessment of function and role involves judgment, and I have made mine evident in these reasons.

I would dismiss the appeal but, in view of the novelty of the issue and the dispositions below as to the merits and as to costs, I would make no order as to costs in this Court.

Appeal dismissed.

Solicitors for the plaintiffs, appellants: Yuffy & Yuffy, Windsor.

Solicitor for the defendant, respondent: Reginald E. Burnell, Windsor.

v. Minister of Town and Country Planning[1], *Calgary Power Ltd. et Halmrast c. Copithorne*[2], et *Padfield v. Minister of Agriculture, Fisheries and Food*[3], qui font partie de la jurisprudence sur laquelle les parties se sont fondées. Bien entendu, l'appréciation de la fonction et du rôle comporte jugement, et j'ai rendu le mien évident dans les présents motifs.

Je suis d'avis de rejeter le pourvoi mais, vu la nouveauté de la question et les décisions des cours d'instance inférieure quant au fond et aux dépens, il n'y aura pas d'adjudication de dépens en cette Cour.

Appel rejeté.

Procureurs des demandeurs, appelants: Yuffy & Yuffy, Windsor.

Procureur du défendeur, intimé: Reginald E. Burnell, Windsor.

[1] [1948] A.C. 87.
[2] [1959] S.C.R. 24.
[3] [1968] A.C. 997.

[1] [1948] A.C. 87.
[2] [1959] R.C.S. 24.
[3] [1968] A.C. 997.

TAB 6

proceedings. Regardless of the species of law suit, the inherent right remains the same and it is lost only when cause, in the form of exceptional circumstances, is found to exist. If, for example, intimidation is the cause being alleged, it must be proved, as I have already stated, on a balance of probabilities. In that situation, if the parties in question are spouses, that fact, by itself, would not be determinative of the issue. What would be important to know is whether the historical nature of their relationship makes it probable that intimidation will result if one spouse sits in on the discovery of the other. Undoubtedly there are instances where, throughout the marriage, the conduct of a husband towards his wife was such that his mere presence during her examination would create the probability of intimidation. But, even then, that must be proved and not assumed.

V. *Conclusion*

For the reasons given, the motion is allowed. The respondent shall attend at his own expense to be examined for discovery at a time and place designated by the applicant in accordance with the Rules of Civil Procedure. The applicant shall be entitled to be present with her counsel during that discovery. Costs of this motion to the applicant fixed at $850 together with GST.

Motion granted.

Re Corporation of the Township of Bruce et al. and Minister of Municipal Affairs and Housing for Ontario et al.

[Indexed as: Bruce (Township) v. Ontario (Minister of Municipal Affairs and Housing)]

Court of Appeal for Ontario, Finlayson, Osborne and Weiler JJ.A.
September 4, 1998

Municipal law — Restructuring — Municipality required to consider Minister's restructuring principles — No failure by municipality to consider restructuring principles — Application for judicial review of municipality's approval of restructuring plan dismissed — Municipal Act, R.S.O. 1990, c. M.45, s. 25.4.

On October 21, 1997, the Council of the County of Bruce adopted a county-wide municipal restructuring plan under which the 30 existing municipal corporations of the county, which included the Township of Bruce and the Village of Tiverton, would be reduced to eight. The Township and the Village applied for judicial

review of the County Council's decision and, amongst other things, they argued that contrary to s. 25.4 of the *Municipal Act*, the County Council had failed to consider the restructuring principles established by the Minister. The application for judicial review was dismissed. Leave having been granted, the Township and the Village of Tiverton appealed.

Held, the appeal should be dismissed with costs.

Considerable deference must be extended to elected representatives undertaking what was essentially a legislative function. Neither the Act nor the regulations imposed any particular process for the development of a restructuring proposal or any direction about when the restructuring principles were to be considered. The obligation to consider imposed no greater obligation than to take the principles into account when developing a restructuring proposal. Moreover, "to consider" does not imply that the principles must be followed in the development of a restructuring proposal. The restructuring principles were very general, and it would be difficult not to take them into account. Further, there was no requirement that there be specific evidence that each principle be considered each time a particular step was taken in what was an extended process. Courts are not equipped to micro-manage a process such as a restructuring proposal and should only interfere in egregious circumstances where it was manifest that statutorily prescribed pre-conditions had not been met. Here the appellants had not established that the principles had not been considered and, accordingly, their appeal should be dismissed.

