



Howard I. Wetston, Q.C.

Chair

Ontario Energy Board

**SPEECH**

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Today, I would like to speak to you about the public interest in the context of regulation by the Ontario Energy Board (OEB). About why the Board needs to promote regulatory outcomes that are in the public interest, and how it does that within the scope of its statutory mandate.

The public interest is a concept that will not be new to any of you. Indeed, many of you here today serve or contribute to the public interest. To illustrate, in perhaps overly simplistic terms:

- Utilities serve the interests of their customers in having reliable service at reasonable rates.
- The Ontario Power Authority (OPA) serves the interests of a broader segment of the public in ensuring that supply is cost-effective while at the same time promoting government policies regarding renewable energy and conservation.
- The Independent Electricity System Operator's (IESO) focus on the public interest resides in ensuring that the provincial grid is operated reliably and that the wholesale electricity market functions effectively.

Clearly, the Board does not have a monopoly on safeguarding the public interest. However, the very fact that the Board regulates aspects of these various entities means that, in any given case, the Board's consideration of the public interest may be different. Importantly, it can accommodate a broad range of interests. Our processes provide an opportunity for interested parties to bring different points of view to the Board, and for Board members and staff to bring their expertise to bear in considering those perspectives and their implications. In that way, the public interest not only drives what we do, but how we do it.

### ***Can we define the public interest?***

Naturally, when speaking of the public interest, the first question on everyone's mind is understandably "what does that mean"? It is a concept that is notoriously difficult to define, and doing so rarely provides meaningful guidance.

It has been said that the public interest "must necessarily represent a working compromise and be subject to continuous definition, as the need arises, in the process of achieving an often delicate balance among conflicting interests." While consistency and predictability are important regulatory goals, there is little, if any, consensus on what exactly constitutes the public interest other than recognizing that it must be elastic and permitted to evolve.

This is reflected in the fact that the courts have characterized the question of "what is the public interest" as neither a question of law or of fact, but rather as a matter of opinion. Which is why there has been limited guidance from the courts on what constitutes the public interest. While the courts have often acknowledged and affirmed

the expertise of the Board in matters of energy regulation, they have devoted little attention to delineating the parameters of the Board's public interest jurisdiction.

So, where does that leave us? One approach would be to identify what the public interest is not. In that regard, I think that it stands in stark contrast to the particular interests of a given individual or of a given group. As one writer has said, "[A] decision...is said to be in the public interest if it serves the end of the whole of the public rather than those of some sectors of the public."

I can say two things with absolute confidence. Determining the public interest in any given matter must be done in a manner that respects our legislation. And it almost invariably involves the balancing of competing individual interests. For the Board, balancing interests in turn requires at least two things: first, processes that are fair, transparent and open; and second, the sound judgment and expertise to weigh the interests and anticipate outcomes.

This approach finds a basis in the decision of the Federal Court of Appeal in the 2001 Superior Propane case, and more specifically in the following statements of my former colleague Mr. Justice John Evans:

*Like other regulatory administrative tribunals, the Tribunal is charged with the responsibility of protecting the public interest, which it does by striking a balance among conflicting interests and objectives in a manner that respects the text and purposes of the legislation, is informed both by technical expertise and by the judgment that comes from its members' varied experiences, and is responsive to the particularities of the case.*

*Of course, balancing competing objectives to determine where the public interest lies requires the exercise of discretion. However, the procedure and composition of the Tribunal equip it for this task no less well than those of other independent, specialized, administrative tribunals that are required to perform similar balancing exercises in the discharge of their regulatory functions.*

While the Superior Propane case involved the Competition Tribunal, in my view these statements on the public interest are equally applicable to the Board and do reflect the Board's experience. To be clear, when I affirm the Board's responsibility to protect the public interest, just as Mr. Justice Evans did for the Competition Tribunal, I should not be misunderstood as attempting to enlarge the Board's jurisdiction. Nor as indicating that the Board should take account of matters that are not relevant to the exercise of its mandate. The Board must always act in a manner that "respects the text and purposes" of its enabling legislation.