Cases referred to

Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities), [1992] 1 S.C.R. 623, 89 D.L.R. (4th) 289, 134 N.R. 241, 4 Admin. L.R. (2d) 121, 95 Nfld. & P.E.I.R. 271, 301 A.P.R. 271; *Old St. Boniface Residents Assn. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170, 75 D.L.R. (4th) 385, 116 N.R. 46, 69 Man. R. (2d) 134, 2 M.P.L.R. (2d) 217, [1991] 2 W.W.R. 145; *Save Richmond Farmland Society v. Richmond (Township)*, [1990] 3 S.C.R. 1213, 75 D.L.R. (4th) 425, 116 N.R. 68, 52 B.C.L.R. (2d) 145, 2 M.P.L.R. (2d) 288, [1991] 2 W.W.R. 178

Statutes referred to

Municipal Act, R.S.O. 1990, c. M.45 (as amended 1996, c. 1), ss. 25.2(2), 25.4
Municipal Boundary Negotiations Act, 1981, S.O. 1981, c. 70 — now *Municipal Boundary Negotiations Act*, R.S.O. 1990, c. M.49

APPEAL of a judgment of Dambrot J. (1998), 37 O.R. (3d) 171, 45 M.P.L.R. (2d) 92 (Gen. Div.) dismissing an application for judicial review of a municipal restructuring plan.

Burton H. Kellock, Q.C., and *Robert G. Maisey*, for appellants.
Andrew J. Roman, for respondent, Minister of Municipal Affairs.
Robert G. Doumani and *William A. Chalmers*, for respondent, Corporation of the County of Bruce.
Darrell N. Hawreliak, for respondent, Town of Kincardine.
James A. Smith, for respondent, Township of Kincardine.

The judgment of the court was delivered by

OSBORNE J.A.: — This is an appeal, with leave, from the January 30, 1998 judgment of Dambrot J. [reported 37 O.R. (3d) 171] dismissing the appellants' application for judicial review of the decision of the Brace County Council to adopt a county-wide municipal restructuring plan. Under the proposed restructuring, 30 existing municipal corporations in the County of Bruce (the "County") would be reduced to eight.

The appellants are two small local municipalities (amalgamated into one municipality as of January 1, 1998), in Bruce County. They have about 3.6 per cent of the County population and 3.4 per cent of the total electors in the County. They opposed the restructuring option adopted by County Council on October 21, 1997 because their representation in the restructured Bruce County would be reduced.

On their application for judicial review, the appellants contend that before approving the restructuring proposal in issue on this appeal, County Council failed to comply with statutorily required pre-conditions to the exercise of its jurisdiction to make a restructuring proposal to the Minister. In particular, Bruce Township and Tiverton submit that County Council failed to consider "principles" it was obligated to consider by s. 25.4 of the *Municipal Act*, R.S.O. 1990, c. M.45, as amended, with the result that its decision to adopt the restructuring proposal is void in law.

The motions judge dismissed the appellants' application for judicial review of County Council's decision to make the restructuring proposal it did. In his analysis, he assumed that the "principles" contained in a Guide circulated by the Minister had to be considered by County Council in developing its restructuring proposal. He found that there was nothing in the record from which he could conclude that members of County Council failed in their assumed duty to consider the principles.

The appellants contend that the motions judge misapprehended the evidence and that he failed to consider relevant evidence and the absence of conflicting evidence in reaching that conclusion.

Although there is a significant factual element to this appeal in respect of what the County Council, and its Restructuring Committee, did in developing the restructuring proposal that County Council submitted to the Minister of Municipal Affairs and Housing (the "Minister") for approval, there is a major underlying issue in this case. This issue is the role of the courts in reviewing decisions of a validly constituted elected body, not on the basis of what the elected body did, but rather on the basis of an assessment of what the elected body considered in developing that proposal.

Municipal Restructuring

On January 30, 1996, by a statute entitled the *Savings and Restructuring Act*, S.O. 1996, c. 1, the *Municipal Act* was amended to streamline the process for municipal restructuring.

Before 1996, municipal restructuring took place by application to the Ontario Municipal Board under the *Municipal Act*, through the process established by the *Municipal Boundary Negotiations Act, 1981*, S.O. 1981, c. 70, or by special Act of the legislature. The 1996 *Municipal Act* amendments substantially changed the process for municipal restructuring.

Section 25.4 of the *Municipal Act* (as amended by the *Savings and Restructuring Act*) provides:

> 25.4 The Minister may establish restructuring principles that shall be considered,
>
> (*a*) by municipalities and local bodies when developing a restructuring proposal to be submitted to the Minister under subsection 25.2(2); and
>
> (*b*) by a commission when developing restructuring proposals under subsection 25.3(1).

As can be seen, s. 25.4 does not require the Minister to establish restructuring "principles". However, if the Minister does establish such principles, s. 25.4 requires a municipal corporation to consider them in developing a restructuring proposal to be submitted to the Minister under s. 25.2(2).

Under the scheme established by the *Municipal Act* amendments, a municipal corporation's restructuring proposal is made to the Minister in the form of a "restructuring report". If the restructuring report contains the necessary information the Minister shall, by order, implement the restructuring proposal. The Minister does not pass judgment on the substantive merits of the restructuring proposal or apply the "principles" referred to in s. 25.4. The "principles" are to be considered by the municipality, if the restructuring is by a municipality under s. 25.4(*a*). The degree of political support required for restructuring is set out in the regulations passed under the Act. Manifestly, the legislative intent is that municipalities develop "made in the municipality" restructuring proposals.

Neither the Act nor the regulations impose any particular process for the development of a restructuring proposal by a municipality such as Bruce County. Nor do the Act or the regulations prescribe when in the restructuring process the Minister's "principles" are to be considered. The process leading to a restructuring report, for the most part, has been left to the discretion of local politicians.

In August 1996, the Minister established the restructuring principles contemplated by s. 25.4 of the *Municipal Act*. These principles were contained in a published document entitled, "A Guide to Municipal Restructuring" (the "guide"). The guide also contained suggestions about whether and how municipal restructurings might be considered and undertaken.

The principles published in the guide are as follows:

> The following are the principles issued by the minister under section 25.4 of the *Municipal Act* that shall be considered by municipalities when developing restructuring proposals:
>
> Less government
>
> — fewer municipalities
>
> — reduced municipal spending
>
> — fewer elected representatives
>
> Effective Representation System
>
> — accessible
>
> — accountable
>
> — representative of population served
>
> — size that permits efficient priority-setting
>
> Best Value for Taxpayer's Dollar
>
> — efficient service delivery
>
> — reduced duplication and overlap
>
> — ability to capture the costs and benefits of municipal services with the same jurisdiction
>
> — clear delineation of responsibilities between local government bodies
>
> Ability to Provide Municipal Services from Municipal Resources
>
> — local self reliance to finance municipal services
>
> — ability to retain and attract highly qualified staff
>
> Supportive Environment for Job Creation, Investment and Economic Growth
>
> — streamlined, simplified government
>
> — high quality services at the lowest possible cost

Bruce County Restructuring

County Council established a Restructuring Committee (the "Committee") in September 1996. According to Stuart Reavie, the Chair of the Restructuring Committee, the composition of the

Committee took into account the need to reflect "the rural/urban, north/south and large/small characteristics of the local municipalities within the County". Apparently no councillors from Bruce Township or Tiverton volunteered to sit on the Committee.

At that time, there were 30 local municipalities (towns, villages and townships) in Bruce County, including the two appellants. As well, restructuring was not new to Bruce County. Indeed, the County restructuring process had been ongoing, at least on an intermittent basis, since 1974.

Comprehensive studies concerning the impact of county-wide municipal restructuring had been published in November 1975 and March 1991. These studies were made available to members of Bruce County Council and to the Committee. The 1975 report is not in evidence, however, the 1991 report is in evidence. I will refer to it in more detail shortly.

From December 1996 to April 1997, the Committee reviewed previous restructuring studies and conducted a survey of local municipal councils to determine their views on restructuring. The Committee was of the view that, in light of the uncertainty associated with provincial downloading of services to municipalities, it was sensible to resort to the 1991 data as those data were as accurate as anything that could be produced currently in respect of the impact of restructuring on municipal spending. Thus, the Committee did not commission a similar study.

In May 1997 the Committee decided to recommend to Council a county-wide restructuring proposal consisting of a two-tiered, eight municipal unit system (the "May proposal").

On May 20, 1997, County Council approved the May proposal. When the May proposal was approved by County Council neither of the appellants raised any concerns about its contents, or about the failure of the Committee, or Council, to consider the principles set out in the guide in developing the proposal.