## ***Balancing of Interests***

The Board's mandate as a tribunal that regulates in the public interest is largely set out in the *Ontario Energy Board Act, 1998* (the Act). In some instances, the legislation refers specifically to the concept of the public interest. Thus, the Board is directed to determine whether the public interest will be served by a licence amendment, by the expropriation of land, by the construction of infrastructure or even by forbearing from regulation. In other cases, the legislation identifies public interest criteria. For example, when deciding whether or not to grant a leave to construct, the Act specifies that the Board can only consider the interests of consumers with respect to prices and the reliability and quality of electricity service. As another example, the *Electricity Act, 1998* refers to cost effectiveness and economic prudence in the context of our review of the Integrated Power System Plan (IPSP).

In many cases, however, the only direction given to the Board is contained in its statutory objectives. And I suggest that the task of balancing interests is inherent in – and arises clearly from – those objectives. One objective has a consumer focus and the other has a utility focus. While not mutually exclusive, in any given case these objectives can give rise to tensions that are challenging to reconcile.

Let me illustrate with some examples of cases where the Board has had to consider these “tensions” or opposing interests.

In setting rates that are just and reasonable, the Board must determine where the public interest lies between the interests of utility shareholders in a fair rate of return and the interests of consumers in obtaining service at a reasonable – some would say low – cost. The balancing of investor and consumer interests that arises directly from the “regulatory compact” was at the heart of the Alberta Energy and Utilities Board's (AEUB) decision in the ATCO Gas case in the context of the allocation of proceeds from the sale of assets that were no longer “used and useful”. Both the majority and minority judgments of the Supreme Court of Canada acknowledged this tension, which is faced by all economic regulators. This case represents the most recent reflections of the Supreme Court of Canada on the public interest mandate of an energy regulator. Although its application in Ontario may be limited, and despite the fact that neither the majority nor the minority judgments define the public interest, the case clearly reflects the tensions that I have seen animate debates about the public interest jurisdiction of the OEB. Indeed, when the Supreme Court of Canada decision was rendered, the OEB was in the midst of a proceeding in which it had to determine whether any of the proceeds of the sale of cushion gas should be credited to ratepayers.

Another example is the 2007 utility rate application in which Low-Income Energy Network (LIEN) argued that a special rate for low-income consumers should be created. Others submitted that creating a special rate class for low-income consumers would place an unfair burden on all other ratepayers. Economists tend to suggest that it is

preferable to charge consumers based on cost, and to fulfill distributional aims by other means, such as through direct subsidies.

Ultimately, the Board determined that it did not have jurisdiction to create a special rate class, although there was a dissenting opinion. The Board's decision was appealed, and has just been heard by the Ontario Divisional Court.

In another example of the Board's balancing of tensions in considering the public interest, I would point to the decision in the Natural Gas Electricity Interface Review (NGEIR) proceeding to forbear from regulating certain natural gas storage services. The Board was required to determine whether markets for natural gas storage were, in the words of the Act, "subject to competition sufficient to protect the public interest". The individual interests that required balancing in this matter are too extensive to identify here, but among the issues the Board had to consider were potentially higher rates in the shorter term; the longer-term need for investment in infrastructure to meet the anticipated demands of gas-fired electricity generators; and the greater efficiency gains that could be expected to result from competition.

In the end, the Board decided that it was in the public interest to increase Ontario's natural gas storage capacity, and that this was in turn best achieved through the operation of a competitive market. I might add that significant investment in Ontario's storage capacity has taken place since that decision was issued. On April 9, 2008, cabinet confirmed the Board's May 2007 NGEIR review decision.