The Minister refused to approve the May proposal because of lack of detail. Thus, the Committee had to continue its work. It decided to consider other restructuring options for presentation at its July 17, 1997 meeting.

At the July 17, 1997 meeting, the Committee decided to present two restructuring options to Council. The first option contained the same municipal alignment as set out in the May proposal, however, it changed the representation provision to one vote on the County Council for each 3,500 electors instead of one vote for each 5,000 electors. The second restructuring proposal, option 2, contained the same municipal alignment as set out in option 1, except for the grouping of Bruce Township and the Village of Tiverton with the Township of Kincardine and the Town of Kincardine, and

the grouping of the Townships of Huron and Kinloss[1] as one municipal unit. This proposal also sought to amend the voting distribution to one vote on Council for each 3,500 electors. The minutes of the July 17 meeting refer to the fact that the Committee examined "statistics" referable to options 1 and 2. The Committee recommended that the Warden call a special meeting of County Council on August 12, 1997 to discuss the restructuring issue.

On July 24, 1997, a memorandum to all County Council members set out restructuring options 1 and 2, both of which were to be presented to County Council, sitting in public in Committee of the Whole on August 12, 1997.

At the August 12, 1997 meeting, Council adopted option 2 as the intended framework for the restructuring proposal. It also adopted a work plan for the consideration and implementation of that framework.

Stuart Reavie, the Chair of the Committee, stated in his affidavit that the Committee felt that the best way to communicate with local municipalities and ratepayers about the restructuring was to leave consideration of the restructuring framework to local municipalities. Throughout August and September 1997 members of the Committee met with representatives of local municipalities to answer questions with respect to restructuring issues. These meetings included a meeting with representatives of the appellants on September 24, 1997. All of these meetings were open to the public.

In accordance with the work plan adopted on August 12, 1997, the Committee met on October 16, 1997 to consider all submissions received from local municipalities and to prepare a report to County Council for its October 21, 1997 meeting. The October 16, 1997 meeting was open to the public. It was open to local groups and municipalities to attend and make submissions. The Committee considered submissions made at that time and the report commissioned by the appellants. The Committee rejected the electoral representation scheme favoured by the appellants because, in the Committee's view, it would have given them over one-third of the seats on the Bruce/Tiverton/Kincardine (Town and Township) Council, with one-quarter of the electors. The Committee concluded that this imbalance would have been achieved at the expense of electors in the Town and Township of Kincardine which in the restructuring proposed by the appellants would have about three-quarters of the electors and two-thirds of the seats.

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1 In option 1, the Town and Township of Kincardine were grouped with Huron and Kinloss Townships. The Village of Lucknow is in Kinloss Township.

At its October 16, 1997 meeting the Committee finalized its draft proposal and report. This is the report that was considered by County Council on October 21, 1997. No representative of either of the appellants attended the October 16, 1997 meeting.

The Committee considered population trends and municipal assessment in respect of both option 1 and option 2. Similar discussions occurred at the township and county council levels.

The final report of the Committee reflected a consideration of service efficiency issues, assessed from a taxpayer's standpoint, political units that would be accountable and the existence of local communities of interest.

Option 2 was formally adopted by Bruce County Council by resolution on October 21, 1997. The vote was 51 in favour and 23 against. The political support for the restructuring proposal required a triple majority — a majority vote in County Council, the support of a majority of the affected local municipalities, and a majority of electors on a county-wide basis. The appellant, Bruce Township, was among the 23 that voted "no" to option 2. It asked that the following be recorded in the minutes:

> Reeve Ribey requested that the following comments be recorded in the minutes: "due to the shortness of notice which could prejudice Bruce Township's position we are forced to vote NO to option #2. If option #2 is approved our lawyer has indicated that we could have grounds for a legal challenge against the county based on natural justice."

At the October 21 meeting, the appellants did not raise the issue of the failure of County Council (or the Committee) to consider the Minister's "principles". Indeed, the first complaint about County Council's failure to consider the principles came to light in an affidavit of David Thompson sworn December 23, 1997.

Bruce County's 1991 study was extensive and was available to, and considered by, the Committee. The report of the 1991 Study Committee set out its terms of reference:

> To carry out a joint review of the issues of municipal structure, representation, and functions of all municipalities in Bruce County . . . .
>
> To define the most appropriate form of local government in Bruce County in terms of municipal structure, boundaries, organization, administration and responsibilities of the County and local municipalities. Recommendations will be made with an aim to ensure the needs of the community are met efficiently, effectively and with sufficient access and accountability.

The 1991 study addressed services, financial matters, demographics, inter-municipal agreements and tax impacts in the context of the restructuring. This report was considered by the Committee and the County Council. The 1991 study examined "services" and a variety of areas:

— planning; roads; waste management; economic development; sewer and water; fire and police; building and plumbing inspection; recreation, library services; social services, including the elderly and child care; municipal administrative responsibilities.

In addition to having access to the 1975 and 1991 restructuring reports, the Reeve of Bruce Township forwarded a copy of a report of McNaughton Hermsen Britton Clarkson Planning Limited dated October 1, 1997 (the "MHBC Report") to all members of Bruce County Council by way of letter dated October 6, 1997. This report was prepared for the appellants at their request. A copy of this report was also given to the Committee.

The MHBC Report considered many of the principles referred to in the guide except for consultation, communication and financial matters. When it compared option 1 (the revised May proposal) and option 2 (the restructuring proposal adopted by County Council in October 1997) on the basis of some of the principles contained in the guide (less government, effective representation, communities of interest and geographic/planning considerations) the MHBC Report concluded that option 2 was equal to or superior to option 1. The MHBC Report was considered by the Committee but no specific discussion of its contents apparently took place.

As I have noted, the MHBC Report addressed four options, including the two options that the Committee placed before County Council for consideration at Council's October 21, 1997 meeting.

The MHBC Report specifically referred to the Minister's principles:

> In August of 1996, the Province published "A Guide to Municipal Restructuring" to assist municipalities in restructuring efforts. *The Guide set out a number of matters to take into consideration for restructuring proposals such as less government, effective representation, increased value for taxpayer dollars, local self-reliance to finance necessary services and streamlining government.*

(Emphasis added)

The reference in the MHBC Report that I have set out above is a reference to the principles that the appellants allege were not considered.

In the main body of the MHBC Report, the authors assessed the Minister's principles by analyzing the four restructuring options that it considered under the criteria of "create less government", "effective representation", "communities of interest", and "geography/planning considerations". The MHBC Report acknowledged the importance of financial restructuring issues, however, it explicitly stated that such matters were beyond the scope of the report.

The MHBC Report concluded:

(a) With respect to the objective of less government, Options 1 and 2 and Alternative A are preferable over Alternative B. This assumes that, under any option, no new huge local Council is created.

(b) With respect to the number of electors per vote . . . the most equitable scenario is Option 2 (August 1997) or Alternative A (Bruce-Tiv.-N.K. Twp.). Option 1 (May 1997) and Alternative B (3 S.W. County units) introduce more variation in the number of electors per vote at the County level.

(c) In summary, based on a review of delivery of services and the existing relationships between various municipalities, it is concluded that Alternative A (Bruce-Tiverton-North Kincardine Township) best defines the commonality of interest. While Option 2 (August 1997) recognizes the links between Bruce Township, Tiverton, Kincardine Township and the Town of Kincardine, it ignores the relationships between Huron Township, Town of Kincardine and the south part of the Township of Kincardine.

(d) In summary, a review of planning considerations reveals that the preferred option is Alternative A (Bruce-Tiverton-North Kincardine Township).

The MHBC Report took no issue with the Committee in relation to its failure to consider the Minister's "principles" in the development of what was referred to in the Report as Option 2.

All meetings of County Council that dealt with restructuring, of the Restructuring Committee and of the Joint Restructuring Subcommittee were open to the public and members of the public and the media attended some of these meetings. In addition, members of the public made submissions on restructuring.

When the appellants sought judicial review of Bruce County Council's restructuring decision, they contended that before voting on the proposal for county-wide restructuring the County Council gave no, or at least inadequate, consideration to the general principles that the Minister had set out in the guide. I have referred to those principles earlier and will return to them shortly.

The appellants' preferred approach to restructuring (an option set out in the MHBC Report) was to amalgamate the Township of Bruce, the Village of Tiverton and the north part of the Township of Kincardine as one municipal unit. This would leave the Town of Kincardine, which is in the south half of the Township of Kincardine, out of the amalgamated unit of which the appellants sought to be part. The Corporation of the Township of Bruce specifically made that proposal to members of County Council dated October 6, 1997. In that letter, the Reeve of the Township of Bruce enclosed copies of the MHBC Report for circulation among members of County Council. The MHBC report recommended the option (Alternative A) that the appellants preferred.