In NGEIR, the Board recognized the importance of taking a longer-term view in determining where the public interest lies. This holds true for much of the work of the Board, including in particular with respect to reliability. Ontario needs investment in infrastructure - for generation, transmission distribution and pipelines – and it is critical that the Board consider the public interest not just for the next quarter - or as it applies to the next electricity bill - but for the next generation.

### ***The Public Interest is Also About How we Regulate***

These are just a few examples that highlight how important the balancing of interests is in how a regulator considers the public interest. This balancing requires three things: respect for the text and purposes of the legislation, an appropriate process and the right people. The first provides the context for the Board's public interest mandate, and the latter two assist in conferring legitimacy on the institutional structure, and ensure that the Board is not diverted away from that mandate. I have no doubt that the Board has the right people with the necessary expertise, so I will focus on the issue of appropriate processes.

Transparency, broad participation and reasonable funding assist in ensuring that

different relevant interests are represented. This reflects our belief that public participation is essential to understanding the public interest.

Transparency and public participation are intuitively linked to our adjudicative processes, but similar principles apply to regulatory policy development including the development of electricity codes, gas rules, and guidelines. And similar tensions need to be balanced in those processes as well.

The Board issued filing guidelines in both the IPSP and the Ontario Power Generation (OPG) payments cases, which are now before us. Numerous stakeholders participated in the development of those guidelines, which was of great assistance to the Board as it prepared for the hearings. And diverse interests are also now represented in those hearings. In the IPSP hearing we have 68 intervenors including environmental groups, First Nations, consumer groups, regional associations, power producers and marketers, the IESO and Hydro One. In the OPG case, we have about fifteen intervenors, including consumer groups and industry associations.

The participation of the parties to these two hearings will greatly assist the Board in determining where the public interest lies in answering the questions before it.

Is there a public interest in how we regulate? From that perspective some have asked whether the introduction of incentive regulation is sufficient in that it will eliminate the need for annual cost of service hearings. Does the Board's current approach satisfy the requirement for just and reasonable rates as well as a public interest in terms of the efficient use of resources, whether they be those of the Board, of distributors or of other stakeholders? Comparisons with other provinces are not always particularly helpful but it may be worth mentioning that the OEB "rate regulates" about 83 electricity distribution companies in Ontario. All the other provinces combined "rate regulate" 27. If we also consider natural gas utilities, Ontario "rate regulates" about 86, while the other provinces combined "rate regulate" 40.

The Board may, in the future, confront these issues in the context of the setting of rates. However, along similar lines, we are asking whether the over 80 electricity distributors we regulate should have different conditions of service on matters as fundamental to consumers as bill payment, the opening and closing of accounts and disconnection. In Ontario, does the public interest require flexibility or standardization? Over 40 stakeholders are participating in a consultation that is currently underway to consider these questions.

### ***Adapting to the Evolution of the Public Interest***

So balancing interests, taking a longer view, seeking widespread participation, hearing different perspectives and expertly testing and weighing the evidence are important

elements of satisfying the public interest from the perspective of regulation by the OEB.

Of course, regulating in the public interest is also understanding that the public interest continually evolves. Probably the most significant component of that evolution is government policy which, as you know, has set broad sectoral objectives directed towards affordability, reliability and environmentally-sensitive energy supply.

As such the Board's independent view of the public interest will need to evolve to account for those imperatives. There is a great line in Lester Thurow's book "Zero Sum Society", where he says: "The role of government is to represent the future to the present." As a regulator, we are to some extent a custodian of the future as well.

### ***Conclusion***

I began my remarks by noting the absence of a satisfactory definition of the concept of the public interest. Let me close by making a couple of observations. Firstly, one of my predecessors, Robert Macaulay once said, when faced with this question, that while he couldn't define the public interest, he knew it when he saw it. Secondly, when I was on the bench I asked one of the more experienced judges a question about the law. He said judges don't make law, they find the law. If asked, I would say that regulators don't make the public interest, they "find it".