In its report to County Council, the Committee commented on its May proposal in the context of the need to develop a "made-in-Bruce-County" solution to restructuring. The Report put it in this way:

> Following the provincial decision to deny our request to proceed with the May proposal, Council once again confirmed the need to develop a made in Bruce County solution to the restructuring issue and directed this committee to develop, with local input, this final draft proposal. We recognize that because this proposal contains more detail than the May proposal, it may provide more opportunity to find a reason for not supporting it. We understand that there are a number of municipalities that do not agree with one or two aspects of the proposal. We ask that you consider the previous support shown this year to proceed with restructuring. This proposal, with one boundary adjustment, is basically the same proposal that received majority support in May. It will create a stronger system of local government based on eight local municipalities large enough to provide efficient services to the taxpayer yet small enough to ensure accessibility and reflect local communities of interest.
>
> Over the past year this committee has repeatedly challenged this Council *to grasp the opportunity to create a made in Bruce local government structure that will position us to provide the required services to residents in a cost effective and responsive manner.* We are confident that you will once again meet that challenge by approving the attached Bruce County Restructuring Proposal.

(Emphasis added)

Analysis

The principles which the appellants contend that the County Council did not consider are, to say the least, general and it seems to me that it would be difficult for anyone, who gave the matter any consideration at all, not to take these principles into account when considering the structural reorganization of a county, as happened here. In summary form they require consideration of:

- the cost efficiencies to be generated by "less government" and in the provision of municipal services;
- an efficient, fair, accessible and accountable system of political representation at the local and county level;
- the financial capacity to provide municipal services from municipal resources;
- a municipal governmental structure that would foster job creation, investment and economic growth.

The appellants, in their submissions, emphasize that the criteria used to assess the merits, or otherwise, of the two options placed before County Council in October 1997, including the

expected impact of each proposal, do not appear in the proposals and were not set out in writing in any document prepared by or on behalf of the Committee or County Council. The appellants submit that the absence of any paper trail in Committee and Council minutes must lead to the conclusion that County Council did not "consider" the Minister's principles as set out in the guide.

County Council was required by s. 25.4 of the *Municipal Act* to do no more than "consider" the Minister's principles. In my opinion, that imposes no greater requirement on County Council than to take the principles into account when developing a restructuring proposal to be submitted to the Minister. Section 25.4 does not state how or when the principles are to be considered. Moreover, to "consider" is a somewhat conditional requirement in the sense that it does not imply that the principles must be followed in the development of a restructuring proposal.

Although consideration of the very broad principles to which I have referred is required, there is no requirement that there be specific evidence that each principle was considered each time a particular step was taken in what was an extended restructuring process.

Considerable deference must be extended to elected representatives undertaking what is essentially a legislative function: see *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623, 4 Admin. L.R. (2d) 121; *Old St. Boniface Residents Assn. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170, 75 D.L.R. (4th) 385; and *Save Richmond Farmland Society v. Richmond (Township)*, [1990] 3 S.C.R. 1213, 75 D.L.R. (4th) 425. In my opinion, courts are not equipped to micro-manage a process such as the restructuring process undertaken in Bruce County. To do so would result in the judicialization of what was intended to be a political process. The courts should only interfere in egregious circumstances where it is manifest that statutorily prescribed pre-conditions have not been met. Here, the appellants have not established that the principles were not considered.

In any case, a review of the record supports Dambrot J.'s conclusion that the County Council did consider the relevant principles. There was ample evidence to support his conclusion in that regard and I see no basis upon which to interfere with it. It is not for the courts to second guess the restructuring decision made by County Council.

For these reasons, I would dismiss the appeal with costs.

Appeal dismissed with costs.

TAB 7

Aboriginal Consultation Policy

The Ontario Energy Board (the "Board") recognizes that, as a an agent of the Crown, it has a duty to ensure that proper consultation with Aboriginal peoples is conducted where a project that is subject to Board approval may have an adverse effect on an existing or asserted Aboriginal or treaty right. The purpose of this Policy is to establish guidelines to be followed by both applicants and the Board to give effect to this duty.

Background

Although the duty to consult has long been a legal requirement in Canada, recent cases before the Supreme Court have helped to clarify the precise extent of this duty. The duty to consult is owed by the Crown to Aboriginal peoples.

The Board is informed in particular by three recent Supreme Court of Canada decisions: *Haida Nation* v. *British Columbia (Minister of Forests)* [2004] 3 S.C.R. 511 ("Haida"), *Taku River Tlingit First Nation* v. *British Columbia (Project Assessment Director)* [2004] 3S.C.R. 550 ("Taku"), and *Mikisew Cree First Nation* v. *Canada (Minister of Canadian Heritage)*, [2005] SCC 69 ("Mikisew"). These cases confirmed that the Crown has a duty to consult with Aboriginal peoples both where there are existing treaty rights and where a land claim has only been asserted, and not proven. Those decisions also explain that the exact extent of this duty will vary based on the facts of each situation. The Court stated that the duty to consult and accommodate arises where the Crown has knowledge of the potential existence of an Aboriginal or treaty right, whether or not that right has been legally established, and where the Crown contemplates conduct that may adversely effect it. The scope of this duty will be proportionate to a preliminary assessment of the strength of the asserted Aboriginal or treaty right, and the seriousness of the potential impact on it. The duty to consult, however, does not mean that the project in question requires the consent of the affected Aboriginals community. The duty to consult and accommodate does not amount to a veto. The case law in this area continues to evolve, and the Board will consider the duty to consult and accommodate in light of the most recent case law.

Policy

In order to make a determination as to whether proper consultation has taken place, the Board will require all applicants in leave to construct applications under ss. 90, 91 or 92 of the *Ontario Energy Board Act, 1998* (the "Act") to complete certain filing requirements. These filing requirements will be incorporated into the Board's existing *Environmental Guidelines for Hydrocarbon Pipelines and Facilities in Ontario* and *Filing Requirements for Transmission and Distribution Applications, and Leave to Construct Projects* (for electricity transmission and distribution projects). In both cases, the filing requirements themselves are identical, and they are attached to this Policy as Appendix A. The Board has drawn upon the experience of the National Energy Board and its policy in this area in drafting these filing requirements. Although the ultimate responsibility to ensure that consultation and, where necessary, accommodation are conducted properly lies with the Board, the Board will require the proponent to demonstrate that it has conducted appropriate consultation and accommodation. The Board may also choose to require that these filing requirements be completed for any other application before the Board where there is the potential existence of an Aboriginal or treaty right and where an applicant or project could result in an adverse impact on that Aboriginal or treaty right.

In each case, the Board will make a determination regarding the adequacy of the consultation undertaken and any proposed accommodation for Aboriginal concerns as part of its review of the application. If the Board determines that the consultations undertaken by the applicant were not sufficient, it may require further consultation and/or accommodation. It is not practical in a Policy of this nature to set out exactly what additional consultations or accommodations may be required; that will have to be determined on a case by case basis. The Board will, however, be guided by the emerging jurisprudence in this area and will continue to update its guidelines and practices as the law evolves in this area.

Appendix A

Information to be Filed with Applications Where there May be an Adverse Effect on an existing or asserted Aboriginal or Treaty Right

a) Identify all of the Aboriginal Peoples that have been contacted in respect of this application.

b) Indicate:
i) how the Aboriginal Peoples were identified;
ii) when contact was first initiated;
iii) the individuals within the Aboriginal group who were contacted, and their position in or representative role for the group;
iv) a listing, including the dates, of any phone calls, meetings and other means that may have been used to provide information about the project and hear any interests or concerns of Aboriginal Peoples with respect to the project.

c) Provide relevant information gathered from or about the Aboriginal Peoples as to their treaty rights, or any filed and outstanding claims or litigation concerning their treaty rights or treaty land entitlement or aboriginal title or rights, which may potentially be impacted by the project.

d) Provide any relevant written documentation regarding consultations, such as notes or minutes that may have been taken at meetings or from phone calls, or letters received from, or sent to, Aboriginal Peoples.

e) Identify any specific issues or concerns that have been raised by Aboriginal Peoples in respect of the project and, where applicable, how those issues or concerns will be mitigated or accommodated.

f) Explain whether any of the concerns raised by Aboriginal Peoples with respect to the applied-for project have been discussed with any government department or agencies, and if so, identify when contacts were made and who was contacted.

g) If any of the Aboriginal Peoples who were contacted either support the application or have no objection to the project proceeding, identify those Peoples and provide any available written documentation of their position. Also, indicate if their positions are final or preliminary or conditional in nature.

h) Provide details of any know Crown involvement in consultations with Aboriginal Peoples in respect of the applied-for project.